Coelho v Grafe Auction Co.
2018 NY Slip Op 30235(U)
February 8, 2018
Supreme Court, New York County
Docket Number: 654404/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54

Justice

Index Number : 654404/2013
COELHO, JOHN R
vs.
GRAFE AUCTION CO.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/8/18
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).** 105-116

Answering Affidavits — Exhibits _____ **No(s).** 118-132

Replying Affidavits _____ **No(s).** 133

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 2/8/18

_____, J.S.C.
SHIRLEY WERNER KORNREICH

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 54

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JOHN R. COELHO,

Index No.: 654404/2013

Plaintiff,

DECISION & ORDER

-against-

GRAFE AUCTION CO. and JUDD GRAFE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Grafe Auction Co. (GAC) and Judd Grafe (Grafe) move, pursuant to CPLR 3212, for summary judgment against plaintiff John R. Coelho. Plaintiff opposes the motion. For the reasons that follow, defendants' motion is granted in part and denied in part.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.

This case concerns an agreement between plaintiff and GAC to acquire and sell assets of The Great Atlantic & Pacific Tea Company (A&P), a supermarket that, in late 2010, filed for bankruptcy in the Southern District of New York. In the bankruptcy proceedings, non-party Gordon Brothers Retail Partners, LLC (Gordon Brothers), a firm that was involved in previous A&P liquidations, was appointed A&P's inventory liquidator in February 2011.

Plaintiff, who lives in Massachusetts, is a former employee of Gordon Brothers. In October 2010, after leaving Gordon Brothers, a former co-worker still with the firm, Steve Lewis, notified plaintiff of the opportunity to bid on A&P assets that were going to be liquidated in the bankruptcy proceedings. Plaintiff then obtained details of A&P's liquidation from other Gordon Brothers contacts and began soliciting third-parties to partner on a deal to acquire and

resell assets of A&P. He found a willing partner in GAC, a company based in Minnesota.[1] Plaintiff and GAC negotiated an agreement in December 2010 and executed a one-page letter agreement dated January 3, 2011. *See* Dkt. 110. (the Letter Agreement).[2]

The Letter Agreement begins:

> We are pleased to be pursuing the above referenced equipment liquidation opportunity with you. This letter will summarize and serve as out understanding with regard to the purchase and sale of these assets.

Dkt. 110. That "above referenced" opportunity is "A&P Grocery Store". *See id.* What follows are the following four provisions:

1. [GAC] will fund the purchase price of any store equipment packages or any other assets of A&P.

2. [GAC] will advance the expenses to prepare for market and conduct any auction and/or liquidation sale ("Sale"), as well as any out of pocket expenses. These expenses will be reimbursed from the first proceeds of the Sale. [GAC and plaintiff] will not charge for their time associated with any aspect of the Sale.

3. [GAC and plaintiff] have entered into this **exclusive** relationship with the understanding additional parties may secure [GAC's and plaintiff's] services outside this agreement.

4. All **net** revenues (gross Sale receipts less expenses, as set forth in paragraph 2 above) **will be shared equally** between [GAC and plaintiff].

Id. (emphasis added).

The following month, in February 2011, plaintiff "began compiling store closing lists and other information from Gordon Brothers and provided this information to Defendants" to determine "the value of the assets located in the stores to be closed and the amounts [the parties]

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[1] Grafe is GAC's principal. For the reasons discussed herein, there is no basis to hold him personally liable for GAC's contractual obligations.

[2] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

should bid to acquire such assets." Dkt. 119 (Coelho Aff.) at 5. On March 15, 2011, by email, plaintiff "received the bid package for the first round of Sales from Steve Lewis and forwarded it to Defendants." *Id.* at 6. Lewis' email included detail concerning the assets of 32 A&P stores. *See* Dkt. 122. On March 25, 2011, GAC "placed bids on the assets of 21 A&P stores." *See* Dkt. 119 at 6. Gordon Brothers awarded bids on 15 stores to GAC (though one was apparently "taken back"). *See id.* Eventually, GAC "acquired the assets (including the furniture, fixtures, equipment and refrigeration systems) of at least 32 A&P stores." *Id.*

