SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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JACK BARDY,

Plaintiff,

-against-

JOSEPH EDWARD BONNEM A/K/A JED BONNEM, PARKWAY COFFEE, LLC d/b/a READY COFFEE and READY COFFEE, LLC,

Defendants.

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Index No. 55909/2023

DECISION AND ORDER

The following papers numbered 1 to 6 were read on the motion (seq. no. 1) by defendants Joseph Edward Bonnem ("Bonnem"), Parkway Coffee, LLC ("Parkway") and Ready Coffee, LLC ("Ready") (collectively, "defendants") for an Order pursuant to CPLR §§ 3211(a)(5) and (7) dismissing the Verified Amended Complaint (the "Amended Complaint") of plaintiff Jack Bardy ("plaintiff"):

Papers	Numbered
Amended Complaint	1
Notice of Motion, Affirmation and Exhibits	2
Memorandum of Law in Support	3
Affidavit and Exhibits in Opposition	4
Memorandum of Law in Opposition	5
Memorandum of Law in Reply	6

BACKGROUND

The Amended Complaint alleges that Bonnem is an investor who was introduced to plaintiff in October 2016 by a mutual friend when Bonnem was attempting to develop and launch a chain of drive-thru coffee establishments modeled on highly successful and rapidly expanding businesses that were operating in the western United States. *See* NYSCEF Doc. No. 20 at ¶¶ 1-72. It further alleges that plaintiff is a hospitality industry veteran who has founded, built, owned and operated many successful restaurants and other businesses, and that plaintiff and Bonnem entered into a series of negotiations in October and November of 2016 regarding a joint venture between plaintiff and Bonnem to use Ready, which is owned by Bonnem and Parkway, for this drive-thru coffee business. *Id.*

Specifically, the Amended Complaint alleges that on November 13, 2016, Bonnem made a written proposal that reflected his discussions with plaintiff, which the parties orally agreed to on November 16, 2016 (the "Agreement"). *Id.* It alleges that the Agreement provides that in exchange for plaintiff working to develop Ready as a drive-thru coffee business, plaintiff would be given an option to purchase a 25 percent ownership interest in Ready, which plaintiff could acquire in two steps: (1) payment of $180,000.00 for an 18 percent ownership interest

therein after the first drive-thru coffee location has opened; and (2) payment for an additional 7 percent ownership interest in Ready after the third year of Ready's drive-thru coffee business, with Ready to be valued at $5 million for purposes thereof. *Id.* It alleges that the Agreement also included other terms, including that Ready would reimburse plaintiff for travel expenses, and that Bonnem in fact subsequently reimbursed plaintiff for travel expenses in accordance with the terms of the Agreement. *Id.*

The Amended Complaint alleges that in accordance with the Agreement, plaintiff trusted and relied upon Bonnem as the majority partner in Ready, and that plaintiff devoted substantial time and effort to develop Ready, despite receiving no compensation for such work. *Id.* It alleges that after Ready opened its first drive-thru coffee location in February 2019, which was immediately successful, plaintiff advised Bonnem that, pursuant to the Agreement, plaintiff was ready to purchase his initial 18 percent ownership interest in Ready. *Id.* It alleges, however, that Bonnem "bizarrely claimed" for the first time that the parties had never made a deal and that plaintiff's efforts over the past several years to develop Ready were being done solely on a "volunteer" basis. *Id.* The Amended Complaint alleges that this claim by Bonnem is both false and fraudulent,

as plaintiff makes his living by developing hospitality businesses, and he would never have invested so much time, effort and resources to develop Ready as a "volunteer" for the sole benefit of Bonnem and Ready. *Id.* It further alleges that plaintiff and Bonnem had no prior relationship and that the Agreement was reached within one month of their being introduced for this business purpose, and that there would be no plausible reason for plaintiff to "gift" such substantial benefits to Bonnem. *Id.* It alleges that Bonnem has breached the Agreement and defrauded plaintiff of his agreed-upon option to obtain an ownership interest in Ready, which has become very profitable; and that Bonnem, Ready, and Parkway – which owns Ready – have wrongfully obtained and kept substantial benefits at plaintiff's expense while improperly denying plaintiff his agreed-upon ownership interest in Ready. *Id.*

