

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT**

Beach v. Touradji Capital Management L.P.

85 A.D.3d 674, 927 N.Y.S.2d 41 (1st Dep't 2011) · Decided June 30, 2011

OPINION

PER CURIAM.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered September 21, 2009, which, to the extent appealed from, as limited by the briefs, granted defendants' motion to dismiss the second cause of action for violation of article 6 of the New York Labor Law, the third cause of action for unjust enrichment, the fourth cause of action for quantum meruit and the sixth cause of action for imposition of a constructive trust, unanimously modified, on the law, to reinstate the second, third and fourth causes of action, and otherwise affirmed, without costs. *675 "A 'quasi contract' only applies in the absence of an express agreement... in order to prevent a party's unjust enrichment" (Clark-Fitzpatrick, Inc. v Long Is.

R.R. Co., 70 NY2d 382, 388 [1987]). Plaintiffs should have been permitted to plead both contract and quasi contract claims in the alternative (see Winick Realty Group LLC v Austin & Assoc., 51 AD3d 408 [2008]). The court erred in dismissing plaintiffs unjust enrichment claim since it was based on allegations that defendants were unjustly enriched by withholding plaintiffs' 2005 compensation and reinvesting it without their permission, and no contract governing those actions existed.

The court also erred in concluding, at this pleading stage, that plaintiffs' compensation did not constitute "wages" under Labor Law § 190 (1), because plaintiffs alleged that the compensation was not "entirely discretionary" and was based on plaintiffs' "own personal productivity," and not solely upon defendants' overall financial success (see Truelove v Northeast Capital & Advisory, 95 NY2d 220, 224 [2000]).

The court's dismissal of plaintiffs' constructive trust claim was proper for failure to establish the existence of a confidential or fiduciary duty (see Mirvish v Mott, 75 AD3d 269, 275 n [2010], lv granted 16 NY3d 705 [2011]; Wachovia Sec., LLC v Joseph, 56 AD3d 269, 271 [2008]). Concur — Gonzalez, P.J., Catterson, Richter, Abdus-Salaam and Román, JJ.