

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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**MICHAEL RAKHNYANSKY, individually and as a
shareholder of GLITSY GLOW CAR WASH CORP.,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 891-12
Motion Seq. No. 2
Submission Date: 6/1512**

VLADIMIR GOTLIBOVSKY,

Defendant.

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The following papers having been read on this motion:

**Notice of Motion, Amended Affirmation in Support,
Affirmations in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affirmation in Opposition, Affidavit in Opposition and Exhibits....X
Affidavit in Reply and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Defendant Vladimir Gotlibovsky ("Defendant") on May 7, 2012 and submitted on June 15, 2012. For the reasons set forth below, the Court 1) grants Defendant reargument and renewal of the prior decision of the Court dated February 15, 2012 and, upon that reargument and renewal, declines to modify the prior decision; and 2) grants Defendant's motion to dismiss the fourth cause of action in the complaint, alleging unjust enrichment, and otherwise denies Defendant's motion to dismiss the complaint.

BACKGROUND

A. Relief Sought

Defendant moves for an Order 1) dismissing the action pursuant to CPLR § 3211 and vacating the prior decision of the Court dated February 15, 2012 (“Prior Order”) (Ex. A to Wolther Aff. in Supp.) in which the Court granted, in part, Plaintiff’s motion for injunctive relief (“Prior Motion”); 2) pursuant to CPLR § 3212, dismissing the action, after converting Defendant’s motion to one for summary judgment pursuant to CPLR § 3212 and vacating the Prior Order; 3) pursuant to CPLR §§ 2221(d) and (f), granting leave to reargue Defendant’s opposition to the Prior Motion and, pursuant to CPLR § 6314, vacating or modifying the Prior Order; and 4) pursuant to CPLR §§ 2221(e) and (f), granting leave to renew Defendant’s opposition to the Prior Motion and, pursuant to CPLR § 6314, vacating or modifying the Prior Order.

Plaintiff Michael Rakhnyansky (“Plaintiff”), individually and as a shareholder of Glitsy Glow Car Wash (“Glitsy Glow”) opposes Defendant’s motion.

B. The Parties’ History

The parties’ history is set forth in detail in the Prior Order in which the Court granted Plaintiff’s Prior Motion to the extent that the Court directed that the temporary restraining order (“TRO”) issued by the Court on January 24, 2012 shall remain in effect, pending further court order or stipulation of the parties, on the condition that Plaintiff post a bond in the amount of \$25,000 within twenty (20) days of the date of the Prior Order. The TRO directed that Defendant, and all persons acting under his direction and control, or in concert therewith, are enjoined and restrained from hypothecating, secreting, wasting, transferring, withdrawing or otherwise using or depleting funds held in the name of or in any and all bank accounts in the name of Glitsy Glow, which includes, but is not limited to, the Chase business checking account number [REDACTED] and the Chase business checking account number [REDACTED]. The Court incorporates the Prior Order by reference as if set forth in full herein.

As noted in the Prior Order, the Verified Complaint (“Complaint”) alleges as follows:

Plaintiff is a 49% shareholder and Defendant is a 51% shareholder in Glitsy Glow which was formed in 2006 to operate a car wash and automobile service center. Defendant is the President and Chairman of Glitsy Glow and Plaintiff is the Secretary-Treasurer and Vice

Chairman of Glitsy Glow.

Pursuant to the Shareholders' Agreement, the parties were each required to make an initial capital investment of \$500,000. Plaintiff made the required capital investment but Defendant made a capital investment of only \$350,000. Thereafter, Plaintiff made an additional capital investment of \$100,000. In addition, pursuant to the Shareholders' Agreement, both Plaintiff and Defendant were to be designated as signatories on all corporate bank accounts.

On or about March 25, 2009, Glitsy Glow entered into a purchase agreement ("Purchase Agreement") to sell substantially all of its assets to Anthony Pagnozzi ("Purchaser"). Pursuant to the Purchase Agreement, the purchase price was \$3.5 million, to be paid as follows: 1) \$5,000 upon execution of the Purchase Agreement, to be credited back upon closing of the transaction; 2) \$1.3 million at the closing of the transaction, and 3) \$2.2 million at the closing, with Glitsy Glow taking back a chattel mortgage and the Purchaser executing two (2) promissory notes, made payable to Glitsy Glow, with interest of 7% per annum. The Promissory Notes were designated as Series A Note and Series B Note.

The principal amount of the Series A Note was \$2 million, payable over fifteen (15) years, the first payment of which was due sixty (60) days from the date of closing, with interest accruing from the date which is thirty (30) days from the date of closing. The principal amount of the Series B Note was \$300,000, payable over five (5) years, the first payment of which was due sixty (60) days from the date of closing, with interest accruing from the date which is thirty (30) days from the date of closing.

The closing took place on April 24, 2009, at which time Plaintiff received a check in the amount of \$200,000. Subsequent to the closing, without Plaintiff's knowledge, Defendant used funds from the sale to pay his personal debts which were unrelated to Glitsy Glow's business operations.

Pursuant to the Purchase Agreement, subsequent to the closing, the Purchaser began making monthly payments on the two Promissory Notes. Those payments were initially deposited into Glitsy Glow's account at Capital One Bank bearing account number [REDACTED] ("Glitsy Glow Account"), on which both parties were signatories. Following receipt of the Purchaser's monthly payments to Glitsy Glow, Plaintiff would receive a monthly payment in the amount of \$11,958.48. These payments were made to Plaintiff by check drawn on the Glitsy

Glow Account, and Plaintiff received these payments until February of 2011, at which time the payments stopped.

In March of 2011, Defendant withdrew approximately \$2,000 from the Glitsy Glow Account without Plaintiff's consent, and closed the Glitsy Glow Account. In March of 2011, Defendant opened a new corporate bank account ("Second Account"), with Chase bank, listing himself as the sole signatory on the Second Account. The account number on the Second Account is 740397138. In August of 2011, following discussions between counsel for the parties, Defendant added Plaintiff as a signatory to the Second Account.

Although payments resumed in August of 2011, Plaintiff was not receiving the full amounts to which he was entitled, and has not received full payment to date. On December 30, 2011, Plaintiff learned that Defendant had opened another Chase bank account ("Third Account"), bearing account number [REDACTED] which identified Defendant as the sole signatory. Defendant withdrew all the funds in the Second Account, leaving the Second Account with a negative balance. Plaintiff has no access to the Third Account and still has not received the payments to which he is entitled.

The Complaint contains seven (7) causes of action: 1) breach of the Shareholders' Agreement, 2) breach of fiduciary duty, 3) conversion of Glitsy Glow's assets, 4) unjust enrichment, 5) a request for an accounting of all monies received by Glitsy Glow and/or Defendant from the date of closing to the present, 6) a request for a constructive trust on all monies received by Glitsy Glow and Defendant from the date of closing to the present, and 7) a request for a permanent injunction that mirrors the applications in Plaintiff's Prior Motion.

In ruling on the Prior Motion, the Court considered a letter dated February 10, 2012 from counsel for Defendant who asserted that the Prior Motion contained "material omissions and misleading statements of key facts linked with purely speculative allegations concerning Defendant's conversion of corporate funds." In the Prior Order, the Court noted as follows:

In a letter to the Court and opposing counsel dated February 10, 2012, counsel for Defendant asserts that Plaintiff's application contains "material omissions and misleading statements of key facts linked with purely speculative allegations concerning Defendant's conversion of corporate funds." Specifically, Plaintiff did not advise the Court that during the period of February 2011 to date, Glitsy Glow paid over \$102,000 in taxes before making distributions to either shareholder. Glitsy Glow's funds were preserved to pay those taxes, and Plaintiff's claim that he has

an “automatic entitlement” to payments of \$11,958.48 is inaccurate. Rather, any dividends or disbursements Plaintiff receives from Glitsy Glow are at the discretion of, and subject to, Glitsy Glow’s obligations and business judgment. A review of Glitsy Glow’s records reveals that, once its tax and other obligations were fulfilled, Glitsy Glow resumed disbursements to the shareholders based on available funds in September of 2011. In 2011, Plaintiff received over \$80,000 from Glitsy Glow, and Defendant’s actions were appropriate.

The letter from Defendant’s counsel also asserts that it was Plaintiff’s own conduct that necessitated the opening of the additional Accounts. Plaintiff allegedly “threatened” Defendant that, unless Glitsy Glow paid its shareholders before it paid its tax obligations, Plaintiff would unilaterally withdraw Glitsy Glow’s funds. The Shareholders’ Agreement places Defendant in control of accounting determinations and tax preparation and he determined, based on his consultation with an accountant, that the tax payments were required to be made. Following negotiations between Plaintiff’s prior counsel and personal accountant, and Glitsy Glow’s counsel and accountant, Plaintiff was provided with full access to Glitsy Glow’s books and records going back to 2007 and was added as a signatory on Glitsy Glow’s account. Plaintiff, however, subsequently withdrew funds without Glitsy Glow’s permission. The opening of the Third Account was necessitated by Glitsy Glow’s desire to protect its assets.

In addition, in the Prior Order, the Court set forth the parties’ positions on the Prior Motion, noting that Defendant opposed the Prior Motion on the grounds that 1) Plaintiff had omitted crucial facts that explained and mitigated Defendant’s conduct; and 2) injunctive relief was not appropriate because, as Plaintiff’s injury if any is compensable by money damages, Plaintiff could not demonstrate irreparable harm without the requested injunctive relief. The Court also noted that counsel for the parties disagreed as to whether Defendant was provided with adequate notice of the Prior Motion, and Defendant now raises the adequacy of that notice in his motion.

In the Prior Order, the Court made specific reference to the letter from Defendant’s counsel. The Court noted that, although Defendant had not provided an affidavit in support corroborating the claims of his counsel, counsel for Defendant had raised issues which, if true, might provide some background and context for Defendant’s alleged conduct. The Court denied the portion of Plaintiff’s Prior Motion seeking mandatory injunctions and denied that portion of the Prior Motion seeking to enjoin and restrain Defendant from “hypothecating, secreting, wasting, transferring, withdrawing or otherwise using any and all assets of Glitsy Glow” on the grounds that such a direction would be overly broad.

In support of the motion now before the Court, Defendant affirms that he is Chairman of, and majority vote holder on, the Board of Directors (“Board”) of Glitsy Glow and, therefore, the person with final say on the management and operation of Glitsy Glow (“Corporation”). Defendant disputes Plaintiff’s claims that Defendant has engaged in wrongdoing. Defendant affirms, *inter alia*, that 1) he did not deprive Plaintiff of any sums to which he was entitled after the sale of the Corporation’s car wash in 2009; 2) Plaintiff is not automatically entitled to a monthly disbursement from the Corporation but, rather, the Corporation made disbursements to its shareholders in its business judgment; 3) the disbursements made in 2011 were affected by a decision to pre-pay New York City taxes, of which Plaintiff was aware, which saved the Corporation money; 4) Plaintiff interfered with the Corporation’s attempt to accumulate the money to pre-pay taxes by threatening to withdraw money if it was going to be used for that purpose and, in fact, making withdrawals in 2011 from the Corporation’s Capital One Account and depositing those sums into his personal bank account (Exs. H and I to D’s Aff. in Supp.); 5) in light of Plaintiff’s allegedly improper withdrawals, Defendant opened the Second Account without adding Plaintiff as a signatory; 6) the Corporation’s tax payment was made in full as reflected by the documentation provided (*id.* at Ex. K); 7) as an accommodation, Plaintiff was added as a signatory to the Second Account but was subsequently advised that the Board had directed that he was not authorized to withdraw funds without Board approval; 8) in November and December of 2011, Defendant cut equal disbursement checks to Plaintiff and Defendant but learned that, rather than cashing the check, Plaintiff wrote out withdrawal slips for larger amounts (*id.* at Ex. L); and 9) in light of Plaintiff’s conduct, Defendant opened the Third Account.

Defendant also submits that the Court should grant renewal and/or reargument of the Prior Order on the grounds that Plaintiff failed properly to serve the Prior Motion on Defendant. Defendant disputes the assertions in the process server’s Affidavit of Service that the Prior Motion was affixed to the front door of his home. Defendant provides an affidavit of Maya Gotlibovsky, his wife, who also disputes the assertions of the process server regarding the timing of service, and affirms that she discovered the Prior Motion in the mailbox on January 31, 2011 at approximately 5:00 p.m.

Defendant also provides an Affidavit in Support of Steven Braman (“Braman”), a Certified Public Accountant, who affirms that he is the accountant for the Corporation. Braman affirms that, as a result of the Corporation’s sale of the car wash, the Corporation is collecting upon two deferred notes which resulted in a total deferred gain to the Corporation of \$920,439.00. As a result, the Corporation was liable for New York City corporate tax of 8.585% on the deferred gains. Braman researched the tax issues and determined that if the Corporation recognized the full gain on the deferred sale, it could save the double taxation that it would otherwise have had to pay on the interest income received over the term of the notes. Braman affirms that, by following his suggestion, the Corporation saved \$93,843.07.

Braman provides copies of the Corporation’s 2010 Federal and New York State, 2010 New York City and 2011 Federal and New York State tax returns (Exs. A-C to Braman Aff.). Braman provides details regarding the payments made and received by the Corporation in 2011 and affirms that the distributions made to the shareholders in 2011 were identical except that on November 11 and December 7 of 2011, Plaintiff withdrew additional funds in the sum of \$159 and \$900, respectively.

Braman also affirms that in July of 2011, he provided Plaintiff with numerous Corporate documents, including but not limited to cash receipts from 2006 to 2010. In addition, in August of 2011, Braman provided Plaintiff and his counsel with copies of the Corporation’s 2010 Federal, New York State and New York City tax returns. And in March of 2012, Braman provided Plaintiff with the Corporation’s 2011 Federal and New York State tax forms, as well as a K-1 form.

In opposition to Defendant’s motion, Plaintiff’s counsel provides affirmations and documentation in support of his assertion that service of the Prior Motion on Defendant was proper and, in any case, Defendant had adequate time in which to prepare his opposition to the Prior Motion. That documentary evidence includes 1) January 23, 2012 correspondence, along with proof of service by electronic mail and Federal Express and confirmation of receipt, advising Defendant that Plaintiff, through counsel, would be appearing before the Court on January 24, 2012 to seek a temporary restraining order (*see* Ex. F to Bizzaro Aff. in Opp.), and 2) the affidavits of service reflecting service of the Prior Motion on Defendant (*id.* at Ex. G).

In further opposition to Defendant’s motion, Plaintiff contends that “[Defendant] and his

attorney rely solely on the mistaken assumption that, as a 51% majority shareholder, Chairman of the Board and President of Glitzy Glow, [Defendant] is free to render any decision concerning the corporation (whether financial or otherwise), simply because he can, in essence, “out vote” me” (P’s Aff. in Opp. at ¶ 3). Plaintiff affirms that, from the date of incorporation to the present, 1) with limited exceptions, he has not been notified of any Board or Shareholders’ meeting; 2) to his knowledge, there has never been either a Board of Shareholders’ meeting; and 3) he has never been given the opportunity to vote on any Board action.

Article II, Paragraph 4 of the Shareholders’ Agreement (Ex. B to P’s Aff. in Opp.) 1) provides that “[a] vote by a majority shall be required to make all decisions other than those in the normal everyday course of business;” 2) designates Plaintiff as the Shareholder who will “oversee the day-to-day operations of the business and...be responsible for making decisions which [a]ffect the normal operation of the business; and 3) designates Defendant as the Shareholder who will “oversee the accounting procedures of the operation of the business which shall include but is not limited to the preparation of tax returns and basic bookkeeping of the business....”

Plaintiff submits that the Shareholders’ Agreement does not give Defendant the sole power to make all accounting and financial decisions on behalf of the Corporation, and that the decision to pre-pay the New York City taxes was a decision that was required to be voted upon. Plaintiff affirms that, since the closing in 2009, there have been no operations of the business or products to purchase, and there have been no accounting procedures or bookkeeping for Defendant to oversee. Thus, Plaintiff contends, the language in the Shareholders’ Agreement authorizing Defendant to oversee those matters cannot be construed to grant Defendant the sole authority to pre-pay the Corporation’s taxes years after the closing.

Plaintiff also affirms that, for the calendar years 2009 and 2010, Plaintiff and Defendant, as shareholders, paid the New York City taxes from their own personal bank accounts, and Plaintiff provides copies of withdrawal slips reflecting those payments (Ex. E to P’s Aff. in Opp.). In addition, Plaintiff has reviewed checks (“Checks”) (*id.* at Ex. C) which reflect that in 2009, Defendant used Corporate funds to repay a personal loan in the amount of \$350,000, and that Defendant used Corporate funds for other personal expenses, including but not limited to a personal trip to Hawaii, repairs to a liquor store and body work on his personal motor vehicle.

Plaintiff also affirms that he investigated Defendant's decision to pre-pay the Corporation's taxes and learned that Defendant is, or was, negotiating with the purchaser of the car wash in an effort to have the buyer pre-pay Defendant's share of the money due him for the remainder of the two promissory notes, in exchange for a reduction of the principal amount due. Plaintiff affirms that Defendant's decision "makes perfect sense to me. If [Defendant] cuts this deal and gets a reduced, lump sum payout, the corporation has already paid the taxes associated with this payout" (P's Aff. in Opp. at ¶ 12).

In reply, Defendant disputes Plaintiff's assertion that Plaintiff did not participate in the Board's deliberations regarding the pre-payment of taxes and affirms that Plaintiff participated in numerous telephonic and in-person conversations with Defendant regarding this matter. Defendant notes that the By-Laws expressly allow for telephonic meetings and submits that the parties' agreements clearly authorize Defendant to make final decisions regarding accounting matters. Defendant also makes reference to language in the Corporation's Certificate of Incorporation which reflects that the Corporation was formed not only to operate car washing and auto detailing facilities, but also to transfer and mortgage property, and argues that this language supports Defendant's argument that the "operation of the business" includes both operating a car wash and collecting upon the sale of its assets. Defendant affirms that, following the sale of the car wash, the Corporation's focus changed and the payment of taxes and related accounting procedures were within the operation of its business. Defendant also disputes Plaintiff's claim that Defendant improperly used Corporate funds to repay a personal loan. Defendant affirms that the Corporation borrowed funds from a mutual family member and when the family member requested repayment, Defendant repaid him with money from one of his personal accounts, as reflected by the check provided (Ex. B to D's Reply Aff.).

C. The Parties' Positions

Defendant submits that 1) Defendant's submissions in support of his motion establish that Plaintiff was not automatically entitled to a monthly disbursement from the Corporation, and Plaintiff received the disbursements to which the Board determined he was entitled, applying its business judgment; 2) Defendant had the authority to make the decision to pre-pay the Corporation's taxes; and 3) in light of Plaintiff's efforts to interfere with the Corporation's appropriate and defensible decision to pre-pay taxes, Defendant was justified in opening an

account to which Plaintiff did not have access.

Defendant also argues, *inter alia*, that the Court should dismiss the causes of action in the Complaint on the grounds that 1) the first cause of action, alleging breach of contract, is legally insufficient because the parties' agreements unambiguously establish that the Board had the authority to make governing determinations, which included accounting determinations and tax preparation for the Corporation, and because the contracts do not support Plaintiff's claimed entitlement to payments of \$11,958.48 per month; 2) the second cause of action, alleging breach of fiduciary duty, cannot survive because it is duplicative of the breach of contract claim; 3) the third cause of action, alleging conversion, is legally insufficient because it is duplicative of the breach of contract claim; 4) the fourth cause of action, alleging unjust enrichment, cannot survive in light of the existence of a written agreement between the parties; 5) the fifth cause of action, in which Plaintiff seeks an accounting, is legally insufficient, both because it is duplicative of the breach of contract claim and because Plaintiff has been granted full access to the Corporation's bank accounts and other records; 6) the sixth cause of action, seeking a constructive trust, is insufficient in light of Plaintiff's failure to plead the required elements, and because it is duplicative of the breach of contract claims; and 7) the seventh cause of action, seeking injunctive relief, must fail because Plaintiff cannot demonstrate a likelihood of success on the merits and because Plaintiff cannot demonstrate irreparable injury as his injury is compensable by money damages.

Defendant also asserts that if the Court permits Defendant to renew and/or reargue his opposition to the Prior Motion, or otherwise examine the Prior Order pursuant to CPLR § 6314 and evaluate the evidence and arguments presented herein, Defendant will waive his objection to personal jurisdiction (D's Memo. of Law in Supp. at p. 31). Defendant submits that the Court should grant leave to renew because Defendant has provided a reasonable justification for not appearing on the return date of the Prior Motion in light of Defendant's affirmations regarding the allegedly insufficient service of the Prior Motion.

Plaintiff opposes Defendant's motion submitting, *inter alia*, that 1) Plaintiff had the right to vote on the decision to pre-pay the taxes which was not a decision in the everyday course of business under the Shareholders' Agreement; 2) Defendant's conduct, including his alleged use of Corporate funds to pay for personal expenses, supports Plaintiff's causes of action for breach

of contract, breach of fiduciary duty and conversion; and 3) the language of the Shareholders' Agreement supports Plaintiff's argument regarding Plaintiff's right to vote on the decision to pre-pay the Corporation's taxes, particularly in light of Plaintiff's affirmation that, since the closing in April of 2009, there have been no accounting procedures or basic bookkeeping of the Corporation for Defendant to oversee.

RULING OF THE COURT

A. Leave to Reargue

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 2012 N.Y. LEXIS 32 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

B. Leave to Renew

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008). The motion court may, in its discretion, grant renewal upon facts known to the movant at the time of the initial motion if the movant offers a reasonable excuse for the failure to present those facts on the initial motion. *Id.*, citing *Lawman v. Gap, Inc.*, 38 A.D.3d 852 (2d Dept. 2007) and *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006). *See also Greene v. NYCH*, 283 A.D.2d 458 (2d Dept. 2001) (rejecting plaintiff's claim that trial court had discretion to grant renewal notwithstanding plaintiff's omission of reasonable justification for failure to present new facts on which renewal motion was based, on prior motion). As noted by the *First Department in Henry v. Peguero*, 72 A.D.3d 600 (1st Dept. 2010), *app. dismiss.*, 15 N.Y.3d 820 (2010), *reconsid. den.* 16 N.Y.3d 726

(2011):

Renewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation...While the statutory prescription to present new evidence need not be applied to defeat substantive fairness...such treatment is available only in a rare case..., and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance [internal citations and quotations marks omitted].

Id. at 602.

C. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

D. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d

268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

E. Fiduciary Duty to Corporation

Directors and officers of corporations, in the performance of their duties, stand in a fiduciary relationship to their corporation. *Yu Han Young v. Chiu*, 49 A.D.3d 535, 536 (2d Dept. 2008). As such, they owe the corporation their undivided loyalty and may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation. *Id.*, quoting *Foley v. D'Agostino*, 21 A.D.2d 60, 66 (1st Dept. 1964). Specifically, an officer or director of a corporation may not, without consent, divert and exploit for his own benefit any opportunity that should be deemed an asset of the corporation. *Id.*, quoting *Commodities Research Unit [Holdings] v. Chemical Week Assoc.*, 174 A.D.2d 476, 477 (1st Dept. 1991).

F. Business Judgment Rule

The business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Matter of 1st Rochdale Cooperative Group, Ltd. v. Altman*, 2008 U.S. Dist. LEXIS 4966, * 2 (S.D.N.Y. 2008), quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979) and citing *Owen v. Hamilton*, 44 A.D.3d 452 (1st Dept. 2007). The business judgment rule, however, will not protect a decision that is the product of fraud, self-dealing or bad faith. *Id.*, quoting *Patrick v. Allen*, 355 F. Supp. 2d 704, 710 (S.D.N.Y. 2005). To earn the protection of the business judgment rule, directors must do more than merely avoid fraud, bad faith and self-dealing. *Id.*, citing *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2d Cir. 1986). The business judgment rule protects directors who act with “due care” and “conscientious fairness.” *Id.* at * 3, citing *Hanson Trust, supra*, quoting *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 569 (1984). In other words, a director who exercises reasonable diligence

in gathering and considering material information, who makes an informed decision after a reasonable investigation, will be protected from liability, even if the decision turns out to be unwise or inexpedient. *Id.*, citing *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 538 (1990), quoting *Pollitz v. Wabash R.R. Co.*, 207 N.Y. 113, 124 (1912).

G. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. *Center for Rehabilitation & Nursing at Birchwood, LLC, v. S & L Birchwood, LLC*, 92 A.D.3d 711, 713 (2d Dept. 2012).

To establish a claim for conversion, a plaintiff must show that he had an immediate superior right of possession to the property and the exercise by defendants of unauthorized dominion over the property in question to the exclusion of plaintiff's rights. *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 (1st Dept. 1992).

H. Standards for Preliminary Injunction

The Court incorporates by reference the discussion in the Prior Order regarding the legal standards for injunctive relief.

I. Application of these Principles to the Instant Action

The Court grants Defendant leave to reargue and/or renew the Prior Motion and, upon that reargument and renewal, declines to modify the prior Order. In support of Defendant's motion to reargue and/or renew, Defendant argues that there were facts, specifically Defendant's position in the Corporation and the reasons for his financial decisions, including Plaintiff's allegedly improper conduct, that the Court did not consider in issuing the Prior Order. As is apparent from the Prior Order, however, the Court did consider those facts, as set forth in the letter of Defendant's counsel, in deciding the Prior Motion. Even assuming *arguendo* the accuracy of Defendant's contentions regarding the financial benefits of pre-paying the taxes, Defendant concedes that he made that decision unilaterally and opened a Corporate account to which Plaintiff had no access when Plaintiff disputed the appropriateness of that decision. To countenance that conduct would potentially create a "slippery slope," in that Defendant might view such a ruling as *carte blanche* to engage in future conduct, to the exclusion and potentially without the knowledge of Plaintiff, on the grounds that he deemed that conduct in the best interests of the Corporation. The Court is not persuaded, at this juncture, that the language of the Shareholders' Agreement, and other relevant agreements, clearly authorized Defendant to make the decision to pre-pay the New York City taxes without permitting Plaintiff to vote on that issue, particularly in light of 1) Plaintiff's affirmations regarding the parties' past practice with respect to the payment of the Corporations' taxes, 2) Plaintiff's affirmations that, since the closing in 2009, there have been no operations of the business or products to purchase, and there have been no accounting procedures or bookkeeping for Defendant to oversee, and 3) evidence that Defendant may have used Corporate funds for personal expenses.

The Court also concludes that the factual allegations in the Complaint constitute causes of action cognizable at law. The Court therefore denies Defendant's motion to dismiss the Complaint, except that the Court grants Defendant's motion to dismiss the fourth cause of action, alleging unjust enrichment, in light of the written agreements governing the parties'

dispute. Plaintiff has adequately alleged a breach of the Shareholders' Agreement by Defendant in failing to make monthly payments to Defendant, unilaterally closing a Corporate account without Plaintiff's consent, opening the Third Account without Plaintiff's consent and using proceeds from the sale of the Corporation to satisfy Defendant's personal debts and obligations. In addition, Plaintiff has sufficiently alleged the remaining causes of action by alleging facts supporting the existence of a fiduciary relationship between the parties by virtue of their status as fellow shareholders and Defendant's position on the Board, and in light of Plaintiff's allegations regarding Defendant's diversion of Corporate funds, prior refusal to provide Plaintiff with information regarding those funds, and the opening of the Third Account. The Court also concludes that the seventh cause of action, seeking injunctive relief, is legally sufficient. Plaintiff has articulated potential irreparable injury in light of Plaintiff's allegation that Defendant engaged in acts of disloyalty, including private negotiations with the purchaser of the car wash and the opening of the Third Account. Finally, the Court declines to convert the motion to one for summary judgment at this juncture.

All matters not decided herein are hereby denied.

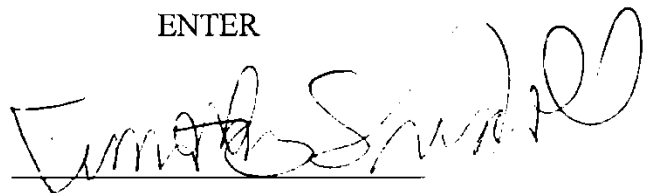
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on September 6, 2012 at 9:30 a.m. for a Preliminary Conference.

DATED: Mineola, NY

August 3, 2012

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
AUG 13 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE