SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 653034/2012
FISCHER, HAROLD M.
vs
ALICE PHILLIPS BELMONTE, ESQ.
Sequence Number : 001
DISMISS ACTION

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

Motions *sequence 001, 002,* and *003* are consolidated for joint disposition and decided herein.

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion (*Seq. 001*) of the defendant Mary Regina Phillips a/k/a Regina Munster, pursuant to CPLR 3211, to dismiss the complaint of plaintiffs is granted solely to the extent of severing and dismissing the *second* and *third* causes of action for breach of contract, the *eighth* cause of action for attorneys' fees, and the *ninth* cause of action for punitive damages as against such defendants; and the motion is otherwise denied; and it is further

ORDERED that the motion (*Seq. 002*) of the defendant Robert F. Phillips, pursuant to CPLR 3211, to dismiss the complaint of plaintiffs is granted solely to the extent of severing and dismissing the *second* and *third* causes of action for breach of contract, the *seventh* cause of action for breach of fiduciary duty, the *eighth* cause of action for attorneys' fees, and the *ninth* cause of action for punitive damages as against such defendants; and the motion is otherwise denied; and it is further

ORDERED that the motion (*Seq. 003*) of the defendants Steven J. Lifton and Lifton Financial Group, L.L.C., pursuant to CPLR 3212, to dismiss the complaint of plaintiffs is granted solely to the extent of severing and dismissing the *second* and *third* causes of action for breach of contract, the *seventh* cause of action for breach of fiduciary duty, the *eighth* cause of action for attorneys' fees, and the *ninth* cause of action for punitive damages as against such defendants; and the motion is otherwise denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 35, 60 Centre Street, Room 438, New York, New York, on **October 29, 2013**, at **2:30 p.m.**; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: 10/11/13

_____, J.S.C.
HON. CAROL EDMEAD

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ 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: PART 35

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HAROLD M. FISCHER and HELEN MAIER,

Plaintiffs,

-against-

ALICE PHILLIPS BELMONTE, ESQ., LAW OFFICES OF ALICE PHILLIPS BELMONTE, HAMILTON CAPITAL GROUP, LLC, MARY REGINA PHILLIPS a/k/a REGINA MUNSTER, ROBERT F. PHILLIPS, STEVEN J. LIFTON, LIFTON FINANCIAL GROUP, L.L.C. and JOHN DOES 1-10,

Defendants.

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Index No.: 653034/2012
DECISION AND ORDER

Motions #001, #002 and #003

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION[1]

In this fraud action by plaintiffs Harold M. Fischer ("Fischer") and Helen Maier ("Maier"), defendants Mary Regina Phillips a/k/a Regina Munster ("Munster") and Robert F. Phillips ("Phillips") move separately to dismiss plaintiffs' complaint pursuant to CPLR 3211, and Steven J. Lifton ("Lifton") and Lifton Financial Group, L.L.C. ("Lifton Financial") (collectively, "the Lifton defendants") move fo summary judgment pursuant to CPLR 3212.

Background Facts

This case arises from an alleged fraudulent scheme whereby defendant Alice Phillips Belmonte ("Belmonte"), an attorney, allegedly duped plaintiffs into investing in two investment "deals." According to plaintiffs, Belmonte and Lifton co-own Lifton Financial, which is engaged in buying and selling pools of distressed real estate assets and foreclosed mortgages. Defendant Hamilton Capital Group, LLC ("Hamilton Group") is a subsidiary of Lifton Financial. Phillips,

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[1] Motion sequence #s 001, 002 and 003 are consolidated for joint disposition and decided herein.

Belmonte's brother, is the Chief Financial Officer (CFO) and Chief Operating Officer (COO) of Hamilton Capital. Belmonte or defendant Law Offices of Alice Phillips Belmonte (the "Lawfirm"), of which Belmonte is the sole principal, is also general counsel to Hamilton Capital. Munster, also an attorney, is Belmonte's sister, and signatory on the Law Office's bank account.

Beginning in February 2011, Belmonte solicited investments from plaintiffs with promises to "double" their money, risk-free, as the money was to remain in her escrow account as "show money" to get the deal done (Complaint, ¶¶26-27).

On November 1, 2011, after failing to pay Fischer for his earlier investment, Belmonte sought additional investments from plaintiffs as "one last opportunity of the year" to be closed on or about December 31, 2011. (Belmonte's email to Maier and Fischer, dated October 31, 2011, exhibit 9). Fischer wired $70,000 and Maier wired $100,000 to Belmonte (Complaint, ¶47; Exhibit 1). On December 8, 2011, before the November 1 deal payout deadline, Belmonte again sought investments from plaintiffs promising a 100% return on a new "last minute investment" that was to close on or before December 23rd (*id.*, ¶51; exhibit 11). Again, Maier, paid $100,000 and Fischer paid $50,000 (¶52). For each of the "deals," Belmonte executed a Promissory Note in favor of plaintiffs and pledged her membership interest in Hamilton Capital as collateral for plaintiffs' investments by executing Pledge and Security Agreements (exhibits 10; 13). According to plaintiffs, prior to the November deal, Belmonte presented them with a prospectus, which named Phillips as CFO and COO (Complaint, exhibit 4). Belmonte never repaid plaintiffs their promised profits or investments.

As a result, plaintiffs sued Belmonte and her co-defendants for fraud, conversion, unjust enrichment, breach of contract, breach of fiduciary duty, punitive damages and attorneys' fees.

Plaintiffs allege that Belmonte's co-defendants conspired with her to embezzle plaintiffs' money. Munster, as a "Security Administrator" and a signatory on the Lawfirm's escrow bank accounts, participated in transferring plaintiffs' money from the escrow accounts to Hamilton Capital; and that money "flowed" from Hamilton Capital to Lifton Financial, and ultimately, to Lifton (Complaint, ¶¶ 10; 60, 175, 265-266). It is also alleged that Lifton and Phillips knew and approved the receipt and deposit of plaintiffs' funds into Hamilton Capital's bank account and remained silent, permitting Belmonte and Munster to embezzle plaintiffs' money (id., ¶¶ 270-280), which were ultimately distributed among the co-conspirators defendants.

