

At an IAS Term, Part Comm Div of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of October, 2006.

P R E S E N T:

HON. CAROLYN E. DEMAREST

Justice.

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FELIX GUREVICH, INDIVIDUALLY AND ON BEHALF OF
F.A. MANAGEMENT SERVICES, INC.

Plaintiffs,

- against -

DECISION

Index No. 28610/05

GELT FUNDING CORP. A/K/A
GFI MORTGAGE BANKERS, INC.,
GFI CAPITAL RESOURCES GROUP, INC.,
ABRAHAM EISNER, ALLEN GROSS, ESQ.,
ALEXANDER GOFMAN AND
1602 AVE. U MANAGEMENT, LLC,

Defendants.

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The following papers numbered 1-9 read on this Motion:

Papers Numbered:

Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 3, 4, 5,10,11,12
Opposing Affidavits (Affirmations)	6, 7
Reply Affidavits (Affirmation)	8
Affidavits (Affirmations)	
Other Papers / Memoranda of Law	9 / 2

Upon the foregoing papers, and upon oral argument, defendants Gelt Funding Corp. a/k/a GFI Mortgage Bankers, Inc. ("GFI"), GFI Capital Resources Group, Inc.,

Abraham Eisner (“Eisner”), and Allen Gross (“Gross”) (collectively, “the GFI defendants”), move for an order, and defendants Alexander Gofman (“Gofman”) and 1602 Ave. U Management, LLC (“1602”), cross-move for an order, collectively pursuant to CPLR 3016 (b) and CPLR 3211 (a) (1), (a) (3) and (a) (7), dismissing each of the causes of action in the amended complaint¹ against them.

In response to defendants’ motions, plaintiff Felix Gurevich (“Gurevich”) cross-moved for an order, pursuant to CPLR 3025 (a), compelling defendants to accept service of his amended complaint but withdrew that cross motion on January 24, 2006 upon agreement of all defendants to accept his amended complaint as stated in the so ordered additional directives to the Court’s preliminary conference order, dated January 24, 2006. The additional directives also made the above motions to dismiss, initially directed at the original complaint, “effective with respect to the amended complaint.”

Background

This action stems from a business relationship between Gurevich and the GFI defendants that culminated on July 26, 2005 with Gurevich’s termination by GFI. That firing followed a physical altercation between Gurevich and his co-worker, loan officer

¹The amended complaint under review actually represents the second amended complaint. The first amended complaint, dated January 4, 2006, contained 72 paragraphs, had added FA Management Services, Inc. as a defendant and had simply jettisoned the last two causes of action in the original complaint, i.e., the sixth cause of action brought under the Donnelly Act, General Business Law § 340 and the seventh cause of action alleging a violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1962 et seq.

The present, or second, amended complaint, dated January 24, 2006 and verified by plaintiff on January 24, 2006, contains 90 paragraphs, has designated Gurevich as now proceeding both individually *and* on behalf of FA Management Services, Inc. (“FA”), has added 1602 Ave. U Management, LLC (“Ave U Management”), an entity allegedly organized and incorporated by Gofman on November 16, 2005, as a defendant and has replaced the last two causes of action in the original complaint with a sixth cause of action against Ave U Management for a constructive trust and a seventh cause of action against Gofman and Ave U Management for an accounting.

Gennady Utchitel (“Utchitel”), at 228 Avenue U in Brooklyn, the office where they both worked. A flurry of legal activity has ensued and reviewing the various actions and applications provides a useful perspective in resolving the issues in this highly contentious dispute.

Plaintiff initially served as a mortgage loan officer for GFI after Eisner, GFI's chief executive officer, hired him as an employee in or about 1993. GFI, a New York State licensed mortgage banking firm, formed by Eisner and Gross in 1983 as Gelt Funding Corp.,² subsequently renamed GFC Mortgage Bankers and now GFI Mortgage Bankers, has grown, according to plaintiff, "into one of the largest mortgage banking operations in the [New York, New Jersey, Connecticut] tri-state area . . . and Florida." GFI, itself, highlights (a) its expansion to 10 offices beyond its main office in Manhattan, (b) the more than \$500 million in loans that it closed last year and (c) its separate service as a direct lender by which it arranges for loans through its warehouse loan facilities. GFI also notes its affiliation with the GFI Capital Resources Group of Companies that purportedly engage in various financial services including insurance, property management, commercial lending and equity acquisitions.

Gurevich would screen and refer individuals seeking residential mortgage loans to GFI and receive commissions for those referrals. GFI maintains that he was an “at will employee”, while Gurevich maintains that he operated as a quasi-franchise. The complaint is devoid of dates as to when Gurevich began “to maintain an office at 228 Avenue U” (¶ 24 of Complaint), but alleges that “about twelve years ago” Gurevich opened an office at 1501 Avenue U upon the alleged promise that he would receive stock in GFI, which GFI

²The Second Circuit Court of Appeals has described Gelt Funding Corp. as “a commercial mortgage broker that represents owners and potential buyers of commercial property and helps them obtain funding for their transactions” (*First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763, 765 [1994], *cert denied* 513 US 1079 [1995]).

vigorously denies. GFI acknowledges that it opened a branch office, apparently in 1996, at East 15th Street and Avenue U in Brooklyn, which later relocated to 228 Avenue U, to service the Russian community and appointed plaintiff Gurevich to serve as loan officer and manager at the branch office. Gofman accompanied plaintiff to this branch office, and in 2002, Gofman and Gurevich, as equal shareholders, formed F&A Management Services, Inc. (“FA”)³, an entity, according to Gofman, for receiving their net commissions. FA leased the premises at the Avenue U branch office from the landlord and assigned its rights and obligations under the lease to GFI on June 20, 2002, for the stated consideration of one dollar. GFI thereafter acquired a license, dated June 3, 2003, from the New York State Banking Department for this satellite office although FA apparently continued to pay rent and utility bills to the landlord after the assignment. The precise relationship between FA and the GFI defendants cannot be ascertained from the Complaint. Plaintiffs FA and Gurevich contend that no written agreement governs the relationship of the various parties and they have not asserted a breach of contract claim.

Problems subsequently arose between Gurevich and the GFI defendants. GFI maintains that Gurevich’s demeanor was alienating loan officers, personnel and customers while plaintiff maintains that GFI and Gofman conspired to usurp plaintiff’s business. These difficulties culminated in a physical altercation between plaintiff and loan officer Gennady Utchitel, which triggered Gurevich’s firing, a dispute over the operation of the Avenue U office and no less than four separate lawsuits.

In a letter dated July 26, 2006, GFI terminated Gurevich, citing the altercation and "past incidents" and barred him from entering the Avenue U office. Loan Officer Utchitel concurrently commenced an action on August 10, 2005 against Gurevich as a result of their

³Gofman explains that “[t]he ‘F’ stands for ‘Felix’ Gurevich, and the ‘A’ stands for ‘Alexander’ Gofman” (see, Affidavit of Alexander Gofman, sworn to September 27, 2005, p 3, paragraph 8, in Opposition to Plaintiff’s Order To Show Cause in this action).

encounter, Utchitel v Gurevich, (Kings County Index No. 24557/05), now pending before the Hon. Gerald S. Held.

Gurevich responded to GFI's edicts by bringing this action for damages and immediately sought to prevent GFI from denying him access to the Avenue U office and interfering with his business activities. The Hon. Mark I. Partnow signed a show cause order on September 16, 2005 containing a temporary restraining order granting plaintiff such interim relief.

GFI then brought its own action against plaintiff Gurevich, ten days later on September 26, 2005 entitled, GFI Mortgage Bankers, Inc. v. Gurevich (Kings County Index No. 29500/05), for alleged business losses attributable to him. It, too, sought interim relief and the Hon. Gerald Rosenberg, apparently unaware of Justice Partnow's TRO, signed a show cause order on September 26, 2005 containing a TRO prohibiting Gurevich from entering the Avenue U office, trespassing therein and interfering with GFI's business at that location. Gurevich immediately sought to vacate Justice Rosenberg's TRO as conflicting with Justice Partnow's earlier-issued TRO by moving for relief in the Appellate Division, Second Department where Associate Justice William J. Mastro, on September 29, 2005, advanced the return date of both show cause orders to October 3, 2005. The Hon. Howard A Ruditsky, originally assigned to hear both matters, had recused himself, by order dated September 28, 2005, the day before Justice Mastro's order, and the matters came to this court following the parties' request for such reassignment.

Pending hearings on both orders to show cause, the parties agreed that Gurevich would retain the right to enter and remain in the Avenue U premises from 10 to 11 AM and

4 to 6 PM each business day.⁴ The parties further agreed on November 1, 2005 to increase plaintiff's presence at the Avenue U premises by revising his access hours to run from 9 to 11 AM and 4 to 7 PM. GFI also agreed to (1) vacate the Avenue U premises on or before December 1, 2005, (2) to then turn over possession to Gurevich under a new entity,⁵ subject to that new entity receiving the landlord's approval and full assignment of the lease and (3) to the release of GFI and FA from obligations under the lease. Consequently, the court extended the TRO in this case to December 1, 2005, when it then expired, and the parties each further agreed on the record to withdraw with prejudice their respective show cause orders seeking preliminary injunctions.⁶

Both actions involving plaintiff and GFI remain, as well as a separate matter brought in April 2006 by Gofman. That action, entitled Gofman v Gurevich, (Kings County Index No. 12513/2006), seeks to dissolve FA.⁷ Presently, defendants challenge the sufficiency of plaintiff's amended complaint in this action.

⁴The court's order, dated October 12, 2005, contains the caveat that "GFI agrees not to interfere with business relationships of clients of Gurevich."

