SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 39
NASSAU COUNTY

DANSKY & ADLERSTEIN, C.P.A., P.C., SHELDON DANSKY, C.P.A. and IRVING ADLERSTEIN, C.P.A.

Plaintiff.

Index No.: 019976/98
Sequence No.: 6 & 7

- against -

STEVEN M. SCARANO, C.P.A., CHARLES N. LIPTON, C.P.A., SCARANO & LIPTON, P.C. and SCARANO & TOMARO, P.C.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, plaintiffs' motion for summary judgment pursuant to CPLR 3212(a) is hereby granted in part and denied in part. Defendant Charles N. Lipton's cross-motion to amend his answer is hereby denied.

Plaintiffs, Sheldon Dansky, C.P.A. and Irving Adlerstein, C.P.A. were the principals of plaintiff accounting firm, Dansky & Adlerstein, C.P.A., P.C. (D&A). In 1995 Mr Dansky and Mr. Adlerstein decided to turn D&A's business over to others with the goal of retirement. The plaintiffs entered into three agreements with defendants Charles N. Lipton, C.P.A., Steven M. Scarano, C.P.A. and Scarano & Lipton, P.C. (S&L). The first of these agreements, the transfer agreement, effectuated the gradual transfer of D&A's clients to S&L. Pursuant to this agreement, defendants were required to make an initial payment to plaintiff and thereafter to make monthly payments based upon fees generated by the former clients of D&A. The parties also formed Scarano, Lipton, Dansky & Adlerstein, C.P.A., P.C., (SLDA) a professional

corporation which was allegedly founded to 1) facilitate the transfer of clients from D&A to S&L and 2) to receive the payments made by D&A's former clients and to make the above referenced payments to the individual plaintiffs pursuant to the transfer agreement. SLDA was permitted to merge into S&L after November 1, 1997.

The parties also entered into a consulting agreement pursuant to which Messrs. Dansky and Adlerstein agreed to continue to provide services for their former clients on behalf of S&L. Pursuant to this agreement, S&L was to pay the individual plaintiffs for their services rendered for their former clients twice monthly at the rate of $350.00 per day worked. Defendants Lipton, Scarano and S&L all executed guarantees of the SLDA payment.

Under the terms of the transfer agreement, if the transfer fees were not paid, S&L was liable to plaintiffs for all fees collected after November 1, 1995 from the former clients of D&A less payments already made for such fees, a release from a restrictive covenant imposed on the individual plaintiffs contained in the transfer agreement and the return of the accounts receivable and files of clients that plaintiffs had transferred to S&L. The agreement also provides that if SLDA loses its identity by sale, merger etc. and the surviving entity does not assume defendants' obligations in writing, plaintiffs are entitled to the above referenced relief.

Plaintiffs allege that the defendants Lipton and Scarano failed to provide adequate services for D&A's former clients. In July, 1997 defendant Lipton left S&L due to disagreements with defendant Scarano. Defendant Scarano, in turn, brought in Charles Tomaro, C.P.A. and formed Scarano & Tomaro, P.C. (S&T). All of S&L's business was allegedly transferred to this new entity. Plaintiffs allege that they viewed the new entity as simply carrying on in S&L's place and continued to service their former clients as before. In 1998 plaintiff alleges that the defendants failed to make an SLDA payment. Defendant Scarano acknowledged the default and attempted to tender a check for the missed payment. The check was returned for insufficient funds. Plaintiffs brought the within action for breach of contract (the first, second and third causes of action), breach of fiduciary duty, specific performance, an accounting, tortious interference with contract, tortious interference with prospective business advantage, conversion, breach of contract under the guarantees and an injunction prohibiting defendants Scarano and S&T from interfering with plaintiffs' servicing of their former clients.

In the instant motion, plaintiffs move for summary judgment as to their tenth cause of action, for breach of the guarantee against defendant Lipton and dismissing defendant Lipton's six counterclaims. Defendant Lipton cross-moves to amend his counterclaims.

That branch of plaintiff's motion which seeks summary judgment as against defendant Lipton on the tenth cause of action is hereby denied. Summary judgment is a drastic remedy "...and should not be granted where there is any doubt as to the existence of a triable issue." Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 224 (1978). In determining such a motion the court looks to whether there are factual issues, not to fact resolution. Frutatrom, Ltd. v. Flavormatic Industries, 237 A.D.2d 487 (2nd Dep't 1997).

Plaintiffs assert that defendant Lipton, as guarantor of the agreements is liable for defendants' breach on the SLDA payment that were due as a result of the 1998 default. Defendant Lipton argues that pursuant to the terms of the guarantee, that he was only required to guarantee the SLDA payments and that defendant Scarano modified the transfer agreement by forming S&T with the express purpose of becoming the primary obligor. Mr. Lipton further alleges that he had a conversation with Dansky wherein Mr. Dansky admitted that he and Mr. Adlerstein knew about the founding of S&T and had directed the former clients of D&A to remit payments to S&T for services rendered.

The guaranty provided that defendants Lipton, Scarano and S&L guaranteed the SLDA payments to be made by SLDA to D&A. Plaintiff contends that defendant Scarano, in co-founding S&T completely absorbed defendant S&L. Defendant S&L is recognized as the purchaser in the transfer agreement. Defendant Lipton alleges that defendant Scarano and/or plaintiffs directed plaintiffs' former clients to make payment to S&T instead of to SLDA, the result being that SLDA stopped receiving funds and was unable to pay plaintiffs.

Unless the underlying contract so discloses, a guarantor who has guaranteed the debt of a specified debtor "may not be held liable for the debt of another." Fehr Bros., Inc. v. Scheinman, 121 A.D.2d 13 (1st Dep't 1986). In the case where the principal debtor is a corporate entity and becomes a new entity, the court must determine whether the change was sufficient such that the guarantor would not have intended to guaranty the new entity's obligation when he executed the guaranty. Fehr Bros., Inc. v. Scheinman, supra. The court must consider: "changes in business name, form, composition, management or ownership, the involvement of the guarantor in the business entity; and whether the guarantor participated in the changes." Fehr Bros., Inc. v. Scheinman, supra. The court should also consider whether the changes in the identity of the principal obligor "have a potentially adverse impact on the nature of the surety's undertaking, particularly on the degree of risk assumed in guaranteeing payment or performance..." State of New York v. International Fidelity Insurance Company, 152 A.D.2d 77 (1st Dep't 1989). Fehr Bros., Inc. v. Scheinman, supra.

In the instant matter, defendant Lipton alleges that defendant Scarano, without his approval or knowledge formed a new entity, S&T which acquired all of S&L's assets. Plaintiff further contends that either plaintiffs and/or Scarano directed the clients to remit payments to S&T. It appears that a new entity may have taken over as purchaser and that this new entity, in which defendant Lipton has no interest or control, may be performing services for D&A's former clients and failing to remit payment to SLDA for payment to plaintiffs. Under these circumstances, questions of fact exist which preclude summary judgment on plaintiff's tenth cause of action.

That branch of plaintiff's motion to dismiss defendant Lipton's six counterclaims is hereby granted. Defendant Lipton asserted counterclaims for 1) fraudulent conveyance; 2) breach of the transfer and consulting agreement; 3) breach of duty of good faith; 4) conversion; 5) unjust enrichment and 6) breach of fiduciary duty.

In Defendant Lipton's first counterclaim, for fraudulent conveyance, defendant alleges that plaintiffs and defendant S&L transferred S&L's assets to S&T, thereby rendering S&L valueless and therefor unable to "satisfy its obligations to Lipton and to others." Defendant Lipton seeks to set aside the conveyances as fraudulent pursuant to Debtor and Creditor Law §§273, 274, 275, 276 and 278. Debtor and Creditor Law §278 provides that where the conveyance is fraudulent as to a creditor, the creditor may as against anyone except for a purchaser for fair consideration and who lacks knowledge of the fraud: a) "have the conveyance set aside; or b) disregard the conveyance and attach or levy execution upon the property conveyed."

The relief of Debtor and Creditor Law §278, however, is not applicable as against defendants who are not transferees or beneficiaries of the conveyance. Federal Deposit Insurance Corporation v. Porco, 75 N.Y.2d 840 (1990); Committee of Unsecured Creditors of Interstate Cigar Co., Inc. v. Interstate Distribution, Inc., 210 A.D.2d 283 (2nd Dep't 1994). In the instant matter, defendant Lipton alleges that S&L's assets were transferred to S&T. Nowhere is there an allegation that plaintiffs were the transferees or beneficiaries of the conveyance from S&L to S&T. Accordingly, the first counterclaim is dismissed as against the plaintiffs.

Defendant Lipton's second counterclaim is for breach of contract against the plaintiffs. In pleading a cause of action for breach of contract in his counterclaim, defendant must plead "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated,...whether the alleged agreement was, in fact, written or oral,...and the amount of [damages]." Sud v. Sud, 211 A.D.2d 423 (1st Dep't 1995). In the instant matter, defendant Lipton's counterclaim completely fails to plead these requisite elements for a breach of contract claim. This counterclaim is therefore dismissed in its entirety.

Defendant Lipton's third counterclaim, for breach of the duty of good faith is dismissed in its entirety. This counterclaim makes the same assertions as the second counterclaim for breach of contract. Where a breach of contract cause of action is dismissed, a cause of action sounding in the breach of an implied duty of good faith should likewise be dismissed as such a cause of action is "merely an element of the damages for the breach of contract alleged in [defendant's]...cause of action [for breach of contract]." Casalino Interior Design Corporation v. Custom Design Data, Inc., 235 A.D.2d 514 (2nd Dep't 1997).

Defendant Lipton's fourth counterclaim is for conversion. "To establish a cause of action sounding in conversion, [defendant] [is] required to 'establish legal ownership of a specific piece of identifiable property and [plaintiff's] exercise of dominion over or interference with the property in defiance of [defendant's] rights.'" Gilman v. Abagnale, 235 A.D.2d 989 (3rd Dep't 1997). See, also, 23 N.Y. Jur.2d §78. Where the property which is the subject of the conversion claim is money, "...it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." . Republic of Haiti v. Duvalier, 211 A.D.2d 379 (1st Dep't 1995). The third counterclaim merely provides that pursuant to the transfer agreement Mr. Lipton was the rightful owner of funds held by plaintiffs and that they have refused to return same to defendant. Nowhere in the pleading does defendant set forth how

he was entitled to the funds pursuant to the agreement. Accordingly, the fourth counterclaim is dismissed.

Defendant Lipton's fifth counterclaim, for unjust enrichment is likewise dismissed. "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." Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, 70 N.Y.2d 382 (1987); Union Structural Erectors, Inc. v. Poslau Joint Venture, 234 A.D.2d 536 (2nd Dep't 1996). Where the obligations of the party are set forth in a written contract, a party may not assert a matter in quantum meruit. Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, supra. It is undisputed between the parties that the parties entered into a series of agreements which effectuated the transfer of plaintiffs' business. Any potential claims that defendant Lipton may have against plaintiffs is subject matter which arises out of the agreements. Accordingly, defendant Lipton's fifth counterclaim is dismissed as against plaintiffs.

Defendant Lipton's sixth counterclaim, for breach of fiduciary duty is dismissed. Defendant Lipton asserts that plaintiffs have breached a fiduciary duty owed to him by allegedly making payments from their former clients directly to S&T instead of to SLDA. This constitutes harm to SLDA. "For a wrong to a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation." Abrams v. Donati, 66 N.Y.2d 951 (1985). The exception to this rule is where the "wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged." Abrams v. Donati, supra. As plaintiff does not allege a duty independent of a duty owed to SLDA, the court hereby dismisses defendant Lipton's sixth counterclaim.

Defendant Lipton's motion to amend his answer to clarify the counterclaims is denied. Generally, leave to amend pleadings should be "freely given." Edenwald Contracting, Inc. v. City of New York, 60 N.Y.2d 957 (1983). The Appellate Division, Second Department, however, has denied a cross-motion to amend where a defendant moved for summary judgment to dismiss two causes of action and plaintiff cross-moved to amend its complaint to plead those causes of action with greater specificity, where the causes of action were first dismissed on the summary judgment motion. Teller v. Bill Hayes, Ltd., 213 A.D.2d 141 (2nd Dep't 1995). See, also, West 90th Owners Corp. v. Schlechter, 165 A.D.2d 46 (1st Dep't 1991). Further, where the proposed amended pleading constitutes the opposition to the summary judgment motion and the party seeking to amend fails to come forth with proof in admissible form which demonstrate issues of fact which preclude summary judgment, denial of the motion to amend is proper. West 90th Owners Corp. v. Schlechter, supra.

In the instant matter, plaintiffs moved for summary judgment dismissing defendant Lipton's counterclaims. Defendant's sole response to this branch of plaintiff's motion was to cross-move to amend those counterclaims. As the court has granted plaintiffs' motion to dismiss the counterclaims and defendant has failed to demonstrate any issues of fact relative to this branch of plaintiffs' motion, the court hereby denies defendant's application to amend his

answer.

The matter is hereby set down for trial to be held on June 26, 2000 at 9:30 a.m. in Part 39.

So Ordered.

A.J.S.C.

Dated: May 15, 2000