Belmonte has not appeared in this action due to a stay imposed by the United States Bankruptcy Court, Eastern District of New York, where various creditors filed an involuntary bankruptcy petition against her on October 5, 2012 (*see* Case # 8-12-76045, exhibit 8 to Complaint).[2]

All of Belmonte's co-defendants now move to dismiss plaintiffs' complaint.

In her motion (*sequence 001)*, Munster argues that plaintiffs' complaint should be dismissed as against her for failure to state a cause of action, or, in the alternative, the Court should treat the motion as one for summary judgment (CPLR 3211 [c]). Munster argues that plaintiffs' conclusory allegations of fraud and breach of fiduciary duty are controverted by Munster's sworn Affidavit and Belmonte's [implicit] admissions that she had no business dealings with Munster (exhibits A-C to Jamie T. Corio, Esq. Affirmation). Furthermore, records

[2] Plaintiffs also allege that Belmonte duped many other "investors," who filed a federal civil Racketeering Influenced and Corrupt Organization (RICO)-based complaint against her in the U.S. District Court, Southern District of New York *(see E.J. Elliot, et al. v Alice Phillips Belmonte*, Esq., 12 Civ 5908 (AKH), exhibit 7 to Complaint).

from J.P. Morgan Chase Bank ("Chase") show that Belmonte, and not Munster, executed the alleged wire transfers. Plaintiffs sued Munster to apply pressure on Belmonte or as a mere fishing expedition.

In opposition, plaintiffs argue that they alleged sufficient facts that Munster conspired to commit fraud with the co-defendants to embezzle plaintiffs' escrowed funds and assisted Belmonte in the processing of the alleged wires. Belmonte indicated in her email to Maier, dated September 23, 2011, that her sister [Munster], who is a "security account administrator," handled the 77 wires relating to plaintiff's investments (Complaint, exhibit 1). Munster's motion should be denied or, in the alternative, held in abeyance until discovery is completed as to the extent of her involvement in the conspiracy, as such evidence is uniquely in Munster's possession.

Plaintiffs further contend that they adequately alleged the *breach of contract claims* since "defendants" failed to return plaintiffs' principal or profits pursuant to the November and December deals (Complaint, ¶¶220-229). Also, Munster was *unjustly enriched*, as she profited from the conspiracy, even if unwittingly or indirectly. And, Munster is liable for a *breach of fiduciary duty* as a Security Administrator of the escrow account who knowingly participated and aided and abetted in misappropriating plaintiffs' funds; and for *attorneys' fees* pursuant to paragraph 3 (g) of the Pledge and Security Agreements (*id.*, 281-285).

Further, plaintiffs are entitled to *punitive damages* because defendants' conduct, as practicing attorneys and licensed financial professionals, was immoral, illegal and reprehensible, approaching "criminal indifference." And finally, the *conversion* claim is also sufficiently stated [against all defendants] because defendants as corporate officers or their agents may be personally liable under the piercing corporate veil theory.

In reply, Munster argues that no privity existed between her and plaintiffs. Munster attests that she was never employed by Belmonte and, although in September 2011, she executed the Security Administrator Designation Form as Security Administrator No. 2 at Belmonte's request, she was never issued a password, user ID or SecurID code, or had any access to the Chase bank account opened by Belmonte. Furthermore, Belmonte chose the option for Single Security Administration Model, and therefore, singlehandedly scheduled and approved all transfers. Belmonte's Chase bank account statement indicates that all the alleged wires sent from Belmonte's escrow account from October through December 2011 were initiated and executed by Belmonte. Furthermore, Munster could not approve the alleged transfers because at the times of their approvals on various dates, Munster had no access to a computer as she was engaged in depositions, hearings court conferences, and at the hospital giving birth to her son.

In sur-reply, plaintiffs contend that since Munster was an attorney in charge of the escrow account, she also owed a fiduciary duty to plaintiffs and, discovery is necessary as to whether she executed the subject transfers.

In motion *sequence 002*, Phillips argues that plaintiffs' complaint should be dismissed as against him because the few allegations that plaintiffs made related to Phillips are conclusory and thus, cannot support any of the claims against him. Phillips denies any knowledge of Belmonte's or Munster's actions with respect to plaintiffs' funds, or any access to or control over the bank accounts of Hamilton Capital. Phillips argues plaintiffs failed to plead civil *conspiracy*, *i.e.*, that he entered into an agreement, or committed any overt acts in furtherance of the agreement, to defraud, or intent to cause harm to plaintiffs. The second and third causes of action for *breach of contract* do not mention Phillips and the *unjust enrichment* claim does not allege that Phillips

received any money obtained from plaintiffs by Belmonte or benefitted otherwise from the alleged transactions. As to the *breach of fiduciary duty* claim, Phillips had no relationship with plaintiffs, which would give rise to a fiduciary duty. Phillips does not hold any interest in Hamilton Capital and is not its COO or CFO (Phillips Affidavit at 7). And, no fiduciary relation is created by virtue of plaintiffs' signing the Pledge and Security agreements with Belmonte, requiring Phillips to protect plaintiffs' interests in Hamilton Capital, which was founded by Belmonte alone (*see* exhibit E). There are no documents showing that Phillips knew Belmonte executed Promissory Notes in favor of plaintiffs or consented to the moving of plaintiffs' funds. And, Phillips is not listed on any banking documents of Hamilton Capital and did not control any aspect of any such banking documents. The informational brochure of Hamilton Capital was prepared by Phillips in April 2011 "in anticipation of someday working together" (Phillips Affidavit 9-14). The *attorneys' fees* and *punitive damages* claims should also be dismissed. As to *conversion*, there are no allegations that Phillips exercised control over plaintiffs' money.