⁵Submissions subsequently identified that new entity as "Global Funding Resources, Inc." (see, Affirmation of Abraham Eisner, dated January 9, 2006, p 4, paragraph 10, in Support of GFI's Cross Motion, dated January 9, 2006, in GFI Mortgage Bankers, Inc. v Gurevich, Index No. 29500/05).

⁶GFI subsequently vacated the Avenue U premises and turned over its possession to Gurevich on November 25, 2005. The court's further order, dated January 24, 2006, reflects that the landlord had provided the needed consent.

⁷The parties therein have agreed (1) to the purchase price for a property at 3600 Mystic Point Drive in Aventura, Florida (see Oral Argument Transcript, pp 7 and 10); (2) to ask the Florida attorneys holding escrow money received from Hollywood Hills, LLC to forward that money to counsel for defendants Gofman and Ave U Management who will hold that money in escrow and pay off the loan/credit line regarding Hollywood Hills, Florida (see Transcript, pp 12-14 and paragraph 40 of the amended complaint herein referencing a Florida real estate venture known as "Hollywood Hills"; and (3) to an accounting after limited discovery as part of a voluntary dissolution of FA (Transcript, pp 14-27).

The Complaint

In the first complaint, dated September 14, 2005, plaintiff sought relief under seven causes of action: (1) tortious interference with prospective economic advantage; (2) breach of fiduciary duty; (3) unjust enrichment; (4) fraud; (5) constructive trust; (6) violation of the Donnelly Act (General Business Law § 340); and (7) under RICO (18 USC § 1962 et seq.) In response to this complaint, the GFI defendants filed a motion to dismiss, and defendant Gofman filed a cross-motion to dismiss, both under CPLR§ 3211(a)(1),(3), & (7), and § 3016(b).

In January, 2006, together with a response to the defendants' motions, plaintiff moved to compel the defendants to accept service of an amended complaint. The proposed amended complaint dropped two causes of action, the RICO and Donnelly Act claims, but added a defendant, F.A. Management Services, Inc. Defendants filed papers in opposition to this cross-motion.

In response to defendants' opposition, without seeking leave of the Court, plaintiff filed a second amended complaint, which removed FA as a defendant, added FA as a plaintiff, and added 1602Ave U Management as a defendant. The second amended complaint also added a seventh cause of action for an accounting against defendants Gofman and 1602.

The parties agreed on the record at oral argument to perform the accounting as part of the dissolution of FA under Index No. 12513/2006. The seventh cause of action is thus rendered moot in this action by the parties' agreement. The fifth cause of action for constructive trust as against the GFI defendants was withdrawn at oral argument, as plaintiffs' counsel conceded it had no merit. The remaining causes of action to be addressed in the motions to dismiss are as follows: (1) tortious interference with prospective business advantage against all defendants; (2) breach of fiduciary duty against all defendants except

1602; (3) unjust enrichment against all defendants; (4) fraud against the GFI defendants; and (5) constructive trust against 1602. Because defendants' motions were originally directed at the initial complaint which has been superceded by the Second Amended Complaint in which 1602 Avenue U is named as a defendant, although the cross-motion by Gofman does not specifically address the claims against 1602, the Court deems the motion to include those claims.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. 511 West 232nd Street Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 152(2002); Casamassima v. Casamassima, 30 AD3d 596(2d Dep't, 2006). It is well-settled that the facts as alleged in the complaint must be accepted as true and plaintiffs must be accorded the benefit of every possible favorable inference. Leon v. Martinez, 84 NY2d 83(1994); Casamassima v. Casamassima, 30 AD3d 596. The court must determine only whether the facts as alleged fit within any cognizable legal theory and not whether the cause of action has been properly pled (see 511 W.32nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152; Morone v Morone, 50 NY2d 481, 484; Guggenheimer v. Ginzburg, 43 NY2d 268(1977); Rovello v Orofino Realty Co., 40 NY2d 633, 634). However, allegations consisting of bare legal conclusions, or that are inherently incredible or contradicted by documentary evidence, will not be accorded a favorable inference. SRW Associates v. Bellport Beach Property Owners, 129 AD2d 328(2d Dep't, 1987).

First Cause of Action - Tortious Interference With Prospective Economic Advantage

A claim of tortious interference with prospective economic advantage, also referred to as tortious interference with prospective business or contractual relations, requires a showing that (1) the defendant knew of the proposed contract between plaintiff and a third

party, (2) the defendant intentionally interfered with that proposed contract, (3) were it not for the defendant's interference, the contract would have been entered into, (4) the defendant's interference was done by wrongful means, and (5) plaintiff suffered damages as a result. Joan Hanson & Co. V. Everlast Corp., 296AD2d 103, 111 (1st Dep't, 2002). In order to recover damages under a theory of tortious interference with prospective business opportunities, plaintiff must show that "a contract would have been entered into but for the actions of the defendant." Ricca v. Valenti, 24 AD3d 647, 648 (2d Dep't, 2005), citing Bankers Trust Co. v. Bernstein, 169 AD2d 400, 401(1st Dep't, 1991). The defendant's actions in pre-contractual interference, moreover, must employ some wrongful means, often rising to the level of criminal or independently tortious conduct. Carvel v. Noonan, 3 NY3d 182, 191-92 (2004); NBT Bancorp v. Fleet, 87 NY2d 614, 621 (1996). Plaintiff's complaint refers to GFI's "reputation" for improper business practices (Plaintiff's Second Amended Complaint ¶ 17), defendants Eisner and Gross holding "selfish positions" (¶¶ 33-34), and intending to "hoodwink" the plaintiff (¶ 35). Such allegations are insufficient. At no point in the complaint does the plaintiff state how the defendants have interfered with any existing or proposed contract with the parties, or what 'wrongful means' were used in such interference.

Moreover, "[t]o make out a claim for tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff, or by means that were unlawful or improper' (citations omitted)". 71 Pierrepont Associates v. 71 Pierrepont Corp., 243 AD2d 625 (2d Dep't, 1997). A justified economic interest of one's own defeats a claim that defendant's sole purpose was to harm plaintiff. . See Foster v. Churchill, 87 NY2d 744 (1996). The allegations herein clearly suggest that plaintiffs were damaged solely in order to advance the self-interest of defendants. Allegations contained in paragraphs 57 through 65 suggesting that beginning in July 2005, both Gofman and the GFI defendants

maliciously fomented discontent and dissension between Gurevich and his business associates at GFI, including inducing co-worker Utchitel to attack him, and maliciously induced associates of FA to terminate their relationships with FA and enter into relationships with GFI, do not state an actionable cause of action for tortious interference with prospective business advantage, since such allegations are conclusory and unsupported by any particulars.

As to Gofman, plaintiffs have not specified any existing or proposed contracts, nor have plaintiffs alleged any specific acts performed by Gofman which interfered with existing or proposed contracts. Although the complaint alleges that Gofman has “essentially sided with the other defendants”(Second Amended Complaint ¶ 10) and “conspired with the GFI defendants to leave F.A. and to open a competing business” (¶ 63), these conclusory allegations fail to articulate a claim of tortious interference with any cognizable business interest with third parties which belong to plaintiffs. See, Joan Hansen & Co., Inc. v. Everlast World’s Boxing, supra. In Kevin Spence & Sons v Boar’s Head Provisions Co., 5 AD3d 352, 354 (2004), the Appellate Division, Second Department found that a plaintiff had satisfied pleading requirements by “making specific allegations identifying those of its customers who were purportedly contacted by the defendants, describing the challenged conduct and the existing and prospective customer agreements affected by that conduct”. Plaintiffs here have not made any specific allegations of customers or contracts lost due to the defendants’ conduct; the speculative suggestion that plaintiffs had any business opportunity which was diverted by defendants is refuted by the documentary evidence and plaintiff’s own admissions.

Any suggestion that Gurevich was entitled to retain the brokerage business of customers he brought to GFI is also not supported by the allegations. New York Banking Law §590 requires that anyone engaged in the mortgage loan business must be licensed by the State. Plaintiff concedes in his papers that he is not a licensed mortgage broker. See

Reply Affirmation in Support of Cross-Motion to Compel the Defendants to Accept Service of Amended Complaint ¶ 8. Defendants included, in the Motion to Dismiss, the mortgage banker license granted by the New York State Banking Department, permitting GFI Mortgage Bankers, Inc. to make mortgage loans. Also annexed to the GFI motion is its “Undertaking of Accountability” listing plaintiff Gurevich and co-defendant Gofman as among those “affiliates” for whom GFI is responsible and indicating that prompt notice of termination of such affiliate will be given to the Banking Department. This documentation establishes that an employer-employee or, at most, an independent contractor relationship existed between GFI and plaintiff Gurevich. Once Gurevich’s relationship with GFI was terminated, he was free to seek employment elsewhere but had no cognizable entitlement to take those clients he had brought to GFI in the course of his employment with him. His recourse for any earned commissions would be through a breach of contract action which has not been interposed.

In cases involving alleged tortious interference with prospective business interests, courts have required a demonstration that the defendant prevented a third party from extending a contractual opportunity to the plaintiff. Morrow v. MVP Health Plan, Inc., 307 AD2d 627(3d Dep’t, 2003); Joan Hansen & Co., Inc. v. Everlast World’s Boxing, 296 AD2d 103(1st Dep’t, 2002); Mandelblatt v. Devon Stores, 132 AD2d 162(1st Dep’t, 1987). Here, plaintiffs have not alleged that there were existing contracts between Gurevich or FA and third parties with which the defendants interfered, nor have they identified any proposed contracts between Gurevich or FA and third parties. Plaintiff Gurevich does not identify any prospective contractual relationship between himself and potential customers. Plaintiff’s relationship was with GFI, from whom he received commissions for referring potential customers. Because he is not a licensed broker and could not provide services to third parties without GFI, he had no expectation of unilaterally contracting with clients for

the services that GFI provided. FA, whose interest Gurevich now seeks to assert derivatively, similarly has identified no claim against the GFI defendants based upon a usurpation of a business opportunity with prospective customers independent of GFI.

Defendant 1602 was created by Gofman to continue providing services to GFI following Gurevich's termination. There are no allegations of any business opportunities between 1602 and any third parties outside of the defendants herein to which plaintiffs would be entitled.

The plaintiffs' first cause of action is therefore dismissed as to all defendants.

Second Cause of Action - Breach of Fiduciary Duty

The second cause of action alleges that all defendants other than 1602 "have breached a fiduciary duty owed to Gurevich and F.A." and that as a result "plaintiffs have sustained damages in an amount to be proven at trial, but estimated at several million dollars." With respect to a fiduciary duty owed to plaintiffs by GFI, Paragraph 49 alleges that the GFI defendants "enjoyed a position of dominance over Gurevich", concluding "the two sides did not bargain at arms length." The complaint alleges that Gurevich and FA were "obliged to make available to the GFI defendants essentially all of the records of the business"(¶ 50), including lists of prospective customers, records of business activities and reports on financial conditions (¶ 51) which would not have been made available but for the relationship (¶ 52), and that a confidential relationship arose from the position of dominance by the GFI defendants over the plaintiffs, as well as from the investment by the plaintiffs of money and time to develop a business for the GFI defendants (¶ 53). Paragraphs 60 and 61 allege that the GFI defendants induced Gofman and Utchitel to harass business associates of Gurevich and assist in destroying the business of Gurevich and of FA. Paragraph 65 alleges that the GFI defendants induced, enticed and procured

associates of FA to terminate their relationships with FA and to enter into relationships directly with the GFI defendants in violation of defendants' "duties of fidelity owed to F.A."

A fiduciary relationship exists when one party "reposes confidence in another and reasonably relies on the other's superior expertise or knowledge." Sergeants Benev. Ass'n Annuity Fund v. Renck, 19 AD3d 107 (1st Dep't, 2005); WIT Holding Corp. v. Klein, 282 AD2d 527, 529 (2d Dep't, 2001); Wiener v. Lazard Freres & Co., 241 AD2d 114, 122 (1st Dep't, 1998). The Court of Appeals stated in EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 (2005), that a "fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation (and) [s]uch a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arms-length business transactions." See also, Restatement [Second] of Torts §874, Comment *a*. Arm's length business transactions do not give rise to fiduciary relationships. Wiener v. Lazard Freres & Co., *supra*.

In this case, the relationship between Gurevich and the GFI defendants arose out of an oral agreement that Gurevich would screen and refer persons seeking residential mortgage loans to defendant Gelt Funding Corp. a/k/a GFI Mortgage Bankers, Inc. ("Gelt") and would receive commissions that would depend upon the amount of the loan. Plaintiff Gurevich further alleges a promise that he would receive stock in defendant Gelt and/or defendant GFI Capital Resources Group, Inc. in consideration for various services (¶ 25). According to the defendants, plaintiff

was hired by GFI as a loan officer and was appointed as the manager of the branch office at 228 Avenue U when that office was opened. GFI was issued a license by the New York State Banking Department to transact the business of a Licensed Mortgage Banker. Gurevich was an “affiliate” for whom GFI was responsible. The documentation establishes that an employer-employee, or at most, an independent contractor relationship existed between GFI and plaintiff Gurevich. (Defendant’s Motion to Dismiss Complaint, Exhibits C and E).

GFI contends, and Gurevich does not dispute, that Gurevich’s employment with GFI was “at will” and that both Gurevich and GFI could sever their relationship at any time. No written contract has been alleged or produced that suggests otherwise. The relationship between FA and GFI is not clearly defined in the complaint other than the assertion that Gurevich and Gofman created the corporate vehicle in order to manage their responsibilities as branch managers of the Avenue U office. The branch office at Avenue U was leased by GFI under an Assignment of Lease and an Acceptance of Assignment and Assumption of lease dated June 20, 2002, between GFI as Assignee and F&A Management Services, Inc. as Assignor.

Plaintiff has failed to plead any facts in the Second Amended Complaint that support the existence of a fiduciary duty running from the GFI defendants to plaintiffs. Plaintiff Gurevich worked on commission for GFI in an arms-length employment situation. There is no allegation that suggests a greater duty imposed on the GFI defendants toward plaintiffs. The allegation that plaintiff was obliged to provide GFI with records of business activities and reports on financial conditions is consistent with an employer/employee relationship or that of a salesman working on commission. The allegation that Gurevich was obliged to turn over lists of prospective customers to GFI is also consistent with such employment relationship.

No fiduciary duty running to the benefit of the employee or broker/agent is created by such relationship. Michnick v. Parkell Prods., Inc., 215 AD2d 462 (2d Dep't, 1995); see also Northeast General Corp.v. Wellington Advertising, Inc., 85 NY2d 158 (1993). The conclusory allegation that Gurevich is a joint venturer with Gross, Eisner and Gofman in a Florida real estate venture is not supported by any specific allegations whatsoever and seems to rest upon the same employee/commission broker relationship that supports all other allegations. "A conventional business relationship does not create a fiduciary relationship in the absence of additional factors." RKB Enterprises, Inc. v. Ernst & Young, 182 AD2d 971, 972 (3d Dep't, 1992). Plaintiff has failed to allege any "additional factors."

Plaintiffs argue that the relationship between plaintiffs and GFI was a "de facto" franchise and that a fiduciary relationship existed by virtue of such franchise. It does not appear that the relationship here falls within the definition of franchise as set forth in General Business Law §681. That section provides that a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark or under a marketing plan prescribed by a franchisor, and is required to pay a franchise fee. Since Gurevich is not a licensed mortgage banker, he could not engage in the same business in which GFI is engaged. However, even assuming there was a franchise, there is no fiduciary relationship between a franchisee and a franchisor. See Marcella & Co., Inc. v. Avon Products, Inc., 282 AD 2d 718(2d Dep't, 2001); Bevilacque v. Ford Motor Co., 125 AD2d 516(2d Dep't, 1986). "The great majority of courts to consider the issue have refused to recognize the existence of fiduciary obligations between a franchisor and franchisee in an ordinary franchise relationship." 52 American Law Reports 5th 613.

The relationship between Gurevich and Gofman, however, arises from their equal co-ownership of F&A Management, Inc., organized on April 19, 2002, with its principal place of business at 228 Avenue U in Brooklyn, also the address of the GFI branch office which they managed. It is not disputed that FA was established for the purpose of doing business with GFI. Paragraphs 53 and 54 of the Second Amended Complaint describe FA as an organization formed to develop a business for the GFI defendants and to market the services of the GFI defendants. FA is described as being “in the business of screening and referring.” (¶ 56).

The “relationship between shareholders in a close corporation, vis-a-vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith.” Brunetti v. Musallam, 11 AD3d 280, 281(1st Dep’t, 2004); Cassata v. Brewster-Allen-Wichert, Inc., 248 AD2d 710(2d Dep’t, 1998)(plaintiff’s summary judgment motion for corporate dissolution on ground of oppressive conduct by majority shareholders denied where there was issue of fact as to bad faith defense alleging that plaintiff/minority shareholder had financial interest in competing agency); Ajettix Inc. v. Raub, 9 Misc3d 908(Sup. Ct, Monroe Cty, 2005)(defendant 50% shareholder violated non-disclosure agreement and breached fiduciary duty by releasing confidential, proprietary information to competitor of corporation, warranting remedy of rescission). Where a fiduciary relationship exists between fifty percent shareholders, a breach of the duty of fidelity and good faith occurs where one party places his private interests in conflict with the corporation and personally profits at the expense of the corporation. See, Fender v. Prescott, 101 AD2d 418(1st Dep’t, 1984). However, when a business relationship terminates because there is no longer any expectation of obtaining business, a fifty percent shareholder does not breach a fiduciary duty to the other shareholder by accepting new employment.

Rafield v. Brotman, 261 AD2d 257(1st Dep't, 1999). The relationship between shareholders in a close corporation is analogous to that between partners, and a fiduciary relationship between partners terminates upon notice of dissolution, so that solicitation of the firm's clients after such notice is given, does not constitute a breach of fiduciary duty. Morris v. Crawford, 304 AD2d 1018(3d Dep't, 2003).

In this case, GFI notified Gurevich, in a letter dated July 26, 2005, that it was terminating his relationship with GFI effective immediately. The conduct set forth in the complaint as having constituted Gofman's breach of fiduciary duty is alleged to have occurred "July 2005 through the present." (§ 57) Paragraph 58 alleges that Gofman defamed Gurevich to the GFI defendants, negotiating with the GFI defendants for a franchise in competition with FA, induced Utchitel to lie about Gurevich and assisted the GFI defendants to destroy the business of Gurevich. The complaint further alleges that Gofman, with Utchitel, conspired with GFI to leave FA and open a competing business (§ 63) and that in furtherance of such conspiracy, Gofman and Utchitel copied procedures and materials used by FA, violated their agreements with FA, attempted to entice associates of Gurevich to leave FA and to work for them instead, and copied and made use of methods and materials that they had acquired while associated with FA (§ 64). Such allegations are sufficient to state a cause of action for breach of fiduciary duty against Gofman.

The defendants' motions to dismiss the second cause of action for breach of fiduciary duty is granted as to the GFI defendants and denied as to Gofman. (It is noted that Utchitel is not a party defendant).

Third Cause of Action - Unjust Enrichment

“The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation that the law creates in the absence of any agreement” (Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561, 572 [2005] [internal citation omitted]). “[T]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (Cruz v McAneney, 31 AD3d 54, 59 [2006] [internal citations and internal quotation marks omitted]). See also Clifford R. Gray, Inc.v. LeChase Const. Services, LLC., 31 AD3d 983 (3d Dep’t, 2006).

Here, plaintiffs have alleged (a) that their own services bestowed benefits upon GFI, GFI Capital Resources Group, Inc., Eisner and Gross (b) that FA’s services bestowed benefits upon Gofman and Ave U Management and (c) that all defendants have allegedly failed to provide full compensation for these alleged benefits (see, for example, Amended Complaint, paragraphs 21-23, 26-30, 39, 46, 57-59, 64, 67,69 and 76-78). Plaintiffs plead that defendant 1602 subsequently benefitted from plaintiffs’ efforts. However, in order to state a claim for unjust enrichment, it is necessary to allege that the services were actually performed “for the defendant” and not merely that defendant received some benefit. (Joan Hansen & Co., supra, 296 AD2d at 108).The complaint therefore is dismissed as to defendant 1602 as there are no allegations that 1602 in any way sought the services allegedly bestowed upon it.

The amended complaint also fails to allege any benefit that plaintiff Gurevich individually provided to Gofman. Such deficiency allows granting that portion of Gofman’s motion seeking dismissal of the amended complaint’s third cause of action brought by plaintiff Gurevich individually.

All defendants also argue that an express oral agreement precludes the unjust

enrichment claim. The Court of Appeals in this regard has held that “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” (Goldman v Metropolitan Life Ins. Co., 5 NY3d at 572 quoting Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]; see also Lum v New Century Mortgage Corp., 19 AD3d 558, 559-560 [2005], lv denied 6 NY3d 706 [2006]).

Plaintiffs do not contend, however, that any valid and enforceable contract, whether written or oral, governs herein. The need for further discovery to more fully develop and resolve this issue thus warrants presently denying dismissal of the unjust enrichment cause of action as to the GFI defendants on this basis.

Fourth Cause of Action - Fraud

The allegations of fraud in the fourth cause of action are made by Gurevich individually solely against the GFI defendants and relate exclusively to a promise of stock made twelve years ago but alleged to be continuing. In paragraphs 26 to 37 of the Second Amended Complaint, Gurevich claims that fraud was perpetrated against him in that he was promised by Eisner, on behalf of the GFI defendants, that defendants were putting together an initial public offering and that Gurevich would receive 5% of the company’s shares. The complaint alleges that the GFI defendants did not intend to make the initial public offering and did not intend to issue stock to Gurevich. The complaint further alleges that Gurevich, in reliance on these false representations, opened the Florida branch and spent \$40,000 training personnel. Gurevich alleges that the false promises were made in order to defraud him of his

work efforts and money.⁸

The defendants contend that Gurevich has not pleaded fraud with sufficient particularity pursuant to CPLR 3016(b) and, in any event, fails to state a claim because he fails to plead any misrepresentation, reliance, scienter or proximate cause.

In addition, the defendants maintain that since the fraud claim arises out of a contractual relationship, it may not be maintained in the absence of an allegation of a breach of a duty independent of the breach of contract.

To plead a prima facie case of fraud the plaintiff must allege representation of a “material existing fact, falsity, scienter, deception and injury.” New York University v. Continental Insurance Co., 87 NY2d 308 (1995) citing Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 NY2d at 407(1958). “To recover damages for fraud, a plaintiff must prove: (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury” Ozelkan v Tyree Bros. Entvl. Servs. Inc., 29 AD3d 877, 878 (2d Dep’t, 2006). In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that “the circumstances constituting the wrong shall be stated in detail” when a cause of action based upon fraud or breach of trust is alleged. CPLR 3016(b) imposes a more stringent standard of pleading than the generally applicable “notice of the transaction” rule of CPLR 3013, and complaints based on fraud or breach of trust which fail in whole or in part to meet this special test

⁸ It is noted that at oral argument on June 29, 2006, plaintiffs’ counsel represented that “all the issues. . . concerning Florida” had been effectively resolved in the settlement of a Florida lawsuit (Tr. at p. 11). The Fourth Cause of Action may therefore be moot.

of factual pleading have consistently been dismissed. Lanzi v. Brooks, 54 A.D.2d 1057(3d Dep't, 1976) affd. 43 NY2d 778(1977).

Essential to a cause of action sounding in fraudulent inducement based upon a false promise is that the defendant had no intention to perform the promise at the time it was made. Dalessio v. Kressler, 6 AD3d 57(2d Dep't, 2004). “Absent a present intention to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud. (Adams v. Clark, 239 NY 403). A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement’ (Lanzi v Brooks, [54 AD2d 1057] at 1058.” Non Linear Trading co., Inc. v. Braddis Associates, 243 AD2d 107, 118(1st Dep't, 1998). The complaint herein alleges that the GFI defendants did not intend to make the initial public offering and did not intend to issue stock to Gurevich when such promises were made. Plaintiff’s allegations about reiteration of the stock promise and the continuing nature of the alleged misrepresentations into the present require discovery before determining whether the statute of limitations bars the fraud claim. In addition, the absence of a breach of contract claim necessarily prevents dismissing the fraud claim as duplicative. As presently pleaded, therefore, the Second Amended Complaint adequately states a fraud claim on behalf of Gurevich in his individual capacity against the GFI defendants.

Fifth and Sixth Causes of Action - Constructive Trust

Plaintiff’s attorney conceded at oral argument that the constructive trust cause of action interposed in the Fifth Cause of Action as against the GFI defendants, is without merit and has been withdrawn. (Transcript of Oral Argument 6/29/06 at p.47). Even absent plaintiff’s concession, however, it is clear, for reasons previously

discussed, that no fiduciary relationship between Gurevich or FA and GFI or between Gurevich and GFI's officers individually has been pleaded, thus precluding a constructive trust cause of action as to them. See Sharp v. Kosmalski, 40 NY2d 119 (1976); Nastasi v. Nastasi, 26 AD3d 32, 37 (2d Dep't, 2005). As stated in Nastasi, "[i]n order to state a cause of action to impose a constructive trust, a plaintiff must allege (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment". As there are no allegations whatever to support a fiduciary relationship between plaintiffs and defendant 1602, the Sixth Cause of Action must also be dismissed.

Conclusion

ORDERED, that the GFI defendants' motion to dismiss the complaint is granted as to the first, second and fifth causes of action (tortious interference, breach of fiduciary duty and constructive trust) as against all GFI defendants and is denied as to the third cause of action for unjust enrichment, and without prejudice to renew, as to the fourth cause of action for fraud, and it is further

ORDERED, that defendant Gofman's cross motion to dismiss the first, second and third causes of action (tortious interference, breach of fiduciary duty and unjust enrichment) as against Gofman is granted only as to the first cause of action and to the third cause of action as to plaintiff Gurevich and is otherwise denied, and it is further

ORDERED, that the first, third and the sixth causes of action alleging tortious interference, unjust enrichment and constructive trust against 1602 Avenue U Management are dismissed, and it is further

ORDERED that the defendants shall have 30 days from service of a copy of this order to answer the surviving causes of action.

Having determined that some of plaintiffs' causes of action herein survive, it is necessary to address various discovery-related motions brought under this index number. Notwithstanding that issue has not yet been formally joined by service of answers, because of the history of this case as recited herein and the need to address the urgent matters raised in the Orders to Show Cause seeking preliminary injunctions, on January 24, 2006, the parties entered into a Preliminary Conference Order which covers both this action and the reciprocal action brought by GFI against defendant Gurevich under Index No. 29500/05. Numerous motions have followed. Two motions brought by defendants GFI and Gofman to quash improper subpoenas served by plaintiffs were granted by Order dated June 29, 2006. Remaining open are motions numbered 7, 8 and 10, all related to discovery.

By motion dated May 15, 2006, (Motion 7) plaintiffs moved to compel production of documents to which they claimed entitlement under the PC Order and their Request for Production dated February 21, 2006 and demanding the striking of defendants' answer for failure to comply. Defendant Gofman opposed this motion and cross-moved (Motion 8) to dismiss the complaint for failure of plaintiffs to comply with this Court's oral Order of April 24, 2006 directing plaintiffs to produce all documents in their possession for copying by defendants within 24 hours. When this order was subsequently thwarted by plaintiff Gurevich's intervention, a written Order was issued on May 23, 2006, directing Gurevich to copy "every document in his possession relating to the business of F.A. Management Services, Inc." "at his own expense" and provide such documents to counsel for Gofman within 7 days or be precluded from offering evidence of his own claims regarding FA. Counsel for

Gofman contends many documents formerly in Gurevich's possession are now missing, including the corporate kit. Motion 8 appears to be duplicated in Motion 10 in which defendants Gofman and 1602 also seek the dismissal of the complaint for failure to comply with discovery directives and for other sanctions.

In light of the fact that no answers have yet been served and, even more compelling, the significant change in circumstances as reflected herein regarding the voluntary dissolution of FA and settlement of a Florida action that may render much of the complaint moot, this Court declines to grant the relief requested at this time. However, plaintiffs are cautioned that these motions, which have not been answered, are perceived to have merit, and are granted to the extent that plaintiffs are directed to comply with the prior orders of this Court by promptly supplying copies of all documents related to the business of FA and plaintiff Gurevich as an employee or broker of GFI within seven days, on or before November 3, 2006. Included shall be the corporate kit and documentation as to every mortgage for which plaintiffs claim that commissions are due. Plaintiffs are precluded from offering evidence at trial of any transaction or claim for which documentation is not produced in compliance herewith.

This constitutes the decision and order of this court.

E N T E R,

J. S. C.

