3839 Holdings LLC v Theodore Farnsworth, Highland Holdings Group, Inc.
2017 NY Slip Op 32433(U)
November 16, 2017
Supreme Court, New York County
Docket Number: 654463/2016
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

3839 HOLDINGS LLC,

Plaintiff,

- against -

THEODORE FARNSWORTH, HIGHLAND HOLDINGS GROUP, INC., ZONE TECHNOLOGIES, INC., and HELIOS AND MATHESON ANALYTICS, INC.,

Defendants.

----------X

DECISION AND ORDER

Index No. 654463/2016
Motion Seq. Nos. 001-002

O. PETER SHERWOOD, J.:

In motion sequence 001, defendants Zone Technologies, Inc. ("Zone") and Helios and Matheson Analytics, Inc. ("HMNY") move to dismiss the amended complaint under CPLR 3211 (a) (3) for plaintiff's lack of legal capacity to sue and 3211 (a) (7) for failure to state a cause of action. In motion sequence 002, defendants Theodore Farnsworth ("Farnsworth")[1] and Highlander Holdings Group, Inc. ("HHG," together with Farnsworth, the "Farnsworth Defendants") move for the same relief under CPLR 3211 (a) (7) only. For the following reasons, The motions will be granted in all respects.

I. BACKGROUND

The amended complaint alleges as follows:

In or around February 2014, Farnsworth induced plaintiff to purchase a 10% interest in HHG in exchange for $1 million, based in part on his assurance that the contribution would be repaid in 24 months (amended complaint ¶¶ 16-17). HHG is incorporated under the laws of Delaware (*id.* ¶ 13). The agreement was memorialized in an Amendment to the HHG Shareholder's Agreement (the "SHA Amendment"), which provided that plaintiff would contribute $1 million in capital (the "Capital Contribution"). The SHA Amendment made plaintiff

[1] Not to be confused with the term as used in the amended complaint, which also encompasses defendant Zone.

a "preferred" shareholder with no obligation to invest any further capital with the company (*id.* ¶ 21).

Plaintiff contends Article 6 provided for a guaranty of the return of plaintiff's Capital Contribution within 24 months. Article 6 states:

> If within 24 months from the date herein [3839 Holdings] has not received a full return of their [sic] Capital Contribution, [3839 Holdings] will have the right to collect up to the amount of their Capital Contribution prior to any other distributions to any other shareholder. If [Farnsworth] shall violate any of the restrictions in Paragraph 3 above or this Paragraph 6, Farnsworth shall be personally liable to [3839 Holdings] for such violation for any actual, out-of-pocket damages incurred by [3839 Holdings].

(*id.* ¶¶ 23-24).

While the SHA Amendment provides expressly that the "purpose of [HHG] is to be the sole shareholder and/or member of separate entities . . . that will acquire, own, hold, develop, maintain, and operate a direct interest of (sic) in certain properties," Farnsworth and HHG did not use plaintiffs' funds for these purposes, or for transactions of any kind (*id.* ¶ 26). As a result, plaintiff did not achieve the return it expected on its investment in HHG (*id.*).

Farnsworth and HHG returned $500,000, or half of the Capital Contribution, on December 18, 2014, but failed to return the remainder within the 24 months period. In June 2016, plaintiff demanded a return of the remainder of its Capital Contribution. Farnsworth responded to plaintiff's principal, Shaul C. Greenwald, that he would wire the remaining amount by no later than Monday, June 20, 2016 (*id.* ¶ 30) but failed to do so and on June 29, 2017, emailed plaintiff, stating among other things, "I believe that I should have money to you by the end of the week. I know you've heard this before, but some things are beyond my control and I just want to thank you again for being patient. I will make it up to you." (*id.* ¶¶ 31-32). After further demands for payment, Farnsworth wrote on July 1, 2016:

> "My deal with HMNY is already signed. If you can't wait longer there is really nothing I can do. The only thing I am asking is to wait until the money is released which has to be by end of this coming week? I don't think it benefits anyone if this ends up in court when you are days away from receiving money. Just to reassure you I have not received any money from this point on the deal."

(*id.* ¶ 33). Plaintiff reads these emails as admissions that Farnsworth had dissipated all of HHG's assets, and that neither Farnsworth nor HHG had the funds available to return without closing on the contemplated merger between Zone and HMNY (*id* ¶ 35).

On July 1, 2016, plaintiff's attorney informed HMNY of plaintiff's claims against Farnsworth, HHG, and Zone (*see* NYSCEF Doc. No. 11). He received no response (amended complaint ¶ 39). On or about July 12, 2017, HMNY and Zone announced they had signed an agreement to merge the two companies (*id.* ¶ 42). Plaintiff brought this action on August 23, 2016 (*id.* ¶ 43). The merger transaction closed on or about November 9, 2016 (*id.* ¶ 44).

Plaintiff contends that Farnsworth diverted the Capital Contribution to Zone, which is owned and operated by Farnsworth in order to improve the prospects of a potential sale or merger of that company (*id.* ¶¶ 40-41). Plaintiff alleges that, as the sole shareholder of Zone, Farnsworth received at least $17 million in HMNY common stock (*id.* ¶ 45).

The complaint asserts nine causes of action: (1) breach of the SHA Amendment against Farnsworth & HHG, (2) breach of the implied covenant of good faith and fair dealing against Farnsworth & HHG, (3) breach of fiduciary duty against Farnsworth & HHG, (4) unjust enrichment against HMNY, Farnsworth and Zone, (5) fraudulent conveyance against all defendants, (6) aiding and abetting liability against HMNY and Zone, (7) alter ego liability against Farnsworth, (8) tortious interference with contract against HMNY, and (9) permanent injunction prohibiting Farnsworth and HMNY from dissipating assets until outstanding amounts are repaid to plaintiff.

II. DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading

states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85). Here, the documentary evidence is the SHA Amendment.

A. Breach of the SHA Amendment (Against Farnsworth & HHG)

Farnsworth and HHG contend that plaintiff's breach of contract claim fails under the plain language of the SHA Amendment (NYSCEF Doc. No. 20 ["001 mem"] at 3-9). As to HHG, the Farnsworth Defendants argue correctly that HHG is not a party to the SHA Amendment and it has no contractual obligations to plaintiff (*id.* at 4; *see* NYSCEF Doc. No. 16 ["Farnsworth aff"],

exhibit B ["SHA Amendment"] at 1). Any breach of contract claim must be asserted against Farnsworth, not HHG.

Regarding the alleged violations of Article 6 of the SHA Amendment, the Farnsworth Defendants note that this provision only entitles plaintiff to a distribution preference. It imposes no obligation to return any of the Capital Contribution. They contend incorrectly, that the amended complaint has not plead that HHG made any distributions after February 11, 2016, two years after the date of the SHA Amendment (001 mem at 5). In fact, the amended complaint at ¶ 28 alleges "upon information and belief, Farnsworth receiv[ed] distributions or otherwise divert[ed] funds from HHG to Zone". At ¶ 36 it states "Farnsworth and HHG must have distributed 3839 Holdings' Capital Contribution to Farnsworth and/or otherwise misappropriated the Capital Contribution". The Farnsworth Defendants also rely on HHG's bank statements for January 2016 to the account's closure in May 2016 to establish that it made no such distributions (Farnsworth aff ¶ 4, exhibit C). The Farnsworth Defendants reply correctly that the bank statements cannot constitute documentary evidence because they do not conclusively refute plaintiff's allegations as these documents do not foreclose the possibility that HHG had other accounts containing funds (*id.* at 9-10). Regarding the alleged emails in which Farnsworth purportedly agreed to wire the remaining $500,000 to plaintiff, the Farnsworth Defendants argue that such communications merely "indicate[] a desire to deal with a complaining minority shareholder," and neither constitutes an admission of existing obligations or creates a binding contract (001 mem at 8-9).

Regarding the alleged failure to pursue real estate ventures, the Farnsworth Defendants contend that neither the second "Whereas" clause setting forth HHG's purpose, nor any other provision in the SHA Amendment, obligates HHG to pursue real estate ventures (001 mem at 7-8). Moreover, any damages arising from such a failure would be highly speculative since there is no way of knowing whether such ventures would have been successful.

In opposition, plaintiff contends that the "Whereas" clause must be read to create an obligation to invest in real estate ventures, since otherwise there would be no mutual consideration (NYSCEF Doc. No. 35 ["001 opp"] at 5-6). The court notes this argument ignores the fact that plaintiff received a 10% equity interest in HHG in return for the $1 million investment. Plaintiff also argues that this clause is "clear evidence that the understanding of the parties was that Farnsworth's performance under the contract . . . would include . . . investing in real estate

ventures" (*id.* at 6-9). Plaintiff cites to several cases, none of which lend support its argument, that this prefatory language imposes an obligation to an otherwise unambiguous agreement,[2] (*see Grand Manor Health Related Facility, Inc. v Hamilton Equities Inc.*, 65 AD3d 445, 447 [1st Dept 2009] ["Although a statement in a "whereas" clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document"]).

Plaintiff next argues that the failure to invest constitutes breach of the SHA Amendment because it prevented the occurrence of two events plaintiff describes as conditions precedent (*id.* at 7-8). The first is "the condition precedent . . . that would trigger Plaintiff's rights under Section 5 of the Agreement" (*id.* at 7). Section 5 merely states that plaintiff will have "the exclusive right to be the exclusive sales representative and order and close the title work on all real estate transactions done by the Company and the Entities until [plaintiff] receives a total of $2,000,000.00 . . . in Net Title Premiums" (SHA Amendment § 5). Plaintiff specifies neither what condition precedent would have trigger this right, nor how the failure to invest as of the filing of the complaint prevented this "condition precedent from occurring". The second is "the condition precedent . . . that would trigger Farnsworth's obligation to pay Plaintiff his preferred return under Section 6 of the Agreement" (001 opp at 8). This argument suffers from the same shortfalls as plaintiff's first condition precedent. Moreover, Section 6 does not obligate Farnsworth to make distributions.

"The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous "[internal citations omitted] (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d

[2] *See Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.* (243 AD2d 107, 114 [1st Dept 1998] [contract contained a clause requiring defendant to use best efforts to accomplish the purpose of the agreement]); *Musman v Modern Deb, Inc.* (56 AD2d 752, 753 [1st Dept 1977] [relying on recital clause to interpret ambiguous operative clause where "the two clauses are so intertwined that the ambiguity of the operative clause permeates the basic aspects of the agreement and the intent of the parties cannot be gleaned from the instrument"])' *In re Universal Serv. Fund Tel. Billing Practice Litig.* (619 F3d 1188, 1205 [10th Cir 2010] [finding binding obligations in "description" sections that included "an independent promise" and were expressly incorporated into the operative agreement]).

398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67).

The amended complaint alleges three separate acts that breached the SHA Amendment: "(i) failing to return the remaining $500,000 of the Capital Contribution . . . (ii) causing HHG to have insufficient funds following the misappropriation of the Capital Contribution to make any distributions to Farnsworth or any other shareholder; and (iii) failing to invest in any real estate ventures" (amended complaint ¶ 49). The amended complaint alleges that plaintiff made the Capital Contribution in four separate installments (*id.* at ¶ 25) and that "Defendants returned $500,000 of the Capital Contribution" (*id.* at ¶ 28).

The SHA Amendment is clear on its face and contains no provisions requiring either Farnsworth or HHG to return the Capital Contribution or to invest in real estate by a time certain. Plaintiff's reliance on the "whereas" clause fails since the contract is not ambiguous (*see e.g. Jones Apparel Group, Inc. v Polo Ralph Lauren Corp.*, 16 AD3d 279 [1st Dept 2005] ["Since the contract is unambiguous on its face, there is no need to refer to its recitals, which are not part of the operative agreement"]). There is no provision in the SHA Amendment that obligates the company to make distributions. Article 6 merely confers a preference on plaintiff a "Preferred Shareholder", to collect "prior to any other distributions to any other shareholder" (NYSCEF Doc. No. 46, ¶ 6). If "Farnsworth and HHG . . . distributed . . . [Plaintiff's] Capital Contribution to Farnsworth and/or otherwise misappropriated the Capital Contribution" (amended complaint ¶ 36) resulting in HHG having insufficient funds remaining to return plaintiff's Capital Contribution, the claim is for waste, mismanagement and self-dealing and belongs to HHG, not plaintiff. Affording the amended complaint "a liberal construction . . . and provid[ing] plaintiff the benefit of every possible inference" (*EBC I*, 5 NY 3d at 11), the amended complaint can be construed as alleging that the Capital Contribution was "misappropriated by Farnsworth and never deposited with HHG. As such, the First Cause of Action survives the Motion to Dismiss to Farnsworth.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing (Against Farnsworth and HHG)

The Farnsworth Defendants argue this claim should be dismissed because the allegations underlying this claim "are identical to the allegedly wrongful actions which underlie the First Cause of Action for breach of contract" (001 mem at 9-10). The Farnsworth Defendants also argue

that, for the same reasons advanced with respect to plaintiff's breach of contract claim, plaintiff cannot establish damages (*id.* at 10).

In opposition, plaintiff contends the amended complaint establishes actions taken by the Farnsworth Defendants which, though not "expressly forbidden by any contractual provision . . . deprive[d plaintiff] of the right to receive the benefits under their agreement" (001 opp at 10-12, quoting *Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22–23 [1st Dept 1996]). Plaintiff does not state exactly what act violated the implied covenant of good faith and fair dealing, or contractual benefit plaintiff was deprived of. At one point, plaintiff suggests that the alleged diversion was the source of the breach; at another, it was Farnsworth's failure to return the full Capital Contribution that deprived plaintiff of the benefits of the SHA Amendment (*see id.* at 12). The only contractual "right" plaintiff references in this argument relates to Farnsworth's purported obligation to invest in real estate ventures (*see id.* at 11), which as discussed above, is not a binding obligation under the SHA Amendment.

A "claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). As the Farnsworth Defendants correctly note the first and second causes of action are virtually identical. For this reason, plaintiff's second cause of action must be dismissed.

Even if this claim were not duplicative of plaintiff's first cause of action, it would still fail. The implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). The implied covenant is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]). However, the obligations imposed by an implied covenant are limited to obligations in aid and furtherance of the explicit terms of the parties' agreement (*see Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The implied covenant cannot be construed so broadly as to nullify the express terms of a

contract, or to create independent contractual rights (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger. LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the plaintiff must allege facts that tend to show that the defendants sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 222 AD2d 17, 22 [1st Dept 1996]). Plaintiff's second cause of action fails to identify any existing contractual obligations that were obstructed, but rather seeks to advance independent contractual rights not already provided for in the agreement. This claim shall be dismissed.

C. Breach of Fiduciary Duty (Against Farnsworth and HHG)

Plaintiff's third cause of action alleges that, as a 90% shareholder and manager of HHG, Farnsworth owed plaintiff a fiduciary duty which he breached by diverting funds and "intentionally causing HHG to not invest" in real estate. The Farnsworth Defendants argue that, under the governing law of Delaware, this cause of action is a derivative claim, which plaintiff does not have standing to assert (001 mem at 10-12, citing *e.g. Mich II Holdings LLC v Schron*, 2011 NY Slip Op 34121[U], *7 [Sup Ct, NY County 2011] [applying Delaware law and noting that causes of action alleging "vast misappropriation . . . in which [a] majority member was complicit" were "[e]ssentially . . . claims for waste, mismanagement and self-dealing" and thus "derivative in nature"]). The Farnsworth Defendants also argue plaintiff has failed to satisfy the particularity requirements of CPLR 3016 (b) (*id.* at 12).

In opposition, plaintiff first argues that its claim is direct. The sole case plaintiff cites to in support is inapposite. While that case states that a minority shareholder may also have a separate direct claim in addition to the corporation's derivative claim, it refers only to instances involving a specific type of transaction not involved in this case (*see* 001 opp at 14-15, citing *Gentile v Rossette*, 906 A2d 91, 99–100 [Del 2006]).[3] Specifically, that situation is "where: (1) a stockholder

[3] Although the issue is not contested, plaintiff also notes that majority shareholders may owe fiduciary duties to minority shareholders in certain instances (001 opp at 13-14, citing *e.g. Ivanhoe Partners v Newmont Min. Corp.*, 535 A2d 1334, 1344 [Del 1987] [noting that under "Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation"]).

having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders" (Gentile, 906 A2d at 99-100).

Plaintiff also contends that, even if this claim is derivative, this court may allow it to go forward as a direct claim (*id.* at 16-17).[4] In support, plaintiff cites to two cases in which courts allowed claims to go forward as direct claims in light of the fact that the corporate entities no longer existed (*see Gentile*, 906 A2d at 103 [noting that because "there is no corporate entity to which a recovery of the fair value of those shares could be paid" and the "only available remedy would be damages, equal to the fair value of the shares representing the overpayment by Single Point in the debt conversion," the "only parties to whom that recovery could be paid are the plaintiffs"]; *McBeth v Porges*, 171 F Supp 3d 216, 233 [SDNY 2016] [allowing direct claim proceed, since "although fiduciary duty claims alleging 'fund mismanagement' are normally derivative under Delaware law, the Spectra Fund was dissolved and the only two members of the Fund—McBeth and Porges—'are now clearly adversaries'"]). These cases are inapposite since, although plaintiff alleges HHG is insolvent, it does not contend HHG is no longer in existence.

Plaintiff also relies on *Fischer v Fischer* (CA 16864, 1999 WL 1032768, at *4 [Del Ch Nov 4, 1999]), which allowed shareholders to assert both direct and derivative claims relating to transactions plaintiff claimed unjustly enriched all other shareholders excluding plaintiff. While that case, too, involved a corporation which, by the time of the litigation, had been dissolved, the court also noted that if it were to dismiss plaintiff's individual claims, it "would place plaintiff in the awkward position of continuing a purely derivative action with any relevant relief benefiting Fischer Enterprises alone. An eventual victory for plaintiff, therefore, would achieve little since the individual defendants own an overwhelming interest in Fischer Enterprises" (*id.*, *4). Accordingly, the court found that it was required to permit plaintiff's individual claims to proceed.

[4] In this section, plaintiff states that "[o]nce a breach of duty has been established, a court's 'powers are complete to fashion any form of equitable and monetary relief as may be appropriate," suggesting that this court may also have the power to allow plaintiff to assert its third cause of action as a direct claim (001 opp at 16, quoting *Weinberger v UOP, Inc.*, 457 A2d 701, 714 [Del 1983]). The selected quotation is not an accurate reflection of the case plaintiff cites to, however, which discusses simply the forms of relief a court may order – not whether the court may, in its discretion, allow a derivative claim to go forward as a direct claim.

The court also held that the individual claims could go forward, since plaintiff alleged a wrong "suffered by plaintiff that was not suffered by all stockholders generally" (*id.*).

In reply, the Farnsworth Defendants attempt to distinguish *Fisher* on the basis that, in that case, the corporate entity had been dissolved (001 reply at 7). The Farnsworth Defendants also argue that, since the harms plaintiff alleges relate to funds that were allegedly misappropriated from HHG's assets, any relief would go to HHG, not plaintiff (*id.* at 7). Allowing plaintiff to recover directly on the basis that HHG is insolvent would effectively allow plaintiff to bypass the normal procedure for dissolving a corporation, which would prioritize shareholders over creditors.

The relevant test for determining whether a claim is direct or derivative in nature is set forth in *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031, 1039 [Del 2004]), which holds that:

> "a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."

(*id.*). Plaintiff does not adequately address the Farnsworth Defendants' arguments that the injury alleged in count three (i.e. diverting funds from HHG) runs to HHG, not plaintiff. Accordingly, the claim may be dismissed on this ground.

As noted above, however, plaintiff also relies on *Fischer* to establish that, even if the claim is derivative in nature, plaintiff may still assert it as a direct claim. *Aboushanab v Janay* (06 CIV. 13472 [AKH], 2007 WL 2789511, at *7 [SD NY Sept. 26, 2007]) addressed a similar argument that, under *Fischer*, a plaintiff should be allowed to bring a derivative claim as a direct claim because a derivative recovery would primarily benefit the controlling shareholders. That court's discussion is helpful. The court noted that a number of cases, including *Fischer*, created what had been referred to as an "'unjust enrichment exception' to the general rule that a plaintiff alleging injury to the corporation must bring his claim derivatively, in accordance with Delaware's demand and notice procedures" (*id.*, quoting *Agostino v Hicks*, 845 A2d 1110, 1124–1125 [Del Ch 2004]). However, that court also noted uncertainty regarding whether such an exception survived *Tooley* in light of the holding in that case "that the issue of whether a stockholder's claim is derivative or direct 'turn[s] solely' on the criteria it set out," and ultimately concluded that, in light of the clear

directions of *Tooley*, "a detailed examination of Plaintiffs' claimed 'unjust enrichment' exception . . . is not required" (*id.*, quoting *Tooley*, 845 A2d at 1033). The opinion also noted that, unlike *Fischer*, the corporation involved continued to operate and earn revenue. This reasoning is directly applicable to this case. HHG is still in existence. Moreover, plaintiff has not identified and the court's research has not uncovered any case since *Aboushanab* suggesting that an "unjust enrichment exception" survives *Tooley*. Accordingly, this claim shall be dismissed.

D. Unjust Enrichment (Against HMNY, Farnsworth and Zone)

Defendants contend the unjust enrichment claim should be dismissed for three reasons. The first, advanced by Zone and HMNY, argues that plaintiff has failed to allege sufficiently that any of the defendants were enriched (NYSCEF Doc. No. 24 ["002 mem"] at 5-7). Specifically, although the amended complaint alleges that the purported diverted funds went to these defendants, defendants observe that such allegations are made only "upon information and belief" (*see e.g.* amended complaint ¶¶ 4, 66, 73). Zone and HMNY contend that such allegations are insufficient even at this stage (002 mem at 6-7, citing *e.g. NY Univ. v Intl. Brain Research Found., Inc.*, 2016 NY Slip Op 30434[U], *9-10 [Sup Ct, NY County 2016] [noting that an allegation based on information and belief offered with "no factual basis" is "simply a conclusory claim or statement unsupported by factual evidence," and, as such, "the bald allegation is not entitled to preferential consideration" on a motion to dismiss]). Zone and HMNY also contend that plaintiff has failed to satisfy the pleading requirements of CPLR 3016 (b) (002 mem at 5).

The second, also advanced by Zone and HMNY, asserts that the allegations fail to establish that it would be against equity and good conscience for Zone or HMNY to retain the purported benefit (002 mem at 7-8, citing *e.g. Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598, 600 [2d Dept 2002] [noting that, to sustain a claim for unjust enrichment, "a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor"]). Specifically, these defendants contend this claim fails in that plaintiff has not alleged that either Zone or HMNY provided no consideration for any funds allegedly misappropriated.

The third maintains that this cause of action is duplicative of plaintiff's claims for breach of contract and breach of fiduciary duty (001 mem at 12-14, citing *e.g. Corsello v Verizon New*

York, Inc., 18 NY3d 777, 790 [2012] [noting that an "unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim"]; 002 mem at 8).

In opposition, plaintiff contends first that dismissal is not warranted simply because some allegations are made on information and belief, and it is only where "the complaint fails to disclose the source of the facts pled upon information and belief" (NYSCEF Doc. No. 42 ["002 opp"] at 4-5, quoting *265 W. 34th St., LLC v Chung*, 47 Misc 3d 1219(A) [Sup Ct 2015], *adhered to on rearg sub nom. 265 W. 34th St., LLC v Joon Sik Chung* [Sup Ct July 20, 2015]). Plaintiff contends it has provided a factual basis in the form of Farnsworth's emails stating that he would be unable to provide the remaining $500,000 until after the HMNY deal went forward (*see* NYSCEF Doc. No. 37 [plaintiff's exhibit A]).

Plaintiff also maintains that its allegations establish that Zone and HMNY did not confer benefits in exchange for the purportedly misappropriated funds since the "entire Complaint is premised on the fact that [plaintiff] ***received nothing*** from Farnsworth or . . . Zone and HMNY" (002 opp at 6-7). Plaintiff also argues that, since its letter to HMNY indicated that Farnsworth was indebted to plaintiff, Zone was aware had been unjustly enriched by misappropriated funds. For the same reason, it would be against equity and good conscience to allow HMNY and Zone to retain those funds (*id.*).

Finally, as to the argument that this claim is duplicative of the breach of contract claim, the defense "is premature at the pleading stage" (*id.* at 18, citing *Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253 [1st Dept 2002] [finding that while "a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage" such a claim was "was properly dismissed because it was not unjust for [defendant] to retain funds obtained pursuant to its clear contractual right"]). The line of authority plaintiff relies on, however, applies only to instances in which there is "a bona fide dispute as to the existence or application of a contract" (*Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]). Nevertheless, plaintiff argues the SHA Amendment does not cover this particular dispute.

Plaintiff further differentiates between the breach of contract claim and this claim on the basis that the contract claim relates to Farnsworth's failure to invest plaintiff's funds, while this claim relates to defendant's retention of the funds.

In reply, Zone and HMNY first argue that the referenced email, at most, shows that Farnsworth intended to make a payment to plaintiff but lacked the funds to do so until the merger closed (NYSCEF Doc. No. 50 ["002 reply"] at 3). Zone and HMNY also note that the letter sent to HMNY states only that HHG was indebted to plaintiff and says nothing regarding purportedly misappropriated funds that were paid to Zone (*see* NYSCEF Doc. No. 41 [plaintiff's exhibit E]). Regarding plaintiff's argument that the amended complaint is based on the allegation that "it received nothing," Zone and HMNY note that plaintiff alleges no instances in which it transacted with either Zone or HMNY and says nothing regarding whether either Zone or HMNY engaged in a transaction with HHG or whether it provided consideration to HHG for what it purportedly received.

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Plaintiff's attempt to differentiate between this claim and the three claims just discussed is belied by the amended complaint, which predicates all claims on the alleged diversion of and failure to "return the remaining $500,000 (*see* amended complaint ¶¶ 49, 54, 58, 63). To the extent this claim is asserted against Farnsworth, defendants are correct that it "simply duplicates" plaintiff's earlier claims. Accordingly, the claim fails with respect to the Farnworth Defendants (*see Corsello*, 18 NY3d at 790). The same does not apply with respect to HMNY and Zone, however, whom those causes of action are not asserted against and whom, under the facts alleged, fall more squarely under what the Court of Appeals has described as the "[t]ypical case[]" of unjust enrichment "in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled" (*id.*). However, as discussed above the money claimed belongs to HHG, not plaintiff.

In any event, "conclusory allegations," made "upon information and belief" are insufficient to defeat a motion to dismiss (*Vil. of Catskill v Kemper Group-Lumbermen's Mut. Cas. Co.*, 111 AD2d 1011, 1012–13 [3d Dept 1985]; *see also Belco Petroleum Corp. v AIG Oil Rig*, 164 AD2d 583, 598-599 [1st Dept 1991] [dismissing claim where plaintiff's allegations of defendant's patterns and practices were made "upon information and belief" and plaintiff failed "to disclose the sources of its information and belief and otherwise come forward with whatever evidence it has of the alleged pattern and practice"]). Plaintiff concedes that dismissal is warranted where "the complaint fails to disclose the source of the facts pled upon information and belief" (002 opp at 4-5, quoting *265 W. 34th St., LLC v Chung*, 47 Misc 3d 1219(A) [Sup Ct 2015], *adhered to on rearg sub nom. 265 W. 34th St., LLC v Joon Sik Chung* [Sup Ct July 20, 2015]). Plaintiff hopes to rely on Farnsworth's emails to substantiate its own allegations, made solely on information and belief. However, the emails provide no factual basis for the allegations on which plaintiff bases this claim – (i) that the funds were misappropriated, and (ii) that those funds were transmitted to Zone, and thereby HMNY through the merger. This claim must be dismissed.

E. Fraudulent Conveyance (Against All Defendants)

As to the fraudulent conveyance claim, defendants contend first that plaintiff lacks standing to assert a cause of action under Debtor and Creditor Law since plaintiff is a shareholder, and thus not HHG's "creditor" in the common sense (001 mem at 14-15, 002 mem at 14). Zone and HMNY also argue that plaintiff failed to adequately allege that conveyances were made to either of them because, as argued previously, plaintiff has made allegations only "upon information and belief," (002 mem at 9-10) and because plaintiff's allegations are bare and conclusory (*id.* at 10, citing *e.g. Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013] [finding that "the bare allegation in the amended complaint that '[t]here was a fraudulent conveyance of assets from [defendant]'" to another entity failed state a cause of action for fraudulent conveyance]).

For these reasons, Zone and HMNY additionally contend plaintiff has failed to satisfy various elements required for claims under Debtor and Creditor Law §§ 273-276, such as lack of fair consideration (§§ 273—275), that the conveyances rendered HHG insolvent (§§ 273, 274), and that such conveyances were made with an intent to defraud (§ 276) (*id.* at 11-13). Defendants also note that Debtor and Creditor Law § 273-a is inapplicable since plaintiff does not allege any conveyance took place after the commencement of this action (*id.* at 12; 001 mem at 15 n 15).

Finally, Zone and HMNY note that claims under Debtor and Creditor Law § 276 are subject to CPLR 3016 (b)'s heightened pleading requirement (002 mem at 12-13, citing *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 477 [1st Dept 2015]), and that plaintiff has failed to meet this standard.

In opposition, plaintiff contends it qualifies as a "creditor" under Debtor and Creditor Law § 270, which defines the term as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Plaintiff argues that, as soon as a fraudulent conveyance was made, plaintiff became a "creditor" under the statute because plaintiff had a claim against Farnsworth and HHG (001 opp at 19-22; 002 opp at 13-14). Plaintiff contends that, for the same reason, it also became a "future creditor[]" under Debtor and Creditor Law §§ 275 and 276.

Plaintiff contends its allegations are not conclusory since they have been substantiated by Farnsworth's emails (002 mem at 8-9). Plaintiff also contends its allegations are sufficient to satisfy the elements of Debtor and Creditor Law §§ 273 and 274. Regarding Debtor and Creditor Law § 273-a, plaintiff contends it has alleged a transfer during the course of this lawsuit in the form of Zone and HMNY's merger, which plaintiff contends was without fair consideration (001 opp at 20; 002 opp at 10-11).

Finally, regarding intent to defraud, plaintiff again contends its allegations are substantiated by Farnsworth's emails and by the letter plaintiff sent to HMNY (002 opp at 12-13). Noting that "intent to commit fraud is a question of fact which cannot be resolved on a motion to dismiss," plaintiff asserts it has met its burden for this stage (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428 [1st Dept 2015]).

Regarding Debtor and Creditor Law § 273-a, Zone and HMNY note in reply that plaintiff's contention that the conveyance occurred after litigation contradicts another argument it made with respect to the particularity of its allegations. Specifically, plaintiff wrote that "[w]hile the dates of the conveyances are, at present, uncertain, they must have occurred prior to January 1, 2016," which predates this action (002 opp at 9 n 5). Finally, regarding plaintiff's argument that Farnsworth's emails substantiate the allegations of intent to defraud, Zone and HMNY counter that the emails are irrelevant since (i) they were sent several months after the date by which

plaintiff argues the conveyances occurred, and (ii) they do not concern any conduct by either Zone or HMNY (002 reply at 10).

Where a claim against a transfer exists prior to the transfer a plaintiff acquires standing as a "creditor" under Debtor and Creditor Law from the "moment the cause of action accrues" (*Shelly v Doe*, 249 AD2d 756, 757 [3d Dept 1998]). Here, the amended complaint fails to allege the circumstances regarding the purportedly fraudulent conveyances. The "bare allegation . . . that there was a fraudulent conveyance of assets . . . fails to state a cause of action for fraudulent conveyance" (*Jaliman*, 105 AD3d at 647 [1st Dept 2013]). Plaintiff alleges simply that there were conveyances at some unspecified point (before January, 2016), that the conveyances were made without fair consideration and rendered HHG insolvent, and that such transactions were made "with the actual intent to hinder, delay and defraud HHG's present and future creditors" (amended complaint ¶¶ 66-69). As was the case in *Syllman v Calleo Dev. Corp.* (290 AD2d 209, 210 [1st Dept 2002]), "plaintiff does not identify any particular transaction that he seeks to avoid; nor does he identify any transaction alleged to be fraudulent, merely alleging that, by reason of certain unspecified transfers, he has been damaged."

Plaintiff's attempt to rely on its submitted exhibits fails as well. Neither Farnsworth's email nor the letter to HMNY lend any support to the contention that either HHG or Farnsworth conveyed funds to Zone. At most the email shows that HHG lacked in funds, and that Farnsworth intended to pay plaintiff with funds from the merger. The emails say nothing as to why either HHG or Farnsworth would have been lacking in funds, let alone that those funds were misappropriated and conveyed to Zone and HMNY. Accordingly, this count shall be dismissed as well.

F. Aiding and Abetting Liability (Against HMNY and Zone)

HMNY and Zone contend this cause of action should be dismissed since plaintiff has already asserted a direct cause of action against the same defendants for the same underlying conduct, because plaintiff fails to plead substantial assistance in the detail required by CPLR 3106 (b), and most critically, because "under New York law, there is no claim for aiding and abetting a fraudulent conveyance" (002 mem at 15-17, quoting *Estate of Shefner v De La Beraudiere*, 127 AD3d 442 [1st Dept 2015]). Plaintiff raises no argument in opposition.

While phrased as "aiding and abetting liability," this cause of action asserts that HMNY and Zone aided and abetted Farnsworth's fraudulent conveyances (*see* amended complaint ¶¶ 72-81). No such claim exists in New York. It must be dismissed.

G. Alter Ego Liability (Against Farnsworth)

The seventh cause of action seeks to hold Farnsworth liable "for the damages suffered as a result of HHG's breaches of the SHA Amendment" (amended complaint ¶ 83). The Farnsworth Defendants contend this claim should be dismissed (i) because all material allegations are made upon information and belief, and (ii) because (as argued earlier) HHG is not a party to the SHA Amendment, and thus could not have breached that agreement (001 mem at 15-16). The Farnsworth Defendants also contend that the claim is subject to the heightened pleading requirements of CPLR 3106 (b) since, under their reading, the count alleges "Farnsworth, at the least, engaged in a breach of trust, if not fraud" (*id.* at 16).

The Farnsworth Defendants also note that alter-ego liability is not an independent cause of action (001 reply at 9, citing *e.g. Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015] [noting that "alter-ego liability is not an independent cause of action"]). Further, there are no facts alleged to support any allegation of failure to follow corporate formalities or inadequate capitalization (*id.* at 10). Regarding the alleged misappropriation, the Farnsworth Defendants argue that, even if wrongful, this does not turn HHG into Farnsworth's alter ego. The single citation defendants rely on states merely that "the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Fernbach, LLC v Calleo*, 92 AD3d 831, 832 [2d Dept 2012] [internal quotation marks and citation omitted]).

Plaintiff asserts no causes of action against HHG such that alter ego liability would apply. Moreover, as noted above, section 6 of the SHA Amendment makes Farnsworth directly liability for the breaches plaintiff alleges here. Accordingly, this claim will be dismissed.

H. Tortious Interference with Contract (Against HMNY)

HMNY argues that plaintiff's allegations regarding the letter it sent to HMNY demonstrated that HMNY did not have knowledge of the SHA Amendment prior to its purported

breach since, as alleged in the amended complaint, HHG breached the contract on February 11, 2016 (*see* amended complaint ¶ 27), but HMNY did not receive the letter until July 1, 2016 (*see id.* ¶ 97). (002 mem at 17-19.) HMNY also argues that, by virtue of its lack of knowledge of the contract, plaintiff cannot show it intentionally procured its breach. Finally, HMNY argues this claim fails to the extent that, as argued above, there was no predicate breach of contract.

In opposition, plaintiff notes that the amended complaint alleges the July letter was "among other things," what made HMNY aware of the contract's existence and contends there remain questions of fact preventing dismissal of this claim, such as "when HMNY knew that Plaintiffs funds were being or had been diverted into the pre-merger company Zone," "whether HMNY either requested, encouraged, or at least acceded to that diversion" and whether, "during due diligence prior to the merger, HMNY was aware of the HHG entity and the funds therein, and then was aware that those funds were moved into Zone" (002 opp at 15).

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney,* 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.,* 81 NY2d 90 [1993]).

As HMNY notes, the only instance of knowledge alleged in the amended complaint post-dates the purported breach. The same is true of the alleged procurement: closing of the merger of Zone and HMNY (*see* amended complaint ¶ 99). Accordingly, this claim must be dismissed.

I. Permanent Injunction Prohibiting Dissipation of Assets, and Attorneys' Fees (all defendants)

The Farnsworth Defendants contend that a permanent injunction is unnecessary since, in the event plaintiff is successful on any of its claims, "Article 52 of the CPLR would provide Plaintiff with all the rights to which a judgment creditor is entitled" (001 mem at 16). Zone and HMNY contend that, since plaintiff's requests for an injunction and for attorney's fees are predicated on meritless causes of action, both counts should be dismissed as well (002 mem 19-20, citing *Weinreb v 37 Apartments Corp.,* 97 AD3d 54, 59 [1st Dept 2012] ["An injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against that defendant"] and *Eight Broadway Assoc. v*

3117 Broadway Owners Corp., 2008 NY Slip Op 32522[U], *7 [Sup Ct, NY County 2008] ["Since plaintiff's causes of action have been dismissed, plaintiff is not entitled to attorneys' fees"]).

In opposition, plaintiff argues that Article 52 of the CPLR would provide no help in light of "Farnsworth's pattern and practice of laundering stolen funds from entity to entity to escape liability for theft" (*id.* at 25 n 13).

As discussed above, plaintiff fails to state a claim under any of the Debtor and Creditor Law provisions it relies on. For this reason, to the extent its tenth cause of action is based on Debtor and Creditor Law § 276-a, that claim must fail. However, to the extent the claim is based on section 6 of the SHA Amendment, which states that "Farnsworth shall be personally liable to [plaintiff] for such violation [of that section or section 3] for any actual, out-of-pocket damages incurred by [Plaintiff]," the claim still stands.

As discussed above, the only remaining causes of action are those asserted against Farnsworth. Thus, to the extent plaintiff seeks a permanent injunction against any other defendant, its claim must fail. To the extent plaintiff seeks a permanent injunction against Farnsworth, the claim must be dismissed as well. Plaintiff's basis for irreparable harm (and argument why the provisions of Article 52 of the CPLR provide no protection) is that Farnsworth may dissipate his assets *prior* to the entry of a final judgment on the merits. Thus, based on plaintiff's arguments, it seems plaintiff is seeking either a preliminary injunction under Article 63 or an order of attachment under Article 62, as opposed to a permanent injunction which would be concurrent with a final judgment on the merits (and thus would duplicate the protections of Article 52). Accordingly, this count will be dismissed in its entirety.

The court has considered the parties' remaining arguments and found the either meritless or of no moment.

II. CONCLUSION AND ORDER

For the reasons discussed, the motion shall be granted and the complaint dismissed. It is hereby

ORDERED that the motion of defendants Zone Technologies ("Zone") and Helios and Matheson Analytics, Inc. ("HMNY"), and of defendants Theodore Farnsworth and Highlander Holdings Group, Inc. ("HHG"), to dismiss the complaint herein (motion sequence number 002) is GRANTED in part and the complaint is dismissed in its entirety as against defendants Zone,

HMNY and HHG with costs and disbursements to said defendants as taxed by the Clerk of the Court upon presentation of a proper bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion to dismiss (motion sequence number 002) as it relates to defendant Farnsworth is GRANTED as to all causes of action except the first cause of action for breach of contract; and it is further

ORDERED that the action is severed and continued against defendant Farnsworth as to the first cause of action only; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and is further

ORDERED that counsel for moving parties shall serve a single copy of this decision and order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

DATED: November 16, 2017

ENTER,

O. PETER SHERWOOD J.S.C.