At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of September, 2017[1]

HONORABLE FRANCOIS A. RIVERA

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OLEG VERKHOGLYAD and ALLIANCE REFRIGERATION INC.,

Plaintiffs,

DECISION & ORDER
Index No. 506190/17

- against -

SERGEY BENIMOVICH, BENIM MECHANICAL LLC, AND NORTH AMERICAN AIR INC.,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the joint notice of motion of Sergey Benimovich, Benim Mechanical LLC and North American Air Inc. (hereinafter the defendants or the movants) filed with the Kings County Clerk's office (KCCO) on June 30, 2017 under motion sequence number one, for an order dismissing the complaint pursuant to CPLR 3211 (a) (7) and (8).

- Notice of motion
- Affirmation in support
- Exhibits A
- Affidavit in opposition
- Exhibits A-D
- Reply affirmation

BACKGROUND

On March 28, 2017, Oleg Verkhoglyad (hereinafter Verkhoglyad) and Alliance

[1]This is also the date that the decision and order was mailed to the parties.

Refrigeration Inc. (hereinafter Alliance) commenced the instant action for, among other things, damages for defendants breach of fiduciary duty, by filing a summons and verified complaint (hereinafter the commencement papers) with the KCCO.

The verified complaint alleges forty eight allegations of fact and six denominated causes of action. The first cause of action is asserted against Sergey Benimovich (hereinafter Benimovich) for breach of fiduciary duty. The second is asserted against North American Air Inc. (hereinafter North American) for aiding and abetting said breach. The third is asserted against Benimovich for misappropriation. The fourth is asserted against North American and Benimovich for intentional interference with prospective business. The fifth is for judicial dissolution of Benim Mechanical LLC (hereinafter Benim). The sixth is for unjust enrichment by North American and Benimovich.

The verified complaint alleges in pertinent part the following facts. Sergey Benimovich is the founder of Benim, a New Jersey limited liability company that is authorized to do business in the State of New York and is in the business of providing installation and maintenance services of HVAC systems in the New York City area. North American is a domestic corporation. The principal place of business of Benim and North American is 178 Bionia Avenue Unit 201, Staten Island, New York.

On February 1, 2014, Verkhoglyad and Benimovich executed an operating agreement (hereinafter the operating agreement) which designated each of them as a

managing member and a 50 % interest owner of Benim. The operating agreement was annexed to and made part of the verified complaint.

Sometime in 2014, Verkhoglyad discovered that Benimovich, was paying his personal expenses using Benim's bank accounts. He also discovered that Benimovich had not reported Verkhoglyad as a part owner when he filed Benim's income taxes for 2014.

On September 13, 2015, Verkhoglyad and Benimovich came to an agreement (hereinafter the September agreement) to dissolve Benim, divide its assets and pay off its liabilities. The agreement further provided that each would continue to service Benim's customers through their respective companies, Verkhoglyad through his company Alliance and Benimovich through his company North American.

Contrary to the terms of the September 2015 agreement, Benimovich continued to use Benim's bank accounts to pay his personal expenses and used North American to facilitate the misappropriation of Benim's business opportunities, equipment and cash assets.

LAW AND APPLICATION

The defendants have moved to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (8) and have submitted a copy of the commencement papers and an affirmation of Douglas Mace, their counsel, in support of the motion.

Dismissal Based on Lack of Personal Jurisdiction

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) and (8) , a court should first determine whether it has personal jurisdiction over the defendants before addressing any other basis for dismissal. The defendants claim lack of personal jurisdiction over the defendants based on the forum selection clause in the parties' operating agreement and not based on improper or lack of service of the commencement papers. In particular, the defendants contend that pursuant to section 10.4 of the operating agreement the parties were bound by a forum selection clause to seek redress in the courts of the State of New Jersey or any Federal Court having jurisdiction.

On a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8), the plaintiff has the burden of establishing the fact of jurisdiction (*Krajewski v Osterlund, Inc.*, 111 AD2d 905 [2nd Dept 1985]). By stipulation dated April 24, 2017, the plaintiffs extended the defendants time to serve an answer to the complaint and the defendants agreed to waive any and all jurisdictional defenses. A defense based on lack of personal jurisdiction may be waived (*Morrison v Budget Rent A Car Systems, Inc.*, 230 AD2d 253 [2nd Dept 1997] *citing, Interlink Metals & Chems. v Kazdan*, 222 AD2d 55 [1st Dept 1996] or negotiated away by stipulation (*Morrison v Budget Rent A Car Systems, Inc.*, 230 AD2d 253 [2nd Dept 1997] *citing, Milbank v Lauersen*, 188 AD2d 644 [2nd Dept 1992]).

The plaintiffs have met their burden by establishing that the defendants waived all

jurisdictional defenses. In reply to plaintiffs' opposition papers, the defendants have admitted to executing the April 24, 2017 stipulation. However, their counsel, Douglas Mace, contends that he was not provided with a copy of the operating agreement containing the forum selection clause when the stipulation was signed and was therefore unaware of the jurisdictional defense contained therein. He contends that the plaintiffs were aware of this fact and unfairly took advantage of him.

Stipulations of settlement between parties are binding contracts enforceable by the court and, as such, they are favored and "not lightly cast aside" (*Rogers v Malik,* 126 AD3d 874, 875 [2nd Dept 2015] *citing, Hallock v New York*, 64 NY2d 224, 230 [1984]). Only where there is a legally sufficient cause to invalidate a contractual obligation, such as, where it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable or constitute fraud, collusion, mistake, or accident, will a party be relieved from the consequences of the bargain struck with the stipulation (*Rogers v Malik,* 126 AD3d 874, 875 [2nd Dept 2015] *citing, Matter of Matinzi v Joy*, 60 NY2d 835, 836 [1983]).

The defendants have not moved to set aside the stipulation and have not shown that the agreement was unconscionable, unfair or a product of plaintiffs' overreaching. Furthermore, Mace's contention that he received the summons and complaint and not a copy of the operating agreement before executing the stipulation is contradicted by the fact that the operating agreement is a part of the complaint. Accordingly, defendants

motion to dismiss the complaint pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction is denied.

Dismissal Pursuant to CPLR 3211 (a) (7) for Failure to Mediate

The defendants seek dismissal of the complaint pursuant to CPLR 3211 (a) (7) based on plaintiffs' alleged failure to mediate their dispute before filing a claim in court. The defendants contend that pursuant to section 10.4 of the operating agreement the plaintiffs were compelled to first pursue mediation of any dispute arising from the operating agreement before seeking a remedy in a court of law.

The defendants are seeking dismissal of the complaint based on the claim that the plaintiffs did not pursue mediation before bringing the instant action. In opposition to the motion, plaintiffs have submitted, among other things, an affidavit of Verkhoglyad; an affirmation of their counsel, Russ Nazrisho; and a copy of an agreement entered into by Verkhoglyad and Benimovich. Nazrisho has averred that Arturo S. Suarez-Silverio was defendants' prior counsel. He has further averred that the parties had a formal mediation session at his office which culminated in an agreement dated May 12, 2016 (hereinafter the May 2016 agreement). The May 2016 agreement, annexed as exhibit B to plaintiffs' opposition papers, was signed by Nazrisho on behalf of the plaintiffs and by Arturo S. Suarez-Silverio on behalf of Benimovich.

The defendants have submitted an affirmation of Douglas Mace, their current counsel, in reply. Mace has averred that the plaintiffs' claim that they mediated the

dispute prior to commencing the action is unequivocally false. Mace has requested a framed issue hearing on whether mediation actually occurred as the plaintiffs have alleged and whether the plaintiffs and their counsel have perjured themselves.[2]

The defendants, however, neither confirmed nor disputed that Arturo S. Suarez-Silverio was their prior counsel. Nor did they confirm or dispute the authenticity of the May 2016 agreement. Furthermore, they did not support their claim of perjury with an affidavit from Benimovich. Accordingly, defendants motion to dismiss the complaint for failure to pursue mediation before commencing a Court action is unsupported and denied. Furthermore, the defendants' request for the affirmative relief of a framed issue hearing is not properly before the court because the defendants did not make a motion or cross motion for said relief (*see Katz v Katz*, --- NYS3d ----, 2017 WL 3723222, 2017 N.Y. Slip Op. 06357 [2nd Dept 2017]).

Dismissal Pursuant to CPLR 3211 (a) (7) Based on the Pleadings

The defendants made the following arguments in support of their application to dismiss the second, third, fourth, fifth and six cause of action. They claim that the second

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[2] The reply affirmation of Mace states that the plaintiffs offered no evidence that they mediated the dispute prior to commencing the instant action although the plaintiffs annexed the May 2016 agreement as evidence of such mediation. The statement is therefore incorrect and potentially misleading. With no evidentiary basis, the defendants have accused the plaintiffs and their counsel of lying to the court under oath. The Court wishes to express it strong disapproval of the defendants and their counsel's baseless *ad hominem* attacks against the plaintiffs and their counsel, and note that any continuation of this conduct may subject the defendants and their counsel to the imposition of sanctions pursuant to 22 NYCRR 130–1.1. (*see Mondrow v Days Inns Worldwide, Inc.*, 53 Misc3d 85 [N.Y. App Term 2016]). It may also subject defendants' counsel to discipline (*see In re Pek,* 142 AD3d 179 [1st Dept 2016]).

cause of action for aiding and abetting does not plead a viable claim. They contend that the third cause of action for misappropriation and the sixth cause of action for unjust enrichment are duplicative. They also contend that the third and forth cause of action should be dismissed because it is allegedly based on the September agreement that never existed. They contend that the fifth cause of action for dissolution of Benim should be dismissed because it is also based on an alleged agreement that never existed.

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*E & D Grp., LLC v. Vialet*, 134 AD3d 981, 982 [2nd Dept 2015]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A court is ... permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*E & D Grp., LLC,* 134 AD3d 981 *citing Sokol v Leader*, 74 AD3d 1180 at 1181 [2nd Dept 2010]; *see* CPLR 3211 [c]; *Mawere v Landau*, 130 AD3d 986, 988 [2nd Dept 2015]). "However, on a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party ... and a plaintiff will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *see Nonnon v City of New*

York, 9 NY3d 825, 827 [2007]).

"When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*E & D Grp., LLC*, 134 AD3d 981 *citing Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Mawere*, 130 AD3d at 988; *Nasca v Sgro*, 130 AD3d 588, 589 [2nd Dept 2015]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Travelsavers Enterprises, Inc. v Analog Analytics, Inc.*, 149 AD3d 1003 [2nd Dept 2017]). Rather, a court must determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*).

Plaintiffs first cause of action is for damages for breach of fiduciary duty. The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Stortini v Pollis*, 138 AD3d 977, 978-979 [2nd Dept 2016]). A "fiduciary relationship," whether formal or informal, is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another and might be found to exist, in appropriate circumstances, between close friends, or even

where confidence is based upon prior business dealings (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6 [2nd Dept 2008]). A conventional business relationship, without more, is insufficient to create a fiduciary relationship; a plaintiff must make a showing of special circumstances that could have transformed the parties' business relationship to a fiduciary one, such as control by one party of the other for the good of the other (*Id.*). Members of limited liability company (LLC) may stand in fiduciary relationship to each other and to the LLC (*Jones v Voskresenskaya,* 125 AD3d 532, 533 [2nd Dept 2015]).

The complaint alleges that Verkhoglyad and Benimovich are managing members and equal owners of Benim pursuant to an operating agreement. Each one signed the operating agreement in their individual capacities. Applying this standard here, the plaintiffs have sufficiently alleged "special circumstances" that, if proven, would transform the parties' business relationship into a fiduciary one (*see Wallkill Medical Development, LLC v Catskill Orange Orthopaedics, P.C.,* 131 AD3d 601 [2nd Dept 2015]). The plaintiffs have sufficiently pleads a cause of action for breach of fiduciary duty by Benimovich in his fiduciary capacity as a managing member of Benim.

Plaintiffs second cause of action is against North American for aiding and abetting a breach of fiduciary duty. To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damages resulting from the breach (*Baron v Galasso*, 83

AD3d 626, 628-629 [2nd Dept 2011]). A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator (*Id.*). Inasmuch as Benimovich is the alleged primary violator of the fiduciary duty to Verkhoglyad and the LLC, and it is alleged that he did so using his company North American, North American cannot be held separately liable for aiding and abetting the breach (*Baron v Galasso*, 83 AD3d 626, 628-629 [2nd Dept 2011]). North Amercian is not a knowing participant but rather merely a conduit or tool of Benimovich to perpetrate the breach. The complaint does not plead a cause of action against North American for aiding and abetting Benimovich's alleged breach of fiduciary duty.

Plaintiffs' third cause of action for misappropriation by Benimovich arises from the same facts as those underlying the first cause of action for breach of fiduciary duty and does not allege distinct damages (*Balan v Rooney,* 152 AD3d 733, 734 [2nd Dept 2014]. It is, therefore, duplicative of the first cause of action and is dismissed.

Plaintiffs' fourth cause of action is for intentional interference with prospective business relations. To establish a claim based on tortious interference with existing business relations, a plaintiff must show the elements of tortious interference with a contract, which are: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff (*Hersh v Cohen,* 131 AD3d 1117, 1119 [2nd Dept 2015]); *M.J. & K. Co., Inc. v Matthew*

Bender & Co., Inc., 220 AD2d 488, 490 [2nd Dept 1995]).

Giving the plaintiffs the benefit of any reasonable inference, the allegations of fact in the complaint, as supplemented by the affidavit submitted by the plaintiffs in opposition to the motion, do not allege that North American induced a third party to breach its contract with the plaintiffs (*Hersh v Cohen,* 131 AD3d 1117, 1119 [2nd Dept 2015]). Accordingly, the complaint does not plead a cause of action against North for tortious interference with existing business relations.

Plaintiffs' fifth cause of action is for judicial dissolution of Benim based on an agreement to do so by managing members, Verkhoglyad and Benimovich. Defendants seek dismissal of the fifth cause of action because they aver that there was no agreement to dissolve Benim. Essentially, they claim that the existence of an agreement is false. The defendants, however, have not conclusively established that any fact alleged in the complaint is false.

The sixth is for unjust enrichment by North American and Benimovich. The elements of unjust enrichment are that defendants were enriched, at plaintiffs' expense, and that it is against equity and good conscience to permit defendants to retain what is sought to be recovered (*County of Nassau v Expedia, Inc.*, 120 AD3d 1178, 1180 [2nd Dept 2014]). The essence of unjust enrichment is that one party has received money or a benefit at the expense of another (*Id.*) Affording the complaint a liberal construction and accepting the allegations in the complaint as true, the plaintiffs have stated a cause of

action to recover damages for unjust enrichment. However, the claim arises from the same facts as those underlying the first cause of action for breach of fiduciary duty and does not allege distinct damages (*Balan v Rooney*, 152 AD3d 733, 734 [2nd Dept 2014]. It is, therefore, duplicative of the first cause of action and is dismissed.

CONCLUSION

Sergey Benimovich, Benim Mechanical LLC and North American Air Inc.'s joint motion for an order dismissing the complaint pursuant to CPLR 3211 (a) (8) is denied.

Sergey Benimovich, Benim Mechanical LLC and North American Air Inc.'s joint motion for an order dismissing the complaint pursuant to CPLR 3211 (a) (7) for failure to mediate the dispute before commencing the instant action is denied.

Sergey Benimovich, Benim Mechanical LLC and North American Air Inc.'s joint motion for an order dismissing the complaint pursuant to CPLR 3211 (a) (7) based on pleading deficiencies is denied as to the first and fifth cause of action and is granted as to the second, third, fourth and sixth cause of action.

The defendants are directed to answer the complaint within thirty days of its receipt of notice of entry of the instant decision and order.

The foregoing constitutes the decision and order of this Court.

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Enter:

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.