Hill v Full 360 Inc.
2019 NY Slip Op 30718(U)
March 19, 2019
Supreme Court, New York County
Docket Number: 654153/2015
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LARRY HILL,

Plaintiff,

-against-

FULL 360 INC and ROHIT AMARNATH,

Defendants.

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DECISION AND ORDER
Index No.: 654153/2015

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

This is an action seeking damages for, *inter alia*, breach of contract. Defendants move for summary judgment dismissing the complaint and on their counterclaims to recover damages for conversion (Motion Sequence Number 002). For the reasons discussed below, the branch of the motion seeking dismissal of the complaint shall be granted and the branch of the motion seeking a judgment on the counterclaims shall be granted in part and otherwise denied.

I. BACKGROUND

Defendant Rohit Amarnath ("Amarnath") is the chief executive officer and sole shareholder of defendant Full 360 Inc. (Full 360), a software development and consulting company formed in 2007 pursuant to Business Corporation Law § 402 (Verified Complaint, at ¶ 11, NYSCEF Doc. 1; Verified Answer and Amended Counterclaim, at ¶ 7, NYSCEF Doc. No. 14).

Plaintiff Larry Hill ("Hill") provided sales services and acted as the Director of Business Development for Full 360 from November 2009 until he was terminated in April 2013 (Complaint, at ¶¶ 10, 24, NYSCEF Doc. 1; Answer and Amended Counterclaim, at ¶ 13, NYSCEF Doc. No. 14). In December 2015, Hill commenced this action against Full 360 and Amarnath seeking damages for breach of contract, promissory estoppel, and unjust enrichment, asserting that defendants promised, but never gave him, an equity interest in Full 360 (Verified Complaint, NYSCEF Doc. 1).

In the first cause of action for breach of contract, Hill alleges that on or about November 1, 2009, he and defendants entered into a contract whereby defendants agreed to pay him a salary of $120,000 per year, plus commissions in the amount of 10% of gross revenue from sales generated by Hill, and a 5% equity share in the corporation (*id.* at ¶ 13). From November 1, 2009

through June 2010, although Hill "performed the agreed upon sales services for the Company and fully complied with the terms of the contract," defendants "failed to pay him the agreed upon 10% commission and 5% equity share" (*id.* at ¶ 18).

Further, as of June 12, 2010, Hill and defendants "had a contract whereby [Hill] would continue to provide sales services to the Company for compensation consisting of base salary of $120,000 per year, plus 30% equity ownership of Company profits" (*id.* at ¶ 16). In May 2012, Hill's base salary was increased to $168,000 per year (*id.* at ¶ 17). From June 12, 2010 through April 2013, although Hill "performed the agreed upon sales services for the Company and fully complied with the terms of the contract," defendants failed to provide [him] with 30% equity and 30% profits for which [he] contracted" (*id.* at ¶ 19). Defendants terminated Hill in April 2013.

In the second cause of action based on promissory estoppel, Hill alleges that in reliance on defendants' promise to give him equity and a percentage of profits, he "continued to work and perform services for the Defendants for compensation in an amount substantially less than his market value as a sales person with his experience" (*id.* at ¶ 29). Furthermore, in reliance on those promises, Hill "continued to forgo reasonable and customary paid time off" (*id.* at ¶ 30).

In the third cause of action alleging unjust enrichment, Hill asserts that during the time he worked for defendants "at a reduced compensation, the Company expanded and became more profitable" due in large part to his efforts (*id.* at ¶¶ 33-34). Defendants derived a benefit from the work Hill performed "in that [Hill] received compensation from the Defendants that was far less than the market value and far less than the compensation agreed upon" (*id.* at ¶ 36). Therefore, "[e]quity and good conscience demands that the Defendants should be ordered to make restitution to [Hill] for the full value of his services" (*id.* at ¶ 37).

In their answer, defendants deny the substantive claims in the complaint, including the existence of an agreement to give Hill an equity interest in Full 360 or a share of the corporation's profits (Answer and Amended Counterclaim NYSCEF Doc. No. 14). Defendants also raise various affirmative defenses, including statute of frauds, and assert counterclaims alleging that Hill converted certain property and funds belonging to Full 360 (*id.* at 2, 4-6). Defendants now move for summary judgment dismissing the complaint and on their counterclaims.

The motion shall be granted to the extent of dismissing the complaint, granting summary judgment on the first counterclaim for conversion of property and denying summary judgment on the second counterclaim for conversion of funds.

II. ARGUMENTS

A. Defendants' Arguments in Support of the Motion

Defendants contend they are entitled to summary judgment dismissing the breach of contract cause of action because the evidence relied upon by Hill to support his claims establishes that defendants never entered into a legally enforceable contract with Hill. Further, the purported agreement is barred by the statute of frauds - specifically former UCC § 8-319 and General Obligations Law § 5-701 (a)(1). In support of their contentions, defendants submit an excerpt from Hill's deposition testimony, during which Hill indicates that his suit is based on an agreement set forth in a 2010 e-mail purportedly granting him, a minimum, a 30% stake in Full 360 (Deposition Tr. of Larry Hill, at 23, NYSCEF Doc. No. 58). Defendants assert that the 2010 e-mails relied upon by Hill to establish the existence of an agreement merely indicate that the parties discussed the *possibility* of Hill receiving an equity interest in Full 360 and, in fact, evince that they never agreed on the terms of him acquiring an interest in the company (2010 E-mails, NYSCEF Doc. No. 58). Emails dated May 9, 2010 through June 13, 2010, reflect negotiations between Hill and Amarnath of the terms of a possible agreement that would result in an equity interest for Hill between 25 and 40 percent (*see id.*). On June 12, 2010, Amarnath suggested an allocation of equity at 60% Amarnath, 30% Hill and 10% a "Class B" pool owned by the company, managed by Amarnath and Hill, the income of which would be used as a profit-sharing pool (*see id.*). On June 13, 2010, Hill responded that he needed "to understand the mechanics of how the Class A/B structure would work a little better" and proposed that they "find some time soon to get together and discuss all this and work out the details of this deal" (*id.*). On this motion, Hill submits an affidavit stating that in a telephone conversation he accepted the offer. Plaintiff has not identified any documentary evidence confirming Hill's statement in the affidavit.

Defendants contend that the e-mails evince that, contrary to Hill's position, there was never a meeting of the minds as to the terms of an agreement. The parties were merely negotiating Hill's potential acquisition of Full 360 stock. Defendants assert that after this exchange, the parties were unable to reach an agreement. In this regard, defendants point out that during his deposition, Hill

testified that he tried to enlist the assistance of a mediator in August 2012, more than two years after he claims an agreement was formed, in order to facilitate the negotiation of his acquisition of Full 360 stock (Deposition Tr. of Larry Hill at 156-157, NYSCEF Doc. No. 58). Specifically, defendants highlight that Hill testified his reason for seeking mediation in 2012 was "our complete inability to come to an agreement for two-and-a-half years" (*id.* at 156). On August 31, 2012, Hill sent an e-mail to the prospective mediator stating that Amarnath

> "made a formal offer of partnership to me, but we still haven't drawn up the papers. Frankly, ***we're stuck on my request for a 50-50 split and his offer of 70-30***.
> *We need to move forward on a contract because I have no formal relationship at this point other than employee.*

(*id.* [emphasis added]). As further evidence of no agreement, defendants point out that Hill sent an e-mail to Amarnath on August 31, 2012, wherein he told Amarnath that he believed the mediator "could help us work through the whole Partnership discussion and *come to a mutually satisfactory agreement*" (NYSCEF Doc. No. 58). Hill testified that Amarnath never followed through with the mediation. Hill was asked: "So if you did not mediate the issues and dispute in August of 2012, were they still lingering?" (*id.* at 157). Hill responded: "Well, of course" (*id.*). He was then asked: "Did you resolve them?" (*id.*). Hill responded: "I think that's what we are trying to do now" (*id.*). Defendants contend these e-mails and Hill's deposition testimony establish that there was never a meeting of the minds.

Defendants also submit Amarnath's affidavit, wherein Amarnath states that in an e-mail on April 30, 2012, and in person on May 3, 2012, that he told Hill he decided that he was not going to change the equity structure of the company (Affidavit of Rohit Amarnath, at ¶ 4j, NYSCEF Doc. No. 59; *see also* E-mails Exh K to Linares Affirmation, NYSCEF Doc. No. 58). Hill nevertheless continued to work at the company for another year. According to Amarnath, Hill failed "to establish and maintain a profitable pipeline of potential customers and [pursued] disastrous deals" which "nearly bankrupted [Full 360] and required it to eliminate [Hill's] position of Director of Business Development" (*id.* at ¶ 4m, NYSCEF Doc. No. 59). Hill was the highest paid employee and by April 2013, Full 360 "could not keep and pay for the position of Director of Business Development" (*id.*). Hill was offered an alternate position, but he declined the offer.

Defendants also contend that the cause of action for breach of contract must be dismissed on the ground that an agreement for the purchase or sale of stocks is subject to the statute of frauds and the e-mails relied upon by Hill do not satisfy the statute of frauds. In addition, defendants argue that the absence of a writing violates the statute of frauds because the purported agreement could not be performed within one year.

As to promissory estoppel, defendants argue that the claim fails because none of the e-mail exchanges on which Hill relies contain any semblance of an unambiguous promise. The e-mails merely evince that the parties were negotiating Hill's potential acquisition of Full 360 stock. Defendants claim they never made an unambiguous promise to Hill that he would receive a certain amount of stock.

Defendants add that promissory estoppel requires an injury caused by the reliance on a promise. Throughout the complaint, Hill alleges that he was substantially under-compensated for his work at Full 360. Defendants assert, however, that this claim is baseless and is contradicted by his earnings prior to joining the company. Defendants submit Hill's 2008 W-2 form and 2009 W-2 form, as well as a statement indicating he received unemployment compensation in the year 2009 (NYSCEF Doc. No. 58). The 2008 W-2 form indicates Hill earned a gross pay of only $86,871.64 that year. The 2009 W-2 form, indicates that he earned a gross pay of $51,389.16 prior to joining Full 360 that year.

Defendants further point out that Hill does not suggest that he had other employment offers and turned them down in reliance on a promise that he would receive shares in Full 360 or that he would have left his employment at Full 360 had he known that he would not receive any shares in the company. Indeed, he remained with the company after he was told that Full 360 had no intention of giving him shares.

Regarding the cause of action for unjust enrichment, defendants contend that this claim fails because Full 360 was not unjustly enriched by Hill's work for the company. Rather, Hill was largely responsible for significant write-offs and solely responsible for the anemic sales pipeline that nearly bankrupted the company (Affidavit of Rohit Amarnath, at ¶ 4m, NYSCEF Doc. No. 59). Further, Hill was well compensated for his work and therefore cannot claim any alleged enrichment occurred at his expense. This is not a case where an individual accepts a minimal salary or no salary at all for the sake of helping to grow a company in exchange for equity.

Defendants also contend that the complaint must be dismissed against Amarnath individually. They point out that the complaint fails to set forth a claim seeking to pierce Full 360's corporate veil so as to hold Amarnath individually liable.

Finally, defendants maintain that they are entitled to summary judgment on their counterclaims for conversion. First, they allege that Full 360 provided Hill with the following items for his use during his employment: a laptop computer, two phones, an iPad tablet, two headsets, and various items of business software installed on these devises (NYSCEF Doc. No. 14 at 4). Hill refused to return these items, valued at $6,749.10. (Deposition Tr. of Larry Hill, at 190, NYSCEF Doc. No. 58; *see also* E-mail, NYSCEF Doc. No. 58).

Second, defendants allege that Hill wrongfully converted $15,556.15 in funds belonging to Full 360 - consisting of $13,602.95 in improper charges on a corporate credit card and $1,953.20 in duplicate expenses submitted for reimbursement (*see* Credit Card Statements, NYSCEF Doc. No. 60).

B. Plaintiff's Arguments in Opposition to the Motion

In response, Hill submits his own affidavit acknowledging that his suit is based on the 2010 e-mails excerpted above (Affidavit of Larry Hill, NYSCEF Doc. No. 89). He claims that Amarnath's statement in the e-mail dated June 12, 2010, that *"We can adjust the split to [Amarnath]: 60% , [Hill]: 30%, Class B: 10%,"* constitutes an offer that Hill would, at a minimum, receive a 30% stake in Full 360 and that in a "subsequent phone conversation," he "accepted that a minimum of 30% equity participation in F360 would be sufficient to conclude a partnership with Amarnath, but that since I was contributing an equal amount of sweat equity to Amarnath, additional future equity would be warranted" (*id.* at ¶ 36). Hill acknowledges that Amarnath "subsequently resist[ed] any material steps toward an actual agreement" (*id.* at ¶ 52). He also acquiesces that in August 2012, he sought the help of a mediator and that the parties intended to, but never formalized the agreement. Hill asserts that even though the parties never reached a "formal agreement," he is nevertheless owed the "guaranteed" minimum 30% stake in the company promised by Amarnath in the June 12, 2010 e-mail. Hill maintains that when Amarnath informed him in April 2012 that he decided not to change the equity structure of the company, he reneged on an "offer that had been in place for over two years, and had induced [Hill] to work for salary and no commissions" (*id.* at ¶ 63).

Hill further claims that contrary to defendants' contention, he worked for Full 360 at below market value in reliance on the promise that he would receive a stake in the company:

> "He states that in 2005-6, he had earned an annual salary of $240,000 from a Hyperion services firm in a role nearly identical in scope and responsibilities to his position at F360. He was paid a salary of $130,000 and earned over $192,000 in commissions alone in just the seven months remaining of 2013, after leaving F360"

(*id.* at ¶ 16).

Hill also states that "[b]y the beginning of 2012, the company's financial situation had deteriorated" and "in order to make payroll for regular employees, Amarnath withheld salary from [Hill] for three half-monthly periods, for a total of $21,000 gross, effectively treating [him] as an equity partner in order to pay all of the regular employees in full" (*id.* at 68). Hill asserts that this loss of salary further supports his claim that he suffered an injury as a result of relying on Amarnath's promise that he would acquire equity in the company.

Hill maintains that the e-mail exchanges between the parties was "sufficient to establish the existence of a 'meeting of the minds,' and an enforceable contract as to the essential terms of the agreement - or at the very least present a material issue of fact precluding summary judgment" (Opp Mem at 3, NYSCEF Doc. No. 90). As to the statute of frauds, counsel contends that this suit does not involve the sale of securities, but rather, a partnership (*id.* at 4-5). Further, even assuming the contract could not be performed within a year, the statute of frauds is satisfied in this case by the electronic communications between the parties. In this regard, Hill's attorney asserts that Amarnath's June 12, 2010 e-mail contained all "essential, material terms" and that Hill accepted his "offer" within a few days of receipt over the telephone (*id.* at 4).

Counsel also argues that the statute of frauds does not bar the unjust enrichment cause of action because it does not seek to enforce a promise, but rather seeks to recover the reasonable value of property or services rendered in reliance on the promise. Counsel argues that although defendants dispute that they were unjustly enriched, there is certainly a question of fact precluding summary judgment on these claims.

As to the cause of action for promissory estoppel, Hill argues that even assuming the court were to determine that the breach of contract cause of action is barred by the statute of frauds, a promissory estoppel claim is still viable under circumstances where unconscionable injury results

from the reliance placed on the alleged promise. Whether Hill's injury rises to the level of unconscionability is an issue of fact.

As to the counterclaims, Hill does not dispute defendants' assertion that he retained the property at issue. He maintains that summary judgment should be denied on this cause of action because defendants have not provided documentary evidence establishing that Hill was not authorized to retain the items.

With respect to the second counterclaim, Hill asserts that defendants authorized his use of a company credit card with an allowance of $1,000 per month in *personal* expenses and that his personal monthly expenses totaled far less and never approached defendants' claim of $15,556.15 in unpermitted expenses (*see* Affidavit of Larry Hill, at ¶¶ 44-46, NYSCEF Doc. No. 89). Hill also submits e-mails indicating that Amarnath authorized his use of the credit card in the amount of $1,000 per month for "pseudo-expenses" and also approved that he would add 50% of his gas, auto insurance, and toll expenses to the card (E-mails, NYSCEF Doc. No. 67]). According to Hill, from August 2011 forward, he also provided Amarnath with periodic reports of all business and personal expense charged to the card, and Amarnath never objected. He claims that only some of the charges were "personal," supplies a spreadsheet delineating which charges were "personal," and points out that they do not amount to more than the $1,000 per month authorized by Amarnath (Expense Spreadsheet, NYSCEF Doc. No. 81).

Finally, as to Amarnath's personal liability, Hill asserts that there is no requirement that he pierce the corporate veil. The parties were negotiating a partnership involving Amarnath individually, the sole shareholder of Full 360.

C. Defendants' Arguments in Reply

In reply, defendants reiterate that the e-mails between the parties contain none of the material terms of an alleged contract and, at best, evidence that they discussed a potential equity interest in Full 360 but never reached a final agreement. Although Hill seems to suggest in his affidavit that he orally accepted, over the phone, an "offer" made by Amarnath in the June 12, 2010 e-mail for a 30% stake in the company, the e-mails that follow do not reference such a conversation and, in fact, negate the notion that a meeting of the minds at the 30% level occurred.

The e-mail exchanges and communications that took place after June 12, 2010 make clear that Hill sought a 50% interest in Full 360 and discussed the possibility of accepting a 40% interest.

The evidence shows that the parties never reached a final agreement and in his opposition papers, Hill never addresses any of his conduct or subsequent e-mails that belie his position that the parties reached a full and final agreement on the material terms.

Even assuming, as Hill suggests, he accepted Full 360's purported June 12, 2010 offer, the parties never discussed, let alone agreed on any material terms surrounding Hill's alleged equity interest in Full 360. The terms of a shareholder's agreement, price, valuation methodology and other material terms were never fleshed out. Consequently, the breach of contract claim fails.

III. DISCUSSION

A. Summary Judgment Standard

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562).

B. Plaintiff's Cause of Action for Breach of Contract

1. Statute of Frauds

Defendants' statute of frauds argument lacks merit. In arguing that a contract for the sale of securities must be in writing, defendants rely on case law citing to a former section 8-319 of the Uniform Commercial Code (UCC, §___), which stated that a "contract for the sale of securities is not enforceable … unless … there is some writing." That section was repealed, effective October 10, 1997 (L 1997, ch 566, 5, eff Oct. 10, 1997), and was replaced by section 8-113, which provides:

> "A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making."

Here, the alleged agreement constitutes a contract for the sale or purchase of a security (*see e.g. Dillon v Peretti*, 176 AD2d 497, 498 [1st Dept 1991]; *Goldfinger v Brown*, 169 AD2d 702 [2d Dept 1991]; *Gross v Vogel*, 81 AD 2d 576 [2d Dept 1981]). Therefore, pursuant to UCC § 8-113, it is enforceable whether or not it is in writing.

Defendants also contend that General Obligations Law § 5-701(a)(1) (GOL, §___) bars the enforcement of the alleged contract. That section provides that an agreement which "[b]y its terms is not to be performed within one year from the making thereof" is not enforceable unless there is a written memorandum thereof signed by the party to be charged (GOL § 5-701 [a] [1]). However, UCC § 8-113 provides with respect to the sale of securities that such an agreement is enforceable whether or not it is in writing and even if it is not capable of performance within one year of its making (*see Matter of Brusco v Braun*, 84 NY2d 674, 681 [1994]["'[a] special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies'"], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 397).

Even assuming GOL, § 5-701 (a)(1) is applicable here, the Court of Appeals has "long interpreted [GOL, § 5-701 (a)(1)] to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year" (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998][internal quotation marks and citations omitted]). Here, the purported promise that Hill would be permitted to purchase a 30% equity stake in the company was capable of being fulfilled within one year. The purported agreement does not call for performance within any particular time span or schedule. Therefore, it is possible for the stocks to have been purchased/sold within one year.

In arguing that the promise is subject to the statute of frauds, defendants rely on *D'Esposito v Gusrae, Kaplan & Bruno PLLC* (44 AD3d 512 [1st Dept 2007]). In that case, the court found that plaintiff's causes of action for promissory estoppel, specific performance, and breach of contract, all based on a purported promise by defendants to make plaintiff a full partner/member of the defendant law firm, were barred by GOL, § 5-701 (a)(1). The court noted that

> "irrespective of whether plaintiff might have become a partner within one year, he claimed that his right to a membership/partnership was to have continued indefinitely and even after he left the firm. The oral agreement he relied on thus called for performance of indefinite duration and was terminable within a year of its inception only by its breach and was thus barred by the statute of frauds"

(*id.* at 513). Defendants' reliance on *D'Esposito* is misplaced because that case does not involve a promise to create a partnership, but rather a purported promise that plaintiff would have the right to acquire 30% of the shares in a corporation.

2. Enforceability of the Contract

Even though the breach of contract claim is not barred by the statute of frauds, the claim shall be dismissed for lack of an enforceable contract. " [I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 [1981]). Here, viewed in the light most favorable to Hill, the e-mails between the parties, as well as Hill's deposition testimony, indicate that the parties at best had a mere "agreement to agree" that Hill would acquire an equity stake in the company, with the terms subject to on-going negotiations and approval (*Benham v eCommission Solutions, LLC*, 118 AD3d 605, 606 [1st Dept 2014]). Essentially, the e-mails show that Hill expressed a strong interest in acquiring an equity stake in the company in 2009. In 2010, the parties discussed such an acquisition where various percentages were discussed. However, an agreement on the material terms was never reached. Indeed, by Hill's own account, Amarnath resisted "any material steps toward an actual agreement" (Affidavit of Larry Hill at ¶ 52, NYSCEF Doc. No. 89).

A basic tenet of contract law is "the requirement of definiteness" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242 [1st Dept 2013]). "[T]he parties must make a manifestation of mutual assent sufficiently definite to assure that they are truly in agreement with respect to the material terms of their contract" (*id.*). "However, [a] contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement. The court shall enforce a contract if the parties have completed negotiations of essential elements, even when the parties have expressly left . . . other elements for future negotiation and agreement" (*id.* at 242-243 [internal quotations and citations omitted]).

Here, the e-mails between the parties, as well as Hill's deposition testimony, evince that the parties never reached an agreement on *any* essential term. Hill argues that on June 12, 2010, the parties agreed he would receive, at a minimum, a 30% stake in the company and any remaining elements that were left for future negotiations are non-essential terms. This contention lacks merit for two reasons. First, the parties never agreed on the valuation methodology or price Hill would pay for acquiring the shares and/or whether acquiring the shares would involve a reduction in Hill's existing compensation structure. Therefore, the parties never completed negotiations of essential elements. Moreover, by Hill's own account, subsequent to Amarnath's June 12, 2010 e-mail, wherein Amarnath proposed that Hill would acquire 30% of the shares, Hill sought a 50% stake in the company (*see Homayouni v Banque Paribas*, 241 AD2d 375, 376 [1997] ["whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of – and substitution for– the initially offered terms"]). Therefore, the first cause of action must be dismissed.[1]

C. Cause of Action for Promissory Estoppel

1. Statute of Frauds/Unconscionable Injury

Defendants' contention that the promissory estoppel claim is barred by the statute of frauds is without merit for the reasons discussed above. The purported agreement is not governed by the statute of frauds.

2. Elements of Promissory Estoppel

The cause of action alleging promissory estoppel must be dismissed. "In order to prevail on a theory of promissory estoppel, a party must establish (1) a *promise that is sufficiently clear and unambiguous*; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017 [emphasis added][internal quotation marks and citation omitted]). In this case, defendants demonstrated their prima facie entitlement to judgment as a matter of law as there is a lack of a sufficiently clear and unambiguous promise. In this regard, the series of e-mails submitted

[1] In relation to the first cause of action, the complaint also alleges that defendants breached an agreement formed on or about November 1, 2009 regarding Hill acquiring a 5% equity stake in the company. Although defendants deny the existence of such an agreement, in opposition to the motion, Hill offers no arguments or evidence in support of the allegation that such an agreement exists. Hill also offers no argument or evidence related to the allegation in the complaint that the purported agreement formed on June 12, 2010 granted him the right to 30% of the company's profits. He appears to have abandoned any claims predicated on these allegations.

establish that, "although the parties were negotiating, there was no *clear and unambiguous promise* that the contemplated transaction would be consummated" or that plaintiff would acquire 30% of the shares in the corporation "in the absence of an executed agreement" (*Delmaestro v Marlin*, 168 AD3d 813, 816 [2d Dept 2019][emphasis added]). In opposition, Hill failed to raise an issue of fact as to whether defendants clearly and unambiguously promised that he would receive shares in the corporation.

D. Cause of Action for Unjust Enrichment

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009][internal quotation marks and citation omitted]). "The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015][internal quotation marks and citation omitted]).

Here, Hill is alleging that defendants were unjustly enriched by his services. However, Full 360 paid Hill a considerable salary for his services. As noted above, the complaint itself alleges that Hill earned between $120,000 and $168,000 per year while employed at Full 360 (Complaint, at ¶¶ 13, 17, NYSEF Doc. No. 1). In support of their motion, defendants submitted evidence demonstrating that Hill was unemployed when Full 360 hired him in 2009 and that in 2008 and 2009, prior to arriving at Full 360, he was paid a lower salary, evincing that Full 360 was not unjustly enriched by his services.

In opposition, Hill fails to raise an issue of fact. Specifically, Hill claims that in the early 2000s, he was paid a salary of $200,000 as VP of Sales for a startup software company (Affidavit of Larry Hill, at 16, NYSCEF Doc. No. 89). However, he presents no financial records pertaining to those years (Exhibits, NYSCEF Doc. No. 67). Next, Hill claims that in 2005 and 2006, he earned an annual salary of $240,000 (Affidavit of Larry Hill, at 16, NYSCEF Doc. No. 89). However, he submits no 2005 W-2 statement and the 2006 W-2 statements submitted indicates that he earned approximately $188,000 that year (Exhibits, NYSCEF Doc. No. 67). Finally, he claims that he "was paid a salary of $130,000 and earned over $192,000 in commissions alone in just the seven

months remaining of 2013 after leaving F360" (Affidavit of Larry Hill, at 16, NYSCEF Doc. No. 89). However, the only proof submitted representing 2013 earnings is a W-2 form indicating that he earned $32,370.78 (Exhibits, NYSCEF Doc. No. 67). He also submits a 2014 W-2 form indicating that he earned $171,233.30 that year (*id.*). Hill's assertion that Full 360 significantly underpaid him for his services is wholly unsupported. Accordingly, the third cause of action for unjust enrichment must be dismissed.

E. Claims Against Defendant Amarnath Individually

> "'The concept [of piercing the corporate veil] is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed .... Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners'"

(*Old Republic Natl. Title Ins. Co. v Moskowitz*, 297 AD2d 724, 725 [2d Dept 2002], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "[A] plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (*JGK Indus., LLC v Hayes NY Bus., LLC*, 145 AD3d 979, 980 [2d Dept 2016]; *see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 140-141). " Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016-1017 [2d Dept 2007]).

Here, Hill fails to allege facts sufficient to support piercing the corporate veil. Indeed, in opposition to the motion, Hill does not attempt to fit within the ambit of a corporate veil piercing theory. Rather, he argues that Amarnath should be held personally liable because he promised, in his personal capacity, to grant Hill an equity stake in his company. This contention lacks merit. "[C]orporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts" (*Westminster Constr. Co. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]). There is no indication here that Amarnath

purported to bind himself individually, rather than as an officer of the corporation. The complaint must be dismissed insofar as asserted against Amarnath.

F. Defendants' Counterclaims for Conversion

"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" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [citations omitted]). With respect to the first counterclaim for conversion of property (*i.e.*, the cell phones, computer, headsets, *etc.*), defendants submitted Hill's deposition testimony, wherein he admitted that he retained the property. Specifically, Hill testified that he retained "the laptop and a couple of other pieces" because he "felt he was owed both equity and expense money" (Deposition Tr. of Larry Hill, at 190, NYSCEF Doc. No. 58). Defendants also submitted an e-mail, dated May 5, 2013, in which Hill stated that he intended to retain "company property" because the items contained information he might need if he pursued arbitration against defendants (E-mail, NYSCEF Doc. No. 58). In opposition, Hill does not dispute defendants' assertion that he retained the property. Rather, he argues that defendants failed to satisfy their prima facie burden of establishing their entitlement to judgment as a matter of law on this counterclaim because they did not provide documentary evidence establishing that Hill was not authorized to retain these items. However, Hill's own deposition testimony indicates that he was not authorized to retain these items inasmuch as he testified that he retained such property because he felt he was owed equity and expense money. In his affidavit Hill does not state that he was authorized by Full 360 to retain these items. He does not even mention the items. Accordingly, defendants established their entitlement to summary judgment on their first counterclaim for conversion of property and Hill has failed to raise an issue of fact in opposition.

On the issue of damages, "the usual measure of damages for conversion is the value of the property *at the time* and place of conversion, plus interest" (*Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 326 [1980][emphasis added]). Here, defendants rely on their response to an interrogatory to establish the value of the items (*see* Memorandum of Law at 23, NYSCEF Doc. No. 56). That response values the property as follows:

> "Technology: $6,749.10. This amount includes the initial price of everything downloaded to technology provided to Larry Hill by Defendant Full 360 ($1,786.89), the *original purchase price* of the Aastra IP phone ($233.43), iPad ($881.64), iPhone ($423.38), Jabra headset and accessories ($77.64), Provantage Headset ($168.42), and the replacement price of the Mac Book Pro Computer ($3,225.44).

(Response to Interrogatory No. 5, at 5-6, NYSCEF Doc. No. 28).

Since defendants are using the *original* purchase price of the items to calculate damages, rather than the value of the items at the time of the conversion, they failed to satisfy their prima facie burden on the issue of damages.

As to the second counterclaim for conversion of funds, defendants have satisfied their prima facie burden of establishing entitlement to judgment as a matter of law by submitting the credit card statements. However, in opposition, Hill raised an issue of fact showing by sworn affidavit that Amarnath authorized him use of the credit card to charge $1,000 per month in personal expenses. He also delineates which expenses were personal expenses and avers that since they average $623 per month, far less than Amarnath's offer of $1,000 per month, and do not approach the $15,556.15 in un-permitted expenses claimed by defendants, defendants are not entitled to summary judgment on this counterclaim. Because Hill's submissions raise an issue of fact as to whether and/or the amount of funds Hill may have converted, the issue of damages shall be referred to a Special Referee.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants dismissing the complaint is GRANTED and the complaint is hereby DISMISSED; and it is further

ORDERED that the motion for summary judgment of defendants as to the first and second counterclaims for conversion is GRANTED as to liability; and it is further

ORDERED that the counterclaims are hereby severed and the matter referred to a Special Referee to hear and recommend on the issue of damages; and it is further

ORDERED that the Clerk is directed to enter judgment against plaintiff Larry Hill and in favor of defendants Rohit Amarnath and Full 360 Inc. along with costs to be taxed by the Clerk upon submission of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: March 19, 2019

ENTER,

O. PETER SHERWOOD J.S.C.