The parties liquidated these assets "in three separate rounds of Sales." *See id.* "The first round of Sales, involving the assets of 14 A&P stores, occurred from on or about April 14, 2011 to April 22, 2011. The second round of Sales, concerning the assets of 8 A&P stores, occurred on or about July 1, 2011. The third round of Sales, involving the assets of 10 A&P stores, occurred from on or about March 7, 2012 to September 19, 2012." *Id.* The Sales, which involved A&P stores located in New York, New Jersey, Pennsylvania, and Delaware, were approved by the bankruptcy court. Plaintiff made numerous trips to these stores "to inspect and value the assets." *See id.* at 7. He "created spread sheet models concerning the expected revenues the Sales of the assets would generate for each store and drafted asset purchase agreements and necessary exhibits." *Id.* He "also personally monitored all removal operations after the first round of Sales (reporting to Defendants daily on the progress of removal operations), as the dates by which all assets were to be removed from the stores were strictly enforced by Gordon Brothers and the Bankruptcy Court." *Id.* "As part of this effort, at Defendants' request, from April 22, 2011 through May 1, 2011, after all first round Sales were complete, [plaintiff] traveled to New York, New Jersey, Pennsylvania and Delaware to personally inspect the removal efforts of the scrap

purchasers' crews which were responsible for clean-up at all ten stores which were auctioned in the first round of Sales." *Id.* at 7-8. Additionally, plaintiff "travelled to Port Chester, New York on or about April 7, 2011, and spent the entire day conducting due diligence," where he "inventoried the equipment and generated the equipment list for the auction." *Id.* at 8. "On or about April 29, 2011, [plaintiff] returned to New York, at Defendants' request, to personally oversee the removal efforts of the Port Chester assets." *Id.*[3]

For his efforts, plaintiff was paid $309,424.50. However, plaintiff claims he was underpaid pursuant to paragraph 4 of the Letter Agreement. He contends that defendants' accounting of the Sales that they used to justify plaintiff's payments, such as defendants' expenses, are inaccurate. Defendants concede the inaccuracy of the accountings originally provided to plaintiff, and now claim such accountings were merely "estimates". There are material questions of fact regarding the actual net revenue, and, thus, the amount owed to plaintiff will be determined at trial.

Nonetheless, defendants seek to avoid paying plaintiff based on an alleged termination and oral modification of the Letter Agreement. Defendants claim that, prior to the third round of Sales, on a January 10, 2012 telephone call, GAC purported to terminate the Letter Agreement. Grafe supposedly told plaintiff that Gordon Brothers no longer wanted to do business with him. Allegedly, plaintiff acknowledged the termination and said he "understood" and would "have to live with it. *See* Dkt. 106 at 14-15. Defendants also claim the Letter Agreement does not really govern because it was supposedly replaced with an oral "Three Party Agreement" between

[3] The court will not further discuss plaintiff's efforts, as the detail recited thus far suffices to show that defendants' contention that plaintiff contributed nothing to the parties' venture borders on the frivolous. As discussed herein, defendants entirely ignore plaintiff's work, and instead baselessly claim that plaintiff's role was that of a "broker", and that since his brokerage services were of no benefit, plaintiff provided no consideration for the Letter Agreement.

plaintiff, GAC, and Gordon Brothers that provided for a three-way split of the net revenue on Sales. Plaintiff denies the Letter Agreement was ever validly terminated or modified, though he concedes this disputed issued cannot be resolved without a trial.

Plaintiff commenced this action on December 20, 2013. His complaint, which has never been amended, asserts five causes of action: (1) breach of contract (the Letter Agreement), asserted against GAC; (2) breach of fiduciary duty, based on the premise that the parties entered into a joint venture that is governed by the Letter Agreement, asserted against both defendants;[4] (3) fraud, asserted against both defendants, based on defendants' false accounting of net revenue on the Sales;[5] (4) quantum meruit, asserted against GAC;[6] and (5) unjust enrichment, asserted

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[4] The court does not understand the import of this claim. Even if the parties had entered into a joint venture, a claim for breach of fiduciary duty that seeks relief duplicative of what is sought under the contract cannot stand. *See Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004). Regardless of whether the parties entered into a joint venture, the amount of net revenue owed to plaintiff must either be based on an agreement between the parties or a quantum meruit recovery (which plaintiff, as noted above, seeks in his fourth cause of action). Moreover, the parties clearly only intended GAC, and not Grafe, to be obligated to pay plaintiff, as they chose not to make Grafe a party to the Letter Agreement. *See Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 13 (1st Dept 2016). Simply put, the existence of a joint venture does not inform how much plaintiff is owed or who owes it to him. Hence, the question of whether there is a joint venture is academic. Plaintiff's claim for breach of fiduciary duty is dismissed as duplicative, rendering academic the parties' disputes, addressed herein, over what state's law applies.

[5] This claim is both duplicative and infirm for lack of *detrimental* reliance. *Frank Crystal & Co. v Dillmann*, 84 AD3d 704 (1st Dept 2011) ("To maintain a cause of action for fraudulent inducement of contract, a plaintiff must show a material representation, known to be false, made with the intention of inducing reliance, **upon which [it] actually relie[d], consequentially sustaining a detriment**.") (emphasis added; citation omitted); *see Capin & Assocs., Inc. v 599 W. 188th St.*, 139 AD3d 634, 635 (1st Dept 2016) ("the complaint fails to allege any specific detrimental reliance by plaintiff on this misrepresentation."). While GAC's possibly inaccurate accountings can be used to established that plaintiff is owed more under the Letter Agreement, plaintiff does not allege he engaged in any act to his detriment in reliance on the allegedly false accountings.

against GAC.[7] *See* Dkt. 1. After the court denied defendants' *forum non conveniens* motion to dismiss [*see* Dkt. 21], defendants filed an answer to the complaint on August 28, 2014. *See* Dkt. 29. After the completion of discovery and the filing of a Note of Issue, defendants filed the instant motion for summary judgment on April 21, 2017. The court reserved on the motion after oral argument. *See* Dkt. 134 (11/2/17 Tr.)

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the

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[6] As discussed herein, this claim is not dismissed as duplicative at this juncture since there is still a question of whether the Letter Agreement governs. If it does not, plaintiff may be entitled to a quantum meruit recovery for his efforts (i.e., assuming what he received thus far is not fair consideration for his work).

[7] This claim is ripe for dismissal since, at best, it is duplicative of plaintiff's quantum meruit claim.

court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

As an initial matter, the court will not address the parties' disputes regarding which state has the greatest interest in claims at issue in this case because the parties do not contend that New York law is materially different than any other possibly applicable state law. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014), citing *Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 (1st Dept 2003) ("In a conflicts of law analysis, the first consideration is whether there is any actual conflict between the laws of the competing jurisdictions. **If no conflict exists, then the court should apply the law of the forum state in which the action is being heard**.") (emphasis added), *aff'd*, 3 NY3d 577 (2004), accord *Matter of Allstate Ins. Co. (Stolarz)*, 81 NY2d 219, 223 (1993).

Summary judgment is denied on plaintiff's breach of contract and quantum meruit claims because defendants have not submitted any uncontroverted evidence that proves the alleged oral agreement governs. Since there are material, disputed questions of fact regarding whether the Letter Agreement governs, both of these claims shall proceed to trial (the latter, of course, will be dismissed as duplicative should plaintiff prevail at trial on the former). *Sabre Int'l Sec., Ltd. v Vulcan Capital Mgmt., Inc.*, 95 AD3d 434, 438 (1st Dept 2012); *see Joseph Sternberg, Inc. v Walber 36th St. Assocs.*, 187 AD2d 225, 228 (1st Dept 1993) ("where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies."); *see also Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404 (2d Dept 2003) (same),

citing *Old Salem Dev. Grp., Ltd. v Town of Fishkill*, 301 AD2d 639 (2d Dept 2003) ("defendant contends that because the dispute between the parties is governed by two contracts, the plaintiffs are precluded from asserting a cause of action to recover damages for unjust enrichment. Although the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract, where there is a bona fide dispute as to the existence of a contract or the application of a contract to the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract.") (internal citations omitted).

That said, and although plaintiff does not move for summary judgment, the court's review of the record impels it to *sua sponte* grant plaintiff summary judgment on defendants' defense of lack of consideration. As noted earlier, defendants' contention that plaintiff did not provide any consideration borders on the frivolous. While the parties dispute the value of plaintiff's contributions, in the commercial context, so long as there is some consideration, that is enough to form a binding agreement. *Robinson v Day*, 103 AD3d 584, 586 (1st Dept 2013) ("Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny."), quoting *Apfel v Prudential-Bache Sec. Inc.*, 81 NY2d 470, 475 (1993) ("Under the traditional principles of contract law, the parties to a contract are free to make their bargain, **even if the consideration exchanged is grossly unequal or of dubious value**.") (emphasis added). Regardless, it strains credulity for defendants to contend that GAC received nothing of value from plaintiff after having paid him more than $300,000 for his work. *See Dafnos v Hayes*, 264 AD2d 305, 306 (1st Dept 1999) (contract enforceable where defendant

received "some benefit"). While the parties may dispute whether the Letter Agreement governs, defendants may not argue at trial that it is unenforceable for lack of consideration.

