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

PRESENT: BERNARD J. FRIED E-FILE PART 60
HON. BERNARD J. FRIED *Justice*

MUTUAL BENEFITS OFFSHORE FUND,

Plaintiff,

- v -

EMANUEL ZELTSER, ET AL.,

Defendants.

INDEX NO. 650438-2009

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

APPEARANCES:

For Plaintiff:

Martin P. Russo, Esq.
Marlen Kruzhkov, Esq.
Gusrae Kaplan Bruno & Nusbaum, PLLC
120 Wall Street, 11th Floor
New York, NY 10005

For Moving Defendants Emanuel Zeltser, Esq., Alexander Fishkin, Esq., and Sternik & Zeltser:

Emanuel Zeltser, Esq.
Sternik & Zeltser
119 West 72nd Street #229
New York, NY 10023

Alexander Fishkin, Esq.
Attorney at Law, P.C.
366 Amsterdam Avenue #176
New York, NY 10024

Plaintiff Mutual Benefits Offshore Fund ("MBOF") brought this action to recover $4.3 million allegedly wrongfully retained by defendants Emanuel Zeltser, Esq. ("E. Zeltser" or "Zeltser"), Alexander Fishkin, Esq. ("Fishkin"), Sternik & Zeltser ("S&Z"), M.E. Seltser P.C. ("M.E. Seltser"), Mark Zeltser ("M. Zeltser"), Interel Corporation ("Interel"), and Joseph Kay ("Kay").

Defendants E. Zeltser, Fishkin, and S&Z now move to dismiss the complaint pursuant to CPLR §§ 3211 and 3212. For the reasons that follow, the motion is granted in part and denied in part.

According to the complaint, MBOF is a fund formed in the British Virgin Islands to invest in the death benefits of U.S.-based life insurance policies. It raised approximately $23 million from investors, of which the largest was Test Trust[1], through its wholly-owned investment company, Kayley Investments NV ("Kayley"), which invested $15 million. MBOF invested all of these funds in policies purchased from Mutual Benefits Corporation ("MBC"), a brokerage house based in Florida. In May 2004, MBC was placed in receivership by the U.S. Securities & Exchange Commission ("SEC") for allegedly manipulating the life expectancies on death benefit policies.

According to the complaint, MBOF hired E. Zeltser and S&Z at Kay's recommendation to recover its $15 million investment in MBC. The complaint alleges that E. Zeltser and S&Z recovered $4.3 million of those funds but never returned them to MBOF. E. Zeltser and S&Z represented to MBOF that the $4.3 million of MBOF's money recovered by them was deposited into their attorney escrow account. Fishkin took over representation of MBOF in connection with this matter for E. Zeltser and S&Z between March 2008 and June 2009, after E. Zeltser was arrested and then imprisoned in Belarus. In late 2008, Fishkin informed MBOF that M. Zeltser, E. Zeltser's brother, had the sole signatory authority on E. Zeltser's attorney escrow accounts, including the account allegedly holding MBOF's funds.

At a meeting in late January 2009, M. Zeltser informed MBOF that only Kay was authorized to instruct him with respect to the account allegedly holding MBOF's funds. At that meeting, Kay's attorney informed MBOF that he believed M. Zeltser had moved the funds into another account.

The complaint alleges that the funds from the MBO receiver made payable to MBOF had been deposited, not into S&Z's attorney escrow account, but into non-attorney accounts in the name of M.E. Seltser at JP Morgan Chase Bank. M.E. Seltser had never been authorized by MBOF to hold its funds. The complaint further alleges that, on June 28, 2008, all $4.3 million were transferred from the M.E. Seltser accounts into an escrow account in the name of Interel. Of that sum, only $10,000 remains.

The complaint identifies Christopher Samuelson ("Samuelson") and Kurt Gubler ("Gubler") as MBOF's escrow agents, authorized to take any legal action to recover MBOF's property.

---

[1] Test Trust had two trustees: Kay and Christopher Samuelson.

The complaint brings eight causes of action for (I) common law fraud, (II) common law fraud, (III) conversion, (IV) breach of contract, (V) breach of contract, (VI) breach of fiduciary duty, (VII) unjust enrichment, and (VIII) a permanent injunction.

Under CPLR § 3211(a)(7)[2], "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." "In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005) (citations omitted). Allegations made upon information and belief "are to be considered true for the purposes of a motion to dismiss pursuant to CPLR 3211(a)(7)." *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 40 (2d Dept. 1989) (citations omitted). However, "factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration." *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dept. 2006), *aff'd*, 9 N.Y.3d 836 (2007) (citations omitted).

Movants have asked me to convert this motion to dismiss into one for summary judgment, pursuant to CPLR § 3211(c). As it is far from clear that there are no triable issues of fact, *see Kronish, Lieb, Shainswit, Weiner & Hellman v. John J. Reynolds, Inc.*, 33 A.D.2d 366, 369 (1st Dept. 1969), I decline to do so.

Defendants E. Zeltser and S&Z raise a variety of arguments in favor of dismissal of one or more counts of the complaint. I will address them in turn.

First, movants argue that the complaint must be dismissed because MBOF is a foreign corporation that lacked authorization to do business in New York State at the time it filed the complaint.

Bus. Corp. Law § 1312(a) provides that "[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state."

It is undisputed that MBOF is a foreign corporation, but at the time of oral argument on this motion, MBOF disputed movants' claim that it was doing business within New York State, and

---

[2] Movants did not specify the subsection of section 3211 under which this motion was made, but in their Argument section, they appear to rely on section 3211(a)(7).

argued that even if it were doing business here, it could cure that defect at any time during the litigation. In my November 1, 2010 order, I stayed this motion while I referred the entire issue of MBOF's capacity to sue to a special referee. Meanwhile, by letter dated March 4, 2011, I was informed that on February 17, 2011, MBOF was approved to do business in New York State as Mutual Benefits Offshore Fund, Ltd., pursuant to Bus. Corp. Law § 1304. No inquest had yet been scheduled when this entire matter was removed to federal court in early April 2011. It was remanded in late July 2011, and MBOF then asked me to rule on the merits of this motion. I will now decide the merits of this entire motion, without referring the issue of MBOF's capacity to sue back to the Referee.

The first question, then, is whether the complaint must be dismissed without prejudice, even though MBOF is now authorized to do business in New York State, because MBOF failed to obtain this authorization before it filed the complaint.

In their March 18, 2011 letter-brief in response to MBOF's March 4, 2011 letter,[3] movants argued that I should answer this question in the affirmative, based on the decision by the Court of Appeals in *United Environmental Techniques, Inc. v. State Department of Health*, 88 N.Y.2d 824 (1996). The Court in *United Environmental* reversed an Appellate Division decision ruling on the merits of an Article 78 proceeding despite the petitioner's possible lack of authority to do business in New York. *Id.* at 825. The underlying Appellate Division decision that it reversed had relied on an earlier First Department decision, *Tri-Terminal Corp. v. CITC Industries, Inc.*, 78 A.D.2d 609 (1st Dept. 1980), in which the court had modified the trial court's outright dismissal of a complaint based on Bus. Corp. Law § 1312, and replaced it with a conditional dismissal enabling plaintiff to cure the defect by obtaining the requisite authority to do business, prior to trial. *Tri-Terminal,* 78 A.D.2d at 609.

United Environmental does not speak directly to the issue before me, however, because there the appellate court ruled on the merits of the petition, before the petitioner had cured any potential lack of authority to do business in New York State. Here, in contrast, MBOF has cured such a potential defect by obtaining authorization to do business in New York State, before I ever issued a ruling on the merits. It would seem inefficient and a waste of judicial resources now to dismiss this action without prejudice, just to permit MBOF to refile the same action. The parties have not

---

[3] I incorporate as part of the record on this motion the March 4, 2011 letter from MBOF's counsel, Efiling Docket No. 241, and the March 18, 2011 letter from defendants, Efiling Docket No. 243.

submitted any authority that compels one result or the other. Therefore, I decline to dismiss this action on the basis that plaintiff lacked capacity to sue; if it did lack such capacity, it has now cured the defect, before any ruling on the merits has taken place.

Second, movants argue that the complaint must be dismissed because MBOF's principals agreed in late 2006 to relinquish administrative control over MBOF to Kay and a person named Badri Patarkatsishvili ("Badri")[4], and not to take any corporate action without their approval, in exchange for a promise by "S&Z and its clients" not to sue MBOF's principals or MBOF. (Memo. in Support at 10.) In their argument on this point in their moving brief, movants do not identify either the particular individuals who they allege were MBOF's principals or the clients of S&Z to which they refer.

Even if movants had articulated the parties to and the material terms of this alleged agreement, and assuming that the agreement as alleged would be enforceable, its existence is a question of fact that cannot be resolved on this motion.

Third, movants seek dismissal of the entire complaint on the ground that this action has been brought on behalf of MBOF by Samuelson, who lacks authority to do so.

As noted above, the plaintiff in this complaint is MBOF. According to MBOF's application under Bus. Corp. Law § 1304 for authority to do business in New York State, MBOF is a foreign corporation organized in the British Virgin Island in 2002. In its application, it called itself "Mutual Benefits Offshore Fund, Ltd." Its president is Shaun Davis. (Ltr. from M. Kruzhkov to Court, (Mar. 4, 2011), Efiling Docket No. 241, Ex. B.)

As any law student knows, while corporate entities are entitled to sue and be sued as "persons," corporate entities act through individuals. The complaint identifies two individuals in connection with MBOF: Samuelson and Gubler. Both are identified as MBOF's escrow agents, who have been authorized to take "all necessary legal action to recover" MBOF's property. (Compl. ¶¶ 10-11.) Samuelson has also submitted an affidavit in this action, dated July 17, 2009, in which he again identifies himself as MBOF escrow agent with authority to take "all necessary legal action to recover" MBOF's property. (Samuelson Aff. ¶ 1.)

To the extent that movants' argument makes any sense, they are questioning the authority of Samuelson to act on MBOF's behalf. In particular, they maintain that Samuelson is not actually MBOF's escrow agent, and that even if he were, that agency is insufficient to enable him to act or

---

[4] Movants identify Badri as "a wealthy investor from Georgia (former Soviet republic), who passed away in February 2008." (Memo. in Support at 3.)

speak on MBOF's behalf. They also question Davis's authority to appoint Samuelson as escrow agent or to undertake any actions on MBOF's behalf.

In support of their arguments, movants cite *Oppenheim v. Simon*, 57 A.D.2d 1006 (3d Dept. 1977), which held that plaintiff escrow agents could properly bring that action in fulfillment of their obligation to pay to a particular corporation certain sums to which it had become entitled. *Id.* at 1008.

Based on their reliance on *Oppenheim*, and despite other language in their moving papers, movants appear to accept the general principle that an escrow agent can bring a lawsuit on behalf of a corporation in order to recover funds to which it is entitled. What remains of their argument is the allegation that Samuelson was not duly appointed as an escrow agent of MBOF or has conflicts of interest that disqualify him from serving as MBOF's escrow agent. In support of these contentions, movants cite Samuelson's and Davis's deposition transcripts and pleading allegations. As any evaluation of these contentions depends on the resolution of disputed questions of fact, and the proffered evidence cannot appropriately be considered on a motion to dismiss, this argument is rejected for purposes of this motion.

Fourth, movants seek dismissal of the causes of action for fraud, conversion, breach of contract, and breach of fiduciary duty (Counts I–VI) because MBOF cannot prove damages. Movants maintain that MBOF cannot prove damages because it is not the rightful owner of the $4.3 million it seeks to recover, and those funds really belong to its investors. In support of this argument, movants cite *Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co.*, 470 F. Supp. 610 (S.D.N.Y. 1979), which states that the plaintiff in an action for damages for fraud must show "actual pecuniary loss." *Fairchild*, 470 F. Supp. at 617.

It is well-settled that "a corporation exists independently of its owners, as a separate legal entity." *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 109 (1st Dept. 2002) (internal citations omitted).

By analogy to this familiar principle, and in opposition to movants' argument, MBOF maintains that MBOF is an independent legal entity independent of its investors, and as such, it is the rightful owner of the funds disbursed by the MBC receiver for its benefit. MBOF does not dispute movants' contention that these funds, once recovered, will need to be disbursed to MBOF's investors, pursuant to its agreements with them. But this eventuality does not derogate from MBOF's right to bring suit to recover the funds in the first place.

I agree with MBOF; I reject movants' argument that MBOF cannot plead damages because it is an investment fund.

Fifth, movants seek dismissal of the third cause of action for conversion, because they allege that the complaint does not and cannot allege that MBOF owns the funds at issue, and MBOF has no superior and immediate right of possession to these funds.

"To establish conversion the plaintiff must demonstrate legal ownership or an immediate superior right of possession to a specific identifiable thing and that the defendant exercised an unauthorized dominion over that property, which can be specific money, to the exclusion of the plaintiff's rights." *Meese v. Miller*, 79 A.D.2d 237, 242-43 (4th Dept. 1981) (internal citations and quotations omitted).

The third cause of action alleges that MBOF has a right to the $4.3 million in checks made out by the MBC receiver to MBOF, and that these funds were not deposited into an attorney escrow account in the name of S&Z, but were instead deposited and transferred into other accounts controlled by defendants, and that defendants intended to retain these funds for their own benefit. (Compl. ¶¶ 61-63.)

Movants' argument seems to depend on its assertion that MBOF is not a "bona fide functioning business," (Memo. in Support at 14) (emphasis in original), to which the funds could be released. Again, resolution of this argument depends on disputed issues of fact that cannot be resolved on this motion. For purposes of this motion, the complaint has adequately stated a cause of action for conversion.

Sixth, movants seek dismissal of the first and second causes of action for fraud, because they are based on the identical circumstances and allegations as the cause of action alleging breach of contract.

It is generally true that, "where a party is merely seeking to enforce its bargain, a tort claim will not lie." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995). Nevertheless, "[a] false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties." *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 122 (1995). *See, also Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 305 (1st Dept. 2003) (acknowledging in dicta that "a false statement of intention can be sufficient to support a claim of fraud"); *H.B. Int'l, Ltd. v. Kahan Jewelry Corp.*, 266 A.D.2d 77, 78 (1st Dept. 1999) (upholding jury's fraud verdict, where proof established that plaintiff had been induced by defendants' deliberate misrepresentation of their intentions into turning over certain funds, "even where that statement relates to an agreement between the parties"); *Century 21, Inc. v. F.W. Woolworth Co.*, 181 A.D.2d 620, 625 (1st Dept. 1992) (finding that plaintiff stated a fraud claim against Woolworth based on its alleged misrepresentation that there was no asbestos in a letter

that was a condition of closing on the sale of the premises, because fraud claim "[wa]s entirely independent of the contractual relation between the parties").

The first two causes of action in the complaint allege fraud. The first cause of action alleges that defendants "knowingly made material misstatements and omissions or material facts to Plaintiff with respect to the location of the $4.3 million," and goes on to state the other elements of a fraud claim in conclusory fashion. (Compl. ¶¶ 48-50.) The second cause of action alleges that E. Zeltser and S&Z, as MBOF's attorneys, fraudulently represented to MBOF that the funds received from the MBC receiver had to be held in S&Z's escrow account until certain withholding tax issues were resolved, and further misrepresented that the funds were actually held in that escrow account. Meanwhile, they knowingly authorized other defendants to transfer these funds to other accounts belonging to defendants. (Compl. ¶¶ 53-58.)

The breach of contract claims are contained in the fourth and fifth causes of action. The fourth cause of action alleges that MBOF entered into an agreement with E. Zeltser and S&Z to provide legal services, in which E. Zeltser and S&Z promised to recover funds owed to MBOF by the MBC receiver. (Compl. ¶¶ 66-68.) It alleges that "[p]laintiff performed under the agreement," but that E. Zeltser and S&Z failed the release the recovered funds to plaintiff. (Compl. ¶¶ 66-68.) The fifth cause of action alleges that MBOF entered into an escrow agreement with E. Zeltser and S&Z, in which the latter agreed to act as MBOF's escrow agent and to hold all funds recovered from the MBC receiver on behalf of MBOF in an escrow account in the name of S&Z. It alleges that "[p]laintiff performed under the agreement," but that E. Zeltser and S&Z breached it by depositing the funds into non-attorney accounts in the name of M.E. Seltser, rather than into an attorney escrow account in S&Z's name. It further alleges that E. Zeltser and S&Z never revealed this information to MBOF and instead led MBOF to believe that they had deposited the funds into the escrow account in the name of S&Z. (Compl. ¶¶ 71-74.)

A comparison of the fraud and breach of contract claims shows that the second cause of action for fraud does not simply reiterate the breach of contract allegations; it contains the additional allegation that Zeltser and S&Z misrepresented that the funds were being held in escrow for tax withholding purposes, in order to prevent MBOF from demanding the funds earlier. Thus, the fraud claim in the second cause of action is based on a particular assurance offered by the defendant, in addition to the promises recorded in the parties' alleged agreement. The alleged fraudulent intent is not asserted in conclusory fashion but is evidenced by parties' alleged conduct. Therefore, this fraud claim is not duplicative of the breach of contract claims. However, the first cause of action, which alleges fraud in conclusory fashion, will be dismissed.

Seventh, movants seek dismissal of the first and second causes of action for fraud on the ground that MBOF cannot prove justifiable reliance. Movants claim that MBOF principals cannot have justifiably relied on any statements by E. Zeltser and S&Z, because they knew that E. Zeltser and S&Z acted on behalf of Badri and Kay, not for MBOF. In support of this claim, movants cite Samuelson's and Davis's deposition transcripts. In its opposition papers, MBOF concedes that E. Zeltser threatened to sue MBOF as a prelude to representing it.

Even if movants are correct that MBOF knew of and consented to a conflict of interest on the part of Zeltser and S&Z, they have not cited to any authority supporting the proposition that a client involved in a dual representation is not justified in relying on statements and assurances given by its attorney of record, as a matter of law. I decline to reach that conclusion.

Eighth, movants seek dismissal of the fourth and fifth causes of action for breach of contract. Movants assert that the alleged contracts are void because (1) the complaint does not allege that MBOF gave any consideration, such as legal fees, to E. Zeltser and S&Z for their alleged representation; (2) the complaint does not allege any performance by plaintiff, except in conclusory terms; and (3) the complaint does not provide any details regarding the terms of the alleged contracts. Movants assert, citing Davis's deposition transcript, that MBOF and E. Zeltser never entered into any written agreement or engagement letter, so the contracts alleged in the complaint must be oral agreements.

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. & Terminal Corp. v. N.Y. State Dept. of Transp.*, 93 N.Y.2d 584, 589 (1999). To state a viable cause of action for breach of contract, a complaint must allege the contractual provision upon which the breach of contract claim is based. *See Rattenni v. Cerreta*, 285 A.D.2d 636, 637 (2d Dept. 2001).

MBOF does not contest movants' assertion that no written agreement–either retainer or escrow–exists, or the assertion that MBOF never paid and never promised to pay E. Zeltser or S&Z for their legal work on MBOF's behalf.

MBOF maintain, however, that the elements of consideration and performance by the plaintiff, and any other details of the contracts' terms, if inadequately pled, are satisfied by its submission of a ledger, attached to its attorney's affidavit in opposition to this motion, purporting to show that Fishkin was paid $23,000 by MBOF for certain work he did on behalf of MBOF. MBOF maintains that this ledger entry demonstrates both consideration and performance by the plaintiff concerning the alleged contracts. MBOF also asks the Court to overlook any deficiency in

pleading, because E. Zeltser and S&Z did not provide MBOF with a retainer letter. MBOF also makes the alternative argument that it is not required to plead consideration, performance by the plaintiff, or the material terms of the alleged contracts, because E. Zeltser entered an appearance on MBOF's behalf in the U.S. District Court for the Southern District of Florida[5] and because the complaint alleges in paragraph 20 that MBOF passed a corporate resolution appointing S&Z as its attorney in that matter. According to MBOF, these facts or allegations nullify any deficiencies in pleading its breach of contract claims.

The complaint does not allege any particular consideration promised to E. Zeltser and S&Z or performance completed by MBOF as part of the alleged contracts, and MBOF has not denied movants' contention that MBOF never paid or promised to pay E. Zeltser and S&Z for their work on MBOF's behalf. The ledger entry submitted by MBOF, submitted by way of its attorney's affidavit, purportedly showing that Fishkin was paid $23,000 for services rendered to MBOF, is insufficient to fill this gap. MBOF has not cited any relevant legal support for its theory that Zeltser's and S&Z's alleged breaches of duties to MBOF as an attorney and a law firm imply either the existence of the agreements alleged in the fourth and fifth counts, or that consideration was given, or that performance by the plaintiff was completed. Accordingly, the fourth and fifth causes of action will be dismissed for failure to state claims for breach of contract.

Ninth, movants seek dismissal of the entire complaint because it fails to implead Kayley as a necessary party, pursuant to CPLR § 1001.

CPLR § 1001 states: "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Movants apparently base their argument that Kayley is a necessary party on the notion that MBOF's "[c]omplaint and subsequent pleadings implied that the assets in issue may belong to Kayley," as the "actual equitable owner of these funds." (Memo. in Support, at 19.) MBOF, in opposition, maintains that MBOF claims no such thing. I do not read into the complaint such an implication. Therefore, this argument fails.

Tenth, movants seek dismissal of the seventh cause of action for unjust enrichment, because, they allege, certain allegations in the complaint and statements in Samuelson's affidavit assert that

---

[5] In a previous order deciding a disqualification motion in this action, I held that E. Zeltser and S&Z were estopped from arguing that they did not act as legal counsel for MBOF in the case captioned *SEC v. Mutual Benefits Corp.*, Case No. 04-60573-Civ (S.D. Fla.).

the funds at issue belong to MBOF's investors. Movants claim that this assertion undermines MBOF's claim in this cause of action that the funds belong to MBOF. Movants also argue that this cause of action fails because MBOF cannot and does not assert that any benefit has been conferred on defendants. Movants further state that the funds at issue are no longer in their possession, because "these funds have been disbursed and/or accrued and allocated during 2007, pursuant to authority of S&Z's clients Kayley, Badri and Kay." (Memo. in Support at 20.)

"The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Paramount Film Distributing Corp. v. State*, 30 N.Y.2d 415, 421 (1972); *accord Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 451 (1st Dept. 2009).

The seventh cause of action alleges that E. Zeltser, M. Zeltser, S&Z, Intel, and ME Seltser were unjustly enriched by receiving and retaining the $4.3 million belonging to MBOF, and by using these funds for their own use and benefit. (Compl. ¶¶ 83-85.) Accordingly, it states a cause of action for unjust enrichment. Movants' contrary arguments depend on questions of fact that cannot be resolved on this motion.

Finally, movants argue that the eighth cause of action seeking a permanent injunction must be dismissed, on the ground that MBOF's ultimate objective is a money judgment, based on the authority of *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000).

The eighth cause of action seeks a permanent injunction against defendants, enjoining them from further transferring, liquidating, or using MBOF's property, based on the concern that defendants will move the funds outside the jurisdiction if an injunction is not granted. (Compl. ¶¶ 88-91.)

The Court in *Credit Agricole* addressed a motion for a preliminary injunction, not a permanent injunction, and specifically identified the "critical distinction between an ultimate entitlement to a permanent injunction in the final judgment . . . and the preliminary injunctive relief at issue . . . in this case." *Credit Agricole*, 94 N.Y.2d at 549. As the eighth cause of action addresses a permanent injunction, not a preliminary injunction, *Credit Agricole* does not govern this case.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part and denied in part; the first, fourth, and fifth causes of action of the complaint are dismissed; and it is further

ORDERED that plaintiff is to serve and file an amended complaint in accordance with this order within ten days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that the reference directed in my interim November 1, 2010 order regarding this motion is withdrawn; accordingly, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry upon the Special Referee Clerk in the Motion Support Office (Room 119M), so that any reference may be canceled.

Dated: 9/7/2011

J.S.C.

HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE