SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

ADAM BAK,

Index No.: 508239/2015

Plaintiff,

-against-

KRZYSZTOF ROSTEK,

Justice Assigned:
Hon. Leon Ruchelsman

Defendant.

----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT KRZYSZTOF ROSTEK'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF ADAM BAK'S COMPLAINT IN ITS ENTIRETY

The Law Firm of Elias C. Schwartz, PLLC
Attorneys for Defendant
Krzysztof Rostek
343 Great Neck Road
Great Neck, New York 11021
Tel. No.: (516) 487-0175

PRELIMINARY STATEMENT

Defendant Krzysztof Rostek ("*Rostek*") respectfully submits this Memorandum of Law in support of Rostek's Motion seeking an Order pursuant to CPLR §3212 dismissing Plaintiff Adam Bak's ("*Bak*") Verified Complaint in its entirety.

Rostek's Motion for Summary Judgment should be granted in its entirety on the grounds that:

a. Bak defaulted under the Operating Agreement for 1059 Manhattan Avenue, LLC ("*Manhattan Ave.*") in that Bak never paid the full investment amount as required by the Operating Agreement, and thus, per the Operating Agreement, forfeited his interest in Manhattan Ave. Despite this fact, Rostek still purchased Bak's interest in Manhattan Ave. wherein not only did Bak receive his initial investment back, but he also received a seven (7%) percent return on his investment and thus, suffered no damages. As a result, all of the causes of action as alleged in Bak's Complaint must fail.

b. In the buyout agreement between Bak and Rostek, Bak waived any and all additional funds realized from the Project. Thus, Bak is not entitled to any further recovery per the buyout agreement. As a result, all of the causes of action as alleged in Bak's Complaint must fail.

c. Bak was aware of multiple potential sales of the property, all of which fell through prior to buyout agreement. However, rather than waiting for a sale of the property to actually occur, Bak, who was having financial difficulties, and as the additional investments to continue construction were needed, Bak could not afford to continue with the investment and needed to leave on a trip to Poland and thus, wanted out of Manhattan Ave. Further, Bak, as a savvy businessman, had an obligation to conduct due diligence, however, admittedly chose not to. As

a result, Bak's causes of action for breach of fiduciary duty, fraud, gross negligence, and negligent misrepresentation must fail.

d. Bak received money from Rostek, not the other way around. As a result, Bak's causes of action for money had and received and unjust enrichment must fail.

Accordingly, for the reasons more fully set forth herein, the annexed Affirmation of Sarah R. Gitomer, Esq. and the annexed Affidavit of Rostek, Rostek's Motion for Summary Judgment seeking to dismiss Bak's Complaint should be granted in its entirety.

Parties

Bak is a savvy and astute businessman as evidenced by his wide range of business investments dating as far back as 1978 and his political engagements wherein he was a Member of the Executive Committee of the Kosciuszko Foundation, Member of the Polish American Business Club, and was a United States representative in the Polish government as a representative of the Polish-American community in the eastern part of the United States. *See*, Exhibit A.

Bak is also a member of the Board of Directors of Wawel Bank. *See*, Exhibit A. In addition to the above credentials, Bak is an experienced real estate investor in a multitude of projects, and a highly successful business owner of ADAMBA which is based in New York and Chicago, as well as the international business of A and M Laktomar in Poland. *See*, Exhibit A. Bak also has significant investments in stocks in the United States and offshore. *See*, Exhibit A.

Bak's most successful business, ADAMBA, has a yearly sales volume of over Twenty Million ($20,000,000.00) Dollars and imports four hundred fifty (450) different food products and fine spirits from Europe. *See*, Exhibit A. While ninety (90%) percent of its products come from Poland, where the importing of alcoholic beverages requires significant political influence to obtain the necessary import permits, the remainder come from Germany, Scotland and Bulgaria. *See*,

Exhibit A. ADAMBA also owns several trademarks including Vavel, Naturalis, Bak's, Adamba, and Tears of Scotland. *See*, Exhibit A. In the United States, it represents Amino, Wawel, Hussman & Han, and Wedel products.[1] *See*, Exhibit A.

Rostek is a real estate broker, mortgage broker, general contractor, and holds several licenses in connection with the construction business. *See*, Exhibit B, p. 13, l.15-25. Rostek belongs to organizations such as the Kosciuszko Foundation, Polish American Business Club, Children's Smile Foundation, Institute of World Politics, and Pulaski Association of Business and Professional Men. *See*, Exhibit B, p. 27, l.25-25; p. 28, l. 2-14.

When Rostek first came to the United States in 1989, he worked in the deli and later he opened a deli with his partner in or around 1993. *See*, Exhibit B, p. 34, l. 3-11. Three (3) years later, in 1996, Rostek sold the deli and became a real estate agent. *See*, Exhibit B, p. 35, l. 2-3; p. 35 l. 4-21. Rostek was a real estate agent for two (2) years before he opened his own office titled Bridge Realty Servicing Group. *See*, Exhibit B, p. 35, l. 4-21-25; p. 26, l. 2-6. Rostek still owns and operates Bridge Realty Servicing Group. *See*, Exhibit B, p. 35, l. 4-21. In 1998 he also became a licensed mortgage broker and opened his own mortgage broker company titled Bridge Capital Enterprises LTD, which he still owns and operates.

In addition to the aforementioned, Rostek entered the construction business in 1993. *See*, Exhibit B, p. 36, l. 7-13. For twenty-seven (27) years, Rostek has continuously remained in the construction business. *See*, Exhibit B, p. 36, l.19-21.

[1] However, notwithstanding Bak's political and economic aptitude, his character is more than questionable. At the Polish Institute of National Remembrance, there are authenticated documents which describe Bak as a two-faced participant in the transfer of information affecting both Polish and American security. Fortunately, since Bak's attempts to act as a double agent were so evident, no damage was done to either county. The Polish American community in Brooklyn is aware of this information and since this information became public, Bak has been openly ostracized.

In or about 2001, Rostek commenced construction of his first new building. *See*, Exhibit B, p. 37, l.3-6. Shortly thereafter, in or about 2002, Rostek incorporated his business known as Belvedere Bridge Enterprises of which he owns a one hundred (100%) percent interest. *See*, Exhibit B, p. 37, l.19-25; p. 38, l.2-4.

Over the years, Rostek has worked with approximately twenty-five (25) to fifty (50) business partners and has developed approximately forty (40) properties. *See*, Exhibit B, p. 42, l. 5-15; p. 43, l. 5-7. These forty (40) development projects consist of brand new construction and complete gut renovations. *See*, Exhibit B, p. 43, l. 11-19.

Rostek first met Bak in or about 2005. *See*, Exhibit B, p. 26, l. 19-25. At the time, both Bak and Rostek belonged to organizations of mutual interest such as the Kosciuszko Foundation, Polish American Business Club, Children's Smile Foundation, Institute of World Politics, and Pulaski Association of Business and Professional Men. *See*, Exhibit B, p. 27, l.25-25; p. 28, l. 2-14. Bak and Rostek were also personal friends who travelled together, socialized together, and conducted business together. *See*, Exhibit B, p. 33, l. 3-18.

Bak has invested with Rostek in several of Rostek's development projects over the years. *See*, Exhibit B, p. 47, l. 12-19. In fact, the first project Bak invested in was a project known as Belvedere Equities One, wherein Bak invested a total of Four Hundred Eleven Thousand ($411,000.00) Dollars in the project and ultimately received his initial investment back plus an almost sixty (60%) percent profit in the amount of Two Hundred Forty Thousand ($240,000.00) Dollars, with a total return on his investment in the amount of Six Hundred Fifty-One Thousand ($651,000.00) Dollars. *See*, Exhibit C; *see also*, Exhibit B, p. 55, l. 9-22.

Bak and Rostek also invested together in a development project known as the 175 12th Street project in Brooklyn ("*175 12th Street Project*"). *See*, Exhibit C; *see also*, Exhibit B, p. 71,

l. 25-25; p. 72, l. 2-6. The 175 12th Street Project was a one (1) or two (2) family house which was developed into a seven (7) unit condominium. *See*, Exhibit B, p. 71, l. 21-25; p. 72, l. 2-6. In the 175 12th Street Project, Bak invested a total of Three Hundred Thousand ($300,000.00) Dollars. *See*, Exhibit C; *see also*, Exhibit B, p. 75, l. 22-25. Ultimately, all seven (7) units were sold and as a result, Bak received his initial investment back plus a seventy (70%) percent profit in the amount of Two Hundred Ten Thousand ($210,000.00) Dollars, resulting in a payout in the sum of Five Hundred Ten Thousand ($510,000.00) Dollars. *See*, Exhibit C; *see also*, Exhibit B, p. 78, l. 2-19.

Rostek also incorporated the Greenpoint Developers Group which was an investors group comprised of eight (8) individuals. *See*, Exhibit C; *see also*, Exhibit B, p. 78, l. 23-25. Ultimately, the group did not go as planned and the group was closed. *See*, Exhibit B, p. 79, l. 2-17. Nonetheless, Bak still received his original investment in Greenpoint Developers Group back in the amount of Fifty-Seven Thousand Three Hundred and Fifty ($57,350.00) Dollars, plus more than a thirty-six (36%) percent profit in the amount of Twenty Thousand Eight Hundred and Ten ($20,810.00) Dollars, resulting in a payout in the amount of Seventy-Eight Thousand One Hundred and Sixty ($78,160.00) Dollars. *See*, Exhibit C; *see also*, Exhibit B, p. 83, l. 6-18.

In or about the summer of 2010, Rostek learned about a fourth investment and development opportunity known as the Manhattan Ave. Project. *See*, Exhibit B, p. 85, l. 15-18. At the time, Rostek and Bak were actively looking for properties with not only residential units, but also a commercial space appropriate for a possible joint venture in a bank. *See*, Exhibit B, p. 86, l. 2-6; 10-16. In that regard, Bak and Rostek agreed that with respect to the Manhattan Ave. Project, Rostek would be responsible for the real estate portion of the Manhattan Ave. Project while Bak would be responsible for the opening of the bank. *See*, Exhibit B, p. 86, l. 25.

Rostek also introduced non-party Bogdan Chmielewski ("*Chmielewski*"), who was very good friends with Bak, as an investor in the Manhattan Ave. Project, while Bak introduced Roman Sledziejowski ("*Sledziejowski*") as a potential investor. *See*, Exhibit B, p. 89, l. 18-25. Ultimately, Chmielewski invested and Sledziejowski did not. Based upon their respective initial investments made by Rostek, Bak and Chmielewski (collectively referred to herein as "*Members*"), the Members executed an Operating Agreement which provided that Bak owned forty-seven and a half (47.5%) percent of Manhattan Ave., Rostek owned forty-seven and a half (47.5%) percent of Manhattan Ave. and Chmielewski owned five (5%) percent of Manhattan Ave. *See,* Exhibit D.

1059 Manhattan Avenue, LLC

Manhattan Ave. was incorporated on September 27, 2010. *See*, Exhibit E. In or around the fall of 2010, Attorney Bielesz represented Manhattan Ave. in the purchase of the property located at 1059 Manhattan Avenue, Brooklyn, New York 11222 ("*Property*"). Rostek signed the contract for purchase on September 27, 2010 and made a down payment of One Hundred Forty-Seven Thousand Five Hundred ($147,500.00) Dollars. *See*, Exhibit F.

The amount and timing of the contributions paid by the Members in addition to their initial investments were managed by Chmielewski as they were held in Wawel Bank, in an account managed by non-party Chmielewski. *See*, Exhibit G. The following is the schedule of the investments made by each Member for Manhattan Ave.:

Rostek	**Bak**
$99,820.00 on October 12, 2010	$99,820.00 on October 12, 2010
$499,100.00 on November 12, 2010	$499,100.00 on November 12, 2010
$149,205.00 on November 17, 2010	$149,205.00 on November 17, 2010
$50,000.00 on May 4, 2011	$72,636.50 on August 4, 2011

$49,750.00 on May 10, 2011

Total Investment: $847,875.00

Total Investment: $820,761.50

Chmielewski

$10,540.00 on October 12, 2010

$52,700.00 on November 12, 2010

$15,510.00 on November 17, 2010

$10,500.00 on May 5, 2011

Total Investment: $89,250.00

As Bak and Rostek both owned equal percentages in Manhattan Ave. per the terms of the Operating Agreement, they were required to deposit an equal amount of money. *See*, Exhibit D, Art VIII Section 8.2. However, Bak underinvested and contributed a total of Twenty-Seven Thousand One Hundred Thirteen Dollars and Fifty Cents ($27,113.50) less than Rostek. *See*, Exhibit G. Additionally, Bak was late with one of his contributions by three (3) months. Instead of depositing his additional contributions in May 2011 as Rostek and Chmielewski did, Bak did not deposit his portion of additional contributions until August 2011. *See*, Exhibit G.

Thus, pursuant to the terms of the Operating Agreement, Rostek and Chmielewski were permitted to force Bak to forfeit his interest in Manhattan Ave. and, in the event they did, Bak would not be entitled to any of the capital contributions paid by him. *See*, Exhibit D, Art. VIII Section 8.3. Alternatively, the Members could have adjusted the percentage of Bak's ownership in Manhattan Ave. *See*, Exhibit D, Art. VIII Section 8.3.

Construction Issues

First and foremost, the Project was designed and we started the process of plan approval prior to the commencement of construction. After the approval of the plans in or about November

2010, the Members began construction on the Property. However, it became immediately apparent that the construction was riddled with complications as the proximity of the New York City subway system to the Property caused significant changes to the building foundation plans and posed substantial challenges to the Project.

Although the Operating Agreement provided for additional contributions by the Members, Bak lost his ability to cover the cost of the construction expenses. *See*, Exhibit G. This is evidenced by the fact that Bak did not make his required contribution on May 4, 2011 in the amount of Fifty Thousand ($50,000.00) Dollars or the required contribution on May 10, 2011 in the amount of Forty-Nine Thousand Seven Hundred Fifty ($49,750.00) Dollars. *See*, Exhibit G. In fact, Bak's only investment after November 17, 2010, was three (3) months late (paid on August 4, 2011) and short by Twenty-Seven Thousand One Hundred Thirteen Dollars and Fifty Cents ($27,113.50) Dollars. *See*, Exhibit G. In August 2011, Bak paid Seventy-Two Thousand Six Hundred Thirty-Six Dollars and Fifty Cents ($72,636.50) instead of the Ninety-Nine Thousand Seven Hundred Fifty ($99,750.00) Dollars he was supposed to pay. *See*, Exhibit G.

Not only was Bak late and short with the required investment funds, Bak immediately "borrowed" from his late investment paid on August 4, 2011 via a wire transfer six (6) days later made to Bak's company, ADAMBA, in the amount of Seventy-Two Thousand Thirty-Seven Dollars and Fifty Cents ($72,037.50) on August 10, 2011. *See*, Exhibit H. While Bak did pay Manhattan Ave. back the sum of Seventy-Two Thousand ($72,000.00) Dollars, it became evident in August 2011 that Bak did not have the funds to continue the Project and was not going to make any future contributions. *See*, Exhibit H. Bak stated that his financial difficulties were, in part, due to his significant losses in the stock market which resulted in the aforementioned immediate loan from Manhattan Ave. *See*, Exhibit H.

The Members had already estimated at the onset of the Project on November 27, 2010 that the cost of the investment would be Six Million ($6,000,000.00) Dollars. *See*, Exhibit D. However, almost a year later, the Members had collectively only invested a little over Two Million ($2,000,000.00) Dollars, Bak was struggling to come up with additional contributions, and the Members ran into a significant additional financial hurdle, that being the exponential cost of re-configuring the construction plans around an existing New York City subway line and the addition of members would dilute Bak's investment. *See*, Exhibit G.

Thus, the investment was becoming untenable due to the significantly increased costs and lack of capital.

ARGUMENT

I. LEGAL STANDARD

A party moving for summary judgment must demonstrate its *prima facie* entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572 (1986). To obtain summary judgment, it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor, and he must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York,* 49 N.Y.2d 557, 562, 404 N.E.2d 718 (1980) *quoting* CPLR 3212(b).

"Summary judgment is proper where it clearly appears that no material and triable issue of fact is presented." *Sillman v. Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957). "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguable there is a genuine issue

of fact (citations omitted). . . . 'A shadowy semblance of an issue is not enough to defeat the motion.'" *S. J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 (1974).

It is well settled that, "[t]he statutory standard for the supporting proof required on a motion for summary judgment is set forth in CPLR 3212(subd.(b)). In brief, the motion must be supported by an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof. If the cause of action or defense be established sufficiently to warrant judgment in favor of a party as a matter of law, then such judgment must be granted." *S. J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 (1974).

Acknowledging that summary judgment is a drastic remedy, it has been pointed out, however, that the Court should not hesitate to give this remedy the full purpose for which it is intended. Given the statutory sanction, it is the duty of the Court, not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues of fact from immaterial ones. *Wanger v. Zeh*, 45 Misc.2d 93, 94, 256 N.Y.S.2d 227, 229-230 (Sup. Ct. Albany Cty. 1965), aff'd by 26 A.D.2d 729 (3rd Dept. 1966).

Accordingly, when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar. *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974).

In the instant action, no triable issues of fact exist in connection with Bak's causes of action as alleged in Bak's Complaint as it is undisputed that Bak suffered no damages, waived his right

to any additional recovery, sought and entered into a buyout agreement without conducting due diligence and as Bak received money from Rostek, not the other way around. As such, Rostek's Motion seeking summary judgment dismissing Bak's Complaint should be granted in its entirety.

II. ROSTEK IS ENTITLED TO SUMMARY JUDGMENT DISMISSING BAK'S FIRST CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY.

To establish a claim for breach of fiduciary duty, a party must first establish the existence of a fiduciary relationship, show misconduct constituting a breach of the fiduciary duty, and damages directly caused by the misconduct. *See*, *Varveris v. Zacharakos*, 110 A.D.3d 1059, 973 N.Y.S.2d 774 (2d Dept. 2013); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 921 N.Y.S.2d 260 (2d Dept. 2011); *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 924 N.Y.S.2d 77 (1st Dept. 2011).

Bak fails to meet any of the aforementioned elements required to establish a breach of fiduciary duty. First and foremost, there was indisputably no fiduciary relationship between Bak and Rostek as of July 24, 2012 when Rostek duly and legally purchased Bak's interest in Manhattan Ave. pursuant to a buyout agreement drafted and negotiated by Bak himself. *See*, Exhibit M; Exhibit O; Exhibit B, p. 220, l. 7-20.

Nonetheless, Bak alleges that despite the buyout, he is a Member of Manhattan Ave. and Rostek was the Managing Member of Manhattan Ave. with a fiduciary duty to make full disclosure to Bak and "Defendant breached his fiduciary duty to Plaintiff by failing to provide full disclosure of all material facts related to the Property at the time that Defendant purchased Plaintiff's interest in the LLC on or about July 25, 2012." *See*, Exhibit S, ¶¶22-24. As the fiduciary relationship terminated via the buyout agreement, Bak cannot claim a breach of fiduciary duty.

Assuming *arguendo* that this Court finds that a fiduciary relationship existed at the time the Manhattan Ave. Property was sold, even though Bak was bought out prior to then, Bak is nonetheless barred from recovery as there was no misconduct on the part of Rostek. To that end, Bak claims that Rostek failed "to provide disclosure of the upcoming sale of the Property for $2,900,000.00" and failed "to disclose the fair market value of the Property". *See,* Exhibit S, ¶24. However, Bak, by his own admission, was well aware that Rostek was trying to sell the Property at or about the time of the buyout agreement. *See,* Exhibit R, p.196. Bak also readily admits that prior to the buyout, Bak discussed what would be a fair sale price for his interest in Manhattan Ave. with Rostek. *See,* Exhibit R, p. 182, ll. 19-21. Finally, Bak readily admits that he did not conduct any measures of due diligence including but not limited to obtaining a valuation of his interest in Manhattan Ave. prior to executing the buyout agreement. *See,* Exhibit R, p. 183. Clearly, Rostek never hid the fact that the Property could be sold post-buyout, nor did Rostek hide what the fair market value of the Property was prior to the buyout. As a result, Bak's claims of misconduct must fail.

The plain fact of the matter is - the investment was going bad - the investment was under-funded by investors, Bak was experiencing financial constraints from outside forces, the New York City subway line was proving problematic and expensive, the real estate condo market was weak after the recession and Bak was not interested in opening a Bank in New York and no longer had use for the commercial space, thus Bak wanted out before it went any further. Yet, Bak would like his proverbial cake and would like to eat it too, taking the guaranteed buyout only to sue three (3) years after the sale, based solely on the fact that Bak bailed out too soon and subsequently realized that there was more money to be had.

That being said, the fact of the matter remains that Bak sustained no damages as he received not only the return of his initial contribution, but also a seven (7) percent profit on that investment in the sum of $85,920.23. *See*, Exhibit S, ¶25. As Bak was not even damaged as a result of the investment and in fact, by his own admission, profited from the transaction, the cause of action against Rostek for breach of fiduciary duty cannot stand.

Finally, the buyout agreement provides that "transferor hereby acknowledges and agrees that upon execution of this Agreement, and receipt of Nine Hundred Six Thousand Six Hundred Eighty-One Dollars and Seventy-Three Cents ($906,681.73) being paid to him in consideration of his transferring his membership interest in Company to Rostek, Bak shall have no right, claim, and/or interest of any kind in any profits, distributions, dividends, or other equity stemming from the Company." *See*, Exhibit O, Section 4. The consideration being paid to Bak pursuant to the Agreement includes any amounts that would otherwise be due to Bak by way of Bak's past or present interest in the Company, and "any such claim for unpaid amounts due to Bak are hereby waived." *See*, Exhibit O, Section 4.

Thus, any claim for future profits was waived by Bak. As a result, Bak cannot seek damages herein.

Due to such, Bak's first cause of action for breach of fiduciary duty should be dismissed as a matter of law.

III. ROSTEK IS ENTITLED TO SUMMARY JUDGMENT DISMISSING BAK'S SECOND CAUSE OF ACTION FOR MONEY HAD AND RECEIVED.

"A cause of action for money had and received is one of quasi-contract or of contract implied-in-law." *Board of Educ. of Cold Spring Harbor Cent. School Dist. v. Rettaliata,* 78 N.Y.2d 128, 138, 576 N.E.2d 716, 572 N.Y.S.2d 885 (1991); *see*, *Parsa v. State of New York*, 64 N.Y.2d 143, 148, 474 N.E.2d 235, 485 N.Y.S.2d 27 (1984). "Having money that rightfully belongs to

another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise." *Byxbie v. Wood*, 24 N.Y. 607, 610 (1862).

The essential elements of a cause of action for money had and received are: (1) the Defendant received money belonging to the Plaintiff, (2) the Defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the Defendant should not be permitted to keep the money. *See*, *Matter of Witbeck*, 245 A.D.2d 848, 850, 666 N.Y.S.2d 315 (1997); *see also*, *Rocks & Jeans v. Lakeview Auto Sales & Serv.*, 184 A.D.2d 502, 502, 584 N.Y.S.2d 169 (1992); *see generally*, 22A NY Jur. 2d Contracts § 533 (2013). "The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it." *Parsa v. State of New York*, 64 N.Y.2d at 148; *see*, *People ex rel. Dusenbury v. Speir*, 77 N.Y. 144, 150, 57 How. Pr. 274 (1879); *Goel v. Ramachandran*, 111 A.D.3d 783, 789-790, 975 N.Y.S.2d 428, 436 (2d Dept. 2013).

It is clear that Bak cannot maintain a cause of action for money had and received. First, Bak alleges that "Defendant benefitted by receiving funds directly from Plaintiff in the amount of $906,681.73." *See*, Exhibit S, ¶28. Yet, in actuality, it was Bak who received these funds from Rostek as a result of the buyout. Thus, as Rostek did not actually receive any money from Bak, the first element for a claim for money had and received can undisputedly not be satisfied.

Second, there is no possible way, either legally or logically, that Rostek could have benefitted from the money Bak received as it was Rostek who paid it. Lastly, it is axiomatic that a claim for money had and received mandates that under principles of equity and good conscience, Defendant should not be permitted to keep Plaintiff's money. Yet, Rostek has no money belonging to Bak. Bak invested money, which investment was not only returned to him, but was returned to

him with a seven (7) percent return on investment. All of the money that Bak invested in Manhattan Ave. Bak received back from Rostek plus an additional profit of $85,920.23. *See*, Exhibit S, ¶30. Thus, Plaintiff's allegation that "Plaintiff's funds of $906,681.73 should have never been provided to Defendant, were and remain the rightful funds of Plaintiff, are currently wrongfully in the possession of Defendant, and under principals of equity and good conscience should be returned to Plaintiff" (*see,* Exhibit S, ¶32) is just downright false and is belied by all of the evidence herein. Rostek paid Bak $906,681.73, not the other way around. Bak readily admits, in his Complaint, that he received all of the money he invested, and then some. *See,* Exhibit S, ¶30. Thus, the cause of action for money had and received fails completely.

As a result, Bak's second cause of action for money had and received should be dismissed as a matter of law.

IV. ROSTEK IS ENTITLED TO SUMMARY JUDGMENT DISMISSING BAK'S THIRD CAUSE OF ACTION FOR FRAUD.

Putting aside the provision in Bak's buyout agreement, which provides that "this agreement represents the entire agreement between the parties. The terms of this Agreement have been agreed upon by the parties hereto after careful discussion and negotiations and both parties represent that the terms of this Agreement are hereby accepted by each party as fair and reasonable at the time of making this Agreement and each party agrees never to assert to the contrary," it is beyond clear that no misrepresentations were made to Bak with respect to the value of Manhattan Ave. and that Bak was informed of all sale contracts prior to the execution of Bak's buyout agreement.

In order to maintain an action for the intentional tort of fraud, a Plaintiff must allege: (1) material misrepresentation of a fact, (2) knowledge of its falsity, (3) intent to induce reliance, (4) justifiable reliance by Plaintiff, and (5) damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 559 (2009).

Here, Bak's claims for fraud are based on the premise that Rostek misrepresented the true market value of Bak's ownership interest in Manhattan Ave. and did not disclose an alleged up-coming sale of the Property. *See,* Exhibit S, ¶34. Yet, despite his feigned ignorance, Bak, by his own admission, was well aware that Rostek was trying to sell the Property at or about the time of the buyout agreement. *See,* Exhibit R, p.196. Bak also readily admits that prior to the buyout, Bak discussed what would be a fair sale price for his interest in Manhattan Ave. with Rostek. *See,* Exhibit R, p. 182, ll. 19-21. Finally, Bak readily admits that he did not conduct any measures of due diligence including but not limited to obtaining a valuation of his interest in Manhattan Ave. prior to executing the buyout agreement. *See,* Exhibit R, p. 183. Yet, Bak would like this Court to believe that he did not know about any sale, and that it was up to Rostek to determine Bak's value in Manhattan Ave. This belies logic, Bak's own testimony, and highlights the fact that Bak, a savvy businessman who was seeking to be bought out from Manhattan Ave., a multi-million dollar Project with a commercial bank, expected Rostek to determine the fair market value of Bak's interest at the time of buyout, rather than Bak's own appraiser or accountant. Bak is clearly blaming Rostek for his own failures, and crying fraud after the fact where no such fraud exists.

The Second Department has held, "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he [or she] was induced to enter the transaction by misrepresentations." *Orlando v. Kukielka,* 40 A.D.3d 829, 831, 836 N.Y.S.2d 252 (2d Dept. 2007). As in *Orlando, supra,* what Bak seeks in this matter is an implausible finding that a sophisticated businessperson, such as Bak, who owned almost a fifty

(50%) percent interest in a commercial LLC, left it up to Rostek to determine what Bak's interest in Manhattan Ave. was worth, despite Bak's own means to discover values to the contrary.

Even if Bak's allegation that he did not know about the sale contracts that had been exchanged pre-buyout were true, despite the clear contradiction of that allegation by both Attorney Bielesz and Chmielewski (*see, i.e,* Exhibit Q, p.155, ll. 21-25; p.156, ll. 2-24; p.157, ll. 10-23; Exhibit P, p. 96 ll. 15-18), Bak had the means in which to discover the value of his interest on his own, rather than relying on Rostek, who was purchasing that interest, to determine that value.

It is undisputed that Bak is a savvy businessman and has had several real estate investments, including many with Rostek. Rostek was a member of Manhattan Ave. and undisputedly did not perform any due diligence in determining the value of Bak's interest in Manhattan Ave. Further, it is undisputed that there were at least three (3) contracts of sale for Manhattan Ave. from March 2012 through July 2012, all of which Bak was involved in. Despite this, in July 2012, Bak sold his interest in Manhattan Ave. to Rostek after the two discussed what would be a fair sale price. *See*, Exhibit J; Exhibit K; Exhibit M; Exhibit N; and Exhibit O.

Clearly, there was no fraud as Rostek did not make any material misrepresentation of fact, did not have knowledge of its falsity, did not have an intent to induce reliance, and there was no justifiable reliance by Bak. Rather, the parties negotiated a buyout based upon what was fair. Bak is only claiming fraud because he now knows if he stayed with the Project, he could have made more. Not making as much profit as Bak wanted is not a basis of a fraud claim.

While Bak attempts to weave a tale of woe that saves him from the unfortunate consequence of buyer's remorse resulting from his investment in Manhattan Ave. – a reality that has plagued all of the parties herein as Manhattan Ave. certainly did not pan out how the Members

had planned – Bak cannot escape the documentary evidence that unambiguously disproves: (i) any misrepresentation by Rostek; (ii) any alleged reliance upon said misrepresentation by Bak; and (iii) any damages incurred by Bak as a result. Rather, the evidence herein conclusively establishes that Rostek truthfully represented the potential sale of the Property and purchased Bak's interest pursuant to fair market value determined by both Bak and Rostek after negotiations.

As such, Bak cannot maintain his cause of action fraud and therefore, the third cause of action should be dismissed as a matter of law.

V. ROSTEK IS ENTITLED TO SUMMARY JUDGMENT DISMISSING BAK'S FOURTH CAUSE OF ACTION FOR GROSS NEGLIGENCE.

To establish a cause of action for negligence under New York law, a Plaintiff must demonstrate that the Defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach. *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 971 N.Y.S.2d 504 (2013). A cause of action for gross negligence further requires a Plaintiff to plead that the Defendant engaged in a "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Colnaghi, USA v. Jewelers Protection Servs., Ltd.*, 81 N.Y.2d 821, 823, 611 N.E.2d 282, 595 N.Y.S.2d 381 (1993) (*citations omitted*).

The claim for gross negligence relies upon the same elements as negligence except for the additional element of reckless disregard. *438 W. 20 St., LLC. v. Bares*, 2016 N.Y. Misc. LEXIS 2813, *13-15, 2016 NY Slip Op 31452(U), 12-14 (Sup. Ct. NY County 2016). Gross negligence is the "failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others." *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992); *Borst v. Lower Manhattan Dev. Corp.*, 2016 N.Y. Misc. LEXIS

3084, *58, 2016 NY Slip Op 51233(U), 21, 52 Misc. 3d 1220(A), 43 N.Y.S.3d 766 (Sup. Ct. NY County 2016).

In Bak's Complaint, he does not even allege a duty of reasonable care, a breach of said duty, or any conduct that shows complete disregard for the rights and the safety of others. *See*, Exhibit S, ¶¶36-38. This is so because Bak, in his cause of action for gross negligence, merely cut and paste the identical allegations as contained in Bak's cause of action for fraud. *Compare* Exhibit S, ¶¶37-38 *with* Exhibit S, ¶¶34-35. Thus, for the same reasons Bak's fraud claim fails, Bak's gross negligence claim fails as well.

Bak's claim of gross negligence is premised on his allegations that Rostek misrepresented the true market value of Bak's ownership interest in Manhattan Ave. and did not disclose an alleged upcoming sale of the Property. *See,* Exhibit S, ¶37. Yet, it bears repeating that Bak, by his own admission, was well aware that Rostek was trying to sell the Property at or about the time of the buyout agreement. *See,* Exhibit R, p.196. Bak also readily admits that prior to the buyout, Bak discussed what would be a fair sale price for his interest in Manhattan Ave. with Rostek. *See,* Exhibit R, p. 182, ll. 19-21.

Nonetheless, Bak chose, through his own volition, to take the safe and quick way out of this investment gone wrong and accept the full buyout of his interest in Manhattan Ave. directly from Rostek rather than cross his fingers and hope that a sale would ultimately go through. Thus, although Rostek arguably did not even have a duty of reasonable care at the time the Property was purchased as Bak had already been bought out, Rostek most certainly did not breach any duty in that regard as he relayed the information pertaining to the potential sale to Bak.

Under any circumstance, it certainly cannot be established that Rostek engaged in any behavior that showed complete disregard for the rights and safety of others. Rostek purchased Bak's interest in Manhattan Ave. at the price negotiated by Bak himself.

Thus, Bak's. cause of action for gross negligence should be dismissed as a matter of law.

VI. ROSTEK IS ENTITLED TO SUMMARY JUDGMENT DISMISSING BAK'S FIFTH CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION.

In order to establish a cause of action based on a theory of negligent misrepresentation and omission, a Plaintiff must show: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect [or withheld]; and (3) reasonable reliance on the information [or omission]." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d at 180, *quoting*, *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148, 863 N.E.2d 585, 831 N.Y.S.2d 364 (2007); *see*, *Stilianudakis v. Tower Ins. Co. of N.Y.*, 68 A.D.3d 973, 889 N.Y.S.2d 854 (2009).

"[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996).

Notably, New York Courts have consistently held that, "[a] special relationship does not arise out of an ordinary arm's length business transaction between two parties." *US Express Leasing, Inc. v. Elite Tech [NY], Inc.*, 87 A.D.3d 494, 497, 928 N.Y.S.2d 696 (2011).

In the instant matter, Rostek was not in a special position of confidence and trust with Bak. First, Bak had already been bought out and no longer had an interest in Manhattan Ave. at the time the Property was sold. Moreover, Rostek was on the other side of the buyout, so it was incumbent

on Bak to perform his own due diligence prior to negotiating the buyout price. It is undisputed that Bak knew that Rostek was trying to sell the Property at or about the time of the buyout agreement. *See,* Exhibit R, p.196. Bak also discussed what would be a fair sale price for his interest in Manhattan Ave. with Rostek. *See,* Exhibit R, p. 182, ll. 19-21. Clearly, Rostek never hid the fact that the Property could be sold post-buyout, nor did Rostek hide what the fair market value of the Property was prior to the buyout. As a result, Bak's claims of negligent misrepresentation must fail.

Interestingly, Bak was well aware that he had not made his required contributions under the Operating Agreement and thus, pursuant to the terms of the Operating Agreement, was exposed to the imminent possibility of forceful resignation and the loss of his entire investment without any return. *See*, Exhibit D. Despite this, Rostek still purchased Bak's interest in Manhattan Ave. wherein not only did Bak receive his initial investment back, but he also received a seven (7%) percent return on his investment. Clearly, Bak saw a quick and easy way to guarantee his return of his investment plus an additional profit. The fact remains that Bak took none of the risk, yet wants all of the return. That is just not equitable and should not be permitted by this Court.

Thus, Bak's cause of action for negligent misrepresentation against Rostek should be dismissed as a matter of law.

VII. ROSTEK IS ENTITLED TO SUMMARY JUDGMENT DISMISSING BAK'S SIXTH CAUSE OF ACTION FOR UNJUST ENRICHMENT.

To recover for unjust enrichment, a Plaintiff must establish that: (1) the Defendant was enriched; (2) at the Plaintiff's expense; and (3) it is "against equity and good conscience to permit the Defendant to retain what is sought to be recovered." *Georgia Malone & Co. Inc. v. Rieder*, 19

N.Y.3d 511, 516 (2012); *AHA Sales, Inc. v. Creative Bath Prods., Inc.* 58 A.D. 3d 6 (2d Dept. 2008).

Bak, in his Complaint, alleges that "Defendant was enriched by receiving funds directly from Plaintiff in the amount of $906,681.73 and these funds were provided at Plaintiff's expense since they were Plaintiff's funds." *See,* Exhibit S, ¶45. Yet, Bak cannot possibly maintain a cause of action for unjust enrichment as despite Bak's confusion, it was Rostek who paid Plaintiff $906,681.73 as a buyout representing Bak's $820,761.50 investment and a seven (7) percent return in the sum of $85,920.23, not the other way around.

Further, Bak actually received that money, not Rostek, thus it is simply impossible that under the facts alleged by Bak that Rostek was actually enriched, no less at Bak's expense. Indeed, it is Bak who was enriched by the investment as he received a profit from same.

As such, Bak's sixth cause of action for unjust enrichment should be dismissed as a matter of law.

CONCLUSION

Due to the foregoing, it is respectfully submitted that Rostek's Motion for Summary Judgment dismissing Bak's Complaint should be granted in its entirety.

Dated: June 3 2020
Great Neck, New York

Respectfully Submitted,

The Law Firm of Elias C. Schwartz, PLLC
By: Sarah R. Gitomer
Attorneys for Defendant
Krzysztof Rostek
343 Great Neck Road
Great Neck, New York 11021
Tel. No.: (516) 487-0175

To:
SIRI & GLIMSTAD LLP
By: Mason A. Barney, Esq.
Attorneys for Plaintiff
Adam Bak
200 Park Avenue
Seventeenth Floor
New York, New York 10166
(212) 532-1091