As for defendants' reliance on Lewis' deposition testimony, such testimony cannot warrant summary judgment in defendants' favor. It is well settled that credibility determinations may only be made at trial; at the summary judgment stage, the facts must be viewed in the light most favorable to the non-moving party (here, plaintiff). *Vega v Restani Const. Corp.*, 18 NY3d 499, 504-05 (2012). Thus, plaintiff's dispute over the veracity of Lewis' testimony creates a triable issue of fact as the value of plaintiff's contributions (an issue only relevant if plaintiff fails on his contract claim and is limited to seeking a quantum meruit recovery).

Defendants' argument that the Letter Agreement was terminable at will because it has no agreed-upon end date was improperly made by defendants for the first time in reply. *See* Dkt. 133 at 6. Nevertheless, to avoid the issue being raised again at trial, the court rejects the argument because it is contrary to settled law. While "[c]ontracts containing no definite term of duration are terminable at will [*see Double Fortune Prop. Invs. Corp. v Gordon*, 55 AD3d 406 (1st Dept 2008)]", "[i]n the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent [*Haines v City of New York*, 41 NY2d 769, 772 (1977)]." *Better Living Now, Inc. v Image Too, Inc.*, 67 AD3d 940, 941-42 (2d Dept 2009). In other words, "a definite term of duration need not be relayed in express terms, and may be implied." *Id.*, citing *Creative Foods Corp. v Chef Francisco, Inc.*, 92 AD2d 462 (1st Dept 1983). Hence, "**where a duration may be fairly and**

reasonably supplied by implication, a contract is not terminable at will." *Id.* at 942 (emphasis added), quoting *Haines*, 41 NY2d at 772.

Here, the Letter Agreement permits the reasonable inference that its duration would be the amount of time necessary to acquire and resell the A&P assets, and thus it is not terminable at will. *See id.* ("plaintiff failed to establish, as a matter of law, that the agreement was terminable at will. By fair implication, the duration of the parties' agreement was dependent upon the relationship between the plaintiff and the 'Other Party,' and the agreement could not be unilaterally terminated by the plaintiff."); *see also Michael Leibman & Assocs., Inc. v Ultimate Combustion Co.*, 145 AD3d 467, 468 (1st Dept 2016) ("if the duration can be 'fairly and reasonably fixed' by the intent of the parties and the surrounding circumstances, the court may supply it, and an issue of fact as to the parties' intention is presented.") (citation omitted). While the validity of GAC's purported termination of the Letter Agreement is a question of fact for trial, GAC may not argue that it had the absolute right to effectuate an at-will termination of the Letter Agreement.

Finally, there is no merit in GAC's claim that the Letter Agreement should be set aside due to the parties' supposed mutual mistake about plaintiff's ability to contribute. Defendants appear to misunderstand the nature of a mutual mistake defense, as it is a doctrine invoked to justify reformation where "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement." *Chimart Assocs. v Paul*, 66 NY2d 570, 573 (1986). That is not the case here, where defendants are really complaining about their mistaken belief in plaintiff's experience. Such a contention is really a claim for fraudulent omission, which is how defendants actually label their fourth affirmative defense. *See* Dkt. 29 at 7. In any

event, at most, GAC's mistake was *unilateral*, as it admittedly did not conduct any due diligence on plaintiff's liquidation background. This is not a basis to set aside the contract, either on the ground of mistake or fraud. *Wachovia Secs., LLC v Joseph*, 56 AD3d 269, 271 (1st Dept 2008) ("The record does not support Wachovia's allegations of injustice or unjust enrichment, **but only supports a finding that Wachovia made a costly error due to its own conduct.**") (emphasis added); *see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 (1st Dept 1997) (failure to conduct due diligence precludes claim of justifiable reliance), accord *MP Cool Investments Ltd. v Forkosh,* 142 AD3d 286, 291 (1st Dept 2016). Moreover, since the mistake was unilateral, it is not a defense because the contract was not procured by fraud, nor can defendants credibly contend that plaintiff was unjustly enriched. *Kotick v Shvachko*, 130 AD3d 472, 473 (1st Dept 2015); *Gessin Elec. Contractors, Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 520 (1st Dept 2010); *cf. Stonebridge Capital, LLC v Nomura Int'l PLC*, 68 AD3d 546, 548 (1st Dept 2009) ("The mutual mistake claim was also properly dismissed as Stonebridge failed to allege that the parties reached an agreement that was not reflected in the transaction documents … and thus failed to overcome **the strong presumption against mutual mistake claims.**") (emphasis added).

The rest of plaintiff's claims are dismissed as duplicative. As noted earlier, plaintiff either has the right to recover under the parties' agreement (whatever that was) or, in the absence of an agreement, the right to recover in quantum meruit. Additionally, there is no basis to hold Grafe personally liable. Had the parties intended for Grafe to be personally liable, they would have so provided in the Letter Agreement. The Letter Agreement expresses a clear manifestation of the parties' intent that – even if the parties were forming a joint venture (an issue the court

need not and does not decide) – the parties to that venture were plaintiff and GAC.[8] *See Leonard v Gateway II, LLC*, 68 AD3d 408 (1st Dept 2009) (The court properly dismissed the breach of contract claims against all defendants except Gateway II, since plaintiff was not in privity with any of the other defendants."). Plaintiff cannot seek to impose liability onto Grafe simply by claiming fraud since, as discussed, he does not claim any detrimental reliance on Grafe's allegedly fraudulent accounting.

Finally, since this is the first dispositive motion in this 2013 case, the court has reviewed defendants' answer and searched the record, and determined that defendants' affirmative defenses based on the statute of limitations, principles of equity such as laches and unclean hands, the absence of an (unstated) necessary party, and unjust enrichment have no merit. This action was indisputably commenced within six years of GAC's breach. CPLR 213(2). The proffered equitable defenses are inapplicable to plaintiff's legal claims and are otherwise unsupported by the record. *Manshion Joho Ctr. Co. v Manshion Joho Center, Inc.*, 24 AD3d 189, 190 (1st Dept 2005) (equitable defenses "unavailable in an action exclusively for damages."). No missing party, such as Gordon Brothers, stands to be adversely affected by this case. *See L-3 Commc'ns Corp. v SafeNet, Inc.*, 45 AD3d 1, 10 (1st Dept 2007). Finally, there is no counterclaim to recover any money back from plaintiff, and, therefore, it makes no sense for defendants to assert a defense based on the contention that it is "against equity and good

[8] Plaintiff does not seek to pierce GAC's corporate veil. Such a claim would be governed by the law of the state of GAC's incorporation (Minnesota). *See Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 (1st Dept 2013). Minnesota, like New York, treats corporations as distinct from their shareholders and requires proof of corporate form abuse prior to permitting veil piercing (though it is unclear if Minnesota' fraud prong differs from New York's). *See Hoyt Properties, Inc. v Prod. Resource Grp., L.L.C.*, 736 NW2d 313, 318-19 (Minn 2007), citing *Victoria Elevator Co. of Minneapolis v Meriden Grain Co.*, 283 NW2d 509, 512 (Minn 1979); *see Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993). Regardless, plaintiff has not alleged nor submitted proof that GAC is Grafe's alter ego.

conscience" to permit plaintiff to keep the amount he was paid by GAC. *See Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 (2012). Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that the second (breach of fiduciary duty), third (fraud), and fifth (unjust enrichment) causes of action are dismissed as against all defendants, the first (breach of contract) and fourth (quantum meruit) causes of action are dismissed as against Grafe, and defendants' motion is otherwise denied; and it is further

ORDERED that, in searching the record, summary judgment is granted to plaintiff on GAC's first (statute of limitations), second (equity), fourth (mistake/fraud), fifth (unjust enrichment), and sixth (absence of a necessary party) affirmative defenses, and the portion of the eighth affirmative defense based on lack of consideration (but not the portion of this defense concerning plaintiff's failure to perform), and such defenses are dismissed; and it is further

ORDERED that within three weeks of the entry of this order on NYSCEF, the parties shall jointly call the court to discuss the scheduling of a pre-trial conference.

Dated: February 8, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.