

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

PRESENT: Eileen BranstenPART 3

Justice

Index Number : 652200/2010

CAROLYN LE BEL, AS EXECUTRIX

vs

DONOVAN, AND, MARY A.

Sequence Number : 001

DISMISS

INDEX NO.

652200/2010

MOTION DATE

6/9/11

MOTION SEQ. NO.

001

MOTION CAL. NO.

s motion to/for

PAPERS NUMBERED

123

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 10-12-11

HON. EILEEN BRANSTEN

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/ JUDG.☐ SETTLE ORDER/ JUDG.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
CAROLYN LE BEL, AS EXECUTRIX OF THE
ESTATE OF MARYA LENN YEE,

Plaintiff,

Index No.: 652200/2010
Motion Date: 06/09/2011
Motion Seq. No.: 001

-against-

MARY A. DONOVAN and DONOVAN & YEE, LLP,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.:

Defendants Mary A. Donovan and Donovan & Yee, LLP (collectively, "Defendants") move pursuant to CPLR 3211(a)(7) to dismiss claims for a breach of contract, breach of fiduciary duty and unjust enrichment/money had and received/constructive trust in the complaint filed by Carolyn Le Bel, executrix of the estate of Marya Lenn Yee ("Plaintiff" or the "Estate"). Defendants also move to strike paragraph 20 of the Complaint pursuant to CPLR 3024(b). Plaintiff opposes the motion.

FACTUAL BACKGROUND

On or about July 15, 1997, Marya Lenn Yee ("Yee"), Mary A. Donovan ("Donovan") and Bela Amladi ("Amladi") formed a partnership to practice law named Donovan Amladi & Yee, LLP. Exhibit A at ¶ 6, Affidavit of Mary A. Donovan in Support of Defendants' Motion to Dismiss ("Donovan Aff.") ("Complaint"). Amladi left the partnership shortly after its formation. *Id.* Donovan and Yee continued the partnership under the name Donovan & Yee, LLP ("D&Y"). *Id.*

On November 30, 2008, Yee was injured in a small plane crash in Coalinga, California. Complaint, ¶ 7. Yee passed away on December 1, 2008. *Id.*

Plaintiff Carolyn Le Bel, as executrix of Marya Lenn Yee's estate, filed this complaint on or about December 3, 2010. Plaintiff alleges that a limited liability partnership dissolves where only one partner remains. Complaint, ¶ 9 (without citation to applicable statute or case law). Plaintiff contends that upon the death of Yee, Donovan was the only remaining partner and, thus, the D&Y partnership dissolved by operation of law. *Id.* at ¶ 11. Additionally, Plaintiff argues that section 6.8(a) of the Partnership Agreement between Donovan and Yee makes it clear that a "dissolution of law resulting from only one Partner remaining in the Partnership" takes priority over any other provision in the agreement. Section 6.8(a) states:

Priority Among Provisions. A voluntary dissolution (including any dissolution by law resulting from only one Partner remaining in the Partnership following the death, retirement, expulsion or withdrawal of the other Partner(s)) and termination of the Partnership shall override any of the provisions of this Article VI then in effect, except those as to Partners whose interests in the Partnership were terminated more than six (6) months prior to the date of dissolution.
Partnership Agreement, § 6.8(a).

Plaintiff contends that defendant Donovan has failed to recognize the dissolution of D&Y and has continued to operate the partnership. Complaint, ¶ 15. According to Plaintiff, Defendants have also failed to distribute one-half of the firm's assets as of December 1, 2008 to Yee's estate. Complaint, ¶ 17.

Plaintiff brings six causes of action: 1) breach of contract; 2) breach of fiduciary duty; 3) unjust enrichment, money had and received, and constructive trust; 4) accounting; 5) declaratory relief; and 6) injunctive relief.

The parties dispute whether the D&Y partnership dissolved upon Yee's death. The complaint references nonparty Andrea Calvaruso with regard to the issue. *Id.* at ¶ 10. Eight months prior to Yee's death, D&Y entered into an agreement on or about April 10, 2008 (effective from January 1, 2008 to December 31, 2009) with Calvaruso. *Id.* The partnership agreed to represent Calvaruso as a partner with D&Y to third parties, but did not allocate any rights or obligations to Calvaruso as an equity partner. *Id.*; *see also* Donovan Aff., Ex. B at 1-2 ("Agreement between D&Y and Calvaruso dated April 10, 2008"). On or about February 25, 2009, Defendant Donovan and nonparty Calvaruso entered an Amended and Restated Partnership Agreement (effective January 1, 2009). Donovan Aff., Ex. D ("Amended and Restated Partnership Agreement"). This Amended and Restated Partnership Agreement seeks to admit nonparty Calvaruso as "a Partner with units of participation in the Partnership." *Id.*, p. 1.

