



By order of the Court, GRANTED. Presiding Judge Robert C. Naraja

FOR PUBLICATION



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IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOSE SANTOS RIOS,  
Plaintiff,

vs.

SAIPAN KOREANA HOTEL, INC.,  
EMMANUEL STAFFING SERVICES,  
INC., WILLIS MANAGEMENT GROUP,  
INC., EMMANUEL HEALTHCARE  
SERVICES, INC., POWER  
CONSTRUCTION & MANAGEMENT  
SERVICES, INC., AIDEM  
INTERNATIONAL, INC., WATSON  
WILLOW HEALTHCARE SERVICES,  
INC., PACIFIC TOWERS, INC.,  
EMMANUEL COLLEGE, INC.,  
PRAXEDES SEDY DEMASA-BERNABE  
(aka Praxedes Sedy Demesa), AMELIA A.  
FEJERAN (aka Ging De Lima), RUTH I.  
DEUS, EMMANUEL A. PEREZ,  
BENIGNO FEJERAN, FRANK  
ANTHONY A. SARMIENTO, RAMON  
DIZON, CHARLOTTE TENEPERE,  
TERESITA A. GUIQUING, FRANCIS  
SARMIENTO, and DOES 1-50,  
Defendants.

CIVIL ACTION NO. 09-0524

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT

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**I. INTRODUCTION**

THIS MATTER came before the Court on February 17, 2011 on Defendants’ Motion to Dismiss the Second Amended Complaint (“Defendants’ Motion to Dismiss”). Defendants Pacific Towers, Inc. (“Pacific Towers”), Praxedes Sedy Demasa-Bernabe (“Demesa”), and Emmanuel College, Inc. (“Emmanuel”) (collectively referred to as “Defendants”) were represented by Matthew T. Gregory, Esq. Jose Santos Rios (“Plaintiff” or “Rios”) was represented by Robert H. Myers, Jr., Esq.

Based on the papers submitted by counsel, the Court GRANTS Defendants’ motion.

**II. BACKGROUND**

On August 8, 1989, Plaintiff leased a hotel, Saipan Koreana Hotel (“SKH”), to Yoo Jin Kim (“Yoo”). (SAC ¶ 29-30.) Yoo and others managed the SKH. (*Id.* ¶ 32.) The SKH began operating at a loss so its properties, asserts, and lease were sold and transferred to Pacific Towers under the auspices of its owner, Demesa. (*Id.* ¶¶ 37, 59, 65-66.) Demesa managed multiple companies, including Pacific Towers, and moved all her companies into the SKH. (*Id.* ¶ 67.) Demesa allegedly took several steps to misrepresent that the companies were their own separately operated and funded entities while they were actually under the full control and financing of Demesa. (*Id.* ¶¶ 74-80.)

Demesa’s companies allegedly breached their lease with Plaintiff by failing to pay rent to Plaintiff, using the hotel for an illegal purpose, and committing waste on the premises, among other improper actions. (*Id.* ¶ 85.) In December 2009, Plaintiff brought suit against Demesa, the SKH, and Emmanuel (a representative for the SKH) for breach of contract and unjust enrichment. On August 17, 2010, Plaintiff filed a first amended complaint (“FAC”) that added several more defendants and causes of action. On January 13, 2011, Plaintiff filed a second amended complaint (“SAC”) in an attempt to cure the defects from his previously filed complaints. Defendants move to dismiss the Fifth, Sixth, Seventh, Eighth, and Ninth Causes of Action contained in Plaintiff’s SAC pursuant to NMI R. Civ. P. 12(b)(6).

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### III. LEGAL STANDARD

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2 Under NMI R. Civ. P. 12(b)(6), a complaint or pleading is subject to dismissal where it  
3 lacks a cognizable legal theory or fails to allege facts constituting a cognizable legal theory.  
4 *Bolalin v. Guam Publications, Inc.*, 4 NMI 176 (1994). In deciding a motion to dismiss under  
5 Rule 12(b)(6), the court must assume the truth of all factual allegations in the challenged  
6 pleading and construe them in the light most favorable to the non-moving party. *Zhang Gui*  
7 *Juan v. Commonwealth*, 2001 MP 18 ¶ 11; *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482,  
8 490 (1992). The court “confines [its] analysis to the allegations and implications contained on  
9 the face of the complaint.” *Sablan v. Roberto*, 2002 MP 23 ¶ 12 (citing cases).

10 The factual matter of the complaint, accepted as true, must “state a claim to relief that  
11 is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d  
12 868, 884 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is  
13 plausible on its face when the plaintiff pleads factual content that allows the court “to draw the  
14 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. The  
15 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a  
16 sheer possibility that a defendant acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 550).

17 Additionally, allegations of fraud “shall be stated with particularity.” NMI R. Civ. P.  
18 9(b); *see also Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.  
19 1984)<sup>1</sup> (noting that plaintiffs may satisfy Rule 9(b) by pleading “allegations of [the] date, place  
20 or time” of fraud, or by “injecting precision and some measure of substantiation into their  
21 allegations of fraud”); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)  
22 (finding that a complaint alleging fraud must specify the fraudulent statements, identify the  
23 speaker, state when and where the statements were made, and why the statements were  
24 fraudulent).

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<sup>1</sup> NMI R. Civ. P. §§ 8(a), 9(b), 12(b)(6), 15(a) are analogous to their federal counterparts. “[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance.” *Ishimatsu v. Royal Crown Ins. Corp.*, 2006 MP 9 ¶ 7 n.3.

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#### IV. DISCUSSION

The factual allegations contained in the SAC are largely derived from two letters dated April 19, 2005 and May 27, 2005 (“the April and May Letters”). (SAC ¶¶ 44, 52.) Defendants contend that the Court cannot consider the contents of these letters on a Rule 12(b)(6) motion because they represent extraneous material and they have not been submitted into evidence. This argument is without merit. The Court may consider all materials contained, or incorporated, in the SAC, such as the April and May letters. *See Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). Also, it is insignificant that the letters have not been submitted into evidence because the purpose of a Rule 12(b)(6) motion is to determine whether the complaint gives the defendant fair notice of a legally cognizable claim rather than scrutinize the claim’s substantive merits. *Twombly*, 550 U.S. at 555; *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

Defendants also argue, as a general matter, that Count V (Accounting) and Count VI (Constructive Trust) in the SAC should be dismissed outright because Plaintiff “merely repackage[d] the claim[s] . . . set forth in the first amended complaint.” (Def’s. Mot. to Dismiss at 5.) The general rule is that “an amended complaint supercedes the prior complaint.” *Clark v. Tarrant County*, 798 F.2d 736, 740-41 (5th Cir. 1986) (citing Fed. R. Civ. P. 15(a)). Therefore, it is advisable that the amended complaint be full and complete in and of itself. Nevertheless, a plaintiff may incorporate by reference portions of a prior pleading into an amended complaint. NMI R. Civ. P. 10(c); *see Federal Nat’l Mortgage Ass’n v. Cobb*, 738 F. Supp. 1220, 1227 (N.D. Ind. 1990) (“In order to incorporate an earlier pleading in a later pleading, the later pleading must specifically identify which portions of the prior pleading are adopted therein.”).

Here, Plaintiff complied with NMI R. Civ. P. 10(c) in incorporating into the SAC the factual allegations asserted in the “Accounting cause of action” and “Constructive Trust cause of action” portions of Plaintiff’s FAC. (SAC ¶¶ 110, 112.) Therefore, the Court will consider the referenced portions of the FAC in analyzing the sufficiency of the Accounting and Constructive Trust claims.

1 The Court will now apply the Rule 12(b)(6) standard to each of Plaintiff's contested  
2 causes of action, including: Count V (Accounting), Count VI (Constructive Trust), Count VII  
3 (Fraud/Misrepresentation), Count VIII (Civil Conspiracy) and Count IX (Promissory  
4 Estoppel).

5 **A. ACCOUNTING**

6 Plaintiff alleges that he is entitled to an accounting "to determine, among other things,  
7 the actual inventoried assets or properties of SKH, or both, which Defendants removed,  
8 delivered or otherwise misappropriated and all the proceeds received by Defendants from any  
9 sale or auction thereof." (FAC ¶ 142.)

10 "An equitable accounting is a remedy which prevents unjust enrichment by requiring  
11 disgorgement of profits a fiduciary receives as a result of a breach of the duty of loyalty."  
12 *Matsunaga v. Matsunaga*, 2006 MP 25 ¶ 30 (citing cases). A fiduciary is one who has a duty  
13 to "act for someone else's benefit, while subordinating one's personal interest to that of the  
14 other person." *See Govendo v. Marians Pub. Land Corp.*, 2 NMI 482, 491 n.5 (1992).

15 Here, Plaintiff fails to provide sufficient facts to show that Defendants owed him a  
16 fiduciary duty. Plaintiff and Defendants had a contractual relationship, which merely obligated  
17 Defendants to abide by the terms of the lease, such as paying rent and not committing waste.  
18 (SAC ¶ 83.) Plaintiff had no pecuniary interest in Defendants' management of the hotel, nor  
19 was their relationship governed by principles of trust. Defendants owed no duty to Plaintiff  
20 outside of the standard provisions of the lease, which is insufficient to establish a fiduciary  
21 relationship. *See Univ. Nursing Assocs., PLLC v. Phillips*, 842 So. 2d 1270, 1275 (Miss. 2003)  
22 ("We have refused to recognize the existence of a fiduciary relationship in cases where the  
23 relationship between the two parties was no more than an arms-length business transaction  
24 involving a normal debtor-creditor relationship.") (internal quotations omitted, citation  
25 omitted).

26 Furthermore, Plaintiff does not state why an accounting is necessary, such as when no  
27 adequate legal remedy is available or when a party cannot otherwise ascertain its damages. A  
28 party is not entitled to an equitable accounting when the party has an adequate remedy at law.

1 *First Commodity Traders, Inc. v. Heinhold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir.  
2 1985). In *First Commodity Traders, Inc.*, the court dismissed plaintiff’s accounting claim  
3 because plaintiff “made no showing why its claim for monies owed could not be identified as  
4 damages under its breach of contract claim.” *Id.* Here, Plaintiff similarly has asserted a breach  
5 of contract claim among other claims for legal relief, and failed to state why such legal relief is  
6 inadequate. Also, Plaintiff does not show that an accounting is necessary as a discovery tool to  
7 ascertain his damages. See *Matunaga*, 2006 MP at ¶ 30; *Lustgarten v. Jones*, 371 N.W.2d 668,  
8 671 (Neb. 1985); *Ritter, Laber & Assocs. v. Kock Oil, Inc.*, 680 N.W.2d 634, 644 (N.D. 2004);  
9 *Henry v. Donovan*, 114 So. 482, 484 (Miss. 1927).

10 Plaintiff does not provide sufficient facts to establish a fiduciary relationship, nor does  
11 he even mention the term, “fiduciary” in any of his pleadings or briefs. Also, Plaintiff’s  
12 Opposition Motion is completely silent as to Defendants’ argument that the SAC fails to  
13 establish a fiduciary relationship between Defendants and Plaintiff. Furthermore, Plaintiff did  
14 not state why a remedy at law is inadequate. Therefore, Count V (Accounting) is not a  
15 cognizable legal theory.

## 16 **B. CONSTRUCTIVE TRUST**

17 Plaintiff asserts a claim for a constructive trust as to the SKH’s inventoried properties  
18 and assets that Defendants allegedly misappropriated. (FAC ¶ 144-145.) A constructive trust  
19 is a remedy used to redress wrongs or to prevent unjust enrichment. *Lifoifoi v. Lifoifoi-Aldan*,  
20 1996 MP 14 ¶ 23; *Rogolofoi v. Guerrero*, 2 NMI 468, 480 (1992). A constructive trust is a  
21 remedy that “is granted where restitution is due and there is specific property to which  
22 equitable rights can attach.” Restatement of Restitution, General Scope Note (1937).

23 A plaintiff cannot, however, assert a “constructive trust” as a cause of action.  
24 *Macharia v. United States*, 334 F.3d 61, 64 (D.C. Cir. 2003) (dismissing plaintiff’s  
25 constructive trust claim because a constructive trust is not an independent cause of action).  
26 Plaintiff’s claim for a constructive trust must fail because it can be asserted only as a remedy.  
27 In any case, Plaintiff does not even identify the specific property sought to be placed in a  
28 constructive trust. Thus, Count VI (Constructive Trust) is misplaced.

1 **C. FRAUD/MISREPRESENTATION**

2 Plaintiff bases his claim for fraud/misrepresentation on the allegation that Defendants  
3 entered into a lease agreement with Plaintiff without any intention of honoring the lease. (SAC  
4 ¶ 117.) The general rule for fraudulent misrepresentation is:

5 One who fraudulently makes a misrepresentation of fact, opinion,  
6 intention or law for the purpose of inducing another to act or to refrain  
7 from action in reliance upon it, is subject to liability to the other in deceit  
8 for pecuniary loss caused to him by his justifiable reliance upon the  
misrepresentation.

9 Restatement (Second) of Torts § 525 (1977). A cause of action can arise under § 525 when a  
10 promisor misrepresents its intention to perform an agreement with the recipient. *Id.* at § 530  
11 cmt. c. “The intention of the promisor not to perform ... cannot be established solely by proof  
12 of its nonperformance;” however, “the intention may be shown by any other evidence that  
13 sufficiently indicates its existence.” *Id.* at cmt. d. For example, evidence of the promisor’s  
14 insolvency, repudiation of the promise soon after it is made, or failure even to attempt any  
15 performance may be sufficient to show the promisor’s intention not to fulfill its contractual  
16 obligations. *Id.* (citing cases).

17 Plaintiff’s claim for fraud/misrepresentation is defective for two reasons: (1) it does not  
18 comply with Rule 9(b)’s pleading standard for allegations of fraud, and (2) it is not plausible  
19 on the face of the SAC because the SAC does not provide sufficient factual support for  
20 Plaintiff’s legal conclusion that Demesa had no intention of honoring the terms of the lease.

21 **1. Rule 9(b) Allegations of Fraud**

22 NMI R. Civ. P. 9(b) provides: “In all averments of fraud or mistake, the circumstances  
23 constituting fraud or mistake shall be stated with particularity.” To satisfy Rule 9(b), the  
24 plaintiff must identify the “who-what-when-where-why” details of the alleged fraud. *See Mills*  
25 *v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). Plaintiff identifies the fraudulent  
26 statement as the disingenuous promise to make monthly rental payments in compliance with  
27 the terms of the lease (the “compensation representations”). (SAC ¶ 115.) Demesa and  
28 Demesa’s companies (collectively, “DEMESA”) allegedly furnished the fraudulent

1 compensation representations. (SAC ¶ 116.) Plaintiff also explains that the compensation  
2 representations were fraudulent because DEMESA had no intention of honoring the lease.  
3 (SAC ¶ 117.) However, Plaintiff does not state *when* and *where* DEMESA communicated the  
4 compensation representations to Plaintiff.

5 Plaintiff elaborates on the details of his fraud/misrepresentation claim in his Opposition  
6 to Motion to Dismiss Second Amended Complaint (“Plaintiff’s Opposition Motion”).  
7 However, Plaintiff raises facts and allegations inconsistent with, or in addition to, those  
8 contained in the “Fraud / Misrepresentation” section of the SAC. According to Plaintiff’s  
9 Opposition Motion, OBDB (a law firm) communicated the compensation representations to  
10 Plaintiff’s then-attorney, S. Joshua Berger, in the April and May letters.<sup>2</sup> (Pl’s. Opp. Mot. at  
11 3.) The intent of these statements was to induce Plaintiff to sell the lease and the SKH to  
12 DEMESA. (*Id.*) It is unclear, however, what DEMESA’s involvement was with respect to the  
13 April and May letters. In conclusion, the allegations for fraud contained in the SAC must be  
14 more clear and specific in order to comply with Rule 9(b).

## 15 **2. Rule 12(b)(6) Plausible Claim**

16 Plaintiff baldly asserts that DEMESA promised to make monthly rental payments to  
17 Plaintiff without any intention of doing so. (SAC ¶ 117.) Plaintiff does point out that “[t]here  
18 is evidence, that at the time [the April and May letters] were written, defendants had  
19 information regarding the Demesa Companies and DEMESA’s financial problems.” (Pl’s.  
20 Opp. Mot. at 3.) This fact alone is insufficient to rebut “the implied assertion of an intention to  
21 perform” when Defendants agreed to the terms of the lease. Restatement (Second) of Torts §  
22 530 cmt. c (1977).

23 It is common knowledge that a great many individuals and entities, unfortunately, have  
24 “financial problems,” but they may still create contracts with the intention and ability to meet  
25 the terms of their contracts. Here, DEMESA’s ultimate failure to meet the terms of its contract  
26 does not prove, in and of itself, that it misrepresented its intention to honor the lease. *Id.* at

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28 <sup>2</sup> Plaintiff alleges in his SAC, however, that “The Demesa Companies and the DEMESA made the compensation representations to Plaintiff.” (SAC ¶ 116.) Plaintiff also does not mention the April and May Letters in the “Fraud / Misrepresentation” section of the SAC.

1 cmt. d. The SAC contains no factual allegations that DEMESA was insolvent or otherwise  
2 unable or unwilling to abide by the terms of the lease at the time the lease was created. The  
3 Court does not accept Plaintiff's conclusory statement that DEMESA never intended to honor  
4 the lease. *Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements, do not suffice.").

#### 6 **D. CIVIL CONSPIRACY**

7 The Commonwealth does not recognize a cause of action for civil conspiracy. *I.G.I.*  
8 *Gen. Contr. & Dev. v. Public Sch. Sys.*, 1999 MP 12 ¶¶ 9-12. Although the Restatement  
9 (Second) of Torts § 876 (1979) recognizes a claim for civil conspiracy under the title "Persons  
10 Acting in Concert," the Court adopts the Restatement *only in the absence of written or*  
11 *customary law to the contrary*. 7 CMC § 3401. Here, the Commonwealth Supreme Court  
12 unequivocally announced that civil conspiracy is not a tort in the CNMI, which is binding on  
13 this Court. *I.G.I. Gen. Contr. & Dev.*, 1999 MP at ¶ 12. Therefore, Count VIII (Civil  
14 Conspiracy) is not a cognizable legal theory.

#### 15 **E. PROMISSORY ESTOPPEL**

16 Plaintiff contends that he reasonably relied upon Defendants' compensation  
17 representations to Plaintiff's detriment, giving rise to a claim for promissory estoppel. (SAC ¶  
18 129.) Promissory estoppel contains the following four elements:

- 19 (1) the party to be estopped must be apprised of the facts;
- 20 (2) he must intend that his conduct shall be acted upon, or must so act that
- 21 the party asserting the estoppel had a right to believe it was so intended;
- 22 (3) the other party must be ignorant of the true state of facts; and
- (4) he must rely upon the conduct to his injury.

23 *O'Connor v. Div. of Pub. Lands*, 1999 MP 5 ¶ 9.

24 Plaintiff alleges that Defendants were apprised of the terms of the lease, Defendants  
25 promised to honor the terms of the lease and intended Plaintiff to rely thereon, and Plaintiff did  
26 so rely to his detriment because Defendants allegedly breached the terms of the lease. Whether  
27 the third element is satisfied is questionable. In any case, however, the cause of action for  
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