Lipton v Green
2016 NY Slip Op 30569(U)
April 6, 2016
Supreme Court, New York County
Docket Number: 651754/2014
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 53

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JONATHAN A. LIPTON,

Index No. 651754/2014

Plaintiff,

-against-

MICHAEL W. GREEN and
ICE FARM ADVISORS, L.P.,

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

This is an action brought by Jonathan A. Lipton (Lipton) against Michael W. Green (Green) and Ice Farm Advisors, L.P. (Ice Farm) (collectively, the defendants) arising out of the defendants' alleged unlawful and fraudulent actions to usurp opportunities from the parties' partnership and investment business.

In motion sequence numbers 007 and 008, which are consolidated herein, the parties move for summary judgment. In motion sequence number 007, defendants move to dismiss Lipton's complaint pursuant to CPLR §3212. In motion sequence number 008, Lipton moves for an order granting summary judgment in his favor on his claims for breaches of fiduciary duty, and fraudulent and negligent misrepresentations and omissions.

Background[1]

[1] The facts set forth herein are taken from the parties' Rule 19-A statements, and the hearing conducted in aid of summary judgment on October 15, 2015, and are undisputed except where noted.

Lipton and Green are financial professionals in the hedge fund industry. From 2008 through 2012 Lipton was a co-founder and managing director of Goshawk Group (Goshawk). From 2011 through 2013, Green was employed as a portfolio manager at Canyon Capital Advisors, LLC (Canyon).

On or about 2011-2012, Lipton and Green developed a proposed investment management business, which they named Trylon. Lipton's position in this action is that the parties formed a partnership and reached a verbal agreement on the essential terms for the Trylon investment business. Green disputes the parties ever reached an agreement and only discussed a potential business that never launched and was conditioned on obtaining a major "seeding" investment by a potential hedge fund, which never materialized.

According to Lipton, the verbal agreement is corroborated by written records including emails between Green and Lipton confirming their roles and responsibilities in the business; presentations identifying them as Trylon's "Founding Team"; and draft legal documents that were prepared by their lawyers and shared with a potential investor.

It is undisputed that the parties discussed their roles, equity shares, salaries, and individual contributions. The dispute is whether these terms were actually agreed on.

First, the parties discussed their roles in Trylon, with Lipton focusing on building business, Asian research, and fund

[* 3]

raising, while Green would act as CIO/portfolio manager, develop investment strategy and make trades. Further, the parties discussed equity shares. Lipton states that he and Green agreed that Lipton would receive a minority share of 20%-33% in equity in their venture with Green receiving the remaining majority share. Green disputes this, stating that the parties never agreed on the exact equity division and that he told Lipton that Lipton's potential equity share in Trylon could not be more than 20%, while Lipton hoped to convince Green that his share should be 33% percent instead.

In addition, Lipton states that he and Green agreed to contribute $3-$5 million into the business, to split expenses and to share in the fund's losses. Green disputes this, stating that the parties never came to an agreement on the specific amount of capital that each would invest in Trylon and did not agree to spilt Trylon's expenses. It is undisputed that neither party ever contributed any capital to Trylon and that any contribution was dependent on securing funding by an outside investment fund. It is also undisputed that the parties split start-up expenses of approximately $36,000.

Lipton further states that initially the oral partnership agreement entered into with Green called for salaries of $250,000 each. Green disagrees, stating the parties never agreed on a specific salary structure and that as late as May 2013, Lipton proposed a salary structure of $100,000 for him and $350,000 for

Green.

It is undisputed that Lipton and Green never discussed the duration of the alleged joint business arrangement.

During the formation of Trylon, Green continued to be employed at Canyon. Green assured Lipton he would leave Canyon once Trylon received a funding commitment. Lipton states that fully-committed capital was not an absolute prerequisite to Green's leaving Canyon because Green stated to him that he may leave Canyon after Green collected his bonus and deferred compensation from Canyon.

From 2011 to 2013, Green and Lipton solicited a number of potential hedge fund investors to invest in Trylon. Lipton and Green both set up meetings with potential investors, and developed presentation materials and pitch books to provide to potential investors where Green was referred to as "Portfolio Manager A" and the two were referred to as the "Founding Team". Green did not want to be identified in writing because he believed it would threaten his employment at Canyon.

First, Green forwarded presentation materials to Canyon. However, Canyon did not move forward with an investment at Trylon. Lipton and Green then met with Soros Fund Management LLC (Soros) in October 2011 but declined to do business with them at that time. A year later, Green and Lipton met with Scott Bessent (Bessent), Soros's Chief Investment Officer (CIO). Bessent was introduced to Green by Steve Drobny (Drobny). Bessent viewed the

proposal as risky and informed Green that Soros would not be investing in Trylon. Green informed Lipton of this. In 2012, Green and Lipton attempted to secure a multi-million dollar investment from PointState Capital (PointState). The investment with PointState did not materialize. In the spring of 2013, Green and Lipton met with representatives of Morgan Creek Capital Management (Morgan Creek). The parties were unable to come to a deal with Morgan Creek.

In preparation for the negotiations with PointState, Lipton and Green jointly retained the law firm of Kleinberg, Kaplan, Wolff & Cohen LLP (Kleinberg Kaplan). Kleinberg Kaplan's engagement letter was addressed to, and signed by, both Lipton and Green and made both of them jointly and severally liable for the amounts due to the firm. Lipton states the retainer agreement reflected the parties' agreement to split Trylon's expenses, which Green disputes.

Kleinberg Kaplan also prepared a private placement memorandum indicating that Lipton and Green were managing members of Trylon. The memorandum made Green a "key man" whose departure from Trylon would allow shareholders to redeem their shares. The law firm also prepared a "Founders Class Supplement" that indicated that Green and Lipton would each have an initial annual salary of $250,000, and that they would contribute a minimum of $3 million to Trylon. It is undisputed that Kleinberg Kaplan never drafted a partnership agreement between Lipton and Green

and that the private placement memorandum and the Founders Class Supplement were draft documents, never formalized or executed.

No later than July 2013, Lipton began considering and exploring numerous employment opportunities outside of Trylon. These opportunities included Blue Mountain Capital Management, Lomas Capital, Reservoir Capital, Bridgewater Associates, and Societe Generale (SocGen). Lipton turned down an offer to join SocGen in September 2013.

Lipton registered two other entities named "Trylon Holdings, LLC" and "Trylon Management LLC," of which he was the sole owner and through which he pursued personal ventures without Green. Lipton also explored potential consulting arrangement with the hedge fund Balcony Partners, LLC (Balcony). Lipton incorporated an entity named Trylon Management, LLC in September 2013 for the purpose of providing consulting services to Balcony. In July 2013, Lipton sent a written proposal using a Trylon letterhead to Norman Milner (Milner) of Orchard Square Partners, LLC (Orchard Square) to jointly launch a Japan-based hedge fund. Green was unaware of these solicitations or potential ventures involving Lipton.

In April 2013, Drobny approached Green involving a proposal to invest in a fund known as Ice Farm. Green took a number of steps to launch the fund including holding meetings with Credit Suisse and Goldman Sachs brokerage services, providing a "paper portfolio" of trades to Drobny Capital, circulating a description

for Green's planned "global macro fund," and preparing marketing materials. Lipton was unaware of Green's efforts involving Ice Farm.

In May and in June 2013, Green told Lipton that he intended to cease all efforts at investor introductions or further exploration of a joint potential investment vehicle. The parties' last meeting with any potential investor in Trylon occurred on June 25, 2013. It is undisputed that Trylon did not launch, no investor ever invested any money in Trylon or gave a firm commitment to invest in Trylon, and neither Green nor Lipton ever contributed substantial capital to Trylon.

In December 2013, Green resigned from Canyon to focus on the launch of Ice Farm, a global macro investment fund in which he is the sole owner. Green did not disclose to Lipton any of the efforts he undertook in response to Drobny's proposal to invest in a fund involving him.

On December 31, 2013, Green informed Lipton that he was launching a hedge fund, Ice Farm, with Soros providing a major anchor investment in the business.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v N.Y. Univ. Med. Center*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the

burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

Previously, this Court held that Lipton failed to raise a triable issue with respect to dismissed Lipton's claims with respect to the formation of a partnership relationship between the parties, granting Green's motion, in part, and reserving decision on the remainder of the motions (*See* 10/15/15 Tr 17-19).

Breach of Contract

Lipton alleges that he and Green reached an agreement on the material terms of their business, including division of Trylon's equity, salaries, contributions, and a delineation of roles and responsibilities, which remained in effect and was not terminated by either party. In breach of this agreement, Green allegedly ousted Lipton from their business without cause and for the sole purpose of retaining all of the equity in their business for himself.

Given that Lipton failed to establish the existence of a partnership, the issue is whether a non-partnership agreement existed between the parties.

"In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look...to the objective manifestations of the intent of the

parties as gathered by their expressed words and deeds" (*Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363 [2005]). The record is abundantly clear, that Lipton himself did not intend to be bound by any alleged agreement. During the alleged agreement between the parties, Lipton registered two other entities named "Trylon Holdings, LLC" and "Trylon Management LLC," of which he was the sole owner and through which he pursued personal ventures without Green or Green's knowledge. Lipton explored potential consulting arrangement with the hedge fund Balcony by incorporating an entity named Trylon Management, LLC in September 2013 for the purpose of providing consulting services to Balcony. In July 2013, Lipton sent a written proposal using the Trylon, name, logo, and letterhead to Milner of Orchard Square to jointly launch a Japan-based hedge fund. Green was unaware of these solicitations or potential ventures involving Lipton.

The requirements for the formation of a contract are (1) at least two parties with legal capacity to contract, (2) mutual assent to the terms of the contract, and (3) consideration (PJI 4:1).

Mutual assent is often referred to as "a meeting of the minds" of the parties on all essential terms of the contract (*Metropolitan Enterprises N.Y. v Khan Enterprise Const., Inc.*, 124 AD3d 609 [2d Dept 2015]). Lipton fails to raise a triable issue that there was mutual assent on the essential terms of the alleged oral contract. Regarding equitable shares in Trylon, the

record shows that the parties discussed Lipton's share to be between 20%-33% but never agreed on an exact number. Furthermore, the day that the parties allegedly agreed on the equity share term, Lipton admits that there was no final and complete agreement (*See* 10/15/15 Tr 17:2-5). Similarly, regarding capital contribution, the parties allegedly agreed on the amount of capital each would contribute to Trylon to be between $3 million and $5 million depending on the influx of cash by investors and Trylon launching (*id.* at 19:4-7). Lipton relies on the Founders Class Supplement drafted by Kleinberg Kaplan to corroborate his allegation that the parties agreed to a minimum $3 million contribution. However, Lipton admits, this document was not executed or formalized (*id.* at 27:4-8). Furthermore, the record shows that salaries was a term that was in flux since, according to Lipton, the agreement entered into called for salaries of $250,000 each (Compl. ¶5), but as late as May 2013, Lipton proposed a salary structure of $100,000 for him and $350,000 for Green (Defendants' Rule 19-a statement in motion seq. No. 7, *citing* exhibit 13 of Mark Cuccaro Aff.).

This Court cannot enforce this alleged oral agreement where the evidence shows that the material terms were indefinite. "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*compare Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989] [A price term of an option permitting plaintiff to

purchase a nursing home is not indefinite to preclude enforcement by the courts where it manifests that price was to be fixed by the Department of Health, a third party, itself providing an objective standard without the need for further expressions by the parties and the agreement additionally directed the Department to fix the price "in accordance with the Public Health Law and all applicable rules and regulations"). Unlike *Cobble Hill* (*id.*), there is no evidence that Lipton and Green set an outside standard as to how an exact number within the range of equity shares, contributions and salaries would be determined.

Lipton admits the amount of contributions by he and Green would be a subject of negotiation once Trylon was able to find an investor (10/15/15 Tr 22:4-7). "A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Teutul v Teutul*, 79 AD3d 851 [2d Dept 2010]).

Moreover, the alleged contract was dependant on a condition precedent that Trylon would not move forward until investors pledge sufficient capital. A condition precedent to the formation of a contract itself dictates that no contract arises "unless and until the condition occurs" (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). Undisputedly, the condition precedent of obtaining a seeding investment by an outside hedge fund never occurred, and thus the contract was never formed (*id.*).

Thus, the missing term of the parties' exact contributions

into Trylon, which was dependant on a future investment by a hedge fund and future negotiations renders the contract unenforceable.

Even assuming that a contract was formed between the parties, it was terminated before any alleged breach took place. The parties agree that there was no term of duration. An agreement with no definite term of duration is terminable at will (*Double Fortune Property Investors Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008]). Here, any agreement between the parties was terminated when Green expressly communicated to Lipton on December 31, 2013, that he was leaving Canyon to launch his own hedge fund. Moreover, Lipton does not submit any evidence that the parties agreed or even discussed non-compete or non-solicitation of any potential Trylon investors. Thus, Green's subsequent involvement with Soros and investment in Ice Farm is not actionable.

Breach of Implied Covenant of Good Faith and Fair Dealing

It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance (*Forman v Guardian Life Ins. Co. of America*, 98 NY2d 144, 153 [2002]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.*).

The covenant arises out of the agreement and because this

Court has found no partnership agreement or any other agreement existed between the parties, the claim for breach of implied covenant cannot stand on its own (*See Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012] [breach of covenant of good faith and fair dealing must be dismissed where no contract exists]).

Promissory Estoppel

The doctrine of promissory estoppel may be invoked only where the aggrieved party can demonstrate the existence of a clear and unambiguous promise upon which he or she reasonably relied, thereby sustaining injury (*Steele v Delverde S.R.L.*, 242 AD2d 414 [1st Dept 1997]). An oral promise will not be enforced unless it would be unconscionable to deny it (*id.*).

Lipton alleges that Green repeatedly represented to Lipton that he was committed to the Trylon business, that they would launch the fund together and that Lipton would receive an equity interest in their venture. Lipton alleges that his reliance on Green's representations was reasonable, and was supported by Green's actions in attending investor presentations with Lipton and working jointly with Lipton to develop Trylon's investment strategies and business plans.

To the extent that Green's promises were verbal, if any, Lipton does not present facts that rise to the level of reliance and unconscionability such that the doctrine of promissory estoppel would be applicable (*id.*). It would be unreasonable to

enforce the verbal promises where Lipton used the Trylon name to solicit hedge funds so that he could launch the Trylon business on his own without Green's knowledge. Furthermore, there was no partnership agreement, no contract, no contributions, and no seeding investment.

Rather, the record demonstrates that Lipton's understanding of Green's intentions were vague and not definite. Lipton began exploring job opportunities since he believed that Green may never leave the lucrative position at Canyon (*See* Lipton's Rule-19A Statement, ¶¶ 67-69).

Lipton also testified that he had a "plan-B" in case Trylon did not come to fruition and that his biggest fear was that "Mike [Green] would have stayed at Canyon" and not depart (10/15/15 Tr 37:17-26, 38:1-6). Lipton testified that he believed that Green had a "Jekyll and Hide" approach to Trylon in that Green relayed to Lipton that sometimes he wanted to leave Canyon to start Trylon and other times stating he was happy at Canyon (*id.* at 40:13-26). These statements show that Green's alleged promises were ambiguous and unreliable.

Lipton also explored job opportunities in 2013 with numerous companies (*id.* at 49:9-26) undermining his contention in this action that he relied on Green's promises.

Breach of Fiduciary Duty

Lipton alleges that Green was a partner and a co-founder of Trylon, and, as a consequence, owed fiduciary duties to Lipton

(Complaint ¶74). In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (*Burry v Madison Park Owner LLC*, 84 AD3d 699 [1st Dept 2011]).

No partnership agreement or any other agreement existed between Lipton and Green. Where no indicia of a joint venture or partnership is established, no fiduciary relationship is found (*Langer v Dadabhoy*, 44 AD3d 425 [1st Dept 2007] *lv denied* 10 NY3d 712 [2008]). Thus, any steps that Green took to launch Ice Farm including using investors that were targeted by Trylon or making any misrepresentations or omissions is not actionable as a breach of fiduciary duty.

Fraud and Negligent Misrepresentation

The elements of a cause of action for fraud are 1) a false representation or omission of a material fact; 2) knowledge of the misrepresentation with an intent to deceive to induce reliance; 3) justifiable reliance upon the misrepresentation or omission and resulting damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Lipton alleges that Green owed a duty of disclosure to Lipton arising from their fiduciary relationship of trust and confidence and that Green violated this duty by making material misrepresentations and omissions of fact to induce Lipton to develop business strategies and corporate opportunities that

Green could later usurp. Green's alleged fraudulent misrepresentations included statements concealing his intent not to participate in Trylon but to launch Ice Farm instead, failing to disclose information that was material to Lipton's continued participation in their business, even as he and Lipton continued to market Trylon to prospective investors.

Green's alleged omissions do not constitute fraud unless there is a fiduciary or other heightened relationship between the parties (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352 [1st Dept 2004]). No such relationship has been shown to exist and thus, Green was not bound by any duty to disclose to Lipton his future plans regarding Ice Farm.

Furthermore, Lipton fails to raise a triable issue as to reasonable reliance. "Sophisticated parties have a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they are assuming" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 195 [1st Dept 2012]). As a sophisticated businessman, Lipton should have known the risk that Green would pursue other opportunities and potential investors, particularly in the absence of a formal agreement and where non-solicitation or non-compete terms were neither discussed or agreed to. Lipton was aware of this risk and even devised a "plan-B" (in his words) for an exit out of Trylon and actively sought employment during the stated time period.

Negligent misrepresentation requires the plaintiff to

demonstrate: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

Lipton fails to establish that a special or privity-like relationship existed between the parties, or that there was reasonable reliance, as discussed above.

Thus, the fraud and negligent misrepresentation claims are dismissed.

Declaratory Judgment

An action for a declaratory judgment is one that seeks to have the court establish and promulgate the rights of the parties on a particular subject matter (*Goodman v Reisch*, 220 AD2d 383 [2d Dept 1995]). The prerequisites for a declaratory judgment action are the existence of an actual controversy, a controversy that is justiciable, and a controversy where a legally protectable interest is determined to be present and where such interest is directly in issue (*Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006]).

Lipton states Green has wrongfully excluded Lipton from the business that Lipton helped to create. In doing so, Lipton states Green secretly took many of the same investment strategies, investor relationships and business plans that were developed for Trylon, using them to launch Ice Farm without Lipton's knowledge,

while at the same time wrongfully denying Lipton any ownership in the fund, which would not have existed without Lipton's substantial contributions. Lipton states he is thus entitled to a declaration that he owns an equity interest in Ice Farm of no less than 20% so that he may recover the economic interest of which he has been wrongfully deprived.

There is no controversy that is justiciable here. The parties were merely discussing an investment plan that was never launched. The allegations that Green took the same investment strategies, investor relationships and business plans of Trylon, if at all true, were legally permissible since the parties were not in an agreement and in no way discussed restricting these activities. Thus, there is no actual controversy as to the respective legal rights of the parties that would warrant a declaration by the Court.

Unjust Enrichment

The concept of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties (*Georgia Malone & Co., Inc. v. Rieder*, 19 NY3d 511 [2012]). An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*id.*). The plaintiff must "assert a connection between the parties that [is] not too attenuated" and "indicate a relationship between the parties that

could have caused reliance or inducement" (*id.*). The plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*id.*).

Lipton contends that the facts show that Ice Farm is merely a continuation of Trylon, for which Lipton contributed the vast majority of his working hours for years to develop and structure. According to Lipton, Ice Farm's investment strategies are the same as those that Green used for years at Canyon and that those Canyon strategies are the same ones he expected to use in connection with Trylon. Lipton states that his contributions had value and enriched the defendants in that in preparing to launch Ice Farm, Green hired operations personnel and consultants to assist him continue the work that Lipton had been doing to build the business, and he compensated them for these services which shows that Lipton's work had value. Further, when Green began working with a launch consultant to prepare pitchbooks for Ice Farm, he allegedly provided the consultant with materials that he and Lipton had previously prepared in connection with Trylon.

It would be unjust to hold Green responsible for an unjust enrichment claim when the evidence shows that Lipton had explored the potential consulting arrangement with Balcony and had incorporated the entity Trylon Management, LLC for the purpose of providing consulting services to Balcony, all without notice to

Green.

Lipton relies on the case of *Philips Int'l. Invs., LLC v Pektor* (117 AD3d 1 [1st Dept 2014]), to support the unjust enrichment claim. In *Philips*, an investment company, brought suit against joint venturers, the Pektors, who created the partnership defendants as vehicles to appropriate the venture's business opportunity of buying a portfolio of commercial properties from nonparty Liberty Property (*id.*). During due diligence, the plaintiff discovered that one of the properties had a critical flaw that made its purchase unviable (*id.*). The parties then entered into discussions with Liberty to purchase the remaining properties (*id.*). The deal with the venture did not go forward (*id.*). Subsequently, plaintiff learned that the Pektors had created a series of limited partnerships (the partnership defendants) to act as vehicles to purchase the viable properties from Liberty, cutting the plaintiff out of the transaction (*id.*). The Court allowed the unjust enrichment claim to move forward (*id.*).

This case differs from *Philips* (*id.*) in the first instance because it was aimed at the sufficiency of the pleadings whereas here, the Court has a full evidentiary record before it. Furthermore, there is no evidence that Ice Farm was created to steer away potential investors from Trylon for defendants' gain. Soros declined to invest in Trylon because it did not view it as a strong investment (Defendants' Rule-19A Statement at ¶ 28),

which occurred approximately one year before their investment in Ice Farm (Green Aff. ¶31).

Moreover, it is undisputed that Trylon's introduction to Bessent, Soros's CIO, was made by Drobny, not by Lipton. None of the potential investors Lipton introduced to Trylon invested in Ice Farm. In addition, it is not alleged that Green is using investment strategies developed by Lipton at Ice Farm. Moreover, neither Lipton nor Green state that the marketing materials developed by Trylon were used to attract Soros to invest in Ice Farm.

Constructive Trust

"The constructive trust doctrine is a fraud rectifying vehicle" (*Meier v Meier*, 76 AD2d 810 [1st Dept 1980]). To invoke it, there must be a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment (*id.*).

The constructive trust claim is dismissed since, as stated above, there is no confidential relationship between the parties. Furthermore, the elements of unjust enrichment have not been met. Moreover, Lipton's conduct in soliciting hedge funds under Trylon's name in order to launch his own fund and incorporating Trylon Management, LLC for the purpose of providing consulting services to Balcony without Green's knowledge renders his claim for constructive trust suspect.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's claims (Sequence No. 007) is granted in its entirety, and the complaint is dismissed with costs and disbursements to defendants as taxed by the clerk of the court, and the clerk is directed to enter judgment accordingly.

ORDERED that plaintiff's motion for summary judgment (Sequence No. 008) is denied.

Dated: April 6, 2016

ENTER:

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J.S.C.