

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS

-----x Index No.:708502/2016  
NICHOLAS CONSTANTINE,

*Plaintiff.*

-against-

FOUR STAR AIR CONDITIONING CO., LLC,  
AND CHRISTINA IRAKLEOUS,

*Defendants.*

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**DEFENDANT'S MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO DISMISS**

Respectfully submitted,

**PARDALIS & NOHAVICKA, LLP**

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SUPREME COURT OF THE CITY OF NEW YORK  
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NICHOLAS CONSTANTINE,

*Plaintiff.*

-against-

**Memorandum of Law**

FOUR STAR AIR CONDITIONING CO., LLC,  
AND CHRISTINA IRAKLEOUS,

*Defendants.*

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FOUR STAR AIR CONDITIONING CO., LLC, AND CHRISTINA IRAKLEOUS  
("Defendants"), by their attorneys, PARDALIS & NOHAVICKA, LLP, respectfully submit this  
Memorandum of Law in support of the within Motion to Dismiss.

**PRELIMINARY STATEMENT**

This case arises from Plaintiff's claim that he is owed monies pursuant to an alleged breach of contract executed between the parties wherein Plaintiff agreed to sell his share of the business in exchange for payment. Plaintiff now seeks damages in the amount of SEVENTY-TWO THOUSAND AND SIX HUNDRED AND FIFTY-ONE DOLLARS (\$72,641.00), alleging breach of contract, unjust enrichment, personal guarantee, and attorney's fees and interest. However, Plaintiff has failed to provide sufficient detail or any evidence of such a contract and proof of unjust enrichment and thus has failed to state a cause of action for which relief can be granted under CPLR 3211(a)(7). Additionally, Plaintiff has been paid all monies owed to him and this case should be dismissed pursuant to CPLR 3211(a)(5).

## **PROCEDURAL HISTORY AND FACTS**

The Procedural History and Pertinent Facts are incorporated as if fully set forth herein from the Affirmation of Ashley Serrano and affidavit of Taso Mitiadou.

## **ARGUMENT**

### **I. Plaintiff's complaint should be dismissed pursuant to CPLR 3211 (a)(7) as Plaintiff has not established a cognizable cause of action and can prove no set of facts in support of his claim which would entitle him to relief.**

When determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. *Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 70 AD3d 928, 930 (2d Dept. 2010) (citing *Leon*, 84 NY2d, at 87-88; *Cayuga Partners v. 150 Grand*, 305 AD2d 527 [2d Dept. 2003]). "Factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, L.L.C. v. Brody*, 1 AD3d 233 (1st Dept 2003) (citing *Caniglia v. Chicago Tribune-New York Syndicate*, 204 AD2d 233 [1st Dept. 1994]).

### **A. Plaintiff Fails To Satisfy the Minimum Requirements for Pleading a Breach of Contract Claim.**

As a threshold matter, this Court should dismiss the this action because Plaintiff has failed to allege the basic and necessary elements of a breach of contract claim. In order to recover, Plaintiff must properly asserts a cause of action for breach of contract by establishing the following: (1) a valid and enforceable contract; (2) the plaintiff's performance of the contract;

(3) breach by the defendant; and (4) damages. See *Noise in Attic Prods., Inc. v. London Records*, 10 AD3d 303, 307 (1st Dep't 2004); *Furia v. Furia*, 116 AD2d 694, 695 (2d Dep't 1986).

Further, a complaint for breach of contract "must set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract." *Valley Cadillac Corp. v. Dick*, 661 N.Y.S.2d 105, 105 (App. Div. 1997). Additionally, under New York law, "a breach of contract claim will be dismissed as being too vague and indefinite, if plaintiff fails to allege, in nonconclusory fashion, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated." *Negrete v. Citibank, N.A.*, No. 15 CIV. 7250, 2016 WL 3002421 (S.D.N.Y. May 19, 2016)

Here, Plaintiff's complaint features a series of conclusory allegations, only one sentence of which pertains to the existence of a contract: "Defendants did enter into an agreement with Plaintiff for the sale of Plaintiff interest in the Defendant Four Star payment to be made in full no later than Feb 5, 2013." See ¶ 4 of Plaintiff's Verified Complaint, attached hereto as **Exhibit A**. Plaintiff's failure to allege a cause of actions by express reference to the contractual provision or by at least properly establishing the existence of the contract on which this claim rests requires dismissal.

**B. Plaintiff Fails To Satisfy the Minimum Requirements for Pleading an Unjust Enrichment Claim.**

Plaintiff also asserts a cause of action for unjust enrichment. "In order to successfully plead a claim of unjust enrichment, a party 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" *Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48. "[A] plaintiff's allegation that the [defendant] received benefits, standing

alone, is insufficient to establish a cause of action to recover damages for unjust enrichment” *Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 678, 680, 790 N.Y.S.2d 143 (2d Dep’t 2005). (dismissing an unjust enrichment claim.); *see also* New York Jurisprudence, *Pleadings; Implied Contract* § 613 (2d ed. 2011). Here, Plaintiff’s superficial allegations only claim that Defendant received benefits. This is insufficient to establish a cause of action to recover under the theory of unjust enrichment. Additionally, as with Plaintiff’s claim for a breach of contract and unjust enrichment - Plaintiff’s Third Cause of action is based on an alleged personal guarantee by Defendant Irakleous entirely rests on a contract that Plaintiff has been vague and elusive as to establish its existence. As such, Plaintiff’s second and third causes of action should be dismissed as well.

**II. Plaintiff’s complaint should be dismissed pursuant to CPLR 3211 (a)(5) since the cause of action may not be maintained since Defendant has made relevant payments in full to Plaintiff.**

In New York, pursuant to CPLR 3211(a)(5) a party may move for judgment to dismiss a cause of action against asserted against him on the ground that: "the cause of action may not be maintained because of arbitration, and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds";... CPLR 3211(a)(5). When a Plaintiff receives all monies owed to him and no further sums are due, Plaintiff’s cause of action should be dismissed pursuant to CPLR 3211(a)(5). *See, Stone v. National Bank and Trust Co.*, 591 N.Y.S.2d 609, 611(3d Dep’t 1992). Plaintiff’s complaint is unclear as to what exactly is the agreement he is referring to. However, if Plaintiff is referring to Defendant’s prior unrelated engagement to pay the business’ debts owed by the business’ account, then Plaintiff’s causes of action should be dismissed

pursuant to CPLR 3211(a)(5) as such payments have been made. The accounting documents and the latest issued check to Plaintiff are annexed hereto as **Exhibit B**.

**Plaintiff's Fourth Cause of Action of Guarantee of Trade Debt is Moot**  
**Because Defendant Has Paid This Debt In Its Entirety**

Plaintiff's fourth cause of action rests on the misleading assertion that Defendants are in default of their guarantee of the business's of trade debt. However, Plaintiff's final and desperate attempt to keep a cause of action afloat is moot as Defendants have paid off the remaining balance on the business American Express Card. In making the appropriate monthly payments, Defendants have subsequently paid off any then-existing debt. *See* American Express Payments and latest official account summary, annexed hereto as **Exhibit C**.

**WHEREFORE**, it is respectfully requested that the Defendant Constantine's Motion to Dismiss be granted in its entirety, together with such other and further relief as this Court deems just, proper and equitable.

Dated: Astoria, New York  
September 13, 2016

**PARDALIS & NOHAVICKA, LLP**

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