In the alternative, Phillips seeks summary judgment (3212 [c]) dismissing plaintiffs' complaint. He relies entirely on his Affidavit, containing essentially the same arguments as in his opposition. Phillips further argues he is entitled to attorneys' fees from plaintiffs because their claims are frivolous as lacking factual basis. The only basis for including Phillips in this action appears to be the brochure of Hamilton Capital containing his name.

In opposition, plaintiffs argue[3] that Phillips's motions should be denied because he failed

[3] The court notes that throughout its oppositions, plaintiffs make, for the most part, the same arguments regarding their pleaded causes of action as they made in opposition to Munster's motion. Therefore, to avoid duplication, the court does not repeat those contentions and only highlights the arguments pertaining to each defendant.

to comply with the discovery demands served on him prior to filing this motion, on January 28, 2013. Therefore, Phillips cannot blame plaintiffs for failing to specify their allegations or produce the required evidence.

Phillips's self-serving denials of the wrongdoings are insufficient. As to the *fraud* claim, Phillips admitted that he discussed with his sister Belmonte working together at Hamilton Capital; and that he helped create the brochure, which partially led plaintiffs to believe they were investing in a valid and fully operational company and induced them to invest with Belmonte in exchange for her pledged shares in Hamilton Capital. Discovery is necessary to ascertain the extent of Phillips's involvement. Thus, in the alternative, the court should hold this motion in abeyance until completion of discovery.

The *breach of contract* occurred when Belmonte and Munster removed plaintiffs' funds from the Law Firm's escrow account, which were subsequently "maneuvered and laundered in such a manner that all co-defendants and co-conspirators benefitted from the breach." Further, if Phillips profited, directly or indirectly, from the embezzlement, he is liable to plaintiffs for *unjust enrichment*. Next, Phillips *breached his fiduciary duty* to plaintiffs when he remained silent and permitted Belmonte and Munster to embezzle the funds. Phillips was aware of the deposited funds in escrow, and aided and abetted Belmonte, Munster and Hamilton Capital in misappropriating plaintiffs' funds. Plaintiffs are entitled to *attorneys' fees* from Phillips pursuant to the Pledge and Security Agreement and to *punitive damages*. As to *conversion*, the discovery will show whether Phillips profited from the embezzlement. The court should deny the alternative relief sought by Phillips, as the evidence of the role he played is uniquely in his hands.

In reply, Phillips argues that plaintiffs named him as defendant solely because they cannot

recover from the main wrongdoer, Belmonte, who filed for bankruptcy; plaintiffs' claims against him in his individual capacity for the alleged corporate wrongdoings, without any evidence of his involvement, constitute a harassing tactic; his discussions with Belmonte about working together and assisting in the preparation of the Hamilton Capital brochure were related to an indefinite future event; being named in a prospectus as a CFO or COO is not evidence of any wrongdoing; and plaintiffs' attorney's Affirmation alone is insufficient to defeat summary judgment.

Further, plaintiffs' request for additional discovery must be denied. Plaintiffs only served one discovery request, which they later withdrew (*see* exhibit A to Andrew P. Nitkewitcz, Esq. Affirmation), and never served new request for documents or deposition date. And, plaintiffs failed to show any basis for further discovery. And, the court should impose sanctions against plaintiffs' counsel for frivolously maintaining this action against Phillips and opposing his motion.

In motion *sequence 003*, the Lifton defendants argue that they are entitled to summary judgment (CPLR 3212) dismissing plaintiffs' complaint because plaintiffs have no bases for any of the claims against them. Plaintiffs' broad allegations "upon information and belief," that Belmonte transferred plaintiffs' money to Hamilton Capital, and then to Lifton Financial and to Lifton personally, are conclusory and flatly contradicted by documentary evidence of Lifton's Affidavit and the bank statements (exhibits C-E to Lifton Affidavit) and are insufficient to support a *conspiracy* claim. As shown by Lifton's Affidavit, the Lifton defendants never heard of plaintiffs, had no knowledge that plaintiffs and Belmonte engaged in any transaction, and did not receive, either directly or indirectly, any proceeds of plaintiffs' alleged transfers to Belmonte. Likewise, the Lifton Financial's bank statements show that neither Lifton individually, nor Lifton

Financial or Hamilton Capital received any transfers from Belmonte, Hamilton or plaintiffs during the period after the plaintiffs invested funds with Belmonte.

Plaintiffs' *fraud* claim should be dismissed because there is no evidence that the Lifton defendants made any representations to plaintiffs; the *breach of contract* cannot be maintained because the Lifton defendants did not enter into any contracts with plaintiffs; there are no allegations that the Lifton defendants had any relationship with plaintiffs so as to give rise to a fiduciary duty claim; nor is fiduciary duty created as a result of Belmonte's attempted pledge of her interest in Hamilton Capital.

As to *unjust enrichment*, there is no evidence that the Lifton defendants received any portion of plaintiffs' investment funds, as shown by the Lifton defendants' bank statements. And, plaintiffs failed to allege facts showing that the Lifton defendants induced them to conduct business with Belmonte, or that the Lifton defendants were aware of plaintiffs' dealings with Belmonte. As for *conversion*, plaintiffs cannot show that the Lifton defendants received any of plaintiffs' money or property. Furthermore, Limited Liability Company Law (the "LLC Law") §609 bars a finding of liability against Lifton on the ground of his membership in Hamilton Capital. Likewise, there is no basis for *attorneys' fees* because the Lifton defendants were not parties to the Pledge and Security Agreements. And finally, New York does not recognize a separate cause of action for *punitive damages* and the Lifton defendants did not engage in any wrongdoing so as to subject them to liability for punitive damages.

In opposition, plaintiffs contend that the Lifton defendants participated in the activities that caused them to enjoy the proceeds of the fraud perpetrated by Belmonte. Plaintiff Maier attests that she deposited $150,000 into Belmonte's account in February 2011, and the banking

records submitted by the Lifton defendants show that at least two payments of $50,000 each were wired into Lifton's personal account at Capital One Bank on February 4, 2011 (exhibit C, p. 00003) and on April 11, 2011 (*id.*, p. 00011). Thus, a question of fact exists as to whether a portion of plaintiffs' money was paid over to Lifton as part of the overall scheme alleged in the Complaint, which may have begun prior to the November and December deals.

Further, the Lifton defendants evaded full discovery and, by filing this motion several days prior to the deadline for responding to the discovery requests, they effectively precluded plaintiffs from obtaining any discovery in this action. What defendants knew or intended with respect to the *fraudulent scheme* is particularly within the defendants' knowledge. In this regard, Lifton's testimony is necessary as to the $92, 662.05 deposit he made into his account on December 2012, two months after plaintiffs served the instant Complaint. Further, since the limited bank records for Lifton Financial and Hamilton Capital for the period of 2011-2012 only show nominal amounts on deposit and little activity, further discovery should be conducted as to any other financial transactions which took place between any co-defendants during the relevant period of November and December 2011.

Furthermore, in her declaration filed with the Bankruptcy Court on July 2013, Belmonte stated that during the period from November 2011 through February 2012, she sent money to her various creditors which forced her into bankruptcy (exhibit 2). These payments raise an issue of fact as to whether Belmonte also transferred any of the plaintiffs' funds to the Lifton defendants or their affiliates.

Further, Lifton can be held personally liable for a *breach of contract* even in the absence of contractual privity with plaintiffs because, as Hamilton Capital's co-owner, he conspired to

commit fraud on the corporations' behalf. Thus, if Lifton knew of Belmonte's pledges, his special relationship with Belmonte would also impose a contractual duty on Lifton despite the lack of contractual privity between Lifton and plaintiffs. Further, the limited documents produced by the Lifton defendants in support of their motion, *i.e.*, their bank records and Belmonte's Declaration in the Bankruptcy Court, show that the Lifton defendants were *unjustly enriched* at plaintiffs' expense, and plaintiffs need not show that they took an active role in obtaining the benefit. Nor is the unjust enrichment claim precluded as duplicative of the contract claim, since there was no express contract between plaintiffs and the Lifton defendants.

Next, the *conversion* claim is also viable since the evidence shows that deposits were made into Lifton's account from unknown sources during the time relevant to the allegations in the Complaint. Therefore, discovery should be conducted on the issue of the origin of those funds, whether they were derived from Belmonte's fraudulent acts and if so, whether Lifton knew that. And, plaintiffs' claims against the Lifton defendants are not barred by LLC Law § 609, as the doctrine of piercing the corporate veil is applicable to limited liability companies as Lifton Financial, in the context of fraud.[4]

The Lifton defendants respond that plaintiffs' allegations of conspiracy are speculative. The Lifton defendants' receipt of payments from Belmonte in February and April 2011, seven and nine months, respectively, before the November and December 2011 transactions, is not evidence that they received a portion of the plaintiffs' allegedly "stolen" money. Even if Maier previously made a loan or investment with Belmonte in February 2011, there is no allegation that

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[4] Plaintiffs also argue that the court should *sua sponte* grant a default judgment against Hamilton Capital for failure to appear in this action; it is undisputed that it had notice of the action since both of its principals Lifton and Belmonte, have been served in this action and have filed an appearance.

the loan was not paid back. Furthermore, Belmonte's email soliciting investments from Maier is dated February 18, 2011, two weeks after the alleged February 4, 2011 wire from Belmonte to Lifton. And, there is no evidence that the Lifton defendants received money from Belmonte after plaintiffs deposited funds with her in November and December, 2011. That Belmonte wired money to *other* creditors does not raise an issue of fact regarding whether she wired money to the Lifton defendants. Further, *punitive damages* are unwarranted because the fraud allegedly committed was against plaintiffs as private individuals, and not against the public at large.

Finally, plaintiffs' claim that summary judgment is premature is based on mere hope and speculation that discovery will lead to evidence that will raise a triable issue of fact, which is insufficient. This action was filed more than a year ago, and plaintiffs had sufficient time to conduct discovery and have no one to blame but their own dilatory tactics. Indeed, after plaintiffs served deposition notices on January 28, 2013, the Lifton defendants immediately offered plaintiffs three dates in March 2013 for Lifton's deposition. However, plaintiffs withdrew the notices of deposition on February 19, 2013 (*see* Affirmation of Alan Marder, Esq.). And, in any event, the Lifton defendants complied with plaintiffs' document demands.

In sur-reply, plaintiffs argue that the Lifton defendants did not fully comply with the discovery demands, and instead, submitted selected, non-compliant documents in support of their summary judgment motion. Nor did plaintiffs "withdraw" the deposition notices, but rather, "suspended" them, pending the receipt of the demanded documents, to be reviewed prior to conducting the depositions. Thereafter, after a period of unsuccessful settlement negotiations, plaintiffs sent a document demand to defendants on May 8, 2013 (Exhibit A), which defined the relevant time period to "mean [from] January 2009 through the trial of this action" (exhibit A).

Instead of responding to plaintiffs' document demands, the Lifton defendants filed the instant summary judgment motion. Instead of providing responsive documents dating back to 2009 as requested in Paragraph 26 of the demand, the Lifton defendants provided banking statements only for the period of November and December 2011 and thereafter (*see*, Exhibits C-E to Summary Judgment Motion). Notably, defendants did not submit an affidavit from Lifton to address plaintiffs' allegations of the Lifton defendants' relationship with Belmonte in the early months of 2011 and Lifton's receipt of two $50,000 wire transfers.

Discussion

On a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]). The court's inquiry is limited to determining whether the complaint states any cause of action, not whether there is evidentiary support for it (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]).

"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 eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York University Medic al Center*, 64 NY2d 851, 853 [1985]). The burden then

shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Conspiracy to Commit Fraud and Conversion (The First and Tenth Causes of Action)

Plaintiffs' allegations against Munster, Phillips and Lifton sound in *conspiracy* to defraud plaintiffs and to embezzle their money (*see 1766-68 Assoc., LP v City of New York*, 91 AD3d 519, 937 NYS2d 33 [1st Dept 2012]; *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). Plaintiffs do not claim that these defendants made any misrepresentations to plaintiffs, or that they ever met or spoke with either of the plaintiffs prior to plaintiffs' "investments" with Belmonte (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]).

Although New York does not recognize an independent cause of action for *civil conspiracy* (*see Romano v Romano*, 2 AD3d 430, 432, 767 NYS2d 841 [2003] ["a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort"]), a plaintiff may plead the existence of a conspiracy "[in order] to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme" (*Abacus Federal Savings Bank v Lim,* 75 AD3d 472, 905 NYS2d 585; *see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969, 510 NYS2d 546 [1986]). Therefore, under New York Law, to establish a claim of *civil conspiracy*, plaintiffs were 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 the furtherance of a plan or purpose; and (4) resulting damage or injury" (*Abacus, citing World Wrestling Fed. Entertainment v Bozell*, 142 FSupp2d 514, 532 [SDNY

2001][emphasis added]).

The Complaint alleges two underlying torts - fraud and conversion.

To make out a *prima facie* case of *fraud*, a party must allege "representation of material fact, falsity, *scienter*, reliance and injury" (*U.S. Express Leasing, Inc. v Elite Technology (N.Y.), Inc.*, 87 AD3d 494, 928 NYS2d 696 [1st Dept 2011], *citing Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57, 698 NYS2d 615 [1999]). In addition, a claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b), sufficient to permit a "reasonable inference" of the alleged misconduct *(Eurycleia v Seward & Kissel*, 12 NY3d 553, 883 NYS2d 147 [2009]). A cause of action for fraud may be maintained where, as here, a claimant pleads a breach of duty separate from, or in addition to, a breach of contract,[5] *i.e.*, that it was induced to enter into a transaction because a defendant misrepresented material facts (*J.A.O. Acquisition Corp. v Stavitsky,* 192 Misc 2d 7, 745 NYS2d 634 [Sup Ct, New York County 2001], *citing, First Bank of the Americas v Motor Car Funding, Inc.,* 257 AD2d 287, 690 NYS2d 17 [1st Dept 1999]).

A *conversion* takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 NYS2d 637, 774 NE2d 702 [2002]).

Here, the allegations of fraud and conversion as against the primary wrongdoer,

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[5] It has been held that "[u]nlike a misrepresentation of future intent to perform, a misrepresentation of present [or past] facts is collateral to the contract ... and therefore involves a separate breach of duty" (*First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, *supra*, at 292).

Belmonte, are undisputed.[6] The complaint alleges misrepresentations that Belmonte made to plaintiffs in her capacity as an attorney and a Principal "of both Law Offices and Hamilton Capital Group LLC"; that plaintiffs relied on such representations, and thereby were induced to entrust their funds to Belmonte, which she thereafter converted (Complaint, ¶¶55; 189; 296).

Turning to the remaining elements of the conspiracy claims, and construing the complaint liberally as the court must within the scope of a motion to dismiss (CPLR 3211), the court concludes that plaintiffs stated viable causes of action for conspiracy to commit fraud and conversion against *Munster, Phillips and the Lifton defendants*.

With respect to *Munster*, the allegations that in September 2011, she agreed to be named a Security Administrator for the Belmonte's escrow account, from which it is alleged that plaintiffs' money was "removed" in November or December 2011, are sufficient, at this stage of the litigation, to raise an inference of an agreement for purposes of conspiracy. Further, the allegations that Munster, as [one of the] Security Administrators, assisted Belmonte in "removing" plaintiffs' money from the escrow and "convert[ing it] for the direct and indirect benefit of [. . .] co-defendants/co-conspirators in furtherance of the conspiracy" (Complaint, ¶¶294-297), sufficiently state the overt act in furtherance of the conspiracy to commit fraud and conversion.

Even if this Court were to consider the documentary evidence submitted by Munster in her original moving papers, such evidence does not warrant dismissal of the Complaint, at this juncture. Affidavits "will almost never warrant dismissal under CPLR 3211 unless they

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[6] None of the moving defendants dispute that Belmonte committed the acts alleged against her in the complaint and Hamilton Capital failed to answer or otherwise move.

"establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

And, contrary to Munster's argument, the evidence she submits in support of her motion is insufficient to warrant the dismissal on the ground that "a defense is founded upon documentary evidence" (CPLR 3211 [a][1]), an argument improperly raised for the first time in reply.[7] A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). Here, Munster's Affidavit and emails do not qualify as "documentary evidence" for purposes of this rule (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004]; see *Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983]). And in any event, the bank statements which show that wire transfers from Belmonte's law firm's escrow account at the Chase Bank in November and December 2011 were executed by Belmonte (*see* exhibit A to Munster Reply Affidavit), are not conclusive on the issue of whether Munster *authorized* any wire transfers from said escrow account within this period of time. Likewise, the evidence that Belmonte marked the box for "Single Security Administration Model," does not flatly contradict the fact that Munster was a Security Administrator who

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[7] While Munster's Notice of Motion does not seek the dismissal on CPLR 3211 (a)(1), in her Reply, she argues that the Complaint against her should be dismissed pursuant to both 3211 (a)(1) and 3211 (a)(7) (Munster Reply, ¶2).

approved the alleged transfers. Thus, the evidence submitted does not establish a Munster's defense to the asserted claims as a matter of law.

Likewise, with respect to *Phillips,* plaintiffs' allegations that Phillips created the prospectus of Hamilton Capital, in which he was listed as a CFO and COO, and on which plaintiffs relied in making their decisions to invest with Belmonte, sufficiently support plaintiff's claim that Phillips agreed to conspire. It has been held that in an action based upon fraud, "corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 890 N.E.2d 184 [2008], *citing Polonetsky v Better Homes Depot*, 97 NY2d 46, 55, 735 NYS2d 479, 760 N.E.2d 1274 [2001]).

Further, the allegations that plaintiffs' funds were transferred to Hamilton Capital's bank account, with Phillips's knowledge and approval, sufficiently state an overt act and participation in the fraudulent scheme for purposes of conversion, and therefore withstand the dismissal of fraud and conversion conspiracy claims.

As to *the Lifton defendants,* the evidence submitted in their motion for summary judgment (CPLR 3212) does not establish their non-liability for conspiracy as a matter of law. Indeed, such evidence raises questions of fact as to the Lifton defendants' knowledge and participation in the alleged conspiracy. In any event, the complaint alleges that in February 2011, Belmonte emailed Maier about the risk-free nature of her "investments" since "it sits in [her] escrow account for the whole time as 'show money' to get the deal done," and consistent with this allegation, plaintiff Maier's affidavit in opposition states that she "deposited $150,000" "into an escrow account in February 2011." (¶4). Maier also attests that her $150,000 deposit

coincided with Lifton's subsequent receipt of two wire transfers in February and April of 2011 for $50,000 each. Lifton's personal bank account also shows numerous deposits ranging from $5,000 to $65,000 after Mairer's first deposit with Belmonte. Plaintiffs point out that meanwhile, the bank records for Lifton Financial and Hamilton show nominal amounts on deposit and little activity during similar periods of time. Also, the fact that Lifton and Belmonte were co-owners of Hamilton Capital, which was owned and controlled by Lifton Financial, and used as a vehicle in syphoning plaintiffs' money from Belmonte's escrow account, permits a strong inference to support plaintiff's allegation of conspiracy to defraud.

Furthermore, given the limited discovery conducted in this case, plaintiffs are entitled to further discovery, *i.e.*, depositions, to establish the role, if any, the Lifton defendants played in the alleged scheme to defraud, as these matters are particularly within the defendants' knowledge *(Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, *supra*).

Moreover, the LLC Law §609[8] does not insulate Lifton as an LLC member from personal liability for fraud if he personally participated in it (*277 Mott Street LLC v Fountainhead Const.*, LLC, 83 AD3d 541, 922 NYS2d 299 [1st Dept 2011]). A member of a limited liability company, like a corporate officer, may be personally liable for committing fraud on the company's behalf (*First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287 [1st Dept 1999]).

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[8] The LLC Law §609 provides that

"(a) Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company."

Thus, summary dismissal of plaintiffs' claims as against the Lifton defendants for conspiracy to commit *fraud* and *conversion* is unwarranted.

Breach of Contract (The Second and Third Causes of Action)

The breach of contract claims against Munster, Phillips and the Lifton defendants should be dismissed.

To assert a breach of contract claim against each defendant, plaintiffs were required to allege the existence of a valid contract, breach of the contract by a defendant and resulting damages (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]).

Here, the Complaint contains no allegations that any of the moving defendants entered into any contract with plaintiffs. And, plaintiffs may not charge these defendants with conspiracy to breach the agreement (*North Shore Bottling Co. v C. Schmidt & Sons, Inc.*, 22 NY2d 171, 239 N.E.2d 189 [1968]). "[I]t is a long established doctrine that one does not have a cause of action against another contracting party for conspiracy to breach the agreement between them" (*Mastro Jewelry Corp. v St. Paul Fire and Marine Ins. Co.,* 70 AD2d 854, 418 NYS2d 44 [1st Dept 1979], *citing Bereswill v Yablon*, 6 NY2d 301, 306, 189 NYS2d 661, 664 [1959]).

Plaintiffs' argument that a party not in privity may nevertheless be held liable for a breach of contract is legally unsupported. The case law cited by plaintiffs, that "a bond [between the parties] so close as to be the functional equivalent of contractual privity" relates to claims of negligent misrepresentation and thus, is inapplicable to the claims of the "conspiracy to breach a contract" (*see Mateo v Senterfitt*, 82 AD3d 515, 918 NYS2d 438 [1st Dept 2011], *citing Ossining*

Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, 419, 541 NYS2d 335 [1989]). Thus, the breach of contract claims against Munster, the Lifton defendants and Phillips, based on conspiracy, are dismissed.

Breach of Fiduciary Duty (The Sixth and Seventh Causes of Action)

Plaintiffs' breach of fiduciary duty claims against the moving defendants appear to be derivative of such claim against Belmonte and essentially seek to hold these defendants liable for aiding and abetting Belmonte's breach of fiduciary duty.

A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another; (2) that defendants knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (*Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003], *citing S & K Sales Co. v Nike, Inc.*, 816 F2d 843, 847-848 [2d Cir 1987]; *Whitney v Citibank, N.A.*, 782 F2d 1106, 1115 [2d Cir 1986], *citing Wechsler v Bowman*, 285 NY 284, 291 [1941]).

To establish a claim for breach of fiduciary duty, a plaintiff must show the existence of a fiduciary relationship, and misconduct by defendant which directly caused plaintiff's damages (*Thermal Imaging, Inc. v Sandgrain Sec., Inc.*, 158 F Supp2d 335 [SDNY 2001]). Under New York law, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158, 866 NYS2d 578 [2008]; *EBCI, Inc. v Goldman Sachs*, 5 NY3d 11, 31, 832 NE2d 26 [2005]). However, "[s]imply because one reposes trust or confidence in another does not give rise to a fiduciary duty; the trust must be accepted as well" (*Regions Bank v Wieder & Mastroianni, P.C.*, 423 FSupp2d 265 [SDNY 2006], *citing Thermal Imaging*,

supra, at 343 [applying New York law]).

It is undisputed that Belmonte, as an escrow agent, breached her fiduciary duty to plaintiffs (*Talansky v Schulman*, 2 AD3d 355, 770 NYS2d 48 [1st Dept 2003]). And Munster, as an alleged Security Administrator, also owed a fiduciary duty to plaintiffs with respect to their funds in the subject escrow account. Thus, plaintiffs' allegations that she assisted or participated in the removal of plaintiffs' money from the escrow account sufficiently state a cause of action for aiding or abetting Belmonte's breach of fiduciary duty. Munster's affidavit and documentary evidence essentially denying plaintiffs' allegations in this regard are insufficient on a motion to dismiss for failure to state a cause of action. And, it cannot be said that the parties charted a summary judgment course so as to permit the Court to assess Munster's affidavit and documents to determine whether they establish the absence of a triable issue of fact as to her liability (*Brathwaite v Frankel*, 98 AD3d 444, 949 NYS2d 678 [1st Dept 2012][finding that while "defendants' notice of motion sought, as alternative relief, summary judgment pursuant to CPLR 3211 (c), plaintiffs never indicated that they joined defendants in "deliberately charting a summary judgment course" . . . , nor does the case involve a purely legal question without any disputed issues of fact]). Thus, dismissal of the sixth cause of action as asserted against Munster is unwarranted.

However, with respect to Phillips and Lifton, plaintiffs failed to allege that they "knowingly induced or participated in the breach" of fiduciary duty. As to the element of knowing participation, courts have held that there must be an allegation that the aider and abettor defendant had *actual knowledge* of the breach of duty (*see Kaufman v Cohen*, 307 AD2d 113, *citing S & K Sales Co. v Nike, Inc.*, 816 F2d at 848, *supra*). Constructive knowledge of the

breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability *(see Filler v Hanvit Bank*, 339 FSupp2d 553, 557 [SDNY 2004]; *Kolbeck v LIT Am.*, Inc., 939 FSupp 240, 246 [SD NY 1996], *affd* 152 F3d 918 [2d Cir 1998]).

While the court is mindful of the inherent difficulty in pleading a defendant's actual state of mind (*see, Wight v Bankamerica Corp.*, 219 F3d 79, 91-92 [2d Cir 2000]), plaintiffs allege no facts in the Complaint from which it could be inferred that Phillips or the Lifton defendants had *actual knowledge* of Belmonte's intended breach of fiduciary duty. Plaintiffs' allegations that "[u]pon information and belief," Lifton and Phillips were aware of the illegal Pledge and Security Agreements executed by Belmonte, and "breached their fiduciary duty [as] interest holders in Hamilton Capital," are insufficient to state an element of actual knowledge. It has been held that a person "knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*see Kaufman, supra, citing King v George Schonberg & Co.*, 233 AD2d 242, 243 [1996]; *National Westminster Bank USA v Weksel*, 124 AD2d 144, 148-149 [1987], *lv denied* 70 NY2d 604 [1987]). Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur (*Kaufman, citing Kolbeck v LIT Am., Inc.*, 939 FSupp at 247). However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty *directly* to the plaintiff *(Kaufman, citing In re Sharp Intl. Corp.*, 281 BR 506 [Bkrtcy EDNY 2002]).

Here, Phillips and Lifton did not owe a fiduciary duty directly to plaintiffs. Thus, plaintiffs' allegations of each of their failures to take any action to protect plaintiffs' interests in Hamilton Capital (Complaint, ¶¶274-275), do not permit an inference that Phillips and Lifton

provided "substantial assistance" to the primary violator, Belmonte, and thereby knowingly participated in her breach of fiduciary duty (*see Kaufman, citing King, supra*).

Therefore, the breach of fiduciary duty claims are dismissed solely as against Phillips, Lifton and Lifton Financial; however, the dismissal as against Munster is unwarranted.

Unjust Enrichment (the Fourth and the Fifth Causes of Action)

A cause of action for unjust enrichment arises "when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another" (*see Parsa v State of New York,* 64 NY2d 143, 148, 485 NYS2d 27 [1984]). "The essential inquiry in any action for unjust enrichment [. . .] is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 884 NYS2d 47 [1st Dept 2009], *affd* 16 NY3d 173, 944 NE2d 1104 [2011], *citing Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, 334 NYS2d 388, 285 NE2d 695 [1972]). In order state a claim of unjust enrichment, a plaintiff must allege that "(1) the other party was enriched, (2) at [plaintiff's] expense, and (3) that 'it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 19 NY3d 511, 973 NE2d 743, 950 NYS2d 333 [2012], *citing Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 944 NE2d 1104 [2011]). In addition, "[g]enerally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and *whether the defendant's conduct was tortious or fraudulent*" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 285 NE2d 695, 334 NYS2d 388 [1972] (emphasis added)).

Plaintiffs allege that "each of the defendant co-conspirators, individually and collectively benefitted from the [plaintiffs'] investment funds obtained [by Belmonte] through fraud" (Complaint, ¶177); that defendants co-conspirators "enriched themselves at the expense of and to the detriment of Plaintiffs" (Complaint, ¶252); and "retained the funds obtained from Plaintiffs" (id., ¶253). Plaintiffs have also pleaded enough facts to show that they might be entitled to a return of the money under principles of equity, and - it is not for the Court to find on a motion to dismiss that plaintiffs are not entitled to such a benefit in equity, since the court's role on a CPLR 3211 motion is to determine whether the complaint *adequately states* that defendants have been unjustly enriched, not whether plaintiff will ultimately be able to *prove* it.

"Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" *(Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 944 NE2d 1104 [2011] (dismissing unjust enrichment claim due to "the lack of allegations that would indicate a relationship between the parties, or at least an awareness by [defendant] of [plaintiff's] existence, *citing Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]).[9] Here, to the extent that plaintiffs' unjust enrichment claims against Munster, Phillips and the Lifton defendants arise from the alleged conspiratory conduct of the defendants, and each of their relationships to Belmonte and their interconnected roles in the investments, the

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[9] In cases involving unjust enrichment claims based on services performed, the Court of Appeals held that a claim for unjust enrichment must allege "a connection or relationship between the parties that could have caused *reliance or inducement* on the plaintiff's part" (*Georgia Malone & Co., Inc. v Ralph Rieder, supra, citing Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182, 919 NYS2d 465)(emphasis added). *Mandarin Trading* involved a claim for fraud and unjust enrichment by a buyer of a Paul Gauguin painting against an appraiser who failed to disclose his partial ownership in the painting; and in *Georgia Malone*, a real estate broker that prepared due diligence reports for a developer for a potential purchase transaction, sued a rival broker who acquired the reports and later obtained sales commission. Furthermore, these cases are distinguishable because, unlike the instant case, they do not involve conspiracy to defraud, which by its nature, shrouds in secrecy the relationships between the parties.

absence of a direct relationship with them does not defeat the unjust enrichment claim.

Accordingly, the dismissal of the *unjust enrichment* claims as against Munster and Phillips is unwarranted.

With respect to the Lifton defendants' motion for summary judgment, the Lifton defendants met their initial burden of establishing *prima facie* entitlement to judgment as a matter of law, by submitting evidence, *i.e.*, bank statements of Lifton Financial and Hamilton Capital, and the Lifton Affidavit, showing that neither Lifton, nor Lifton Financial or Hamilton Capital received transfers or any proceeds of plaintiffs' alleged investments with Belmonte after November 1, 2011 or December 12, 2011 (see Lifton Affidavit and Exhibits C and E).

However, the evidence submitted by plaintiffs in opposition that Lifton received "tens of thousands of dollars from unknown sources during 2011 and 2012," as noted above, raises issues of fact as to whether any of those funds originated from Belmonte's escrow account containing plaintiffs' "investments" and whether Lifton or Lifton Financial, through the alleged fraudulent scheme, benefitted at plaintiffs' expense, and makes summary judgment premature at this juncture.

Therefore, summary judgment dismissing the unjust enrichment claim is unwarranted as premature at this time.

Punitive damages

Plaintiffs' cause of action for punitive damages should be dismissed. It is well established that such cause of action cannot stand as a separate cause of action since it constitutes merely an element of the single total claim for damages on the underlying causes of action (*APS Food Systems, Inc. v Ward Foods, Inc.*, 70 AD2d 483, 421 NYS2d 223, [1st Dept 1979], *citing*

Goldberg v New York Times, 66 AD2d 718, 411 NYS2d 294 [1st Dept 1978]).

Furthermore, it is well established that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct *directed at the public generally* (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995][emphasis added]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]).

Here, plaintiffs have failed to state that the alleged fraudulent conduct was aimed not solely at these plaintiffs, but at the public, generally (*American Transitions. Co. v Associated International Ins. Co.*, 261 AD2d 251 [1st Dept 1999][the underlying wrongful conduct was focused upon plaintiff and not aimed systematically at the public generally]). Therefore, the ninth cause of action is dismissed.

Attorneys' Fees

Plaintiffs' claim against Munster, Phillips and the Lifton defendants for attorneys' fees is also dismissed.

Under the general rule, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 906 NYS2d 205 [1st Dept 2010]; *Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]).

Here, none of these moving defendants were parties to the Pledge and Security Agreements pursuant to which plaintiffs seek attorneys' fees (*see* Complaint, ¶¶281-285; Pledge and Security Agreements §3). Therefore, the *eighth* cause of action is dismissed as against them.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion *sequence 001* of the defendant Mary Regina Phillips a/k/a Regina Munster, pursuant to CPLR 3211, to dismiss the complaint of plaintiffs Harold M. Fischer and Helen Maier is granted solely to the extent of severing and dismissing the *second* and *third* causes of action for breach of contract, the *eighth* cause of action for attorneys' fees, and the *ninth* cause of action for punitive damages as against such defendants; and the motion is otherwise denied; and it is further

ORDERED that the motion *sequence 002* of the defendant Robert F. Phillips, pursuant to CPLR 3211, to dismiss the complaint of plaintiffs Harold M. Fischer and Helen Maier is granted solely to the extent of severing and dismissing the *second* and *third* causes of action for breach of contract, the *seventh* cause of action for breach of fiduciary duty, the *eighth* cause of action for attorneys' fees, and the *ninth* cause of action for punitive damages as against such defendants; and the motion is otherwise denied; and it is further

ORDERED that the motion *sequence 003* of the defendants Steven J. Lifton and Lifton Financial Group, L.L.C., pursuant to CPLR 3212, to dismiss the complaint of plaintiffs Harold M. Fischer and Helen Maier is granted solely to the extent of severing and dismissing the *second* and *third* causes of action for breach of contract, the *seventh* cause of action for breach of fiduciary duty, the *eighth* cause of action for attorneys' fees, and the *ninth* cause of action for punitive damages as against such defendants; and the motion is otherwise denied; and it is further

ORDERED that the parties shall appear for a preliminary conference at Part 35, 60 Centre Street, Room 438, New York, New York, on **October 29, 2013**, at **2:30 p.m.**; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: October 11, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD