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

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PRIME 135 NYC, LLC,

Index No.: 651966/2017

Plaintiff,

- against -

MAJOR CONSTRUCTION CO., INC.,

Defendant.

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

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PRELIMINARY STATEMENT

Defendant Major Construction Co., Inc. ("Major") respectfully submits this Memorandum of Law in opposition to Plaintiff, Prime 135 NYC, LLC's ("Plaintiff") motion for an order (i) pursuant to CPLR § 1003, for leave to add non-party Joseph Mendler ("Mendler") as a party to this action; (ii) pursuant to CPLR § 103(c) and New York Business Corporation Law Art. 10 converting the instant action into a special proceeding for this Court's supervision of Major's dissolution and liquidation; (iii) pursuant to CPLR § 305(c) for leave to serve a supplemental summons, and (iv) pursuant to CPLR § 3025(b) for leave to serve a proposed second amended verified complaint (the "Proposed Complaint").

For the reasons discussed below, it is respectfully submitted that the Plaintiff's motion be denied in its entirety.

ARGUMENT

POINT I

THE MOTION TO AMEND THE COMPLAINT SHOULD BE DENIED

"Whether to grant the amendment is committed to the court's discretion." *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 24 (1st Dep't 2003) ("*Heller*"); *see Edenwald Contr. Co. v. City of New York,* 60 N.Y.2d 957 (1983). Such discretion does not extend to a motion to amend which is not "supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." *Zaid Theatre Corp. v. Sona Realty Co.,* 18 A.D.3d 352, 355 (1st Dep't 2005) ("*Zaid Theatre*") (internal quotations omitted); *see also, Greentech Research LLC v. Wissman*, 104 A.D.3d 540, 541 (1st Dep't 2013) (affirming the denial of a motion to amend which lacked an affidavit of merit).

Leave to amend should also not be given when "the proposed amendment lacks merit." *Matthews v. City of New York,* 138 A.D.3d 507, 508 (1st Dep't 2016) ("*Matthews*"); *see Harlem Real Estate LLC v. New York City Economic Development Corp.*, 111 A.D.3d 549 (1st Dep't 2013); *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012).

Here, Plaintiff has failed to comply with the requirement to file an affidavit of merit in support of its motion to amend the complaint. Further, the Proposed Complaint and in particular the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Causes of Action lack merit and are insufficient as a matter of law.

A. The Motion to Amend Should be Denied as Plaintiff Has Not Submitted an Affidavit of Merit

Plaintiff has failed to submit an affidavit of merit in support of the Proposed Complaint. Though Plaintiff does submit the affidavit of its counsel, as we demonstrate below, such affidavit is insufficient to support the instant motion.

The Courts have repeatedly stated that a motion to amend a pleading must be supported by "an affidavit of merit and evidentiary proof that could be considered upon a motion for summary judgment". *Silver v. Equitable Life Assurance Society of the United States*, 168 A.D.2d 367, 369 (1st Dep't 1990); *see also Non-Linear Trading Co., Inc. v. Braddis Associates, Inc.*, 243 A.D.2d 107, 116 (1st Dep't 1998) ("…this Court has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted. Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.") (internal citations and quotations omitted).

Attorneys' affirmations, which are not based on personal knowledge of the relevant underlying facts, and do not purport to demonstrate the merits of the proposed amendment, do

not satisfy a party's burden. *See Beekman v. Sylvan Lawrence, Inc.*, 111 A.D.2d 658 (1st Dep't 1985) ("Initially, we find that the plaintiff's motion, supported only by an affirmation of her attorney, who had no personal knowledge of the facts, was defective."); *Clark v. Foley*, 240 A.D.2d 458, 458–59 (2d Dep't 1997); *North River Restaurant, LLC v. Paratore,* 2011 WL 11074352 at *4 (Sup. Ct. N.Y. Cnty., Mar. 28, 2011), *citing Zaid Theatre,* 18 A.D.3d at 355 (denying cross-motion for leave to amend, and holding that attorney's affirmation and affidavit submitted did not satisfy the requirements for an affidavit of merits).

The First Department has reiterated time and again that a motion for leave to amend must be denied where the movant "failed to submit 'an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.'" *Matthews,* 138 A.D.3d at 507; *see also Velarde v. City of New York*, 149 A.D.3d 457 (1st Dep't 2017) ("To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment"); *Boaz Bag v. Alcopi*, 129 A.D. 3d 649, 649 (1st Dep't 2015) ("*Bag Bag*") (denying motion for leave to amend pleading which was not supported by an affidavit of merits and evidentiary proof, noting that "the court was *not* required to accept their allegations as true on a motion to amend." emphasis in original) So too here.

B. The Proposed Complaint Is Insufficient as a Matter of Law

It is well-settled that leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law. *Thompson v. Cooper*, 24 A.D.3d 203, 205 (1st Dep't 2005); *Ancrum v. St. Barnabas Hosp.,* 301 A.D.2d 474, 475 (1st Dep't 2003); *Davis & Davis, P.C. v. Morson,* 286 A.D.2d 584, 585 (1st Dep't 2001). Put another way, the court is not required to permit futile amendments which may lead to needless litigation. *South Bronx Unite! v. New York City Indus. Development Agency*, 138 A.D.3d 462, 462 (1st

Dep't 2016); *Cusack v. Greenberg Traurig, LLP*, 109 A.D.3d 747, 749 (1st Dep't 2013); *Carol v. Madison Plaza Associates, LLC*, 95 A.D.3d 735 (1st Dep't 2012). "An amendment is devoid of merit where the allegations are legally insufficient," *Reyes v. BSP Realty Corp.*, 171 A.D.3d 504 (1st Dep't 2019), and as such, a court must examine the sufficiency of the merits of the proposed amendment but is not required to accept the allegations therein as true. *See Bag Bag*, 129 A.D.3d at 649.

Though Plaintiff correctly notes that it need not prove the merits of the newly proposed allegations on a motion to amend, even the case relied upon by Plaintiff for such proposition, *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499 (1st Dep't 2010), notes that the amendment should not be permitted if the new allegations are "palpably insufficient or clearly devoid of merit." *Id.* at 500.

As demonstrated below, the Proposed Complaint is devoid of merit and legally insufficient as a matter of law, specifically the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Causes of Action contained in the Proposed Complaint fail to state a cause of action upon which relief can be granted.

a. The Second Cause of Action for Fraud

On April 30, 2019, this Court granted the motion to dismiss the Amended Complaint as alleged against Mendler (the "Order"). *See* Dkt. No. 60, 61. In issuing the Order the Court dismissed the Second Cause of Action alleging fraud against Mendler. Dkt. No. 60, 61. The Second Cause of Action of the Amended Complaint asserts the same purported misrepresentations against Mendler as are alleged in the Proposed Complaint against Major. *See* Dkt. No. 38.

In dismissing the Second Cause of Action, the Court noted that the alleged representations made by Mendler alleged in the Proposed Complaint "are, or would be easily verifiable with any sort of due diligence" and as such there could be no justifiable reliance upon the alleged representations. Dkt. No. 61, pg. 14.

The same holding that there could be no justifiable reliance upon the purported representations applies to Major just as it applied to Mendler. As this Court has already concluded that the Second Cause of Action was insufficiently plead, and the Proposed Complaint does not attempt to resolve the justifiable reliance issue as determined by the Court, the Second Cause of Action is insufficient as a matter of law.

Assuming *arguendo* that the reliance issue had been resolved, the Second Cause of Action would still be insufficient as a matter of law as it relies upon statements of future acts and lack the requisite specificity as previously argued with regard to Mendler's prior motion to dismiss. *See* Dkt. 52.

b. The Third, Fifth, and Sixth Causes of Action of the Proposed Complaint Are Duplicative of the Breach of Contract Claim

It is well settled that a negligence claim will be dismissed when it is merely duplicative of a contract claim. *Apogee Handcraft, Inc. v. Verragio, Ltd.*, 155 A.D.3d 494, 495 (1st Dep't 2017) (affirming the dismissal of a claim for negligent performance of contractual obligations as duplicative of the breach of contract claim); *Von Sengbusch v. Les Bateaux De New York, Inc.*, 128 A.D.3d 409 (1st Dep't 2015) ("the negligence cause of action should have been dismissed as duplicative of the contract claim because it failed to allege a duty independent of the contract, and because it alleges only economic harm").

Here, the Third Cause of Action alleging unjust enrichment, the Fifth Cause of Action alleging breach of the implied covenant of good faith and fair dealing, and the Sixth Cause of

Action alleging careless contractual work all arise from the same facts as Plaintiff's breach of contract claim. In fact, neither the Third Cause of Action, the Fifth Cause of Action, nor the Sixth Cause of Action allege any specific conduct to support the causes of action, and instead merely rely upon the conduct alleged generally with respect to the breach of contract claim. *See* Proposed Complaint at ¶¶ 65-68, 76-78, 79-81.

As more fully discussed below, it is evident that these causes of action are duplicative of the Plaintiff's breach of contract claim and are thus insufficient to state a cause of action as a matter of law.

i. The Third Cause of Action for Unjust Enrichment

The Third Cause of Action seeks liability against Major for unjust enrichment. Notably, Plaintiff continues to seek such relief dispute the clear acknowledgment that an express contract between the parties exists.

Unjust enrichment is a quasi-contractual claim. *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012); *Bd. of Educ. of Cold Spring Harbor Cent. Sch. Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 (1991).

The Courts have repeatedly held that such a claim is not available where, as here, there is an express contract. *Goldman v. Metropolitan Life Insurance Co.*, 5 N.Y.3d 561, 587 (2005) (affirming dismissal of unjust enrichment claim on a CPLR 3211 motion and holding that unjust enrichment is a quasi-contract claim as it is an obligation that the law creates in the absence of an agreement); *MMA Meadows at Green Tree, LLC v. Millrun Apartments, LLC*, 130 A.D.3d 529, 532 (1st Dep't 2015) (holding on a Section 3211 motion to dismiss that "the existence of express contracts bars plaintiffs' unjust enrichment claim."); *Feigen v. Advance Capital Mgt. Corp.*, 150 A.D.2d 281, 283 (1st Dep't 1989) (finding on a Section 3211 motion to dismiss that "[u]njust

enrichment is a quasi contract claim, and the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter") (internal quotations omitted). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *citing Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388–389 (1987) ("*Clark-Fitzpatrick*"); *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 81 (2008).

Plaintiff is attempting the impermissible: to maintain cause of action for unjust enrichment while simultaneously alleging the existence of a contract that covers this dispute. Given Major's admission that a contract was entered into, Plaintiff cannot also assert a quasi-contract cause of action, such that its unjust enrichment cause of action should be dismissed. *See Kassover* v. *Prism Venture Partners, LLC*, 862 N.Y.S.2d 493, 449 (1st Dep't 2008) (affirming dismissal of unjust enrichment cause of action "because the merger agreement covers the same subject matter").

The Third Cause of Action alleges no conduct by Major which was not also alleged in support of the First Cause of Action. Proposed Complaint at ¶ 65-68. The underlying factual asserts in support of the claim for unjust enrichment are identical to those which support the Plaintiff's breach of contract claim, and as such, the Third Cause of Action is duplicative of the First Cause of Action and devoid of merit as a matter of law. *Tozzi v. Mack*, 169 A.D.3d 547, 548 (1st Dep't 2019) ("*Tozzi*") (dismissing a claim for unjust enrichment as duplicative of the breach of contract claim where it arose from the same facts).

ii. The Fifth Cause of Action for the Implied Duty of Good Faith and Fair Dealing

The proposed additional Fifth Cause of Action for breach of the implied duty of good faith and fair dealing asserting that Major "has deliberately acted in a manner not expressly forbidden by the contract, yet nevertheless deprived Plaintiff of the benefit of the contract, prevented performance of the contract, and/or withheld the benefit of the contract from Plaintiff". Proposed Complaint at ¶ 77. The proposed Fifth Cause of Action does not allege any conduct in support of the asserting that Major deprived Plaintiff the benefit of the contract and in fact, solely relies upon the same purported conduct upon which the First Cause of Action is based. *Id.* at ¶ 76-78.

The implied covenant of good faith and fair dealing "is in aid and in furtherance of other terms of the agreement of the parties" and, significantly, "[n]o obligation can be implied … which would be inconsistent with other terms of the contractual relationship." *Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 304 (1983). "[T]he covenant of good faith and fair dealing … cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." *Fesseha v. TD Waterhouse Investor Svcs, Inc.,* 305 A.D.2d 268, 268 (1st Dep't 2003) ("*Fesseha*"). And, "the implied covenant does not extend so far as to undermine a party's 'general right to act on its own interests in a way that may incidentally lessen' the other party's anticipated fruits from the contract." *M/A-COM Sec. Corp. v. Galesi,* 904 F.2d 134 (2d Cir. 1990).

"A cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" *Hawthorne Group v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep't 2004), *quoting Canstar v. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dep't 1995).

Further, a claim for the breach of the implied covenant of good faith and fair dealing is duplicative of a claim for breach of contract where both claims arise from the same operable facts. *Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, 434 (1st Dep't 2013) ("Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, however, should be dismissed as duplicative of its contract clai

ms, since both claims arise from the same facts and seek the identical damagers for each alleged breach") (internal quotations omitted); *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010) (same); *see also Tozzi*, 169 A.D.3d at 548.

Here the Fifth Cause of Action is based upon the same facts which give rise to the First Cause of Action and seeks the same damages. As such, it fails to state a cause of action as a matter of law.

iii. The Sixth Cause of Action for Careless Contractual Work

New York courts have long held that a breach of a contract between parties cannot be transformed into a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpartick*, 70 N.Y.2d at 389. Here, despite Plaintiff's efforts to cast this matter in a different light, it does not allege that Major had a duty independent of the acknowledged contractual agreement between the parties. In furtherance of the effort to paint this matter as something other than a mere breach of contract case, the proposed additional Sixth Cause of Action though entitled "Careless Contractual Work" is in actuality a claim for negligent performance of the parties' contract by Major.

The Proposed Complaint, which as noted above acknowledges and asserts the existence an express contractual agreement between the parties. Indeed, even within this proposed Sixth Cause of Action, Plaintiff asserts that "Plaintiff and Defendant [Major] are parties to a

contract…." Proposed Complaint at ¶ 80. The Sixth Cause of Action further alleges that Major failed to properly perform its work under the parties' contract. *Id.*

Under New York law, a restatement of the contractual obligations asserted in a cause of action for breach of contract does *not* give rise to a claim for negligence. *Clark-Fitzpatrick*, 70 N.Y.2d at 389-390. Furthermore, a breach of contract claim should not be considered a tort unless a legal duty *independent* of the contract itself has been violated. *Id*.

It is black letter law that such allegations are duplicative of the breach of contract claims under the circumstances presented herein. *See Board of Managers of Soho North 267 West 124th Street Condominium v. NW 124 LLC*, 116 A.D.3d 506, 507 (1st Dep't 2014) (dismissing negligent construction claims as duplicative of breach of contract); *Sutton Apts. Corp. v. Bradhurst 100 Dev. LLC*, 107 A.D.3d 646, 648 (1st Dep't 2013) (same); s*ee e.g., New York University v. Continental Ins. Co.,* 87 N.Y.2d 308 (1995) (dismissing plaintiff's negligence claim as duplicative of breach of contract cause of action); *Stardial Comm. Corp. v. Turner Constr. Co.,* 305 A.D.2d 126 (1st Dep't 2003) ("The court properly dismissed the negligence claim against [defendant] as duplicative of the breach of contract claim").

c. The Seventh Cause of Action for Duress

The proposed additional Seventh Cause of Action seeks rescission and restitution under the parties' contract and asserts that "Defendant made threats of an unlawful act to compel Plaintiff's performance and retention of specific vendors, of which Plaintiff had a legal right to abstain, thereby depriving Plaintiff of the ability to act in furtherance their own interest and/or free will". Proposed Complaint at ¶ 83. This simple recitation of the pleaded claim for duress shows its insufficiency when read in conjunction with the necessary elements of such a claim.

"In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof." *Babylon Assoc. v. Suffolk County*, 101 A.D.2d 207, 215 (2d Dep't 1984); *see also Fred Ehrlich, P.C. v. Tullo*, 274 A.D.2d 303, 304 (1st Dep't 2000) ("Repudiation of an agreement on the ground that it was procured by duress requires a showing of both (1) a wrongful threat, and (2) the preclusion of the exercise of free will"); *In re Guttenplan*, 222 A.D.2d 255 (1st Dep't 1995) (. Moreover, "an agreement procured under duress must be promptly disaffirmed, or otherwise deemed to have been ratified." *Kahan Jewelry Corp. v. First Class Trading, L.P.*, 2019 WL 103728, *3 (Sup. Ct., N.Y. Cty. 2019, Scarpulla, J.), *citing In re Guttenplan*, 222 A.D.2d at 255. None of these circumstances warranting rescission are pled.

Here, even if the allegation that Mendler would exert influence on the Landlord to be uncooperative was true, there are no facts alleged from which it could be inferred that Plaintiff was not deprived of its free will to contract with a contractor of its choosing, only that the build out would take longer with another contractor. This does not deprive Plaintiff of its free will.

The mere threat that the Landlord would be uncooperative is insufficient and is in reality simply negotiating tactics. *Boshes v. Williamson, Picket, Gross, Inc.*, 276 A.D.2d 257, 258 (1st Dep't 2000) ("Defendants' mere threat to breach a contract to pay commissions unless plaintiffs signed the releases did not constitute duress, and their purported knowledge of plaintiffs' alleged financial straits was merely "hard bargaining tactics") (internal citations omitted), *quoting Laub & Co., Inc. v. Domansky*, 172 A.D.2d 289 (1st Dep't 1991) ("Defendant's contention that there is a question as to the enforceability of the contract due to economic duress is unpersuasive. Plaintiff was entitled to seek a lease elsewhere for its client-tenant if defendant would not agree

to pay a brokerage commission. Defendant has not shown that it was forced to agree to the commission by means of a wrongful threat which precluded exercise of free will. That plaintiff knew defendant was in financial straits when demanding commission amounts to no more than mere hard bargaining tactics. Moreover, we note that defendant has nowhere demonstrated that it had absolutely no other alternative and could not seek adequate relief elsewhere.") (internal citations omitted)

Further, it cannot be said that the Plaintiff "promptly disaffirmed" the contract between the parties. *See Kahan Jewelry*, 2019 WL 103728, *3; *In re Guttenplan*, 222 A.D.2d at 255As noted in the Proposed Complaint, the parties agreed to a contract in 2014, yet the asserted claim of duress in the execution of the contract is being made for the first time seven years later.

In light of the above, the proposed Seventh Cause of Action for duress is insufficient as a matter of law.

d. The Eighth Cause of Action for Interference with Prospective Economic Advantage

To state a claim for tortious interference with a prospective economic advantage, a plaintiff must allege that (i) the defendant directly interfered with a third party, and (ii) the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff. *See Posner v. Lewis*, 18 N.Y.3d 566 (2012)

The proposed additional Eighth Cause of Action, for intentional interference with a prospective business advantage, alleges, in part, as follows:

> "By virtue of the foregoing, Defendant interfered with Plaintiff's third-party business relationships with the sole purpose of harming Plaintiff, and/or used dishonest, unfair, and/or improper means to injure Plaintiff's third-party business relationships."

Proposed Complaint at ¶ 86.

The Proposed Complaint's conclusory allegations, which merely recite the elements of the purported claim, are insufficient, and accordingly the proposed Eighth Cause of Action is insufficient as a matter of law. *See Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 (1st Dep't 2004) (affirming dismissal of a claim for tortious interference with a prospective business advantage where the complaint contained only conclusory allegations); *M.J. & K. Co., Inc. v. Matthew Bender and Co.*, 220 A.D.2d 488, 490 (2d Dep't 1995) (dismissing claim). Specifically, the proposed Eighth Cause of Action fails to identify any business relations or prospective economic advantage with any third party, fails to allege any wrongful conduct directed at any third party, and fails to allege a crime, independent tort, or exclusive intent to harm Plaintiff.

i. ***Failure to Identify A Prospective Economic Advantage***

The Proposed Complaint does not identify any specific business relationship or prospective economic advantage with which Major has interfered. It is well settled in New York that mere conclusory allegations that a defendant has interfered with business relations or a prospective business advantage, without specifying which relations or advantages were affected by the defendant's conduct and how the defendant interfered with those relations, are insufficient to state a cause of action for interference with business relations. *See Moynihan v. New York City Health & Hosps. Corp.*, 120 A.D.3d 1029, 1034 (1st Dep't 2014) ("petitioner's cause of action for tortious interference with prospective business relations fails as a matter of law because she does not identify any third party with whom she lost the prospect of doing business as a result of HHC's actions"); *Best Payphones, Inc. v. Empire State Payphone Ass'n*, 272 A.D.2d 139 (1st Dep't 2000) (holding that plaintiff's cause of action for tortious interference with prospective business relations was properly dismissed since the plaintiff failed to identify

any prospective business relations that had been impaired by the defendants' conduct); *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep't 1992) ("The eleventh cause of action, for instance, cannot stand as an allegation of interference with business relationships to the extent it purports to do so, since it makes only a general allegation of interference with customers without any sufficiently particular allegation of interference with a specific contract or business relationship").

ii. ***Failure to Allege Wrongful Conduct Directed at Third Parties***

Further, even if Plaintiff had identified a particular prospective economic advantage, which it has not, Plaintiff has failed to allege that Major directed any wrongful conduct at any party other than Plaintiff itself. A viable claim for tortious interference with a prospective economic advantage must allege that the defendant directed its wrongful conduct at the third party with whom plaintiff has or is seeking to have a business relationship. *See Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 192 (2004) ("*Carvel Corp.*") ("conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship"); *RXR WWP Owner LLC v. WWP Sponsor, LLC*, 2015 Slip Op 07447 (1st Dep't 2015) (holding that the plaintiff's claim of tortious interference with a prospective business relationship with WWP failed because the defendant "engaged in no wrongful conduct directed at" a third party); *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F.Supp. 2d 157, 167-168 (S.D.N.Y. 1998) (applying New York law to hold that the defendants' "alleged conduct concededly was not directed towards any third party with whom Piccoli had an existing prospective business relationship").

The Proposed Complaint fails to allege any conduct by Major directed toward any third-party. As the conduct alleged, even if true which Major denies, was directed exclusively at Plaintiff, not Plaintiff's unidentified prospective business opportunities.

iii. ***Failure to Allege a Crime, Independent Tort, or Exclusive Intent to Harm Plaintiff***

Where, as is the case here, there is no allegation that a defendant has caused a third-party to "breach … an existing contract, but only interference with prospective contract rights, a plaintiff must show more culpable conduct on the part of the defendant." *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 621 (1996); *see also 2626 B'way LLC v. Broadway Metro Assoc., L.P.*, 2011 N.Y. Slip Op 51582(U) (Sup. Ct. N.Y. Cnty. 2011) (dismissing tortious interference with business relations and economic advantage claims because the plaintiff failed to allege that the defendant acted with the sole purpose of harming plaintiff or interfered by use of means amounting to a crime or independent tort).

Thus, where a complaint is based on interference with a nonbinding relationship, a plaintiff must show that the defendant's conduct "was not 'lawful' but 'more culpable,'" i.e., a "defendant's conduct must amount to an independent tort". *Carvel Corp*, 3 N.Y.3d at 190. In contrast, non-criminal or independently tortious conduct will "generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations". *Id.*

Here, Plaintiff merely alleges that Major failed to complete its contractual work in accordance with the terms of the contract between the parties.[1] Even the unfounded and unsupported allegations that Major exerted unfair and unreasonable influence upon the Landlord, and prevented other contractors from entering the property to bid on the prospective project, are insufficient to create liability for inference with prospective contracts. *See Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 108 (1st Dep't 2009) ("Plaintiff has not alleged any

[1] As noted above, Plaintiff's claims regarding misrepresentations contained in Paragraphs 24 through 36 of the Propose Complaint, have already been found to be insufficient to sustain a fraud claim in this action. *See* Dkt.. 61 at pg. 14-16.

facts suggesting that defendants violated the law or undertook actions with the sole purpose of harming him; indeed, by plaintiff's own theory of the case, defendants acted with the intent of benefitting themselves. Plaintiff has also failed to allege any facts suggesting that defendants' actions were criminal or independently tortious."); *see also Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (wrongful means include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure")

In light of the above, the proposed Eighth Cause of Action is insufficient as a matter of law.

e. The Ninth Cause of Action for Accounting

Plaintiff's proposed Ninth Cause of Action seeks a post-dissolution accounting of Major's assets. Proposed Complaint at ¶ 90.

Notably, New York Business and Corporations Law ("BCL") § 1008 does not provide for an accounting. Despite the general language of BCL §1008, courts are not free to make any order it deems proper. *Ravitz v. Furst,* 65 A.D.3d 1049, 1050 (2d Dep't 2009) (Supreme Court properly refused to supervise a corporate dissolution when the requested relief, valuation of good will, is not set forth in BCL §§1005 through 1008); *Matter of Oak St. Mgt*, 307 A.D.2d 320 (2d Dep't 2003) (Supreme Court erred in appointing a referee to hear and report as to the value of the corporation's assets because post-dissolution procedures in a judicial dissolution proceeding are set forth in Business Corporation Law §§1005 through 1008 and do not include the appointment of a referee).

Plaintiff has not cited to any holding which provides for an accounting and the statute relied upon in the instant motion does not provide for an accounting, the claim for an accounting is insufficient.

f. Plaintiff's Trust Claims

Plaintiff seeks to assert claims for trust conversion (the proposed Tenth Cause of Action) and trust waste (the proposed Eleventh Cause of Action) against Mendler. These claims are predicated upon Plaintiff's assertion that Mendler has become a trustee of the asserts of Major – however as noted below, Plaintiff fails to properly allege or establish such a claim.

Plaintiff's motion assumes several items that have not been alleged in the Proposed Complaint and have not been proven by submission of evidence. While the filing of a certificate of dissolution concludes the dissolution, it is blackletter law that while a corporation may carry on no business after it has been dissolved, a corporation may take those steps necessary to wind up its affairs. BCL § 1005(a); *see also Rodgers v. Logan*, 121 A.D.2d 250, 253 (1st Dep't 1986). Dissolution does not terminate the existence of the corporation. BCL § 1006; *Rodgers*, 121 A.D.2d at 253 ("a corporation undergoing dissolution continues to exist for the purpose of and for as long as is necessary to satisfy and provide for its debts and obligations and it may sue or be sued on these obligations until its affairs are fully adjusted. Included as corporate liabilities are contractual obligations and contingent claims."), *citing Matter of Ehrlich, Inc.,* 5 N.Y.2d 275, 279-280 (1959); *City of New York v. New York and South Brooklyn Ferry and Steam Transportation Co.,* 231 N.Y. 18, 22 (1921); *United States v. Oscar Frommel & Bros.,* 50 F.2d 73, 74 (2d Cir.1931) ("*Oscar Frommel*").

Second, Plaintiff assumes, without actually alleging in the Proposed Complaint, that Major has made a distribution to Mendler. The assets of the corporation remain with the

corporation until transferred by it in the corporate name. BCL § 1006(a)(1); *see also Rodgers*, 121 A.D.2d at 253 (Until dissolution is complete, title to the corporate assets remains in the corporation"). It is only upon the distribution or liquidation of the corporation's assets that the shareholders become trustees of the assets. BCL § 1006(a)(1); *see also Rodgers*, 121 A.D.2d at 253 ("After dissolution, the shareholders to whom are distributed the remaining assets of the corporation are said to hold the assets which they received in trust for the benefit of creditors.") (internal quotation and citation omitted), *quoting Plastic Contact Lens Co. v. Frontier of the Northeast, Inc.,* 324 F.Supp. 213, 220 (W.D.N.Y.1969) *aff'd* 441 F.2d 67 (2d Cir.1971) *cert. den.* 404 U.S. 881 (1971); *see also Oscar Frommel,* 50 F.2d at 74. Notably, it has been held that only the shareholders who actually received a distribution of assets from the dissolved corporation could be considered trustees or liable for the claims against the dissolved corporation. *See In re Hartley*, 479 B.R. 635, 640 (S.D.N.Y. 2012) ("*Hartley*"), *citing Hatch v. Morosco Holding Co.,* 50 F.2d 138, 140 (2d Cir.1931) ("*Hatch*"); *see also Wells v. Ronning,* 269 A.D.2d 690, 692 (3d Dep't 2000) ("*Wells*") ("After dissolution, shareholders who have received distribution of remaining assets of the corporation hold these assets in trust for the benefit of creditors").

Noticeably absent from the Proposed Complaint is an allegation that Major made a distribution or that Mendler received any asset from Major. As such, the Proposed Complaint is insufficient to state claims for either trust conversion or trust waste.

i. The Tenth Cause of Action for Trustee Conversion

Under New York law in order to establish a claim for conversion, the plaintiff must show that it has legal ownership or a superior immediate possessory right or interest in the property that was "converted" and that the defendant exercise dominion over the property or interfered

with it, in derogation of the plaintiff's rights. Pappas v. Tzolis, 20 N.Y.3d 228, 234 (2012); Tudisco v. Duerr, 89 A.D.3d 1372, 1373 (4th Dep't 2011).

Conversion occurs when there is a refusal to return the property upon demand. Salatino v. Salatino, 64 A.D.3d 923, 925 (3d Dep't 2009). Conversion cannot be maintained where the damages are merely being sought for a breach of contract. Melcher v. Apollo Med. Fund Mgmt LLC, 25 A.D.3d 482, 483 (1st Dep't 2006); Fesseha v. TD Waterhouse Inv. Servs, 305 A.D.2d 268, 269 (1st Dep't 2003); Peters Griffin Woodward, Inc. v. WCSC Inc., 88 A.D.2d 883, 884 (1st Dep't 1982).

While money may be the subject of a conversion claim, it must be specifically identified and segregated, and there must be an obligation to return or otherwise treat the specific fund in a particular manner. Manufacturers Hanover Trust Co. v. Chemical Bank, 160 A.D.2d 113, 124 (1st Dept. 1990).

Notably, Under New York law –

> to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question … Tangible personal property or specific money must be involved.

Cohain v. Klimley, 2011 WL 3896095 (S.D.N.Y. Aug. 31, 2011) (internal citations omitted).

The Courts have further stated that "[c]onversion occurs when a defendant exercises unauthorized dominion over personal property in interference with a plaintiff's legal title or superior right of possession." *LoPresti v. Terwilliger,* 126 F.3d 34, 41 (2d Cir.1997); *see also Kirschner v. Bennett,* 648 F.Supp.2d 525, 540 (S.D.N.Y.2009) (to establish a conversion claim plaintiff must show "(1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property before its conversion; and (3)

defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights."). New York distinguishes claims that the defendant wrongfully detained—in contrast to having wrongfully taken—the property in question. *See generally MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co.,* 193 N.Y. 92, 101, 85 N.E. 801 (1908). In dealing with claims concerning wrongful detention when the initial taking was lawful and authorized, such as here, "a conversion does not occur until the owner makes a demand for the return of the property and the person in possession of the property refuses to return it." *Newbro v. Freed*, 409 F.Supp.2d 386, 396-397 (S.D.N.Y. 2006), *aff'd*, 2007 WL 642941 (2d Cir. 2007), *quoting* In re Estate of King, 305 A.D.2d 683, 683, 759 N.Y.S.2d 895 (2d Dep't 2003); *see also* D'Amico v. First Union Natl. Bank, 285 A.D.2d 166, 172, 728 N.Y.S.2d 146 (1st Dep't 2001).

The proposed Tenth Cause of Action asserts that Plaintiff as a contingent creditor of Major has a superior right of possession to Major's assets and that Mendler was a trustee of Major's assets post-dissolution for the benefit of Major's creditors. Proposed Complaint at ¶ 92-93. The Proposed Complaint further alleges that Mendler exercised unauthorized dominion over such funds by disbursing the assets either to himself or to other third-parties. *Id.* at ¶ 93.

Plaintiff's proposed claim herein is insufficient since, as noted above, Plaintiff has not alleged or established that any distribution of Major's assets has been made, nor that Mendler received any assets. *See Hartley*, 479 B.R. at 640; *Hatch,* 50 F.2d at 140; *Wells,* 269 A.D.2d at 692. .

ii. The Eleventh Cause of Action for Trustee Waste/Mismanagement

Plaintiff's proposed Eleventh Cause of Action is insufficient for the additional reason that it does not comply with the heightened pleading requirements of CPLR § 3016(b). This

provision requires that allegations of breach of trust must be pled with specificity and applies to allegations of trust waste. *See Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2d Dep't 2011); *Application of Grotzinger*, 81 A.D.2d 268, 282-283 (1st Dep't 1981).

Here, the Proposed Complaint alleges only that Mendler breached the trust by "failing to retain so much of [Major]'s assets as to provide for [Major]'s contingent liablity to Plaintiff and either personally retaining [Major]'s assets or transferring them to a third-party beneficiary, thereby proximately damaging Plaintiff". Proposed Complaint at ¶ 97. In this allegation, the Proposed Complaint fails to set forth a single specific act which it claims to have wasted trust assets. Such conclusory allegations are insufficient to meet the heightened pleading requirement to state a cause of action for trust waste.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be denied in all respects.

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