Johnson v Cestone
2017 NY Slip Op 30532(U)
March 17, 2017
Supreme Court, New York County
Docket Number: 152444/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SARAH JOHNSON,

Plaintiff,

- against –

MARIA CESTONE, CHRISTOPHER WOODROW, MOLLY CONNERS, HOYT DAVID MORGAN, ROSELAND VENTURES, LLC, PROSPECT POINT CAPITAL, LLC, WORLDVIEW ENTERTAINMENT HOLDINGS, LLC, WORLDVIEW ENTERTAINMENT HOLDINGS, INC., WORLDVIEW ENTERTAINMENT CAPITAL, LLC, WORLDVIEW ENTERTAINMENT CAPITAL II, LLC, WORLDVIEW ENTERTAINMENT PARTNERS IV, LLC, WORLDVIEW ENTERTAINMENT PARTNERS V, LLC, WORLDVIEW ENTERTAINMENT PARTNERS VI, LLC, WORLDVIEW ENTERTAINMENT PARTNERS VII, LLC, WORLDVIEW ENTERTAINMENT PARTNER IX, LLC,

Defendants.

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Index No. 152444/2015

Decision and Order

Mot. No. 14, 15, 16 and 17

This action arises out plaintiff Sarah Johnson's ("Plaintiff" or "Johnson") investments in films.

Motion Seq. 14

Defendant Molly Conners ("Conners") moves to dismiss pursuant to CPLR § 3211(a)(1) (documentary evidence), (a)(3) (capacity), and (a)(7) (failure to state a claim). Specifically, Conners moves to dismiss the following counts of the Second Amended Complaint ("SAC"): fraud (Count 1); aiding and abetting fraud (Count 2);

civil conspiracy (Count 3); negligent misrepresentation (Count 4); fraudulent concealment (Count 5); tortious interference (Count 11); breach of fiduciary duty (Count 12); aiding and abetting breach of fiduciary duty (Count 13); gross negligence (Count 14); and aiding and abetting conversion (Count 16). Johnson opposes.

Motion Seq. 15

Christopher Woodrow ("Woodrow") moves to dismiss pursuant to CPLR § 3211(a)(7). Woodrow moves to dismiss Counts 1-5, 11-14, and 16 of the SAC. These claims are as follows: fraud (Count 1); aiding and abetting fraud (Count 2); civil conspiracy (Count 3); negligent misrepresentation (Count 4); fraudulent concealment (Count 5); tortious interference (Count 11); breach of fiduciary duty (Count 12); aiding and abetting breach of fiduciary duty (Count 13); gross negligence (Count 14); and aiding and abetting conversion (Count 16).

Motion Seq. 16

Defendants Worldview Entertainment Holdings LLC ("Holdings"), Worldview Entertainment Holdings Inc. ("Worldview Inc."), Worldview Entertainment Capital LLC ("WEC"), Worldview Entertainment Capital II LLC ("WEC2"), Worldview Entertainment Partners IV LLC ("WEP4"), Worldview Entertainment Partners V LLC ("WEP5"), Worldview Entertainment Partners VI LLC ("WEP6"), Worldview Entertainment Partners VII LLC ("WEP7"), and Worldview Entertainment Partners IX LLC ("WEP9") (collectively, the "Defendant Entities") move to dismiss the SAC against the Defendant Entities pursuant to CPLR § 3211(a)(1), (a)(3), (a)(5), and (a)(7).

Motion Seq. 17

Defendants Maria Cestone ("Cestone") and Roseland Ventures LLC ("Roseland Ventures") move to dismiss pursuant to CPLR §3211(a)(7) the following counts of the SAC: fraud (Count 1); aiding and abetting fraud (Count 2); civil conspiracy (Count 3); negligent misrepresentation (Count 4); fraudulent concealment (Count 5); tortious interference (Count 11); breach of fiduciary duty (Count 12); aiding and abetting breach of fiduciary duty (Count 13); gross negligence (Count 14); and aiding and abetting conversion (Count 16).

Oral argument was held on these motions to dismiss.

After oral argument, Johnson submitted a supplemental memorandum. Johnson agrees that the following counts should be dismissed: Count 3 (civil conspiracy against Cestone, Woodrow, Conners, Worldview Inc., Roseland and Prospect Point), 11 (tortious interference with contract against Cestone, Woodrow, Conners, and Worldview Inc.), 12 (breach of fiduciary against Cestone, Woodrow, Conners, Holdings, Worldview Inc., Roseland); 13 (aiding and abetting breach of fiduciary duty against Holdings, Worldview Inc., Roseland, Cestone, Woodrow, and Conners), and 14 (gross negligence against all Defendants).

Johnson states:

> New Counsel for Plaintiff agrees with Defendants that some of Plaintiff's claims in the SAC, prepared by prior counsel, should be dismissed.
>
> First, because the SAC alleges that it was only in August of 2012 that Defendants first learned that Welcome to the Punch ("Punch") would be a financial failure, we agree with Defendants that Plaintiff cannot presently allege that she was fraudulently induced into investing in WEP II-V [2-5] because Plaintiff's investments in those LLCs predated August of 2012.
>
> Second, Plaintiff agrees to dismiss Count III of the SAC because Defendants are correct in arguing that New York law does not recognize a separate cause of action for civil conspiracy.
>
> Third, Plaintiff agrees to dismiss Counts XII-XIV [12-14] of the SAC because Defendants are correct in arguing that they are derivative in nature. However, Plaintiff requests leave to replead those counts in derivative claims in a Third Amended Complaint.

Accordingly, in her supplemental submission, Johnson concedes that her fraud based claims (Counts 1, 2, and 5) should be dismissed to the extent that they rely on her allegations that she was fraudulently induced into investing in WEP 2,

WEP 3, WEP 4, and WEP 5. However, Johnson maintains that her fraud based claims (Counts 1, 2, and 5) should not be dismissed to the extent that they are based on allegations distinct from WEP 2, WEP 3, WEP 4, and WEP 5.

Johnson further concedes that her claim for civil conspiracy (Count 3) should be dismissed because New York law does not recognize such a claim. Count 3 is therefore dismissed.

Johnson further concedes that her claims for breach of fiduciary duty (Count 12), aiding and abetting breach of fiduciary duty (Count 13) and gross negligence (Count 14) should be dismissed because they are derivative in nature. Johnson requests "leave to replead those counts in derivative claims in a Third Amended Complaint." However, Johnson fails to submit a copy of the proposed amended pleading as required under CPLR 3025(b). See CPLR § 3025(b) ("Any motion to amend or supplement pleadings *shall be* accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.") (emphasis added). Counts 12, 13, and 14 of the SAC are therefore dismissed.

Plaintiff argues that Counts 7, 8, 9, and 10 (breach of agreements) should not be dismissed. The Court will consider the sufficiency of these counts, as well as all the remaining ones, below.

Counts 1, 2, and 5 - Fraud Based Claims

Johnson's claims against Worldview Inc. and Holdings arise from alleged misrepresentations made to Johnson concerning certain returns from WEP 2 and projections regarding Johnson's investments. Johnson alleges that in September 2012 and January 2013, certain monies, that were allegedly not returns from WEP 2's investment in the film entitled Welcome to the Punch, were distributed to WEP 2 investors such as herself. Johnson also alleges that she was provided with inaccurate projections in March 2013 and December 2013, regarding her investments in various film funds. Johnson alleges that she reasonably relied on these alleged misrepresentations in that she decided to make other investments, and sustained damages as a result.

In light of Johnson's supplemental submission, the issue that remains is whether Johnson has stated fraud based claims (Counts 1, 2, and 5).

Count 1 (Fraud) of the SAC alleges:

> Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point made false and/or misleading representations of material facts, and/or concealed and failed to satisfy obligations to disclose material facts to Plaintiff, including, but not limited to, misrepresentations and omissions calculated to conceal and/or misrepresent the actual or projected performance of Plaintiff's investments in the Worldview Film Funds . . . [that they] knew and understood that these representations were false and made them deliberately. To the extent the representations were actually transmitted by others, they were reviewed, authorized and approved by Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point. Cestone, Woodrow, Conners and Morgan engaged in fraudulent acts while acting as the agents of and with the actual or apparent authority of Holdings, Worldview Inc., Roseland and/or Prospect Point . . . [and] intended to induce Plaintiff to rely on their representations and omissions and make additional financial contributions to Holdings, Worldview Inc. and the Worldview Film Funds. Plaintiff reasonably relied on material misrepresentations and omissions made by [these defendants]. At the time Plaintiff made her financial contributions to Holdings, Worldview Inc. and the Worldview Film Funds, Plaintiff was ignorant of the falsity of the misrepresentations made by Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point. Had Plaintiff known the truth about the actual and projected performance of her investments, she would not have continued to make financial contributions to Holdings, Worldview Inc. and the Worldview Film Funds. As a direct and proximate result of fraudulent conduct by Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point, Plaintiff has suffered, and continues to

suffer, damages in an amount to be proven at trial. In addition, the misconduct by Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point was willful, wanton and/or reckless, thus entitling Plaintiff to recover punitive damages.

Count 2 (Fraud) of the SAC alleges:

As alleged herein, Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point committed primary acts of fraud against Plaintiff …, had knowledge of the primary violations of the others and (i) knowingly provided substantial assistance therein, or (ii) recklessly provided substantial assistance therein, where each of [these defendants] had a duty to disclose misconduct to Plaintiff.

Cestone knowingly provided substantial assistance to the fraud, including by reviewing, approving and authorizing the transmittal of fraudulent financial summaries and projections to Plaintiff.

Woodrow knowingly provided substantial assistance to the fraud, including by directing Conners, Morgan and other Worldview Inc. employees to prepare fraudulent financial summaries and projections, overseeing their preparation, and transmitting them to Plaintiff.

Conners and Morgan knowingly provided substantial assistance to the fraud, including by knowingly preparing and transmitting fraudulent financial summaries and projections to Plaintiff.

Worldview Inc. knowingly provided substantial assistance to the fraud, including by transferring funds unrelated to WEP II to WEP II investors so as to inflate artificially the purported returns on investments.

> Holdings knowingly provided substantial assistance to the fraud, including by authorizing the transfer of funds unrelated to WEP II to WEP II investors so as to inflate artificially the purported returns on investments.
>
> Roseland and Prospect Point knowingly provided substantial assistance to the fraud in their roles as members of Holdings and by virtue of the acts of the sole members of Roseland and Prospect Point, Cestone and Woodrow.
>
> As a direct and proximate cause of the foregoing, Plaintiff has suffered, and continues to suffer, damages in an amount to be proven at trial. Each of Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point is secondarily liable for the others' acts of fraud against Plaintiff, and for all damages incurred or otherwise owed to Plaintiff (including exemplary damages) with respect thereto. In addition, the misconduct by Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point was willful, wanton and/or reckless, thus entitling Plaintiff to recover punitive damages.

In a claim for fraudulent misrepresentation, a plaintiff must allege: 1) a misrepresentation or a material omission of fact; 2) which was false and known to be false by defendant; 3) made for the purpose of inducing the other party to rely upon it; 4) justifiable reliance of the other party on the misrepresentation or material omission; and, 5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 [2011]). For aiding and abetting fraud, in order to sustain a cause of action for aiding and abetting the plaintiff must allege: (1) the existence of wrongful conduct by the primary wrongdoer; (2) that defendant knowingly induced or participated in the wrongdoing; and, (3) damage resulting from the same. (*see Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 101 [1st Dep't 2006]).

A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so. (*Wiscovitch Associates, Ltd. v. Philip Morris Companies, Inc.,* 193 A.D.2d 542, 598 N.Y.S.2d 193).

CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]).

In Motion Sequence 14, Conners argues that the fraud-based claims asserted against her should be dismissed because the SAC fails to adequately allege that Johnson reasonably relied on any purported representation made by Conners, documentary evidence exists that flatly contradicts the allegations of the SAC, and Conners owed Johnson no duty to disclose material information.

In Motion Sequence 15, Woodrow argues that the fraud-based causes of action asserted against him should be dismissed because the SAC fails to plead the fraud claims against him with the requisite particularity.

In Motion Sequence 16, Defendant Entities argue that the fraud-based causes of action asserted against Worldview Inc. and Holdings should be dismissed because: (1) the SAC fails to plead the fraud claims against Worldview Inc. and Holdings with the requisite particularity; (2) documentary evidence refutes the claims; and (3) as a matter of law, Johnson could not have reasonably relied on any of the alleged misstatements, especially those predicated on words such as "estimate" and "projection." The Defendant Entities argue that the fraudulent concealment count fails for the same reasons as fraud based claim and because Worldview Inc. and Holdings did not owe Plaintiff a fiduciary duty.

In Motion Sequence 17, Roseland Ventures and Cestone argue that the fraud-based causes of action against them should be dismissed because the SAC does not allege a single misrepresentation made by Roseland Ventures, the SAC does not identify a single representation made by Cestone in connection with Johnson's investments; the SAC fails to allege scienter on Cestone's part; and Plaintiff has failed to establish reliance because Plaintiff cannot claim reasonable reliance with respect to Cestone because Cestone made no representations to her, and her reliance is belied by the SAC's allegations and her own acknowledgments in writing of the risks associated with investing in independent films.

In a Supplemental Memorandum, Johnson states, "Although not artfully pleaded, Counts I, II and V of the SAC, which allege fraud, aiding and abetting fraud, and fraudulent concealment by Cestone, Woodrow, Conners, Holdings, Worldview Inc., Roseland and Prospect Point, state an action for fraud against these

Defendants." Johnson states, "In essence, Counts I and II should have been pleaded as one count for fraud under a conspiracy to defraud theory -- something which Plaintiff believes should be done in a Third Amended Complaint."

Johnson states, "In general, the fatal flaw in all of Defendants' efforts to dismiss Plaintiff's fraud claim is that they erroneously seek to focus upon each individual investment made by Plaintiff instead of understanding and/or acknowledging that, as described above, the fraud was a broad based scheme to defraud Plaintiff into making multiple investments with Defendants."

Johnson argues that nothing in the WEP 6, WEP7, and WEP9 Subscription Agreements precludes her claim that she was fraudulently induced into entering those agreements. Johnson argues that nothing in the WEP 6, 7, and 9 Operating Agreements or the WEC 1 and WEC 2 Operating or Subscription Agreements precludes Johnson's fraud in the inducement claim. Johnson concludes that she has adequately alleged reasonable reliance.

Regarding the Private Placement Memorandum for WEP 6, Johnson provided WEP6 with a signed questionnaire aimed at demonstrating her suitability as an investor in each of the respective companies. This was followed by an Operating agreement which Johnson executes.

The Operating agreement for WEP 6 acknowledges the speculative nature of investing in the motion picture industry and the high risk of a total loss on an investment in a motion picture. She recognizes that a film's success is dependent upon public taste, which is unpredictable and susceptible to change. WEP 6 names a specific work that company intends to produce and provides that the company has no prior financial or operating history. The agreement empowers the production company to, among other things, abandon the Picture at any time for any reason. It provides for compensation to management. Finally, the agreement provides that the agreement may be amended, modified or supplemented, "provided that the same are in writing and signed by the undersigned and the Manager."

Johnson claims that her continued investing in films should be viewed, not by each film investment, but as a larger course of investing. Indeed, she asserts that she fell victim to misrepresentations about the health and financial success of various companies and relied upon those misrepresentations in continuing to invest in new films. Such claims are starkly contradicted by the very agreement she signed for

WEP6. In that agreement, she acknowledged that the film had no prior history upon which to rely, that it was a speculative investment, that it was dependent upon the uncertainties of public acceptance, and that the film could be abandoned and not completed.

The agreements for WEP 6, like the earlier ones that Johnson executed, make clear that Johnson was relying only on the information contained within the four corners of those agreements in deciding to make the investments in their respective film funds. These agreements constitute documentary evidence that flatly contradict any allegations that Johnson reasonably relied on any misrepresentations when making these investments. In addition, there are no new misrepresentations alleged after WEP 6 that would support a claim for fraud. Accordingly, Counts 1, 2, and 5 of the SAC are dismissed.

Breach of Contract Claims (Counts 7, 8, 9, and 10)

Counts 7, 8, 9, and 10 of the SAC allege that Johnson entered into "valid" and "express agreements" (See Paragraph 117 of the SAC) with WEP 7, WEP9, WEC, WEC2, Holdings and Worldview Inc. in which each of these entities "agreed that no financing, production and/or management fees would be paid out of funds contributed by Plaintiff to [the respective entities]" and that the entities breached the agreements.

The Defendant Entities seek to dismiss the "oral" contract counts for the following reasons: "(1) management fees were not paid with respect to WEP7, WEP9, WEC and WEC2; (2) documentary evidence demonstrates conclusively that promises not to pay producer/production other non-management fees never existed; (3) the doctrine of definiteness makes the alleged agreements unenforceable; and (4) the statute of frauds mandates dismissal."

Accepting the allegations of the SAC as true and drawing all inferences in favor of the non-moving party, the four corners of the SAC state claims for breach of contracts against WEP7, WEP9, WEC 1, WEC2, Holdings, and Worldview Inc. The documentary evidence that the Defendant Entities rely upon to refute the allegations of the SAC are agreements which Johnson alleges "[she] was not sent (and has not executed)," and are therefore distinct from the contracts that the SAC alleges were breached.

OTHER REMAINING COUNTS

Count 4 - Negligent misrepresentation - against Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point

Johnson alleges, "Each of Cestone, Woodrow, Conners, Morgan, Holdings, Worldview Inc., Roseland and Prospect Point made misrepresentations and omissions of material fact to Plaintiff, and did so negligently or with a reckless disregard for Plaintiff's rights tantamount to intentional wrongdoing."

A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given. (*Hudson River Club v. Consolidated Edison Co.*, 275 A.D.2d 218, 220 [1st Dep't 2000]).

Accordingly, in order to maintain a negligent misrepresentation cause of action, a plaintiff must demonstrate reasonable reliance on the alleged misrepresentations. As discussed above, Johnson cannot allege reasonable reliance on any alleged misrepresentations by the defendants based on the documents she does not execute up to and including WEP 6, and there are no new representations alleged after WEP 6.

Furthermore, the Court notes that in Johnson's opposition papers, she does not specifically address the arguments raised by Defendants with respect to Count 2. Rather, Johnson states in a conclusory fashion, "The Complaint sufficiently pleads Plaintiff's remaining claims. The individual Defendants acted on behalf of the Entities, which are liable for their agents' actions."

Count 6 - Breach of WEP 4 Operating Agreement – against WEP 4 and Holdings

Johnson alleges that WEP4 and Holdings breached certain provisions of the fully executed private placement memorandum and operating agreement for WEP4.

Plaintiff asserts that WEP4 and Holdings violated the express obligations of Section 2.7.6 of the WEP4 Operating Agreement by causing a "$500,000 financing

and/or production fee to be paid to Worldview Inc. prior to recoupment of WEP4's 'Equity Investment.'" Plaintiff also asserts that WEP4 and Holdings violated the express obligations of Section 4.1.3 of the WEP4 Operating Agreement by failing to use "'ordinary care and reasonable diligence in carrying out the affairs of the Company' by investing in a film, Devil's Knot, that had no reasonable chance of returning Plaintiff's investment and by mismanaging this film asset so as to cause a significant loss of equity to Plaintiff."

Based on a review of the WEP 4 operating agreement, Section 2.7.6 does not expressly prohibit the payment of a financing/or production fee prior to recoupment of WEP4's Equity Interest. Additionally, Section 4.1.3, which provides that "the Manager shall not be liable to the Members for any negligence on behalf of the Company or for any loss due to the negligence, fraud or misconduct of any employee, broker or agent of the Company who was selected, engaged or employed by the Manager" bars any liability for the alleged negligence in Holdings' management of WEP4. Accordingly, the terms of the WEP 4 operating agreement bar Johnson's alleged claim of breach of the agreement.

Count 11 Tortious interference with contract (against Cestone, Woodrow, Conners, Morgan, and Worldview Inc.)

Count 11 alleges:

> At all relevant times, Plaintiff was party to the contracts with WEP IV, WEP VII, WEP IX, WEC I, WEC II, Holdings and Worldview Inc. described supra at ¶¶ 239, 246, 251, 256, and 261.
>
> Cestone, Woodrow, Conners and Morgan had knowledge of these contracts because, among other reasons, Cestone, Woodrow, Conners and Morgan are owners, managers and/or officers of Holdings and Worldview Inc. As described above, WEP IV, WEP VII, WEP IX, WEC I, WEC II, Holdings and Worldview Inc. breached their contracts with Plaintiff. Cestone, Woodrow, Conners and Morgan intentionally and improperly induced and procured the breaches described herein, including: a. as to Worldview Inc., by executing agreements with third

> parties that facilitated the payment of unauthorized financing, production and/or management fees from the Worldview Film Funds to Worldview Inc.; b. as to Cestone, Woodrow, Conners and Morgan, by knowingly directing and facilitating the transfer of unauthorized financing, production and/or management fees from the Worldview Film Funds to Worldview Inc.; and c. as to Cestone and Woodrow, by knowingly directing and facilitating the deployment of funds loaned by Plaintiff to WEC II despite the fact that the minimum raise required for deployment of those funds had not been met. As a result of these breaches, Plaintiff has suffered, and continues to suffer, damages in an amount to be proven at trial.

Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. (*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 [1996]). For a tortious interference claim to proceed, it must be alleged that there breach of the contract with which the defendant allegedly interfered. (*Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413 [1996]).

To the extent that Johnson alleges that Worldview Inc., and the individual defendants tortiously interfered with the written WEP4 Operating Agreement, since Johnson has failed to sufficiently allege a breach of that agreement as discussed above, Johnson's claim for tortious interference with that agreement fails as a matter of law.

Furthermore, to the extent that Johnson alleges that Worldview Inc., tortuously interfered with the express agreements of WEP 7, WEP 9, WEC 1, and WEC 2, her claim fails as a matter of law because she alleges that Worldview Inc. was a party to these same contracts. A party cannot tortiously interfere with its own contract. A claim of tortious interference with a contract is not applicable to the parties to the contract, only to a third person that is not a party to the contract. *Beecher v. Feldstein*, 8 A.D.3d 597, 598 [2d Dep't 2004]; see also *Bradbury v. Cope-Schwarz*, 20 A.D.3d 657, 660 [3d Dep't 2005] ("[A] cause of action for tortious

interference was not stated against the seller. Inasmuch as she was not a third party to her own contract, the seller could not tortiously interfere with it as a matter of law, regardless of the validity of the underlying contract"). Furthermore, the Court notes that in Johnson's opposition papers, she does not specifically address the arguments raised by the Defendant Entities with respect to Count 10. Rather, Johnson states in a conclusory fashion, "The Complaint sufficiently pleads Plaintiff's remaining claims. The individual Defendants acted on behalf of the Entities, which are liable for their agents' actions."

Turning to the claim that Conners, Woodrow, and Cestone, the individual defendants tortuously interfered with the WEP 4 Operating Agreement, and the WEP 7, WEP 9, WEC 1, and WEC 2 agreements, "To establish a corporate officer's liability for inducing a breach of a contract between the corporation and a third party, the complaint must allege that the officers' ... acts were taken outside the scope of their employment or that they personally profited from their acts." (*Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 228 [1st Dept 1998]).

Conners argues that because she is an officer of Worldview Inc., she cannot be liable for tortuously interfering with any alleged contract between Johnson and Worldview Inc. Conners argues that the SAC fails to allege that Conners' actions which allegedly resulted in the tortious interference with contract were beyond the scope of her employment by Worldview Inc. and Johnson does not allege that Conners personally profited from these alleged acts.

Woodrow also argues that Johnson's tortious interference claim should be dismissed as against him. Woodrow argues that the alleged actions taken by him were carried out in his capacity as CEO of Worldview and, through Worldview, as manager of the investment companies. Woodrow argues that because his alleged actions were all taken on behalf of affiliated companies, within the scope of his duties as an officer and director of Worldview, this claim fails as to him as a matter of law.

Cestone also argues that even if she caused the alleged contracts at issue to be breached, she did so in her capacity as director of Worldview Inc., and thus had an economic interest. Cestone further alleges that Johnson fails to allege malice or fraudulent conduct by Cestone to overcome Cestone's defense that she was acting in her capacity as a director of Worldview Inc.

The SAC fails to state a claim against Conners, Woodrow, and Cestone for tortious interference with any alleged contract between Johnson and Worldview Inc., and the tortious interference claim is dismissed as against them.

Counts 15 and 16

Count 15 - Conversion (In the Alternative)- Against WEP 6, 7, 9, WEC 1, WEC 2, Holdings and Worldview Inc.

Count 16 - Aiding and Abetting Conversion- Against Woodrow, Cestone, Morgan, Holdings, and Worldview Inc.

Count 15 asserts conversion (in the alternative) against WEP4, WEP7, WEP9, WEC, WEC2, Holdings and Worldview Inc. Count 16 asserts aiding abetting of conversion (in the alternative) against Holdings and Worldview Inc.

A conversion occurs when a party, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Lynch v City of New York*, 108 A.D.3d 94, 101 [1st Dep't 2013]). Two key elements of conversion are: (1) plaintiff's possessory right or interest in the property; and, (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. (*Id.*). "A cause of action for conversion cannot be predicated on a mere breach of contract." (*Fesseha v. TD Waterhouse Investor Servs.*, 305 A.D.2d 268, 269 [1st Dep't 2003]).

A cause of action for conversion that "merely restates" a cause of action for breach of contract, does not allege independent facts sufficient to give rise to tort liability and must be dismissed. (*Yeterian v. Heather Mills N. V., Inc.*, 583 N.Y.S.2d 439, 440 [1st Dep't 1992]).

Plaintiff's conversion and aiding and abetting conversion claims are dismissed because they are based on the alleged breaches of contract of counts 6-10.

Count 17 – Unjust Enrichment (In the Alternative) – Against WEP4, WEP5, WEP VI, WEP VII, WEP IX, WEC 1, WEC II, Holdings, and Worldview Inc.

Count 17 alleges:

> WEP IV, WEP V, WEP VI, WEP VII, WEP IX, WEC I and WEC II have been enriched directly by the payment of money from Plaintiff to these entities, which payments were made as a result of the misrepresentations and omissions described supra at ¶¶ 38–47, 49, 51, 64–68, 72–76, and 80–81.
>
> Worldview Inc. was enriched directly by the unauthorized transfer of financing, production and/or management fees from the funds transferred by Plaintiff as investments in WEP IV, WEP VII, WEP IX, WEC I and WEC II, as described in further detail supra at ¶¶ 114– 22.
>
> Holdings was enriched directly by the transfer of funds from Plaintiff to Holdings, which Plaintiff made as a loan but which Holdings has since attempted to categorize improperly as an equity investment. Principles of equity require the return to Plaintiff of the funds, plus interest. Defendants have failed to make restitution to Plaintiff for their ill-gotten gains. Restitution should therefore be made to Plaintiff in an amount to be proven at trial.

To prevail on a claim for unjust enrichment, the "plaintiff must show 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., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). Generally speaking, however, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]).

Johnson is precluded from recovery on a theory of unjust enrichment against WEP4, WEP5 and WEP6, as well as Holdings, because of the existence of the signed

private placement memoranda and operating agreements for these film funds. The Defendant Entities do not dispute the existence of these contracts.

However, since the Defendant Entities dispute the existence of Johnson's agreements regarding WEP7, WEP9, WEC 1 and WEC2, Johnson's unjust enrichment claims against those film fund Defendants, as well as against Holdings and Worldview Inc. which Johnson also alleges to be parties to the agreements, may proceed.

Counts 18 and 19- Declaratory Judgment (as to loans made by Johnson to WEC II and Holdings)

In Count 18, Johnson seeks a declaration that "her financial contribution to WEC II is properly characterized as a loan and that this loan, plus all associated interest charges and fees, be repaid prior to the recoupment of any amounts by the WEC II investors."

In Count 19, Johnson seeks a declaration that her $1.18 million "financial contributions to Holdings are properly characterized as a loan and that this loan, plus all associated interest charges and fees, be repaid prior to the recoupment by Holdings of any of its film investments." S.A.C. ¶ 323.

Defendant Entities argue that both claims must be dismissed because documentary evidence demonstrates conclusively that: (1) Johnson has admitted that the funding she provided to WEC2 is an investment; and (2) Johnson instructed that the $1.18 million she provided to Holdings be booked as an "equity investment."

Accepting the allegations of the SAC as true and drawing all inferences in favor of the non-moving party, the four corners of the SAC state claims for declaratory judgments as to the alleged loans made by Johnson.

Count 20 – Accounting

Johnson has withdrawn the count.

WHEREFORE, it is hereby

ORDERED that Defendant Entities' motion to dismiss the SAC (Mot. Seq. 16) is granted only to the extent the following counts of the SAC are dismissed: Counts 1 (fraud against Holdings and Worldview Inc.); Count 2 (aiding and abetting fraud against Holdings and Worldview Inc.); Count 3 (civil conspiracy against Holdings and Worldview Inc.); Count 4 (negligent misrepresentation against Holdings and Worldview Inc.); Count 5 (fraudulent concealment against Holdings and Worldview Inc.); Count 6 (breach of WEP 4 operating agreement against WEP 4 and Holdings); Count 11 (tortious interference against Worldview Inc.); Count 12 (breach of fiduciary duty against Holdings and Worldview Inc.); Count 13 (aiding and abetting breach of fiduciary duty against Holdings and Worldview Inc.); Count 14 (gross negligence against all Defendant Entities); Count 15 (conversion against WEP 4, WEP 6, WEP 7, WEC 1, WEC 2, Holdings, and Worldview Inc.); Count 16 (aiding and abetting conversion against Holdings and Worldview Inc.); and Count 17 (unjust enrichment only as against WEP 4); and it is further

ORDERED that defendant Molly Conners' motion to dismiss the counts of the SAC (Mot. Seq. 14) that are asserted against her (Counts 1-5, 11-14, 16) is granted in its entirety, and Johnson's action is dismissed as against Molly Conners and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Christopher Woodrow's motion to dismiss the counts of the SAC (Mot. Seq. 15) that are asserted against him (Counts 1-5, 11-14, 16) is granted in its entirety, and Johnson's action is dismissed as against Christopher Woodrow and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants Maria Cestone and Roseland Ventures' motion to dismiss the counts of the SAC (Mot. Seq. 17) that are asserted against them (Counts 1-5, 11-14, 16) is granted in its entirety, and Johnson's action is dismissed as against Maria Cestone and Roseland Ventures and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Count 20 (accounting) of the SAC has been withdrawn by Plaintiff.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MARCH 17 2017

EILEEN A. RAKOWER, J.S.C.