

**Minuto v Longo**

2013 NY Slip Op 31683(U)

July 25, 2013

Supreme Court, New York County

Docket Number: 115932/09

Judge: Cynthia S. Kern

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 115932/2009  
MINUTO, ANTHONY  
vs.  
LONGO, VINCENT  
SEQUENCE NUMBER : 004  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

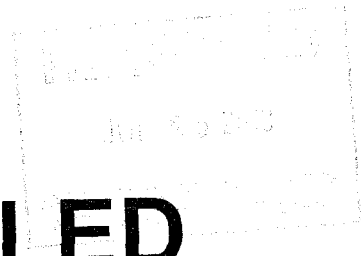
The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

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

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

is decided in accordance with the annexed decision.

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



## FILED

JUL 26 2013

Dated: 7/25/13

COUNTY CLERK'S OFFICE \_\_\_\_\_, J.S.C.  
NEW YORK PK

- 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 55

-----X  
ANTHONY MINUTO, DEBRA S. MINUTO and  
FOUNTAINBLEAU HOLDINGS, INC.,

Plaintiffs,

Index No. 115932/09

-against-

**DECISION/ORDER**

VINCENT LONGO, VINCENT LONGO INC.,  
VINCENT LONGO ON 57<sup>th</sup> INC., CARLO LONGO,  
ROBERT B. CHAVEZ and SUSAN ALEXANDRA  
WEAVER a/k/a SIGOURNEY WEAVER,

Defendants.

**FILED**

JUL 26 2013

-----X  
HON. CYNTHIA S. KERN, J.S.C.

COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1,2</u>
Affirmations in Opposition to the Motion .....	<u>3,4</u>
Replying Affidavits.....	<u>5,6</u>
Exhibits.....	<u>7</u>

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Plaintiffs Anthony Minuto ("Mr. Minuto"), Debra S. Minuto ("Ms. Minuto") and Fountainebleau Holdings, Inc. ("Fountainebleau") (hereinafter collectively referred to as "plaintiffs") commenced the instant action to recover damages arising out of defendants' alleged breach of an agreement between the parties by failing to transfer 25% of the total outstanding shares of Vincent Longo, Inc. (the "Longo Company"), despite receiving consideration therefor. Defendants Vincent Longo ("Mr. Longo"), the Longo Company and Longo on 57<sup>th</sup> Inc. ("57<sup>th</sup> Inc.") (hereinafter collectively referred to as the "moving defendants") now move for an Order (1) pursuant to CPLR § 3025 to amend their answer to assert a defense based on the Statute of

Frauds; and (2) pursuant to CPLR § 3212 for partial summary judgment. Plaintiffs also move for an Order pursuant to CPLR § 3212 granting them partial summary judgment on their causes of action for breach of contract, fraud and unjust enrichment. The motions are consolidated for disposition. For the reasons set forth below, the moving defendants' motion is granted in part and denied in part and plaintiffs' motion is denied.

The relevant facts are as follows. Plaintiffs commenced the instant action in November 2009 and later amended their complaint in July 2010, alleging causes of action for (1) a declaratory judgment that Mr. Minuto is a shareholder and Co-CEO of the Longo Company; (2) breach of contract; (3) fraud; (4) unjust enrichment; and (5) defamation. Specifically, plaintiffs allege that "in or about February 2008, [Mr. Longo], individually, and on behalf of the [Longo Company], requested that Plaintiffs lend [Mr. Longo] and/or the [Longo Company] funds to salvage the business" and represented that the funds would be used solely to benefit the Longo Company. Plaintiffs further allege that in or around July 2008, "in order to induce Plaintiff to lend funds to [Mr. Longo] and/or the [Longo Company], [Mr. Longo] agreed to transfer 25% of the total outstanding shares of the Longo Company to [Mr. Minuto] and to appoint [Mr. Minuto] Co-CEO of the [Longo Company]." Pursuant to this alleged agreement, plaintiffs claim that they "paid and/or loaned, in the aggregate, a sum in excess of \$400,000 to [Mr. Longo] and/or the [Longo Company]." However, plaintiffs allege that Mr. Longo and the Longo Company breached said agreement by failing to transfer the 25% of the Longo Company to Mr. Minuto, failing to repay the money "loaned" to the Longo Company and terminating Mr. Minuto from his position as Co-CEO.

In July 2010, defendants answered and asserted counterclaims against plaintiffs for (1)

conversion; (2) breach of fiduciary duty; and (3) breach of contract. Defendants also asserted affirmative defenses of, *inter alia*, failure to state a cause of action; lack of standing; claim preclusion; unclean hands; breach of contract; bad faith; waiver, ratification and/or estoppel; and statute of limitations. In their answer, defendants assert that the agreement was not that plaintiffs would “loan” funds to defendants but rather that plaintiff would purchase the shares of the Longo Company for \$400,000.00. Following the conclusion of discovery, the Note of Issue was filed in January 2013.

The court first turns to that portion of the moving defendants’ motion for an Order pursuant to CPLR § 3025(b) granting them leave to amend their answer to the amended complaint to assert the Statute of Frauds as a thirteenth affirmative defense. Pursuant to CPLR 3025(b), “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1<sup>st</sup> Dept 2010) (internal citations omitted). While delay does not ordinarily serve as an impediment to the granting of leave to amend, leave should be denied where the other party will be prejudiced. *See Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502 (1<sup>st</sup> Dept 2011).

In the instant case, that portion of the moving defendants’ motion for an Order pursuant to CPLR § 3025(b) granting them leave to amend their answer to plaintiffs’ amended complaint to plead the Statute of Frauds as an affirmative defense is granted as the proposed amendment is not patently devoid of merit and plaintiffs will not be prejudiced by the amendment. The moving

defendants only became aware of a potential Statute of Frauds defense at Mr. Minuto's deposition in July 2011, during which Mr. Minuto testified that the "loan" he provided to defendants was made to the Longo Company, not Mr. Longo, and that it was guaranteed by Mr. Longo. Pursuant to New York General Obligations Law ("GOL") § 5-701,

- a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
2. Is a special promise to answer for the debt, default or miscarriage of another person.

Therefore, if Mr. Longo did agree to guarantee the loan made to the Longo Company, as Mr. Minuto testified, such agreement had to be in writing, as a result of which the Statute of Frauds defense would have merit. Moreover, this defense only became available to defendants based on the subsequent testimony of Mr. Minuto, which testimony was inconsistent with the allegations in the complaint.

Plaintiffs' assertion that leave to amend should be denied on the grounds that the complaint alleges that the "loan" was made to "Mr. Longo and/or the [Longo] Company" is without merit. Mr. Minuto clearly explained during his deposition that the "loan" was made to the Longo Company and was guaranteed by Mr. Longo. The fact that the complaint states otherwise is not dispositive. Plaintiffs' argument that the amendment should not be allowed on the ground that further discovery would be required is also without merit. To the extent plaintiffs seek specific discovery with regard to the Statute of Frauds defense, plaintiffs must identify such discovery to the court and the court will consider such request.

The court next turns to that portion of defendants' motion for an Order pursuant to CPLR § 3212 for partial summary judgment. On a motion for summary judgment, the movant bears the

burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

As an initial matter, Mr. Longo has established his prima facie right to summary judgment dismissing the amended complaint’s first cause of action for a declaratory judgment that Mr. Minuto is a shareholder and Co-CEO of the Longo Company as against him as such cause of action concerns corporate acts only. Plaintiff’s assertion that such cause of action should not be dismissed as against Mr. Longo because it was Mr. Longo who agreed to appoint Mr. Minuto as Co-CEO and because Mr. Longo is a majority shareholder in the Longo Company is without merit as it is only the Longo Company that can provide Mr. Minuto with the relief he seeks. Thus, the amended complaint’s first cause of action for a declaratory judgment is dismissed as against Mr. Longo.

However, Mr. Longo is not entitled to summary judgment dismissing the amended complaint’s second cause of action for breach of contract pursuant to the Statute of Frauds. Defendants assert that because Mr. Minuto testified during his deposition that the funds were loaned directly to the Longo Company and that Mr. Longo agreed to guarantee the repayment of said loan, such agreement would need to be in writing pursuant to the Statute of Frauds, and thus, a cause of action for breach of contract against Mr. Longo cannot lie. However, there exists an

issue of fact as to whether the funds were loaned only to the Longo Company or to Mr. Longo himself based on the copies of the bank checks which were made out to both the Longo Company and Mr. Longo. Thus, Mr. Longo's motion for summary judgment dismissing the amended complaint's second cause of action for breach of contract is denied.

The moving defendants have also failed to establish their prima facie right to summary judgment dismissing the amended complaint's fourth cause of action for unjust enrichment. While a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery on a theory of unjust enrichment for events arising out of that subject matter, a plaintiff may proceed upon a quasi-contract theory of unjust enrichment where the contract does not cover the dispute at issue. *See Ashwood Capital, Inc. v. OTG Mgt. Inc.*, 99 A.D.3d 1 (1<sup>st</sup> Dept 2012). As an initial matter, there exists an issue of fact as to whether a valid and enforceable contract exists. The purported agreement between the parties includes an e-mail between Mr. Longo and Mr. Minuto, oral communications between the parties and a written affirmation signed by Mr. Longo dated December 23, 2008. In the e-mail, dated December 18, 2008, the parties discussed the purported written agreement and its language, stating as follows:

We both agree that the proper terminology is as follows. That Mr. Minuto purchased 25% of the stock of Vincent Longo, Inc., for 400,000 of which the balance of 100,000 will be paid when Mr. Longo returns from vacation. At that time the stock will be formally transferred to Mr. Minuto.

Additionally, defendants rely on the purported agreement signed only by Mr. Longo, dated December 23, 2008, which states:

I Vincent Longo hereby state in my capacity as CEO and majority shareholder of Vincent Longo, Inc, that Anthony Minuto is entitled to purchase 25% of the outstanding shares of Vincent Longo, Inc for a purchase price of 400,000.



I acknowledge to date Mr. Minuto has deposited 300,000 to Vincent Longo, Inc. and those funds will be applied towards the aforementioned 400,000 purchase price.

Neither the e-mail nor the agreement preclude plaintiffs from proceeding on their unjust enrichment claim as neither deal with Mr. Minuto's purported salary, his role in the Longo Company as Co-CEO or plaintiffs' allegation that the funds provided to the Longo Company were actually a loan that must be repaid. Therefore, as plaintiffs claim they are entitled to recover for items outside the written agreement, defendants' motion for summary judgment dismissing the fourth cause of action is denied.

However, the moving defendants have established their prima facie right to summary judgment dismissing the amended complaint's third cause of action for fraud. "[T]o prevail on a cause of action for fraud, a plaintiff must prove (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations." *Leno v. DePasquade*, 18 A.D.3d 514, 515 (2d Dept 2005), citing *Guirdanella v. Guirdanella*, 226 A.D.2d 342, 343 (2d Dept 1996); see also *Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 N.Y.2d 644, 646-647 (1989)(a claim for fraud constitutes "misrepresentation of a material fact, falsity, scienter and deception"). A fraud-based cause of action can only lie "where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assocs., LLC*, 53 A.D.3d 451, 453 (1<sup>st</sup> Dept 2008); see also *Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1<sup>st</sup> Dept 1998), citing *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 113 (4<sup>th</sup> Dept 1975)("To plead a viable cause of action for fraud arising out of a

contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties.”) “A failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract.” *Tesoro Petroleum Corp. v. Holborn Oil Co.*, 108 A.D.2d 607 (1<sup>st</sup> Dept 1985).

In the instant action, the fraud cause of action must be dismissed as the moving defendants have shown that there is no evidence of fraud which is collateral or extraneous to the purported agreement. Plaintiff alleges that in exchange for a “loan,” the Longo Company and/or Mr. Longo agreed to transfer 25% of the Longo Company to plaintiff, to use the “loan” for the Longo Company’s business only and to appoint Mr. Minuto Co-CEO and pay him a salary. The basis for the fraud claim is that these representations were false as defendants had no intent of performing their alleged contractual obligations. However, a contract claim cannot be converted into a fraud claim merely by the allegation that a contracting party never intended to perform its promise. *See Smart Egg Pictures, S.A. v. New Line Cinema Corp.*, 213 A.D.2d 302 (1<sup>st</sup> Dept 1995). Moreover, the issue of whether Mr. Longo or the Longo Company performed pursuant to the agreement, such as paying Mr. Minuto a salary or appointing him Co-CEO, is the crux of a breach of contract claim, not a fraud claim. Plaintiffs have not pointed to any fraud collateral or extraneous to the agreement and it is clear that the breach of duty plaintiff alleges is that of a breach of contract. As stated above, “[a] failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract.” *Tesoro*, 108 A.D.2d at 607.

Additionally, Mr. Longo has established his prima facie right to summary judgment dismissing the amended complaint’s fifth cause of action for defamation. Plaintiffs allege that in

or around September 2009, “[Mr.] Longo, acting intentionally and willfully, maliciously made several false, defamatory and slanderous statements about Plaintiff Minuto to Randy Kornblatt, a mutual business acquaintance of [Mr.] Longo and the Plaintiff.” Specifically, plaintiff alleges that while speaking to Mr. Kornblatt, Mr. Longo “called Plaintiff Minuto ‘a crook,’ ‘a criminal’ and stated that Plaintiff ‘stole and embezzled money from the [Longo] Company.’” However, Mr. Longo has affirmed that he never uttered any such statements to Mr. Kornblatt. In response, plaintiff fails to raise an issue of fact sufficient to defeat Mr. Longo’s motion for summary judgment as he has not provided any evidence affirming the allegedly defamatory words were stated to Mr. Kornblatt by Mr. Longo. Additionally, that portion of the moving defendants’ motion which seeks to dismiss defendant 57<sup>th</sup> Inc. from the instant action is granted as there are no allegations in the amended complaint concerning any wrongdoing by said defendant.

Finally, plaintiffs’ motion for an Order pursuant to CPLR § 3212 granting them partial summary judgment on their causes of action for breach of contract, unjust enrichment and fraud is denied. There exist issues of fact as to whether the money plaintiffs provided to defendants was a “loan” and whether the full \$400,000.00 was ever provided to the Longo Company as only a portion of that sum was paid in the form of bank checks while at least \$100,000.00 of that sum was allegedly provided to Mr. Longo directly in the form of cash. Finally, plaintiffs are not entitled to summary judgment on their fraud cause of action as this court has already determined that they have not established fraud collateral to the contract.

Accordingly, that portion of the moving defendants’ motion for an Order pursuant to CPLR § 3025 for leave to amend their answer to assert a defense of the Statute of Frauds is granted and that portion of the moving defendants’ motion for an Order pursuant to CPLR §

3212 for summary judgment dismissing the complaint is granted only to the extent that the third cause of action for fraud and the fifth cause of action for defamation is dismissed as against the moving defendants and the first cause of action for a declaratory judgment is dismissed as against Mr. Longo only. Additionally, that portion of the moving defendants' motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint as against defendant 57<sup>th</sup> Inc. is granted. However, plaintiff's motion for an Order pursuant to CPLR § 3212 for partial summary judgment is denied in its entirety. The moving defendants' amended answer is deemed served *nunc pro tunc*. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated:

7/25/13

Enter: \_\_\_\_\_

  
J.S.C.

**FILED**

JUL 26 2013

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