Defendants filed this motion to dismiss Plaintiff's claims for: 1) breach of contract, 2) breach of fiduciary duty and 3) unjust enrichment/money had and received/constructive trust. Defendants also seek to strike paragraph 20 of the Complaint, which alleges that Donovan discontinued Yee's medical insurance while Yee was still alive.

STANDARD OF LAW

Motion to Dismiss

Under CPLR 3211, the court takes the facts alleged in the complaint as true and accords the non-movant the benefit of every possible favorable inference. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 691 (2005). Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence. *Id.*, citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635-36 (1976). “[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *Yan Ping Xu v. New York City Dep’t of Health*, 77 A.D.3d 40, 43 (1st Dep’t 2010).

Under CPLR § 3013, “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Under CPLR 3016, a breach of trust shall be pled in detail. CPLR 3016 states that, “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” CPLR 3016; *see also Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559-61 (2009) (fraud claim dismissed under CPLR 3016); *Peacock v. Herald*

Square Loft Corp., 67 A.D.3d 442, 442-43 (1st Dep't 2009) (claim for breach of fiduciary duty dismissed under CPLR 3016).

Motion to Strike Pleading

Under CPLR 3024(b), “a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” CPLR 3024(b). In determining whether allegations are scandalous or prejudicial such that a motion to strike shall be granted, the court asks whether the allegations are relevant to the cause of action. *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dep't 2007); *see also New York City Health and Hosps. Corp. v. St. Barnabas Cmty. Health Plan*, 22 A.D. 391, 391 (1st Dep't 2005).

ANALYSIS

I. Breach of Contract

Defendants first move to dismiss Plaintiff's breach of contract claim.

Plaintiff alleges that upon Yee's death, the D&Y partnership dissolved pursuant to New York Partnership law and the Partnership Agreement in effect. Plaintiff argues that Defendant Donovan breached the Partnership Agreement by continuing to operate D&Y and by failing to properly distribute funds to Yee's estate after Yee's death. Complaint, ¶¶ 22-24.

Defendants argue that a partner cannot pursue a claim for a breach of contract claim based on a partnership agreement where no accounting to determine partnership assets and liabilities has yet occurred. Defendants' Memorandum of Law in Support of Motion to

Dismiss (“Def. Mem.”), p. 5. Thus, Defendants argue that where a plaintiff seeks an accounting in one cause of action in her complaint, she may not also seek a claim for breach of contract.

In opposition, Plaintiff argues that Defendants misstate New York law. Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss (“Pl. Mem.”), p. 7. Plaintiff contends that courts permit causes of action in equity and causes of action in law to proceed simultaneously with the only condition that the equity claim proceed prior to the other causes of action. *Id.*

To plead a breach of contract claim, a plaintiff must allege the existence of a valid contract, performance by plaintiff and the basis of defendant’s alleged breach. *Morris v. 702 East Fifth Street HDFC*, 46 A.D.3d 478, 479 (1st Dep’t 2007). Additionally, the pleading must also “set forth the terms of the agreement upon which [the breach] is predicated, either by express reference or by attaching a copy of the contract.” *Chrysler Capital Corp. v. Hilltop Egg Farms, Inc.*, 129 A.D.2d 927, 928 (3rd Dep’t 1987).

Plaintiff has sufficiently alleged a breach of contract claim. Plaintiff points to a valid contract governing the parties’ conduct in effect at the time that Plaintiff alleges Defendants breached. In 1997, Yee and Donovan entered into a Partnership Agreement. The parties do not dispute that the Partnership Agreement was valid and in effect through December 1, 2008. Plaintiff alleges that upon Yee’s death on December 1, 2008, the D&Y partnership dissolved pursuant to Section 6.8(a) of the Partnership Agreement and by operation of New

York Partnership Law, requiring that where only one partner remains in a partnership, the partnership automatically dissolves. Complaint, ¶ 9.

Plaintiff further contends that Defendants breached the Partnership Agreement. *Id.*, ¶¶ 17, 19. First, Plaintiff argues that Defendants may not “trade and profit on Yee’s good will and reputation by continuing to use Yee’s name” in the firm’s name and in marketing material. *Id.*, ¶ 19. Second, Plaintiff contends that as per the Partnership Agreement, Yee’s estate is owed “one-half of the assets of the firm (including accounts receivable and work in-progress) as of December 1, 2008, less any accrued liabilities as of such date and any direct expenses incurred in dissolving Donovan & Yee.” Complaint, ¶ 17. Viewing all facts in light most favorable to the Plaintiff, this court finds the allegations in the complaint sufficient to sustain a breach of contract claim.

This court disagrees with Defendants’ contention that an accounting claim would here automatically preclude a claim for breach of contract. Defendants state that in a situation involving a partnership, an accounting claim (equity claim) must occur prior to a breach of contract claim (claim based on law). Defendants rely upon *Wiesenthal v. Wisenthal* for the proposition that Plaintiff’s breach of contract claim should be dismissed. *Wiesenthal v. Wisenthal*, 40 A.D.3d 1078 (2nd Dep’t 2007). Defendants cite the following language from *Wiesenthal*: “...[A] partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting and a balance struck, or an express agreement to pay.” *Id.* at 1079.

In *Wiesenthal*, the plaintiff, an executrix of an estate, sued defendants for an accounting. Defendants asserted counterclaims for breach of fiduciary duty. *Id.* The lower court granted plaintiff's motion for partial summary judgment as to her accounting claim but denied her motion to strike defendants' counterclaims. The Second Department upheld the lower court's decision to permit plaintiff's remaining claims and defendants' counterclaims to proceed in the same action in the "interest of judicial economy." *Id.* at 1080. Despite acknowledging that defendants' counterclaims for breach of fiduciary duty were premature until an accounting was complete, the Second Department permitted the action to proceed. Thus, *Wiesenthal* stands for the proposition that a court may maintain both an accounting claim and a breach of fiduciary duty claim in the same action involving a partnership in the interest of justice and judicial economy.

Further, *Wiesenthal* was at a different juncture procedurally. In *Wiesenthal*, the lower court already granted partial summary judgment with respect to plaintiff's claim for accounting. Here, no such substantive motion has been decided. In order to withstand a motion to dismiss, a party must merely show that a cause of action is stated within the four corners of the complaint. Plaintiff has done so here.

Plaintiff's claims for breach of contract may stand. Defendants' motion to dismiss Plaintiff's breach of contract claim is denied.

II. Breach of Fiduciary Duty

Defendants next move to dismiss Plaintiff's claim for breach of fiduciary duty.

Plaintiff alleges that Defendants owed a fiduciary duty both to Yee and her estate and that Defendants' conduct breached that duty. Complaint, ¶ 26-29. In their motion to dismiss this cause of action, Defendants first argue that Plaintiff has improperly incorporated by reference allegations from another cause of action into this cause of action. Defendants next contend that Plaintiff has not pled a breach of fiduciary duty with the particularity required by CPLR 3016(b). Def. Mem., p. 7. Defendants state that Plaintiff merely seeks an accounting in this action and has failed to demonstrate any act that amounts to a breach of trust. *Id.* at 8.

In response, Plaintiff contends that her claim for a breach of fiduciary duty has been pled with particularity. First, Plaintiff states that the Complaint contains separately stated and numbered paragraphs. Plaintiff argues that if Defendants did not understand the separate causes of actions that the appropriate remedy was to file a motion for a more definite statement under CPLR 3024(a). Second, Plaintiff contends that the Complaint contains three and a half pages of detailed factual allegations which describe Donovan's alleged acts. Pl. Mem., p. 10. Plaintiff argues that the Complaint clearly states that Donovan owed Yee a fiduciary duty based on the Partnership Agreement and that Donovan breached that duty.

To plead a breach of fiduciary duty, a plaintiff must allege: 1) defendant owed a fiduciary duty; 2) the defendant committed misconduct; and 3) the plaintiff suffered damages

caused by that misconduct. *Burry, et al. v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep’t 2011). “A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 561 (2009) quoting *EBC I v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). This relationship is grounded on a “higher trust” than normally present in the marketplace between those involved in arm’s length business transactions. *HF Mgmt. Servs., LLC v. Pistone*, 34 A.D.3d 82, 85 (1st Dep’t 2006).

CPLR 3016(b) requires that “where a cause of action is based upon . . . [a] breach of trust . . . the circumstances constituting the wrong shall be stated in detail.” However, this rule does not require a plaintiff to have perfect knowledge of the facts underlying its claim at the initial stage of a litigation, when little if any disclosure may have occurred. *Foley v. D’Agostino*, 21 A.D.2d 60, 64 (1st Dep’t 1964). The directive of CPLR 3016(b) constitutes “no more than a directive that the ‘transactions and occurrences’ constituting the ‘wrong’ shall be pleaded in sufficient ‘detail’ to give adequate notice thereof.” *Id.*

Here, Plaintiff has sufficiently alleged a fiduciary relationship, breach of that relationship and damages which arose from that misconduct. Yee and Donovan were partners in a partnership which practiced law. *See* Partnership Agreement. Under New York law, partners owe each other a fiduciary duty. *Appell v. LAG Corp.*, 41 A.D.3d 277 (1st Dep’t 2007). Defendants owed a fiduciary duty to Yee’s estate as Yee’s successor in interest.

Josephberg v. Cavallero, 262 A.D.1, 8-9 (1st Dep’t 1941) (citing *Bauchle v. Smylie*, 104 A.D. 513, 515 (1905) (which states that “[t]he relation which a surviving partner holds to the representative of a deceased partner...is a fiduciary relation, involving trust and confidence of the highest character...”). Plaintiff alleges that Defendant Donovan continues to operate the partnership in violation of the Partnership Agreement and has failed to distribute Yee’s interest to Yee’s estate in accordance with the Partnership Agreement. Thus, Plaintiff has sufficiently pled a claim for breach of fiduciary. For this reason, Defendants’ motion to dismiss Plaintiff’s breach of fiduciary duty claim is denied.

III. Unjust Enrichment, Money Had and Received, and Constructive Trust

Defendants also move to dismiss count three of Plaintiff’s Complaint, which is a claim for “unjust enrichment, money had and received and constructive trust.” Defendants reiterate their position that it is improper that this cause of action incorporates by reference allegations from another cause of action. Defendants also argue that these three causes of action are improperly pled as one cause of action in violation of CPLR 3014 and 3024. Def. Mem., p. 9. Defendants contend that this claim is based in quasi-contract and cannot be pled in this matter before a full accounting occurs. *Id.*, p. 10. Additionally, Defendants argue that this claim in quasi-contact must be barred because the Partnership Agreement as a valid contract governs the rights of the parties. *Id.*

In opposition, Plaintiff argues that her third cause of action for quasi-contract is pled in the alternative. Pl. Mem., p. 13. Plaintiff contends that if the court finds that the Partnership Agreement is invalid, the Estate may still recover under the theory of unjust enrichment and money had and received. Plaintiff argues that the paragraphs asserted reflect restitution for unjust enrichment and properly asserts each element of such a claim. *Id.* According to Plaintiff, the claim seeks restitution of all amounts owed and the imposition of a constructive trust upon all such amounts. Plaintiff argues that Defendant Donovan converted the Estate's interest in Yee's share of the partnership and has failed to distribute Yee's share.

To properly plead a cause of action for unjust enrichment, a plaintiff must assert that: 1) plaintiff bestowed a benefit and that 2) the defendant will obtain such a benefit without adequately compensating plaintiff. *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 119 (1st Dep't 1998) (citing *Tarrytown House Condominiums v. Hainje*, 161 A.D.2d 310, 313 (1st Dep't 1990)). A claim for unjust enrichment is "based on equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another." *Banco Popular N. Am. v. Lieberman*, 75 A.D.3d 460, 461 (1st Dep't 2010) (citing *Waldman v. Englishtown Sportswear*, 92 A.D.2d 833, 836 (1983)). An unjust enrichment cause of action may be dismissed where the allegations arise out of subject matter covered by express contracts and the validity of the contracts are not in dispute. *Dabrowski v. ABAX, Inc.*, 64 A.D.3d 426, 427 (1st Dep't 2009) (citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009)).

Similarly, a claim for money had and received is “a form of remedy resting on the theory of implied contract.” *Gottfried v. Gottfried*, 269 A.D. 413, 418 (1st Dep’t 1945). The claim reflects an obligation created by law, in the absence of an agreement, whereby money is in the possession of one person under circumstances when in equity and good conscience he should not retain it. *Id.* To plead a claim for money had and received, plaintiff must allege that 1) defendant received money rightfully belonging to another; 2) the defendant benefitted from the receipt of the money; and 3) equity and good conscience dictate that the money should not be kept by defendant. *Id.*

Finally, to plead a constructive trust, a party must allege 1) a confidential or fiduciary relationship; 2) a promise, express or implied; 3) a transfer in reliance thereon and 4) unjust enrichment. *Panetta v. Kelly*, 17 A.D.3d 163, 165-66 (1st Dep’t 2005).

In this matter, Plaintiff has not sufficiently alleged the elements for unjust enrichment, money had and received and constructive trust. Plaintiff’s third cause of action merely states the elements of these respective claims and does not allege facts to provide a basis for these claims. Further, an unjust enrichment cause of action may be dismissed where the allegations arise out of subject matter covered by express contracts and the validity of the contracts are not in dispute. *Dabrowski v. ABAX, Inc.*, 64 A.D.3d. 426, 427 (1st Dep’t 2009) (citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009)). Here, the parties entered into a Partnership Agreement which was in effect up until the time of Yee’s death in 2008. The parties do not dispute the validity and the applicability of the Partnership Agreement. However, the parties do dispute whether the partnership dissolved as a result of

Yee's death. Even if the partnership did not dissolve upon Yee's death, the terms of the Partnership Agreement would still affect the amounts due and owing to the deceased partner's estate. *See* Partnership Agreement, Article VI, Section 6.2.

Viewing all facts alleged in the complaint as true and according the benefit of every possible favorable inference to the non-movant, this court finds that Plaintiff has not sufficiently pled these causes of action. For this reason, this cause of action is dismissed without prejudice.

Motion to Strike Paragraph 20 of the Complaint

Defendants move to strike paragraph 20 of Plaintiff's Complaint pursuant to CPLR 3024(b). Under CPLR 3024(b), a paragraph which is prejudicial may be struck. Paragraph 20 alleges that, "[f]ollowing Yee's death, Donovan improperly and prematurely cancelled the medical insurance covering Yee, including coverage for medical treatment and services rendered while Yee was still alive, resulting in the Estate unnecessarily being charged for such medical expenses." Complaint, ¶ 20.

Defendants argue that this paragraph is prejudicial. Defendants also contend that this paragraph is unnecessary because the issue of insurance would only be relevant if Defendants had an obligation to maintain insurance. Def. Mem., p. 13. In her supporting affidavit, Defendant Donovan states that she believed Yee to have passed away on November 30, 2008 based on a report from the National Transportation Safety Board. Donovan Aff., ¶¶ 5-6. Donovan states that, thus, she subsequently cancelled Yee's health insurance effective

November 30, 2008. *Id.* She further indicates that upon being notified of the insurance company's denial of coverage for services rendered on December 1, 2008, Defendants arranged to change the date of cancellation. *Id.* at ¶ 7.

In opposition, Plaintiff contends that paragraph 20 of the Complaint bears on the issue of whether Defendant Donovan benefited at the expense of the Estate. Pl. Mem., p. 14. Plaintiff contends that the allegation bears on Donovan's conduct as it relates to the Partnership Agreement and thus, is relevant to the action.

Under CPLR 3024(b), a motion to strike a paragraph may be granted where the paragraph contains statements which are scandalous or prejudicial and unnecessarily inserted in a pleading. In determining whether allegations are scandalous or prejudicial such that a motion to strike shall be granted, the court asks whether the allegations are relevant to the cause of action. *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dep't 2007).

This court does not find the allegation in paragraph 20 of the Complaint scandalous or prejudicial. Defendants conduct and in particular, Donovan's conduct, relates to the various causes of action in the Complaint. Thus, the allegation is not unnecessarily included in the pleading. Further, this court does not find that any prejudice would arise from its denial of Defendants' requested relief. For this reason, Defendants' motion to strike is denied.

Accordingly, it is

ORDERED that Defendants' motion to dismiss plaintiff's cause of action for unjust enrichment/money had and received/constructive trust is granted without prejudice; and it is further

ORDERED that Defendants' motion to dismiss is otherwise denied; and it is further

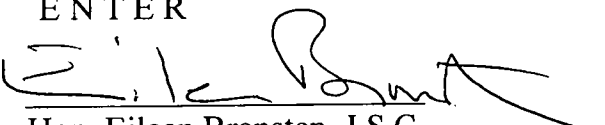
ORDERED that Defendants' motion to strike paragraph 20 of the Complaint is denied; and it is further

ORDERED that Defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on November 15, 2011, at 9:30 AM.

Dated: New York, New York
October 12, 2011.

ENTER



Hon. Eileen Bransten, J.S.C.