Based upon the foregoing general allegations, the Amended Complaint asserts: (1) a first cause of action for breach of contract against Bonnem; (2) a second cause of action for unjust enrichment against all defendants; (3) a third cause of action for quantum meruit against all defendants; (4) a fourth cause of action for breach of fiduciary duty against Bonnem; (5) a fifth cause of action for constructive trust against all defendants;

and (6) a sixth cause of action for accounting against all defendants. *See* NYSCEF Doc. No. 20 at ¶¶ 73-110.

Defendants move to dismiss the Amended Complaint pursuant to CPLR §§ 3211(a)(5) and (7), arguing, *inter alia*, that the first cause of action should be dismissed because the Statute of Frauds renders plaintiff's claimed Agreement to be unenforceable; that the quasi-contract claims set forth in the second and third causes of action should be dismissed on the same grounds and/or to the extent that they are duplicative of the breach of contract claim; that the fourth cause of action should be dismissed for failure to state a claim; and that the fifth and sixth causes of action are subject to dismissal because plaintiff's underlying substantive claims fail as a matter of law. *See* NYSCEF Doc. Nos. 23-29. Plaintiff opposes the motion. *See* NYSCEF Doc. Nos. 31-43.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO CPLR § 3211(A)(5)

Pursuant to CPLR § 3211(a)(5), a party may move to dismiss a Complaint in whole or in part on the basis of the "statute of frauds." *See* NY CPLR § 3211(a)(5). It is well-settled that "[o]n a CPLR 3211 motion made against a complaint, including a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint based on the statute of frauds, a court must take the allegations as true and resolve all inferences which reasonably flow therefrom

in favor of the pleader." *Baron v Suissa*, 167 AD3d 685, 687 (2d Dept 2018), *quoting AAA Viza, Inc. v Business Payment Sys., LLC*, 38 AD3d 802, 803 (2d Dept 2007). "In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims." *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998). "Though limited to that purpose, such additional submissions of the plaintiff, if any, will similarly be given their most favorable intendment." *Cron*, 91 NY2d at 366.

New York's Statute of Frauds is set forth in N.Y. Gen. Oblig. Law § 5-701(a)(1), which provides in relevant part:

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof . . . *See* N.Y. Gen. Oblig. Law § 5-701(a)(1).

Having reviewed the parties' submissions, including the detailed allegations set forth in the Amended Complaint and the documentary evidence annexed to plaintiff's affidavit furnished in opposition to defendants' motion (*see* NYSCEF Doc. Nos. 31-42), the Court determines that dismissal of the first cause of

action for breach of contract[1] against Bonnem is unwarranted on this Record pursuant to CPLR § 3211(a)(5).

Specifically, without opining regarding whether plaintiff may ultimately prevail on the merits of this claim, the Court credits plaintiff's assertion that he has set forth documentary evidence reflecting the terms of the Agreement. Indeed, plaintiff has furnished a copy of an email from Bonnem to plaintiff dated November 13, 2016, in which Bonnem unambiguously stated the contractual terms that he was offering plaintiff as per the Agreement. *See* NYSCEF Doc. No. 34. In relevant part, that email states:

> I hope that you could tell from our call on Friday that I'm excited about the prospect of your becoming a partner in this company. I believe that our combined skills will create a great growth business with enduring value.
>
> To that end I'd like to propose the following:
>
> A partnership stake of 25%
>
> - Vested interest in general partnership: carries benefits and obligations of partnership
>
> - This partnership interest would be acquired by you in two steps 1) 18% upfront

[1] It is well-established that "[t]he essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *Blank v Petrosyants*, 203 AD3d 685, 688 (2d Dept 2022), *quoting Liberty Equity Restoration Corp. v Yun*, 160 AD3d 623, 626 (2d Dept 2018).

> at a nominal valuation for the whole company of $1 million and 2) an additional 7% after the third year at a valuation of $5 million . . . *See id*.

This email is precisely consistent with the terms of the Agreement as alleged in the Amended Complaint, and given that plaintiff alleges that he orally accepted this offer on November 16, 2016, and both alleges and annexes documentary evidence reflecting that the parties' subsequent course of conduct is consistent with their having entered into the Agreement, dismissal of this claim on this Record and in the context of this CPLR § 3211(a)(5) motion would be improper.[2] *See* NYSCEF Doc. No. 20 at ¶¶ 32-56; *Mor v Fastow*, 32 AD3d 419, 420 (2d Dept 2006) (holding that a document "which sets forth all of the essential terms of the proposed transfer was sufficient to satisfy the requirements of the statute of frauds" and noting that "acceptance could have been made orally without the agreement running afoul of the statute of frauds"), *citing* N.Y. Gen. Oblig. Law § 5-703(1) and *Tymon v Linoki*, 16 NY2d 293, 296 (1965); *see also Leonard v Cummins*, 196 AD3d 886, 890 (3d Dept

[2] In addition to Bonnem's November 13, 2016 email outlining the terms of the Agreement, plaintiff also annexes to his affidavit documentary evidence including, *inter alia*, a confidentiality and non-compete agreement entered into by the parties on October 7, 2016 in connection with their discussions regarding a potential business agreement, as well as numerous emails between plaintiff and Bonnem from November 2016 through April 2019 discussing and/or describing plaintiff's efforts in developing Ready as a drive-thru coffee establishment as contemplated in the Agreement. *See* NYSCEF Doc. Nos. 32-42.

2021) (stating that "[a] party's partial performance of an alleged oral contract will be deemed sufficient to take such contract out of the statute of frauds only if it can be demonstrated that the acts constituting partial performance are unequivocally referable to said contract" and holding that plaintiff sufficiently alleged partial performance that was unequivocally referable to the parties' oral agreement by alleging that he contributed to the business and that defendant referenced plaintiff "as his business partner").

The Court does not credit defendants' argument that the first cause of action should be dismissed on the ground that the Agreement is unenforceable because it could not have been performed within one year as required by N.Y. Gen. Oblig. Law § 5-701(a)(1). As noted by plaintiff, this statute has been interpreted by the Court of Appeals of New York "to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year. As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame." *See Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998), *citing D & N Boening, Inc. v Kirsch Beverages,*

Inc., 63 NY2d 449, 454 (1984) and *Warren Chemical & Mfg. Co. v Holbrook*, 118 NY 586, 593 (1890). Thus, "the question is not what the actual performance of the contract was, but whether the contract required that it should not be performed within a year." *Cathy Daniels, Ltd. v Weingast*, 91 AD3d 431, 434 (1st Dept 2012), *citing Foster v Kovner*, 44 AD3d 23, 26 (1st Dept 2007). Because the Record on this motion, which is comprised of the allegations in the Amended Complaint and the documentary evidence annexed to plaintiff's affidavit, demonstrates that plaintiff's acquisition of the 18 percent interest in Ready could have been performed within one year of the Agreement, and as nothing in the Agreement required that the acquisition of the first 18 percent interest be made within one year, the Agreement falls outside of the Statute of Frauds and is enforceable. *See Cron*, 91 NY2d at 366; *Cathy Daniels, Ltd.*, 91 AD3d at 434.

Accordingly, the branch of defendants' motion seeking to dismiss the first cause of action for breach of contract pursuant to CPLR § 3211(a)(5) is denied. *See Leonard*, 196 AD3d at 890; *Mor*, 32 AD3d at 420; *see also Gedula 26, LLC v Lightstone Acquisitions III LLC*, 150 AD3d 583, 583 (1st Dept 2017) (holding that "[d]ismissal of the breach of contract claim would be premature, since discovery may reveal documents that

support plaintiffs' allegation that both parties accepted the terms set forth in an internal email by defendants' counsel").

With respect to the branch of defendants' motion seeking to dismiss the second cause of action for unjust enrichment and the related third cause of action for quantum meruit, it is well-established that "[t]he 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." *Travelsavers Enters. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 (2d Dept 2017). Furthermore, "[i]n order to succeed on a cause of action to recover in quantum meruit, the plaintiff must prove (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Gould v Decolator, Cohen & DiPrisco, LLP*, 197 AD3d 1242, 1243 (2d Dept 2021).

The Court does not agree with defendants that these two quasi-contract claims should be dismissed pursuant to CPLR § 3211(a)(5) on the ground that the related breach of contract claim is barred by the Statute of Frauds, as the Court has

rejected that argument above based upon this Record and solely for purposes of this CPLR § 3211 motion.

Nor does the Court credit defendants' assertion that the quasi-contract claims should be dismissed as duplicative of the first cause of action for breach of contract. First, given that discovery in this action may potentially reveal evidence reflecting that plaintiff's breach of contract claim fails because the Agreement is unenforceable pursuant to the Statute of Frauds, plaintiff is permitted to plead alternative causes of action, and it would be inappropriate to dismiss the quasi-contract claims in this procedural context at the lawsuit's infancy. *See* NY CPLR § 3014 (providing in relevant part that "[c]auses of action or defenses may be stated alternatively or hypothetically"); *Pickering v State of New York*, 30 AD3d 393, 394 (2d Dept 2006) (stating that "at this early stage of the proceedings . . . claimants were entitled to plead incompatible theories of recovery in the alternative"); *see also Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 581 (1st Dept 2015) (noting that "[d]efendants contend that the aiding and abetting claim is duplicative of their fraud claim" but finding that "[h]owever, plaintiffs may plead alternate causes of action"); *Weinberg v Mendelow*, 113 AD3d 485, 487 (1st Dept 2014) (holding that

although a "claim appears to be unnecessary; nevertheless, plaintiff may plead alternate causes of action").

Second, as noted by plaintiff, a plain reading of the Amended Complaint demonstrates that the quasi-contract claims, which are asserted against all three defendants, are distinguishable from the first cause of action for breach of contract against Bonnem, and are not duplicative thereof. While the breach of contract claim seeks specific performance of the Agreement and "other damages" in connection with Bonnem's alleged breach thereof (*see* NYSCEF Doc. No. 20 at ¶¶ 73-79), the unjust enrichment claim cites the "benefits of [plaintiff's] labor" as the foundation of plaintiff's theory of damages, while the quantum meruit claim similarly seeks "compensat[ion] for the services [plaintiff] provided to Bonnem and Ready Coffee." *See* NYSCEF Doc. No. 20 at ¶¶ 80-85; 86-91.

Therefore, based upon the foregoing, the branch of defendants' motion seeking to dismiss the second and third causes of action pursuant to CPLR § 3211(a)(5) is denied.[3] *See Allenby, LLC*, 134 AD3d at 581; *Weinberg*, 113 AD3d at 487; *Pickering*, 30 AD3d at 394.

[3] To the extent that defendants' motion can be construed as seeking to dismiss the second and third causes of action pursuant to CPLR § 3211(a)(7), such dismissal is unwarranted on this Record as plaintiff has stated cognizable claims for unjust enrichment and quantum meruit, respectively. *See* NYSCEF Doc. No. 20 at ¶¶ 80-85; 86-91; *see also Gould*, 197 AD3d at 1243; T*ravelsavers Enters.*, 149 AD3d at 1006.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO CPLR § 3211(A)(7)

With respect to a motion to dismiss pursuant to CPLR § 3211(a)(7), it is well-established that "the complaint must be liberally construed, giving the plaintiff the benefit of every favorable inference." *Cunningham v Nolte*, 188 AD3d 806, 807 (2d Dept 2020), *citing Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." *Cunningham*, 188 AD3d at 807, *citing Hartman v Morganstern*, 28 AD3d 423, 424 (2d Dept 2006). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002).

Having reviewed the parties' submissions, the Court determines that dismissal of the fourth, fifth and sixth causes of action is unwarranted on this Record pursuant to CPLR § 3211(a)(7).

Regarding the fourth cause of action for breach of fiduciary duty, it is well-established that "[t]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by

the defendant's misconduct." *Matter of Caton*, 206 AD3d 993, 994 (2d Dept 2022), *quoting Celauro v 4C Foods Corp.*, 187 AD3d 836, 837 (2d Dept 2020). Without opining as to whether plaintiff may ultimately prevail on the merits of this claim, a plain reading of the Amended Complaint demonstrates that plaintiff has unambiguously alleged all such requisite elements, as he alleges that by entering into a joint venture and/or partnership[4] with Bonnem to develop Ready, the parties were in a fiduciary relationship; and that Bonnem breached his fiduciary duty by refusing to allow plaintiff to exercise his agreed-upon option to purchase an 18 percent ownership interest in Ready, which directly caused plaintiff to suffer monetary damages. *See* NYSCEF Doc. No. 20 at ¶¶ 92-96.

Accordingly, the branch of defendants' motion seeking to dismiss the fourth cause of action pursuant to CPLR § 3211(a)(7) is denied. *See LMEG Wireless, LLC v Farro*, 190 AD3d 716, 720 (2d Dept 2021) (holding that "the complaint adequately stated the causes of action to recover damages for breach of fiduciary duty" and that "the Supreme Court properly denied that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to

[4] In Bonnem's November 13, 2016 email to plaintiff, he refers to plaintiff "becoming a partner in this Company" and outlines the proposed terms of plaintiff's "partnership stake of 25%" in Ready, with a "[v]ested interest in general partnership" that "carries [the] benefits and obligations of partnership." *See* NYSCEF Doc. No. 34.

dismiss the [related breach of fiduciary duty] causes of action"); *Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1078-1079 (2d Dept 2019) (stating that "we find that the plaintiffs set forth a cognizable cause of action to recover damages for breach of fiduciary duty, and stated in sufficient detail the facts constituting the alleged wrong").[5]

Finally, the Court does not credit defendants' assertion, which is limited to a single sentence at the conclusion of their memorandum of law, that "[p]laintiff's remaining claims – for a constructive trust and an account[ing] against all Defendants – must be dismissed because the underlying claims fail." *See* NYSCEF Doc. No. 24 at p. 21. On the contrary, because the Court herein has not dismissed any of plaintiff's first four causes of action pursuant to either CPLR §§ 3211(a)(5) or (7), and because plaintiff has stated cognizable claims in connection with his fifth cause of action for a constructive trust and sixth cause of action for an accounting, the corresponding branches of defendants' motion seeking to dismiss such claims pursuant to

[5] The Court does not credit defendants' argument that plaintiff has not alleged the existence of a partnership or joint venture with Bonnem, and nor does it agree that the existence of such a business arrangement is definitively undermined by the apparent lack of an agreement to equally share in Ready's profits and losses where Bonnem agreed to provide Ready's start-up capital in exchange for plaintiff's work in developing Ready. *See generally Jeremias v Toms Capital LLC*, 204 AD3d 498, 500 (1st Dept 2022) (noting that "there are issues of fact as to whether this was a situation in which there was no reasonable expectation of loss, thus falling under the exception to the general requirement that partners and joint venturers must agree to share in losses as well as profits").

CPLR § 3211(a)(7) are denied. *See* NYSCEF Doc. No. 20 at ¶¶ 97-104; 105-110; *see also Olden Group v 2890 Review Equity*, 209 AD3d 748, 753 (2d Dept 2022) (noting that "[t]he elements of a constructive trust are (1) a confidential or fiduciary relationship between the parties, (2) a promise, (3) a transfer of an asset in reliance upon a promise, and (4) unjust enrichment flowing from the breach of the promise"); *Melapioni v Melapioni*, 133 AD3d 456, 457 (1st Dept 2015) (stating that "[t]he basis for an equitable action for accounting is the existence of a fiduciary or trust relationship respecting the subject matter of the controversy").

CONCLUSION

Accordingly, based upon the foregoing, defendants' motion to dismiss the Amended Complaint pursuant to CPLR §§ 3211(a)(5) and (7) is denied in its entirety.

The foregoing constitutes the decision and order of the Court.[6]

Dated: White Plains, New York
May 26, 2023

HON. LINDA S. JAMIESON
Justice of the Supreme Court

[6] All other arguments raised on this motion and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

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