Yuen v Branigan
2020 NY Slip Op 30280(U)
January 28, 2020
Supreme Court, New York County
Docket Number: 150420/2013
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

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WILLIAM YUEN,

Plaintiff,

- v -

MARK BRANIGAN, PANGEA CAPITAL MANAGEMENT, LLC F/K/A PANGEA CAPITAL MANAGEMENT LP, JOHN LAKIAN,

Defendants.

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INDEX NO. 150420/2013

MOTION DATE 07/31/2019

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

MARK BRANIGAN, PANGEA CAPITAL MANAGEMENT, LLC F/K/A PANGEA CAPITAL MANAGEMENT LP,

Plaintiffs,

-against-

JOHN LAKIAN

Defendant.

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Third-Party
Index No. 590313/2013

The following e-filed documents, listed by NYSCEF document number (Motion 007) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290

were read on this motion for SUMMARY JUDGMENT

Guzov, LLC, New York, NY (Debra J. Guzov and Anne W. Salisbury of counsel), for plaintiff.
Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York, NY (Dean G. Yuzek, Caitlin L. Bronner, and Alexander F. Schlow of counsel), for defendants/third-party plaintiffs.
No appearance for third-party defendant.

Gerald Lebovits, J.:

In this action, William H. Yuen sues Mark C. Branigan (Branigan) and Pangea Capital Management, LLC (Pangea), a hedge fund managed and controlled by Branigan, asserting causes of action sounding in malicious prosecution, breach of contract (partnership and compensation agreements), fraudulent inducement, and unjust enrichment against defendants. In turn, defendants commenced a third-party action against John R. Lakian (Lakian), a former

partner of Branigan in Pangea, asserting, among other things, claims for contribution and indemnification against Lakian.

By the instant motion (motion sequence number 007; NYSCEF Doc. No. 225), defendants seek an order, pursuant to CPLR 3212: (1) dismissing all causes of action of plaintiff asserted against defendants in the First Amended Verified Complaint (NYSCEF Doc. No. 006); and (2) granting defendants summary judgment against Lakian on the third-party claims. The motion is granted in part and denied in part.

Background Facts and Procedural History

The following alleged facts are derived from the complaint and plaintiff's opposition brief to defendant's summary judgment motion (Plf. Opp.; NYSCEF Doc. No. 268), unless otherwise indicated. Pangea, a hedge fund that conducts trades for outside investors, was founded by Branigan in February 2008 (Complaint, ¶¶ 7-8). Prior to joining Pangea, plaintiff held senior positions in major finance companies, specializing in capital markets and trading; plaintiff met Branigan in 2007 when the two worked at a hedge fund advisory firm (*id.*, ¶¶ 9-10). In or before July 2009, Branigan induced plaintiff into joining Pangea as its "Head of Trading" and falsely represented to plaintiff that Pangea had over $40 million in investor funds under its management, and that it possessed a proprietary algorithm that would generate advantageous trade recommendations (*id.*, ¶ 11). Relying on such misrepresentation and in consideration for the offer that plaintiff would join Pangea as its partner and Head of Trading, plaintiff entered into agreements ("Compensation Agreement" and "Partnership Agreement") with defendants, on or about July 24, 2009, pursuant to which he would receive a compensation package that included a monthly payment of $15,000 for a minimum of three years, plus an additional sum based upon the amount of assets under management, as well as a 10% equity stake in Pangea (*id.*, ¶¶ 14-18). While Lakian, Pangea's other partner, confirmed plaintiff's understanding of the Compensation Agreement and the Partnership Agreement, Branigan agreed to confirm the Partnership Agreement in a formal agreement but such agreement was never prepared; instead, Branigan confirmed plaintiff's 10% equity stake via email and other references (*id.*, ¶¶ 19-20). Even though a draft of the Compensation Agreement was not signed, plaintiff and Branigan acted in accordance therewith; and after joining Pangea, plaintiff commenced work as Head of Trading and Pangea began paying plaintiff his monthly compensation of $15,000 (*id.*, ¶¶ 22-24).

