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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 2014CA006733 AI

ALLIED CAPITAL AND DEVELOPMENT OF SOUTH FLORIDA, LLC, a Florida Limited Liability Company; HARBOURSIDE PLACE, LLC, a Florida Limited Liability Company,

Plaintiffs,

v.

DAVID FINKELSTEIN, an individual,

Defendant.

_____/

DAVID FINKELSTEIN, an individual,

Counter-Plaintiff/Plaintiff

v.

ALLIED CAPITAL AND DEVELOPMENT OF SOUTH FLORIDA, LLC, a Florida Limited Liability Company; HARBOURSIDE PLACE, LLC, a Florida Limited Liability Company; FLORIDA REGIONAL CENTER, LLC, a Florida Limited Liability Company; U.S. IMMIGRATION FUND, LLC, a Delaware Limited Liability Company; HARBOURSIDE FUNDING, LP, a Florida Limited Partnership; VIA MIZNER FUNDING, LP, a Florida Limited Partnership; CHARLES INVESTMENT FUND, LLC, a Delaware Limited Liability Company; CHARLES SPE FUNDING, LLC, a Delaware Limited Liability Company; U.S. IMMIGRATION FUND-NY, LLC, a New York Limited Liability Company; 65 BAY STREET FUNDING, LLC, a Delaware Limited Liability Company; BRYANT PARK FUNDING 100, LLC, a Delaware Limited Liability Company; W57TH STREET FUNDING, LLC, a Delaware Limited Liability Company; and NICHOLAS A. MASTROIANNI, II, an individual,

Counter-Defendants/Defendants.

_____/

COUNTER-DEFENDANTS' MOTION TO DISMISS COUNTERCLAIM

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Plaintiffs/Counter-Defendants, Allied Capital and Development of South Florida, LLC ("Allied"), Harbourside Place, LLC ("Harbourside") and Additional Counter-Defendants Florida Regional Center, LLC ("FRC"), U.S. Immigration Fund, LLC, Harbourside Funding, LP, Via Mizner Funding, LLC, Charles Investment Fund, LLC, Charles SPE Funding, LLC, U.S. Immigration Fund-NY, LLC, 65 Bay Street Funding, LLC, Bryant Park Funding 100, LLC, W57TH Street Funding, LLC and Nicholas A. Mastroianni (collectively, "Counter-Defendants") by and through their undersigned counsel, move to dismiss Counter-Plaintiff, David Finkelstein's Counterclaim, on the following grounds:

SUMMARY OF ARGUMENT

Finkelstein through his Counterclaim purports to assert the following claims:

Count I	Judicial Dissolution of Florida Regional Center, LLC. [Fla. Stat. § 605.0702]
Count II	Judicial Dissolution of Allied Capital and Development of South Florida, LLC [Fla. Stat. § 605.0702]
Count III	Judicial Dissolution of Harbourside Place, LLC [Fla. Stat. § 605.0702]
Count IV	Breach of Contract
Count V	Fraudulent Inducement
Count VI	Unjust Enrichment
Count VII	Promissory Estoppel

For a variety of reasons, including patently inconsistent *factual* allegations, Finkelstein's Counterclaim fails to state viable causes of action. And because Finkelstein's statements of alleged fact could never support viable claims, a dismissal with prejudice is warranted.

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I. LEGAL STANDARD

It is axiomatic that "[a] motion to dismiss tests whether the plaintiff has stated a cause of action," *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001), and thus on a motion to dismiss, the material facts set forth in the complaint are taken to be true. *Rohatynsky v. Kalogiannis*, 763 So. 2d 1270, 1272 (Fla. 4th DCA 2000). But "to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Edwards v. Landsman*, 51 So. 3d 1208, 1213 (Fla. 4th DCA 2011). If the complaint fails to make an adequate pleading of those material facts, it will be dismissed. *See id.*

If "the complaint shows on its face that there is a deficiency which cannot be cured by amendment," leave to amend the complaint will not be permitted, and the complaint should dismiss it with prejudice. *Unitech Corp. v. Atl. Nat'l Bank of Miami*, 472 So. 2d 817, 818 (Fla. 3d DCA 1985). Where, as here, Finkelstein cannot amend his complaint to sustain a cause of action, judicial economy and efficiency mandate that the court deny leave to amend. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 567 (Fla. 2005) (stating that "a trial court may deny leave to amend where the complaint is clearly not amendable") (citing cases). An amendment of the Counterclaim would be futile; the Counterclaim should be dismissed with prejudice.

II. FINKELSTEIN IS ADMITTEDLY NOT A MEMBER OF ANY OF THE LLCS; HE LACKS STANDING

Finkelstein, in Counts I, II and III of his Counterclaim, seeks judicial dissolution of three separate limited liability companies: Allied, FRC and Harbourside. Finkelstein seeks this relief pursuant to Fla. Stat. § 605.0702, a provision within Florida's Revised Limited Liability Act (the "Revised Act").

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However, pursuant to Florida Statutes § 605.0702(b), only a member or manager of a limited liability company may seek to dissolve that limited liability company. Under Florida Statutes Section 605.0102(40) of the Revised Act, a "member" means a person who:

> (a) is a member of a limited liability company under s. 605.0401 or was a member in a company when the company became subject to this chapter; and
>
> (b) has not dissociated from the company under s. 605.0602.

See also § 605.0401(3) ("**Becoming a member**"):

> (3) After formation of a limited liability company, a person becomes a member:
>
> (a) As provided in the operating agreement;
>
> (b) As the result of a merger, interest exchange conversion, or domestication under ss. 605.1001-605.1072, as applicable;
>
> (c) With the consent of all the members; or
>
> (d) As provided in s. 605.0701(3).[1]

Taking as true paragraphs 46, 54, 55, 65, 67, and 68 of the Counterclaim, for argument's sake, Finkelstein was promised *but did not receive* a membership interest in certain LLCs. In fact, through his contract claim (Count IV), Finkelstein is pursuing judicial relief to compel those LLCs to recognize him as a member (ignoring, of course, a host of legal requirements under statutes or operating agreements). *See, e.g.*, Counterclaim at ¶ 55 ("Despite their promises, Counter-Defendants never provided Finkelstein any membership interest in *Harbourside, FRC,* [or] *Allied FL*") (emphasis added)).

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[1] Fla. Stat. § 605.0701(3) provides a mechanism through which a LLC can continue to exist in the event that there are no members in the LLC.

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By Finkelstein's own pleading admissions, he is not a member of any of the LLCs at issue; he therefore lacks standing to bring any sort of action for judicial dissolution (or any other relief to which an LLC member might be entitled).

Moreover, Florida Statutes § 605.0401 does not permit the addition of any new members to an LLC without the consent of all members; unless a majority-in-interest of the members consent in writing to the admission. Finkelstein fails to allege well-pled facts which, if proven true, would support his admission as a member of any LLC here. Finkelstein's allegations that Mastroianni promised him a membership interest in FRC, Allied, and Harbourside are legally insufficient to establish that Finkelstein became a member of those entities.

For these many reasons, Counts I through III of the Counterclaim must be dismissed with prejudice.

III. FINKELSTEIN CANNOT FORCE HIS WAY INTO A MEMBERSHIP INTEREST UNDER A CONTRACT THEORY

A. No Contract to Become a Member Was Ever Formed

A basic principle of contract interpretation is that no contract can be formed where there was no mutual assent as to the essential terms of the contract, which includes the amount of payment. *See e.g., David v. Richman*, 568 So. 2d 922, 924 (Fla. 1990). Although Finkelstein alleges that Mastroianni promised him an undefined ownership interest in FRC, Allied and Harbourside, there is nothing in the Complaint which establishes that Finkelstein actually accepted Mastroianni's offers. In fact, the well-pled allegations of Finkelstein's Counterclaim admit that he never received any member interests.

The only allegations that remotely address the concepts of offer and acceptance are contained in paragraphs 25, 26 and 27, through which Finkelstein asserts that Mastroianni

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"confirmed" that Finkelstein held an ownership interest in three LLCs (FRC, Allied and/or Harbourside). However, those allegations do not indicate or reveal the significance of the terms "owner" or "interest" and it is unclear as to whether Finkelstein was entitled to a share in the profits of FRC, Allied or Harbourside, or a membership interest.

Moreover, Finkelstein's allegations of his purported contract conspicuously omit any consideration (or "agreement") as to the duration of Finkelstein's employment arrangement pursuant to which he claims to be an "owner" in three LLCs, the effect of the termination of his employment or whether his employment was *at will*. This is especially fatal to Finkelstein's claim that he is entitled to 10% of all profits derived, in connection with all future EB-5 ventures affiliated with the LLCs. As such, Finkelstein's allegations, even if taken as true, do not demonstrate the parties' mutual assent to critical terms as is required to establish a valid contract under Florida law. His allegations fail to meet the "short and plain statement" standard of Rule 1.110(b).

B. <u>No Written Evidence of Any Alleged Contract Is Provided</u>

Despite having more than 120 days to assert this Counterclaim, Finkelstein failed to attach any of the writings upon which his Counterclaim is brought.

Pursuant to Fla. R. Civ. P. 1.130, "[a]ll . . . contracts . . . upon which an action may be brought . . . or copy thereof or a copy of the portions thereof material to the pleadings shall be incorporated in or attached to the pleading." Although Finkelstein contends that he was promised a 5% interest in FRC and Harbourside, and a 10% interest in Allied, in exchange for his services as CFO (time duration unknown and consideration unknown), the Counterclaim does not provide any written exhibits that purport to set forth any terms of the alleged agreement. For

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example, paragraph 26 asserts that "Mastroianni confirmed in writing he would get Mr. Finkelstein 5% of Harbourside and 10% of Allied." However, Finkelstein fails to append that critical writing to his Counterclaim, in violation of Rule 1.130.

C. The Alleged Contract Is Barred by Florida's Statute of Frauds

Florida's statute of frauds, codified at Florida Statutes § 725.01, bars enforcement of certain agreement that are not properly confirmed in writing. *See* Fla. Stat. § 725.01; *Ballard-Cannon Dev. Corp. v. Sandman Props. & Dev., LLC*, 933 So. 2d 1251, 1252 (Fla. 1st DCA 2006); *LynkUs Commc's, Inc. v. WebMD Corp.*, 965 So. 2d 1161, 1165 (Fla. 2d DCA 2007); *Conner, I, Inc. v. Walt Disney Co.*, 827 So. 2d 318, 319 (Fla. 5th DCA 2002); *Tobin & Tobin Ins. Agency, Inc.*, 315 So. 2d 518, 519-20 (Fla. 3d DCA 1975); *Food Fair Stores, Inc. v. Vanguard Invs. Co. Ltd.*, 298 So. 2d 515, 516-17 (Fla. 3d DCA 1974).

Here, taking Finkelstein's allegations as true, solely for purposes of this motion, the agreement on which all of his claims are based allegedly had no stated duration or term; real estate developments by their very nature are not anticipated to be completed, and any investment therein fully recovered, within the span of only one year. As a result, Florida's statute of frauds requires that the agreement alleged by Finkelstein to have been created, must be in writing in order to be enforceable.

To the extent that Finkelstein alleges that any Mastroianni statements caused him to work for FRC, Harbourside and Allied at a reduced rate and in association with some grant of rights concerning any LLCs, those claims are barred by Florida's statute of frauds, and concepts such as promissory estoppel cannot aid Finkelstein. *See DK Arena, Inc. v, EB Acquisitions I, LLC*, 112 So. 3d 85 (Fla. 2013). For this reason, Count VII of the Counterclaim, which seeks relief in

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the form of promissory estoppel also fails. *Id.* ("As we explained in *Tanenbaum*, application of the Statute of Frauds is a matter of legislative prerogative; the judicial doctrine of promissory estoppel may not be used to circumvent its requirements.") (citing *W.L. Tanenbaum v. Biscayne Osteopathic Hosp. Inc.*, 190 So. 2d 777,779 (Fla. 1966)).

The absence of a written agreement is fatal to the Counterclaim in all respects. The foundation of all counts within the Counterclaim is the existence of a legally enforceable contractual arrangement inuring to the benefit of Finkelstein, which does not exist. *See Hertz v. Salman*, 718 So. 2d 942 (Fla. 3d DCA 1998); *Khawly v Reboul*, 488 So. 2d 856, 857 n.1 (Fla. 3d DCA 1986); *Conner, I, Inc. v. Walt Disney Co.*, 827 So. 2d at 319.

In fact, the scant remnants of discussions between Finkelstein and Mastroianni indicate that their communications were merely negotiations of an arrangement that never gained finality and enforceability. Mere negotiations cannot give rise to specific performance, and the allegations in the Counterclaim establish that, at best, the parties were still negotiating and had not reached a meeting of the minds. *See Rovin v. Garfield*, 207 So. 2d 10, 11 (Fla. 3d DCA 1968); *Fladell*, 772 So. 2d at 1242; Fla. R. Civ. P. 1.130; *Hillcrest Pac. Corp.*, 727 So. 2d 1053 at 1055.

D. Even If a Contract Were Formed, Finkelstein's Specific Performance Claim Is Time-Barred

Finkelstein contends that he is entitled to become a member of one or more LLCs as allegedly agreed by Mastroianni. However, Finkelstein also requests judicial assistance to become a member and so that he may exercise a member's rights to pursue and obtain a judicial dissolution of the LLCs in which Finkelstein is a putative member.

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Although disguised as a breach of contract or fraud claim, Finkelstein is actually seeking the judicial remedy of specific performance. However, the limitations period for the bringing of specific performance claims in Florida is one year. § 95.11(5)(a)("An action for specific performance of a contract"). *See e.g. Rybovich Boat Works, Inc. v. Atkins,* 585 So. 2d 270 (Fla. 1991)(specific performance an appropriate remedy when seeking the delivery of unique or non-fungible property); *see also, Int'l Union, United Plant Workers of America v. Johnson Controls World Services, Inc.*, 100 F.3d 903 (11th Cir. 1996) (applying Florida law) (motion to compel arbitration analogous to action for specific performance of a contract; one year limitations period applies). As there are no allegations that indicate that Finkelstein was employed beyond February of 2013 at the latest, and Finkelstein's purported right to an "ownership" interest was conditioned on his employment, Finkelstein's claims are barred by the one year statute of limitations.

IV. FINKELSTEIN'S FRAUDULENT INDUCEMENT CLAIM IS INSUFFICIENT AS A MATTER OF LAW

Pursuant to Fla. R. Civ. P. 1.120, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." While Finkelstein generally alleges that he was promised some type of interest in certain LLCs, ostensibly as partial compensation for his work as a CFO, there are no well-pled facts in the entire Counterclaim to support Finkelstein's allegations of fraudulent inducement. Dismissal of Count V of the Counterclaim is warranted. *See Bankers Mut. Cap. Corp. v. U.S. Fidelity and Guar. Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001) (to satisfy Fla. R. Civ. P. 1.120 a party must specify "who made the false statement, the time frame in which it was made and the context in which the statement was made").

The Counterclaim contains the conclusory statement "Mastroianni promised Finkelstein that if he accepted employment with Counter-Defendants at a reduced salary, he would also be given a membership interest in Harbourside, FRC, Allied FL, and 10% of all future EB-5 projects/entities including USIF, HarborFund, Mizner, Charles, CharlesSPE, USIFNY, Bay Street, Bryant and W57th." However, there is not a single factual allegation in the Counterclaim that even relates to the salary that Finkelstein received. Instead, the Counterclaim provides that "[u]ltimately, FRC was retained to, and did in fact, complete EB-5 funding of other projects, as to all of which Finkelstein has been promised a 10% interest." These inconsistent and vague allegations are insufficient to demonstrate any sort of viable claim for fraud in the inducement. *See Rhodes v. O. Turner & Co., LLC*, 117 So. 3d 872 (Fla. 4th DCA 2013) (noting that Fla. R. Civ. P. 1.120 and 1.110 require particularity concerning statements made to a plaintiff).

The Counterclaim is also legally deficient in that it fails to show, through well-pled facts that Finkelstein acted in reliance on the alleged representations. The underlying gravamen of Finkelstein's Counterclaim is that Mastroianni fraudulently induced him into entering into an employment contract at a reduced salary by promising Finkelstein some type of rights in Harbourside, FRC and Allied. Yet no contract ever existed, and Finkelstein was an *at-will* employee.

Finkelstein's fraudulent inducement claim, presented in Count V of the Counterclaim, is simply a disguised contract claim. Finkelstein does not seek relief from his alleged contract; instead, he strives to force Mastroianni to specifically perform under it. Finkelstein seeks the same relief under a breach of contract claim (specific performance of alleged contractual obligations to make him a member of one or more LLCs) that he does under his alleged

fraudulent inducement claim. Finkelstein alleges the same conduct as supportive of his breach of contract claim as well as his fraudulent inducement claim. At bottom, the claims are purely duplicative, and the tort claim is supplanted by the alleged existence of a contract. *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 2d 399, 402 (Fla. 2013); *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994); *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996); *AFM Corp., v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987).

V. UNJUST ENRICHMENT AND PROMISSORY ESTOPPEL CLAIMS FAIL AS A MATTER OF LAW

Finkelstein claims claim that he is entitled to millions of dollars under unjust enrichment and promissory estoppel theories of liability. (Counts VI and VII) However, the law "places a tougher burden on a plaintiff who relies on an implied contract than it does on one 'who uses reasonable care and foresight in protecting himself by means of an express contract.'" *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 305 (Fla. 1st DCA 1999) (internal citation omitted). Moreover "[w]here negotiations [are] unsuccessful, there is no basis for imposing quasi contract liability." *Hermanowski, etc. v. Naranja Lakes Condominium*, 421 So. 2d 558, 560 (Fla. 2d DCA 1982); *see also* Counterclaim ¶ 25 ("while Mastroianni and Finkelstein were in negotiations. . . Mastroianni confirmed in writing to Mr. Finkelstein that he would get Mr. Finkelstein '5% of harbourside, and 10% of Allied'").

Throughout his Counterclaim, and except for Counts VI (Unjust Enrichment) and VII (Promissory Estoppel), Finkelstein touts the existence of an enforceable contractual arrangement under which he ostensibly gained rights as a member in certain LLCs, and pursuant to which he proceeds to seek judicial dissolution of those LLCs. These allegations and positions of fact are

wholly inconsistent with the notion that Finkelstein must resort to a quasi-contract theory when seeking relief. This is not simply alternative pleading; this amounts to inconsistent statements of fact (which permeates the Counterclaim) which this Court should not permit. Count VI and VII should be dismissed.

Finkelstein through Count VI of the Counterclaim asserts that "he was not fully compensated as promised." Counterclaim ¶ 60. Likewise in Count VII, Finkelstein claims that he "accept[ed] a reduced salary as compensation." *Id.* ¶ 67. However, those bare allegations are insufficient to establish a claim under Florida law, because he was reasonably paid in connection with his position as CFO. *See DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 95 (Fla. 2013); *Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 387 (Fla. 4th DCA 1997); *Skytruck Company, LLC v. Sikorsky Aircraft Corp.*, 501 Fed. App'x 879, 882 (11th Cir. Dec. 13, 2002) (applying Florida law). Moreover, there is nothing in the Counterclaim to demonstrate that Finkelstein in fact provided any services to Allied, FRC or Harbourside. *See Townsend Contracting v. Jensen Civ. Const.*, 728 So. 2d 297, 306 (Fla. 1st DCA 1999) (dismissing implied contract claim where plaintiff did not specifically plead the provision or delivery of any "goods or services"). Instead, the Counterclaim asserts Finkelstein provided his "expertise and knowledge[,]" which is insufficient to allege that he actually provided any services. Counterclaim ¶ 60. Thus, Finkelstein has not established any right to relief under a quasi-contractual theory.

WHEREFORE Counter-Defendants respectfully request that the Court enter an Order: (i) dismissing the Counterclaim in its entirety with prejudice; and (ii) any other relief the Court deems just and proper.

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2015, a true and correct copy of the foregoing was filed electronically through the Florida Court's E-Filing Portal, which will, in turn, send a notice of electronic filing to: Gerald F. Richman, Esq., grichman@richmangreer.com, Leora B. Freire, Esq., lfreire@richmangreer.com, Richman Greer, P.A., Counsel for Defendant, 250 Australian Avenue, South, West Palm Beach, Florida 33401.

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