One of the "selling points" Branigan stressed to plaintiff was Pangea's ownership of a program of a proprietary trading algorithm, which was located on a secured server of an outside company, QES, LLC (QES), and plaintiff depended on his assistant, Annesh Sinha (Sinha), to log onto the QES system to receive trading recommendations (*id.*, ¶¶ 27-29). Sinha was hired to handle QES interactions, and plaintiff was never assigned his own username nor ever accessed the QES server (*id.*, ¶ 30). Plaintiff monitored the stock markets via a licensing agreement with Bloomberg and executed trades over the phone via its brokers; access to Bloomberg's trading platform was via a specialized keyboard, which remained at Pangea's office at all times (*id.*, ¶¶ 31-32). To facilitate plaintiff's work out of the office, Pangea bought a laptop which plaintiff would take home on most nights to work on presentations or analysis (*id.*, ¶ 32). The laptop did not contain any Pangea proprietary information, and the trading algorithm remained at all times on QES's secured servers, and not in plaintiff's possession; at no point did Pangea or its employees store or physically possess the algorithm on any of its computers (*id.*, ¶¶ 32-33).

After plaintiff joined Pangea, he discovered Branigan had deliberately and significantly inflated the amount of assets under management at Pangea, and instead of $40 million, Pangea only had $4 million (*id.*, ¶ 34). Also, plaintiff realized that Branigan had mischaracterized the quality and capability of the trading algorithm, and when he brought this to Branigan's attention and recommended alternative business opportunities, Branigan enacted a plan to squeeze him out of Pangea (*id.*, ¶¶ 35-37). On June 1, 2010, Branigan terminated plaintiff's email account in Pangea, but feigned ignorance about the termination; and instead claimed to be rectifying the error by calling Pangea's web-hosting service (*id.*, ¶¶ 41-42). On June 2, 2010, Branigan emailed plaintiff purporting to terminate his employment, and instructed plaintiff to return all of Pangea's equipment and files by June 4, 2010 (*id.*, ¶ 43). Due to his sudden ouster, plaintiff was "deprived of reimbursement of work-related expenses, agreed-to compensation of a minimum of $450,000 in monthly payments and an equitable stake of no less than $1,000,000" (*id.*, ¶ 45).

Following his purported termination from Pangea, plaintiff continued to work with Lakian, the other partner, in a "strategic capacity" to help grow Pangea's subsidiary named "Capital L," an investment advisory firm, and Lakian agreed that plaintiff would continue to use the laptop originally purchased for him in his work for Capital L (*id.*, ¶¶ 48-50). After plaintiff made several good-faith attempts to resolve the dispute over monies owed to him by Defendants, he retained counsel to try to resolve this issue; but instead of negotiating in good faith, Branigan chose to escalate the dispute by falsely accusing plaintiff of a crime (*id.*, ¶¶ 53-54). Branigan began calling on his friends in the New York City Police Department (NYPD) to assist him with false accusations that plaintiff wrongfully retained the laptop; on September 14, 2010, plaintiff was detained by NYPD detectives when volunteering to drop off the laptop at a police precinct, but was finally released after eight hours of detention (*id.*, ¶¶ 56-71). The primary motivation for Branigan's lies and malice was to discredit plaintiff in the event he took his allegation of Branigan's misconduct to "the authorities" or to Pangea's outside investors, and to gain a financial advantage in a civil dispute with plaintiff (*id.*, ¶¶ 73-76).

As more evidence of his malice, after Branigan discovered that the Manhattan District Attorney had preliminarily dismissed the original misdemeanor charges against plaintiff based on Branigan's theft-of-laptop claims, he stepped up his campaign and made up new stories to revive the charges and even augment them to felonies (*id.*, ¶ 77). The specific facts that Branigan lied about, and importuned other Pangea employees to lie about, included (1) plaintiff threatened to hold the laptop hostage and destroy it if he was not given the compensation owed; (2) Pangea had only one computer on which it was capable of trading, and the laptop in plaintiff's possession was that computer; (3) there was one program (the algorithm) on plaintiff's laptop, to which Pangea owned all of the rights; (4) without the laptop and the algorithm, Pangea would not be able to access QES or execute trades, and its business was crippled; and (5) plaintiff had no authority to retain or possess the laptop (*id.*, ¶ 78). Eventually, through Branigan's malicious lies, the criminal investigation proceeded and a grand jury indicted plaintiff for grand larceny, based on Branigan's false allegations and withholding of material information that would have proved plaintiff's innocence (*id.*, ¶ 85). Plaintiff denied all the false allegations and maintained his innocence throughout the criminal proceedings, and plaintiff won a dismissal of all charges on January 31, 2012 on speedy-trial grounds (*id.*, ¶ 88).

After termination of the criminal proceedings against plaintiff, he commenced the instant action against Defendants, and responding to the complaint, defendants asserted counterclaims

against Plaintiff (Plf. Opp. at 2). After defendants filed their answer with counterclaims, plaintiff brought a motion to dismiss the counterclaims (motion sequence number 001), and Defendants responded with a cross motion to dismiss or for summary judgment (*id.* at 3). This court (Judge Wooten) issued a decision, dated September 2, 2015 (Prior Decision; NYSCEF Doc. No. 132), which addressed the foregoing motions, claims and counterclaims, as well as those asserted in the third-party action between defendants and Lakian (Plf. Opp. at 3). Pursuant to the Prior Decision, defendants' cross motion for dismissal or summary judgment was granted only to the limited extent that the third cause of action (breach of Compensation Agreement) was dismissed, while plaintiff's motion for dismissal of the counterclaims was "successfully obtained" in that four out of five of the counterclaims were dismissed (*id.*; referencing Prior Decision). After issuance of the Prior Decision, the parties completed document discovery "but held only a single deposition, that of Defendant Branigan" (*id.*; referencing Salisbury affirmation [Salisbury Aff.], NYSCEF Doc. Nos. 271 and 272).

By this motion, defendants seek summary judgment dismissing the remaining four causes of action of the complaint: first (malicious prosecution); second (breach of Partnership Agreement); fourth (fraudulent inducement) and fifth (unjust enrichment), as well as summary judgment on their remaining causes of action against Lakian in the third-party action.

Applicable Legal Standards

In a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact about the claim (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of material issues of fact which require a trial (*id.*). In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]) because summary judgment is a "drastic remedy" that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Where different conclusions may be drawn from the evidence, the motion must be denied (*Jaffe v Davis*, 214 AD2d 330 [1st Dept 1995]). When a motion seeks summary dismissal of a claim based upon documentary evidence, the movant must show that the proffered evidence conclusively refutes the claim (*McCully v Jersey Partners, Inc.*, 60 AD3d 562 [1st Dept 2009]).

Discussion and Analysis

Notably, in his affidavit filed in support of Defendants' summary judgment motion (Branigan Aff.; NYSCEF Doc. No. 226), Branigan attached 26 exhibits that are mostly emails, without comments (NYSCEF Doc Nos. 227-252). Separately, in defendants' counsel's filed affirmation in support of the summary judgment motion (Bronner Aff.; NYSCEF Doc. No. 253), the exhibits annexed thereto which are relevant to the claims against defendants consist mainly of documents related to the prior criminal proceedings against plaintiff, as well as the emails exchanged between plaintiff and Lakian.

Malicious Prosecution (First Cause of Action)

The elements of a malicious prosecution claim are: (1) commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of a probable cause for the criminal proceeding; and (4) actual malice (*Broughton v State of New York,* 37 NY2d 451, 457 [1975], *cert denied sub nom Schanbarger v Kellogg*, 423 US 919 [1975]; *see also Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]; *Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]). Notably, Defendants' prior cross motion seeking dismissal or summary judgment of this claim was denied by this court, based on its detailed analysis of the elements of such claim, as discussed below (Prior Decision at 13-15).

Here, as an initial matter, defendants argue in their moving brief (Def. Brief; NYSCEF Doc. No. 265) that this claim must be dismissed as against Pangea because, as a business entity, it does not have the "actual malice" to satisfy the fourth element of the claim (Def. Brief at 16). As to Branigan, defendants do not analyze all of the enumerated elements. Instead, they focus on the first element and argue that the claim must be dismissed, as a matter of law, because the Court of Appeals has imposed "stringent requirements" for bringing such claim: "the defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, *to the point where the officer is not acting of his own volition*" (*id.* [emphasis added by Defendants], citing *Moorhouse v Standard, N.Y.*, 124 AD3d 1, 7 [1st Dept 2014] [*Moorhouse*]; referencing *Curiano v Suozzi*, 63 NY2d 113, 119 [1984], and *Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003]). They also argue that dismissal of this claim is appropriate where "the record establishes that [defendants] did not participate in the arrest or prosecution of plaintiff except as witness" (Def. Brief at 17; quoting *Narvaez v City of New York*, 83 AD3d 516, 516 [1st Dept 2011]). Specifically, they argue that the documentary evidence shows the following: Branigan informed the police that plaintiff had taken the laptop and, based on that information, NYPD detectives concluded that a crime had been committed and invited plaintiff to the precinct, and after confirming plaintiff had taken the laptop, arrested him "outside of Defendants' presence and control" (Def. Brief at 1, 17; referencing Branigan Aff., exhibit 26 [Branigan's email to detective] and Bronner Aff., exhibit 2 [detective's statement made in connection with the criminal proceedings for a misdemeanor charge against plaintiff]). Defendants further argue that merely identifying plaintiff as the perpetrator of a crime "does not give rise to tort liability, even in the case of a disposition of the criminal proceedings in favor of plaintiff" (Def. Brief at 17; citing *Narvaez*, 83 AD3d at 516, and *Celnick v Freitag*, 242 AD2d 436 [1st Dept 1997]).[1]

In opposition, plaintiff contends that defendants "misstate the law" and try to "greatly overextend" the First Department's ruling in *Moorhouse* "to the point where such a reading would overrule all of the New York jurisprudence" (Plf. Opp. at 9). Plaintiff's contention that defendants overstated the law in *Moorhouse* is persuasive, particularly when viewed in the context that plaintiff's allegations against defendants are significantly different from those in *Moorhouse*, as discussed below. Notably, the First Department stated that "[t]o establish the element of initiation of a criminal proceeding, it typically must be shown that the defendant did

[1] Defendants' citation to and reliance upon these two cases for the proposition of law is flawed and misplaced because they do not stand for such a proposition. Moreover, the *Celnick* case does not even discuss a malicious prosecution claim, but rather a claim for false arrest and false imprisonment.

something more than merely report a crime to the police and cooperate in its prosecution" (*Moorhouse*, 124 AD3d at 4 [internal quotation marks and citations omitted]). In dismissing the malicious prosecution claim asserted by Moorhouse against the defendants -- The Standard Hotel (and others) where Moorhouse stayed as a guest -- the First Department concluded that the evidence showed that the victim of Moorhouse's alleged rape (a hotel employee referred to as "G.P.") "did not play an active role in Moorhouse's arrest and prosecution .... She did not contact, encourage, or direct the police or prosecutors to arrest and prosecute plaintiff," and her testimony was corroborated by other hotel employees, as well as the affidavit of the arresting police officer "stating that G.P. did not direct or demand Moorhouse's arrest" (124 AD3d at 8). Based on this "unrefuted evidence," the First Department held that "it cannot be said that G.P. initiated the criminal proceeding against Moorhouse" (*id.*; citing *Narvaez*, 83 AD3d at 516 [dismissed malicious prosecution claim because defendant did not participate in the arrest or prosecution of plaintiff except as a witness]). More importantly, the First Department stated that: "A person can be said to have initiated a criminal proceeding by knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's determination to make an arrest," but there was "no credible evidence in the record that the information G.P. gave to the police or prosecutors was false," and "[t]he record contains compelling evidence corroborating G.P.'s testimony that Moorhouse sexually assaulted her" (124 AD3d at 8). These facts in *Moorhouse* are distinguishable from those in this action.

In this case, plaintiff contends that the complaint is not alleging that Branigan "simply furnished information" to the detectives (who are allegedly Branigan's friends) or acted as a "mere witness," but that it shows in detail that Branigan "concocted an untrue story ... lied about the laptop containing secret scientific material, enlisted the help of others in trying to get the authorities to take action against [plaintiff,]" as well as "falsified information in a report to the police, hounded the police to do something about his fabricated claim, lied to the grand jury and ultimately brought about a false indictment" (Plf. Opp. at 9). Plaintiff also points to the various emails annexed as exhibits to his affidavit (Plf. Aff.; NYSCEF Doc. No. 287) to support this claim, and asserts that such emails "alone are sufficient to allow this case to proceed to trial as defendants have neither disputed nor explained them" (Plf. Opp. at 11). The court considered emails in sustaining the viability of this claim. Indeed, in the Prior Decision, the court wrote: "Plaintiff has also submitted evidence that Branigan may have provided incomplete or misleading information to his friends at the police department, and pressured others to falsify their stories" (Prior Decision at 14-15; referencing plaintiff's email exhibits).

In their reply (Def. Reply; NYSCEF Doc. No. 289), instead of addressing plaintiff's email exhibits, defendants argue that plaintiff's submissions in opposition "do not meet the unusually high bar for a malicious prosecution claim" because plaintiffs was indicted by a grand jury, "which creates a presumption of probable cause," and plaintiff's testimony that "Branigan lied to the grand jury, without more, is insufficient as a matter of law" (Def. Reply at 8). This argument was addressed in the Prior Decision, which, while noting that a grand jury action "creates a presumption of probable cause," stated that "Plaintiff has submitted evidence that raises issues of fact as to whether Branigan commenced the criminal proceeding against him out of spite and retaliation based on Yuen's refusal to cooperate in Pangea's business practices," and that "there are issues of fact as to whether Branigan had probable cause to commence a criminal complaint against plaintiff, and whether he acted out of malice" (Prior Decision at 14; quoting

Nardelli v Stamberg, 44 NY2d 500, 503 [1978] [holding that "actual malice," the fourth element of this claim, means that the defendant must have commenced the criminal proceeding for a wrong or improper motive, "something other than a desire to see the ends of justice served"]; *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132 [1st Dept 1999]). Defendants have not, in the papers filed in connection with this motion, addressed the concerns of the court raised in the Prior Decision with respect to this claim, and thus have not established a prima facie case for summary judgment as a matter of law (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012] [movant must make a prima facie showing of entitlement to judgment, tendering sufficient evidence in admissible form to demonstrate the absence of material issues of disputed fact]).

Moreover, plaintiff points out that, subsequent to the issuance of the Prior Decision, when questioned in a videotaped deposition held on April 20, 2018 about the veracity of his grand jury testimony, Branigan claimed that "he does not even remember testifying" due to a purported medical condition that affected his memory, "thereby cutting off any opportunity for effective cross examination" (Plf. Opp. at 1-2; referencing Salisbury Aff., exhibit A, deposition transcript, NYSCEF Doc. No. 272). Defendants do not deny plaintiff's statement, and simply refer to their filed exhibits (purportedly as documentary evidence): the grand jury minutes and the grand jury indictment (Def. Reply at 8; referencing NYSCEF Doc Nos. 254 and 257). Yet, as plaintiff also points out, the challenged grand jury minutes, and the email from a former Pangea employee, Aneesh Sinha, explicitly stated that "both of the stories attributed to [Sinha by Branigan] are untrue" (Plf. Opp. at 4; referencing Sinha's affidavit dated June 25, 2019, ¶ 5, NYSCEF Doc. Nos. 269 and 270). Defendants counter that Sinha's affidavit "flatly contradicts documentary evidence in the form of emails sent by Sinha whose authenticity, once again, is not in doubt" (Def. Reply at 9; referencing Sinha's earlier email to plaintiff dated June 24, 2010 [Branigan Aff., exhibit 25, NYSCEF Doc. No. 251], which stated that "we really need the Pangea Gateway Laptop back from you to be able to run our systems"). However, the email from Sinha to plaintiff, dated June 24, 2010, does not conclusively refute plaintiff's claim and Sinha's subsequent statement made in his June 25, 2019 affidavit, in which he stated that the stories attributed to him by Branigan are untrue. The foregoing serves as an additional basis to deny defendants' motion for summary judgment, because their purported documentary evidence does not conclusively refute the instant claim (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590 [2005] [defendant's documentary evidence must conclusively refute plaintiff's claim]).

Accordingly, defendants' motion for summary judgment to dismiss the first cause of action for malicious prosecution is denied; however, limited relief is granted with respect to the dismissal of such claim as against Pangea, because plaintiff does not dispute (or implicitly concede) defendants' contention that Pangea, as a business entity, cannot have the requisite "actual malice" to satisfy the fourth element of such claim.

Breach of Partnership Agreement (Second Cause of Action)

The complaint alleges that defendants breached an oral agreement whereby plaintiff would receive a 10% equity stake in Pangea (Complaint, ¶ 14). In the Prior Decision, this court rejected defendants' argument that this claim is time-barred, holding that "an oral agreement to form a partnership for an indefinite period creates a partnership at will and is not barred by the

statute of frauds" (Prior Decision at 16). The court also ruled that plaintiff has submitted sufficient evidence that raised issues of fact as to "whether a partnership existed for an indefinite period of time in which the parties shared control, profits and losses" (*id.* at 17). Based on certain emails exchanged between the parties, including those which referenced Plaintiff's 10% equity share as an "existing vested equity interest" in the alleged partnership and discussions about a possible reduction to 5%, as well as certain facts pleaded by plaintiff and "other factors" which could be inferred that "Yuen's appointment as Heading of Trading, whereby [he] was placed in charge of all of Pangea's trading activity through which he contributed his skill and knowledge to Pangea" would indicate his joint control and management of Pangea, the court denied defendants' prior motion to dismiss this claim (*id*).

In the instant motion, instead of focusing on the issues raised in the Prior Decision (such as the emails discussed therein), defendants argue in their opening brief that "Yuen's conclusory allegations are simply insufficient to demonstrate the existence of a partnership," and that "[a]lthough Yuen is entitled to have the evidence interpreted in his favor ... this entitlement does not extend to crediting absurd conclusions refuted by other evidentiary facts" (Def. Brief at 19). Apparently, defendants' reference to "other evidentiary facts" is to the so-called Pangea's "organizational documents" ("Pangea LP Agreement" and "Pangea LLC Agreement"), which were signed by parties other than plaintiff (*id.* at 21-24). Based on these documents, defendants argue that "references to Yuen's unvested, contingent interest in Pangea are, at best, irrelevant" because such documents "explicitly disclaim any ownership interest by Yuen, and preclude any oral agreement to grant him such an interest," and "his claim predicated thereon is insupportable as a matter of Delaware law" (*id.*; discussing various provisions in such documents).

In opposition, plaintiff asserts that, contrary to defendants' claim that there is "no evidence other than Yuen's own conclusory self-serving statements" regarding his equity stake in Pangea (referring to Def. Brief at 18), various documents support his assertion (Plf. Opp. at 12). In particular, plaintiff refers to the following exhibits attached to his affidavit (Plf. Aff., ¶ 43; NYSCEF Doc. No. 287) for support: email between Branigan and Lakian in January 2010 that mentioned Yuen's equity stake (exhibit 12); emails from Branigan to third-party investors in March and April of 2010 showing Yuen as "a partner" (exhibit 13); and excerpt of a private offering memorandum where Yuen was held out as a partner (exhibit 14). In addition, plaintiff asserts that "Defendants' conflation and confusion of the two independent agreements at issue [i.e., Compensation Agreement and Partnership Agreement] does not disprove the existence of the Partnership Agreement; rather, they simply indicate further issues of fact" (Plf. Opp. at 13).[2] Plaintiff also contends that, contrary to defendants' argument that the Partnership Agreement is void for lack of consideration, his role as a partner in "growing the fund, creating new strategies and bringing in investors" were functions that "differed from his responsibilities as Head of Trading of Pangea," which served as his consideration for the Partnership Agreement and, thus,

[2] Apparently, plaintiff's assertion is made in response to defendants' argument that "Yuen is relying on the oral partnership agreement, not the ten percent (10%) stock warrant of the [written but unsigned] Compensation Agreement" (Def. Brief at 23). It is also apparent that plaintiff seeks to refute defendants' argument that his allegation of "direct ownership of Pangea in connection with his employment is precisely the claim that this Court dismissed in connection with the unenforceable and unsigned Compensation Agreement" (Def. Brief at 13).

defendants should be estopped from relying on the Pangea organizational documents "to deny [him of] his fair share of the entity's equity" (*id.*).

Given the parties' submissions, it is apparent that plaintiff does not seek an equity stake under the Pangea LP Agreement, which "established ownership interests in Pangea's predecessor entity, Pangea Capital Management LP," which pre-dated plaintiff's involvement (Def. Brief at 2 and 17). Therefore, defendants' reliance on this "organizational document" is misplaced. Yet, defendants argue that "even if Yuen could prove the existence of [the Partnership Agreement] as something distinct from the Compensation Agreement," the partnership arrangement "Yuen has alleged would violate the binding organizational documents" and, thus, the alleged "transfer" of equity interests to Yuen, whether through a transfer of Branigan's or Lakian's interest, "would be void in any event" (Def. Reply at 10 and 21). In other words, defendants argue alternatively that the Pangea LLC Agreement would also void the transfer of any interest to Yuen. However, it is apparent that Plaintiff does not seek an equity stake under the Pangea LLC Agreement, because the instant claim is based upon "an oral agreement to form a partnership at will" (Prior Decision at 16). In any event, defendants do not argue that they had offered Yuen an opportunity to review this agreement and be a signatory thereto (Def. Brief at 20, n 114; Branigan Aff., exhibits 12, 14 and 24). Indeed, in the email, dated June 7, 2010, from plaintiff to Branigan, plaintiff wrote, in relevant part: "I gave up other significant opportunities when I agreed to join PCM as a 10% partner as well as opportunities that I passed up on while I was at Pangea" (Branigan Aff., exhibit 24). This email, together with "other factors" discussed on page 17 of the Prior Decision, raises issues of disputed fact with respect to plaintiff's claim of having an equity interest in Pangea, as well as to defendants' alleged breach of the "at will" Partnership Agreement, which is clearly not a part of defendants so-called "organizational documents."

Accordingly, defendant's motion for summary judgment dismissing this second cause of action is denied.

Fraudulent Inducement (Fourth Cause of Action)

In the complaint, plaintiff alleges that Branigan falsely represented to him that, as of July 2009, Pangea had over $40 million in investor assets under management and that he relied on this statement in joining Pangea (Complaint, ¶¶ 11 and 14). In denying defendants' prior motion to dismiss this claim, the court observed that the parties' relevant emails raised "issues of fact as to Yuen's actual start date, and thus, whether he relied on Branigan's alleged misrepresentation about the amount of Pangea's assets under management prior to the time he began working at Pangea" (Prior Decision at 20).

In this motion, defendants argue that the "timing" issue raised in the Prior Decision "was not of any fact material to Yuen," and that even if the alleged misrepresentation by Branigan occurred, "it is clear that Yuen was not damaged in any way by this alleged fraud," because Yuen was paid the same $15,000 per month salary even though the assets under management were significantly less than represented (Def. Brief at 25). Therefore, defendants argue that plaintiff cannot show any "damages" resulting from the alleged fraud, which is a required element of a fraudulent inducement claim (*id.*, citing *Connaughton v Chipotle Mexican Grill*

Inc., 29 NY3d 137, 143 [2017] [damages on this claim is calculated based upon the actual pecuniary loss sustained by the claimant as a direct result of the fraud]).

In his opposition, plaintiff does not address *Connaughton*. Instead, he contends that he suffered damages under these hypothetical scenarios: (1) "there would have been no guarantee that Plaintiff could have found another position immediately after departing Pangea" when he discovered Branigan's fraudulent statement, and the idea of "put[ting] himself in an exposed financial position is ludicrous;" and (2) "managing a fund with $4 million in assets is a very different, and a much more difficult, task than managing a $40 million fund, and plaintiff would certainly have negotiated a different compensation package had he been made aware of the facts" (Plf. Opp. at 15). Plaintiff's contention is unpersuasive in light of *Connaughton*, a case in which the plaintiff, who sued the defendant for fraudulent inducement, claimed that he would not have taken the employment offer by the defendant had he known of certain concealed facts prior to his employment (29 NY3d at 141-142). In *Connaughton*, the Court of Appeals affirmed the lower court's ruling in dismissing the fraud claim pursuant to CPLR 3211 (a) (7). Indeed, the Court of Appeals held that, as a matter of law, "[d]amages [based on a fraudulent inducement claim] are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" (29 NY3d at 142 [internal quotation marks and citations omitted]).

Moreover, as noted by defendants: "Yuen's protestations that he could not realistically leave the position or renegotiate his compensation run afoul New York's at will employment doctrine" (Def. Reply at 19; citing *Bottini v Lewis & Judge Co.*, 211 AD2d 1006, 1008 [3d Dept 1995] ["Having remained in defendant's employment … plaintiff is deemed to have assented to the modification and, in effect, commenced employment under a new contract"]). Therefore, defendants argue that even if the alleged fraud was material, plaintiff's assent "to continue working for the agreed compensation operated as a new acceptance of that compensation for what he then understood the work to be" (Def. Reply at 19). This argument is persuasive.

Accordingly, defendants' motion to dismiss the fourth cause of action is granted.

Unjust Enrichment (Fifth Cause of Action)

An unjust enrichment claim requires a plaintiff to allege that the defendant was enriched, at the expense of plaintiff, and that it would be inequitable to permit the defendant to retain the benefit (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Here, plaintiff's unjust enrichment claim is allegedly based upon "his rightful, equitable stake in Pangea" under the Partnership Agreement, not the Compensation Agreement (Plf. Opp. at 16).

Defendants argue that "there is no credible evidence that Yuen was ever promised anything other than a contingent interest in Pangea," and that Yuen must, when faced with an evidentiary showing by defendants, put forth evidence establishing each element of his claim, including the damages sustained (Def. Reply at 20-21, n 119; citing *Tobron Off. Furniture Corp. v King World Prods. Inc.*, 161 AD2d 355, 357 [1st Dept 1990] [Tobron]).

Defendants' argument is unavailing and their reliance on *Tobron* is misplaced. As discussed above, this court has ruled that, with respect to the breach of Partnership Agreement cause of action, plaintiff has raised an issue of fact as to his claim of having an equity interest in Pangea and defendants' alleged breach of such agreement by submitting evidentiary materials, including the relevant emails. Also, as noted in *Tobron*, it is well settled that a party opposing summary judgment must "submit evidentiary facts or materials . . . demonstrating the existence of a triable issue of ultimate fact," and that it is "insufficient to merely set forth averments of factual or legal conclusions" (*id.* at 357). Based on this court's review of the evidentiary materials, plaintiff has sustained his burden in establishing the existence of a triable issue of fact as to the existence of the Partnership Agreement. Therefore, Plaintiff is "not precluded from proceeding on both breach of contract and quasi contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue" (*Curtis Props. Corp. v Greif Co.*, 236 AD2d 237, 239 [1st Dept 1997]).

Accordingly, defendants' motion for summary judgment to dismiss the fifth cause of action is denied.

Third Party Claims Against Lakian

By the instant motion, defendants also seek summary judgment against Lakian, the third-party defendant, on Pangea's third-party claims against Lakian.

Notably, in their notice of motion (NYSCEF Doc. No. 225), defendants indicated that this motion was mailed to Lakian at a federal correctional institution located in New Jersey, where he is incarcerated. It is also noteworthy that, when this third-party action against Lakian was commenced in 2013, he defended himself through counsel, but when this motion was filed in April 2019 he was already in prison. In their submissions, defendants have not shown that Lakian actually received a copy of this motion; instead, they merely assert that "Lakian has not opposed the instant motion or responded thereto in any other fashion," and thus request that summary judgment be granted in their favor due to Lakian's alleged default (Def. Reply at 21).

Summary judgment on the third-party claims against Lakian cannot be granted. Defendants have not complied with CPLR 3215. Indeed, defendants must demonstrate that they have afforded Lakian his procedural due-process rights with respect to the instant motion.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment dismissing plaintiff's claims against them is granted only to the extent of dismissing the complaint's first cause of action (and only as against defendant Pangea Capital Management, LLC) and the fourth cause of action (as against both defendants), and is otherwise denied; and it is further

ORDERED that defendants' motion for summary judgment in their favor on their third-party claims against third-party defendant John Lakian is denied without prejudice.

1/28/2020
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE