

P.J. Alizio Realty, Inc. v Eisenberg

2008 NY Slip Op 32478(U)

September 2, 2008

Supreme Court, Nassau County

Docket Number: 0312-04/

Judge: Stephen A. Bucaria

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CORRECTED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

P.J. ALIZIO REALTY, INC.,

Plaintiff,

INDEX No. 0312/04

MOTION DATE: Aug. 4, 2008
Motion Sequence # 002

-against-

IRVING EISENBERG, ANTHONY ALIZIO,
JOSEPH ALIZIO, LEONARD EISENBERG,
DR. CHARLES TITONE, PETER ROBERT
PERPIGNANO, ANITA OTTON, SHEILA
LEIPSNER, BRIDGE VIEW II COMPANY
a/k/a BRIDGEVIEW II ASSOCIATES,
BRIDGE VIEW III ASSOCIATES, OCEAN
VIEW REALTY COMPANY a/k/a OCEAN
VIEW ASSOCIATES, OCEAN VIEW II
ASSOCIATES and HEYSON GARDENS
ASSOCIATES,

Defendants.

IRVING EISENBERG, LEONARD EISENBERG,
DR. CHRALES TITONE, PETER ROBERT
PERPIGNANO, ANITA OTTON, SHEILA
LEIPSNER, BRIDGEVIEW II COMPANY a/k/a
BRIDGEVIEW II ASSOCIATES, BRIDGEVIEW
III ASSOCIATES, OCEAN VIEW REALTY
COMPANY a/k/a OCEAN VIEW ASSOCIATES,
OCEAN VIEW II ASSOCIATES and HEYSON
GARDENS ASSOCIATES,

Third Party Plaintiffs,

-against-

PETER ALIZIO,

Third Party Defendant.

The following papers read on this motion:

Notice of Motion.....	X
Affidavit in Opposition.....	X
Reply Affirmation.....	X
Memorandum of Law.....	XXX
Reply Memorandum of Law.....	X

This motion, by plaintiff, P. J. Alizio Realty, Inc., and by third party defendant, Peter J. Alizio, pursuant to CPLR 3211(a)(7) and/or 3211(a)(3), for an Order dismissing: (1) the fraud and breach of fiduciary duty claims [2nd and 3rd counterclaims] asserted by the Partnerships in the Partnership Answer dated July 1, 2004 [Index Number: 0312/04]; (2) all claims [1st, 2nd and 3rd causes of action] asserted by the Partnerships against Peter Alizio in the Partnership Answer [Index Number: 0312/04]; (3) the fraud claim [3rd cause of action] asserted in the First Amended Complaint by Irving Eisenberg as managing partner of the Partnerships against P.J. Alizio Realty, Inc. and Anthony Alizio in Queens County under Index Number 21860/03 dated September 9, 2003; and (4) all claims [1st, 2nd and 3rd counterclaims] asserted by Joseph Alizio against PJ Alizio, in the Amended Verified Answer [Index Number: 0312/04] dated July 21, 2004, is determined as hereinafter set forth.

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (**Guggenheimer v. Ginzburg**, 43 NY2d 268, 275, 1977), the underlying facts are as follows:

Plaintiff, P.J. Alizio Realty Inc. ("PJ Alizio"), a domestic corporation, incorporated in 1991, is engaged in the business of managing real estate and specializing in the management of HUD-regulated projects in the New York metropolitan area. Third party defendant, Peter Alizio is the President and a shareholder of PJ Alizio. Defendant Anthony Alizio is its Vice President. Anthony Alizio is also Peter's father. The management firm, PJ Alizio initially "belonged" to Anthony Alizio, who later transferred his interest in the firm to his sons, Peter and Paul Alizio.

Bridge View II Company a/k/a Bridge View II Associates ("Bridge View II Apartments"), Bridge View III Associates ("Bridge View III Apartments"), Ocean View Realty Company a/k/a Ocean View Associates ("Ocean View Apartments"), Ocean View II Associates ("Ocean View II Apartments"), and Heyson Gardens Associates ("Heyson

Gardens") are all New York limited partnerships and the owners of various real properties located in Astoria and Far Rockaway, in Queens County, New York. The Bridge View II Apartments, Bridge View III Apartments, Ocean View Apartments, Ocean View II Apartments and Heyson Gardens are collectively referred to herein as the "Partnerships" or "Partnership Properties."

Defendant, Irvin Eisenberg, is the managing general partner of the Partnerships. Defendants, Anthony Alizio, Joseph Alizio and Leonard Eisenberg are general partners of each of the Partnerships. Defendant Peter Robert Perpignano was a general partner and/or assignee with full voting and management rights and obligations of a general partner of each of the Partnerships; he assumed management and control of the Partnerships until his death when Irving Eisenberg was designated by a majority in interest of the partners as the successor managing partner. It is unclear to this Court, based upon the papers submitted on this motion, as to the identities and positions of defendants, Dr. Charles Titone, Anita Otton and Sheila Leipsner in this matter.

On May 14, 1991, the Partnerships, each entered into separate Management Agreements with the plaintiff, PJ Alizio, to manage the respective apartment complexes for an initial term of five years commencing on July 1, 1994, which term was extended for an additional five year period which expired on June 30, 2004. Collectively, these agreements will be referred to herein as the "Management Agreements." Each of the Management Agreements called for PJ Alizio to become the managing agent of each of the Partnerships' properties. Each Agreement was signed by Anthony Alizio as the Vice President of PJ Alizio.

Essentially, pursuant to the Management Agreements, the managing agent agreed to: comply with all applicable Housing and Urban Development (HUD) requirements and regulations in connection with its management of the Partnership Properties; and provide access to HUD to review the Partnerships' books and records. The plaintiff, PJ Alizio's, rights and obligations concerning the scope and amount of the management fees and other expenses it was entitled to receive in connection with its management of the Partnership Properties, were also governed by the Management Agreements. The plaintiff also had a contractual obligation to prepare and submit annual financial statements to the Partnerships; specifically, PJ Alizio was obligated to retain, on behalf of the Partnerships, a certified public accountant to prepare annual financial statements. Plaintiff was also contractually obligated to provide to the Partnerships the books and records for their review. The Management Agreements also provide that PJ Alizio, as managing agent, may only be terminated "for cause" by the Partnerships on proper and timely written notice.

In or about late 2002 or early 2003, all of the general partners, except for Anthony

Alizio, concluded that they wished to sell the Partnership properties, recoup their investments in the HUD properties and wind up the affairs of the Partnerships. Irving Eisenberg, as managing partner of the Partnerships, was authorized and directed by the parties (other than Anthony) to obtain a purchaser for the Partnerships' properties. Anthony Alizio opposed the sales of the Partnerships' properties and, together with Peter Alizio and the plaintiff, took steps to prevent the sale.

In July 2003, all of the general partners in the Partnerships, save Anthony Alizio, entered into an agreement pursuant to which the Partnerships appointed Joseph Alizio to supervise and wind up the affairs of the Partnerships and to pursue the Partnerships' claims against both PJ Alizio and Anthony Alizio. The July 2003 Agreement, specifically states, in pertinent part, that:

[B]ased upon Joseph Alizio's agreement to supervise the winding up of the affairs of the Partnerships, the General partners hereby assign to Joseph Alizio the sum of \$300,000 and 50% of the proceeds recovered by the Partnerships upon claims against PJ Alizio Realty, Inc. and/or Anthony Alizio, all of which are to be paid out of any such recovery or settlement against PJ Alizio Realty Inc. and/or Anthony Alizio...The parties hereto acknowledge and agree that Joseph Alizio shall have sole control over these claims and *may* prosecute these claims in the name of the Partnerships and proceed to judgment to settlement on such terms as he determines in his sole discretion (*July 2003 Agreement*, ¶3 [Emphasis Added]).

In June 2003, Anthony Alizio commenced a proceeding by Order to Show Cause in New York County Supreme Court to stay a sale of the Partnerships' properties. The Court denied the stay.

On June 24, 2003, Queens County Supreme Court vacated PJ Alizio and Anthony Alizio's stays under Index Number 13410/03 so that Irving Eisenberg, as Managing Partner of the properties, could contract with the highest bidder and sell the properties at issue. In order to contract with the highest bidder however, PJ Alizio was required to make available financial statements, tax returns, checkbooks and rent rolls.

In a further effort to keep the Partnerships from selling their properties, PJ Alizio,

who, pursuant to the Management Agreements, had possession and control of the Partnerships' books, records and bank accounts, refused to turn over documents and funds necessary to market the Partnerships' properties to their greatest potential. Notwithstanding, apparently a potential purchaser, willing to pay \$35 million, was located. While the purchaser agreed to enter into a contract of sale without examining the Partnerships' books and records, in order to obtain HUD approval of the sale and financing, it required certain books and records of the Partnerships which were in PJ Alizio's possession. PJ Alizio, however, continued to refuse to turn over the Partnerships' books and records despite demand therefore.

On September 9, 2003, the Partnerships' managing partner, Irving Eisenberg, commenced an action against PJ Alizio and Anthony Alizio seeking to obtain the Partnerships' books and records [Index Number 21860/03, Queens County]. On November 3, 2003, PJ Alizio served an Answer to Eisenberg's First Amended Complaint. Anthony Alizio apparently defaulted.

In December 2003, PJ Alizio had still not turned over the Partnerships books and records. As a result, on December 16, 2003, the managing general partner of the Partnerships, Irving Eisenberg, by notice of termination, for cause, terminated the Management Agreements. Eisenberg stated in his letter that "[t]he owners of the subject properties hereby terminate your Management Agreements for cause, based upon your material breach of said Management Agreements and/or the owners' claims involving actual fraud or fraudulent misrepresentation of funds by you" (*Motion*, Ex. F).

The Partnerships refused to rescind the Termination Notice. Plaintiff consequently brought the instant action, by Order to Show Cause, seeking, **inter alia**, to restrain, enjoin and/or otherwise prohibit Irving Eisenberg and/or the Partnerships from terminating the Management Agreements. By Order dated January 8, 2004, this Court issued a temporary restraining order which, **inter alia**, enjoined the termination of the Management Agreements pending a hearing on PJ Alizio's request for a preliminary injunction.

In February 2004, the proposed purchaser of the Partnerships' properties brought another action in Queens County Supreme Court to compel the Partnerships to turn over documents it needed to complete its purchase of the Partnerships' properties. The Partnerships, however, were unable to turn the documents over because they were still in the possession of PJ Alizio. In their Partnership Answer, *infra*, the Partnerships, by virtue of their allegations, admit that "[o]nly through Court intervention in the instant matter were the Partnerships finally able to obtain documents needed to turn over to the prospective purchaser" (*Partnership Answer*, ¶114). Upon the turn over of the documents, the closing of the sales of the Partnerships' properties took place.

On April 8, 2004, the attorneys for all parties entered into a so-ordered stipulation,

pursuant to which PJ Alizio agreed to transfer management of the Partnership Properties to T.U.C. Management, Inc. ("TUC Management"). PJ Alizio also agreed to withdraw its motion for a preliminary injunction subject to a full reservation of rights concerning whether PJ Alizio was wrongfully terminated by the Partnerships in violation of the Management Agreements. Thereafter, in full compliance with the Stipulation, PJ Alizio transferred management of the Partnership Properties to TUC Management and transferred all of the Partnerships' books, records and bank accounts to the Partnerships and/or the Partnerships' designees.

On April 29, 2004, PJ Alizio served a Supplemental Summons with Notice and an Amended Verified Complaint in this action.

On July 1, 2004, the Partnerships, Irving Eisenberg, Leonard Eisenberg, Dr. Charles Titone, Peter Robert Perpignano, Anita Otton and Sheila Leipsner, collectively served their Answer to the complaint (apparently, the general partners and/or assignees have agreed to withdraw their individual claims asserted against PJ Alizio and Peter Alizio in the Partnership Answer. A stipulation to this effect, however, has not been provided to this Court). In their Answer, the Partnerships deny the material allegations of the Complaint, assert nine affirmative defenses and attempt to advance a third-party claim against the president of plaintiff, PJ Alizio, namely Peter Alizio.

As a general matter, jurisdiction cannot be obtained over a defendant except through strict compliance with the statutorily mandated procedures (*Macchia v. Russo*, 67 NY2d 592, 595 [1986]). Those procedures have not been followed in this case thus requiring, as a matter of course, that the third party complaint against Peter Alizio be **dismissed**. Here, Peter Alizio was not a party to the original action. Indeed, so far as can be told from the record, at the time of the commencement of the third-party action, Peter Alizio was not before the Court in his individual capacity. Thus, the service of a summons together with the prior pleadings then was absolutely essential to bring Peter Alizio within the Court's jurisdiction (CPLR §§ 304, 1007). Such service never having been made, jurisdiction over Peter Alizio in the third-party action was never obtained. However, having appeared in this action, this Court finds that Peter Alizio has waived his jurisdictional defense in the third party action and has consented to the jurisdiction of this Court in this matter.

On July 1, 2004, Joseph Alizio also served a Verified Answer to PJ Alizio's complaint in this action. Thereafter, on July 21, 2004, he served an Amended Verified Answer in which he asserted counterclaims on his own behalf against the plaintiff PJ Alizio.

Also on July 21, 2004, PJ Alizio and Peter Alizio, served a Verified Reply to Counterclaims and Cross claims asserted in the Partnership Answer, and also answered the third party claims brought by the Partnerships.

Thereafter, on August 6, 2004, plaintiff served a Verified Reply to the Counterclaims asserted by Joseph Alizio and asserted 11 affirmative defenses including that "[t]he answering defendant [Joseph Alizio] lacks standing to commence and/or maintain any claims against PJ Alizio" (*Motion*, Ex. P, ¶22 [2nd Affirmative Defense]).

Upon the instant motion, **supported by, inter alia, the affirmation of their attorney, John S. Ciulla**, PJ Alizio and Peter J. Alizio (also referred to hereinafter as the "movants"), seek an Order, pursuant to CPLR 3211(a)(7) and/or CPLR 3211(a)(3), dismissing the fraud and breach of fiduciary duty claims asserted by the Partnerships against them in the Partnership Answer and the fraud claim asserted by Irving Eisenberg as managing partner of the Partnerships against PJ Alizio in the First Amended Complaint brought in Queens County; the Partnerships' claims against Peter Alizio, to pierce the corporate veil of the plaintiff; and also to dismiss all claims asserted by Joseph Alizio against PJ Alizio.

Prior to addressing the merits of this motion, this Court takes note that some, if not all, actions, including Index Numbers: 21860/03 (Queens County), 17792/03 (Suffolk County), 16478/03 (Nassau County) and 0312/04 (Nassau County), have seemingly been "consolidated" into Index Number 19181/03 (Nassau County). At this juncture, with all the various actions and index numbers, all of which remain "active" as of this date, it is worth noting the difference between consolidation and joint trial. Consolidation fuses two or more actions into a single lawsuit. Joint trial, on the other hand, maintains the separate character of each action, but secures the practical advantage of a single trial of the issues common among them (**Vojtech Blau, Inc. v. Sara**, 160 Misc. 2d 431 [Sup. Ct. New York 1994]). Thus, consolidation gives rise to a new action displacing the separate actions that have been combined, while joint trial preserves the integrity of each action (**Kelley v. Galina-Bouquet, Inc.**, 155 AD2d 96, 1st Dept., 1990; **Mars Associates, Inc. v. New York City Educational Const. Fund**, 126 AD2d 178, 1st Dept., 1987).

Perhaps because of their similarities, both litigants and courts, sometimes use the terms "consolidation" and "joint trial" interchangeably. It appears to have been the case here. Having read the case closely, and having mapped out the various actions tied to these parties, this Court determines that neither the litigants, nor the Court, ever in fact intended a full consolidation; rather, it appears, just from a plain reading of the various captions of the actions where some of the parties are plaintiffs in certain actions and are also defendants in others, that the intention of the litigants and this Court, is and has been that these multiple cases be tried together rather than merged into one action (**Sidney Bitterman, Inc. v. Herbert H. Post & Co.**, 169 AD2d 686, 1st Dept., 1991; **Melendez v. Presto Leasing**, 161 AD2d 501, 1st Dept., 1990). A joint trial - as distinguished from a consolidated action - occurs when (1) the parties cannot be realigned as plaintiffs or defendants due to the claims brought against them in the actions; (2) jury confusion renders a single trial among multiple parties confusing; or (3) prejudice and expense will result (**Perini Corp. v. WDF, Inc.**, 33 AD3d 605, 2nd Dept., 2006; **Cola-Rugg**

Enterprises, Inc. v. Consolidated Edison Co. of New York, Inc., 109 AD2d 726, 2nd Dept., 1985). The standard necessary to warrant a joint trial is identical to that for consolidation - namely, that an important issue of law or fact is common to the actions (Fay Estates v. Toys "R" Us, Inc., 22 AD3d 712, 2nd Dept., 2005; Gottlieb v. Budget Rent-A-Car, 18 AD3d 429, 2nd Dept., 2005). Thus, in this case, the application for an Order dismissing, *inter alia*, the fraud claim asserted by Irving Eisenberg as the managing partner of the Partnerships against PJ Alizio, Inc. and Anthony Alizio, in Queens County under Index Number 21860/03 is capable of being addressed by this Court notwithstanding that that case was supposedly "consolidated" into Index Number 19181/03.

Prior to addressing the merits of this motion, this Court must also examine whether the movants are able to make a motion under CPLR 3211(a)(7) and 3211(a)(3) notwithstanding that responsive pleadings have been served in all the open index numbers (CPLR 3211[e]). CPLR 3211(e) states in relevant part, as follows:

At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. *Any objection or defense based upon a ground set forth in paragraph[...]three...of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph...seven...of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted...* [Emphasis Added]

Thus, based upon a simple and plain reading of this CPLR provision, it is clear that PJ Alizio and Peter Alizio's motion to dismiss for failure to state a cause of action, brought pursuant to CPLR 3211(a)(7) is timely despite service of the responsive pleadings. Similarly, their motion to dismiss defendant, Joseph Alizio's claims for lack of standing, brought under CPLR 3211(a)(3) is also properly raised at this juncture.

The movants submit that Joseph Alizio's claims, against PJ Alizio should be dismissed because he lacks standing to assert the Partnerships' claims. A lack of standing is not such a fundamental defect that it cannot be waived (Wells Fargo Bank Minnesota Nat. Ass'n v. Mastropaolo, 42 AD3d 239, 2nd Dept., 2007). The Court of Appeals has squarely held that an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint is waived pursuant to CPLR 3211(e) (Matter of Fossella v. Dinkins, 66 NY2d 162, 167-168 [1985]; Dougherty v. City of Rye, 63 NY2d 989, 991-992 [1984]). In this case, however, in its Verified Reply to Counterclaims, PJ Alizio, in fact raised an objection of standing thereby preserving the issue and compelling Joseph Alizio at this juncture to prove that it is proper party to seek the requested relief it (Matter of Fossella v. Dinkins, supra; Dougherty v. City of Rye, supra).

Where standing is put into issue by a defendant's answer, a plaintiff must prove its standing "at the outset of [the] litigation" if it is to be entitled to relief (**TPZ Corp. v. Dabbs**, 25 AD3d 787, 789, 2nd Dept., 2006; **Society of Plastics Indus. v. County of Suffolk**, 77 NY2d 761, 769 [1991]). In this case, the July 2003 Agreement by and between all the general partners in the Partnerships (save Anthony Alizio), permits Joseph Alizio to bring the claims on behalf of the Partnerships in his own name. The general partners' explicit use of the permissive term "may" in said paragraph demonstrate that Joseph Alizio was not obligated to bring the claims in the name of the Partnerships, but could bring them in his own name. Consistent with that, he was given sole control over the claims. Thus, under the July 2003 Agreement, Joseph Alizio has standing to bring the Partnerships' claims. Accordingly PJ Alizio and Peter Alizio's motion to dismiss the claims asserted by Joseph Alizio under CPLR 3211(a)(3) is **denied**.

Movants also move to dismiss the Partnerships' various claims as well as the claims of Irving Eisenberg brought as the managing partner of the Partnerships for failure to state a cause of action under CPLR 3211(a)(7).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (**Sokoloff v. Harriman Estates Development Corp.**, 96 NY2d 409, 414 [2001]; **Leon v. Martinez**, 54 NY2d 83, 87-88 [1994]; **Guggenheimer v. Ginzburg**, 43 NY2d 268, 275 [1977]). Under CPLR 3211, this Court may use affidavits in its consideration of a motion to dismiss (**Rappaport v International Playtex Corp.**, 43 AD2d 393, 394-395, 3rd Dept., 1974; **Epps v Yonkers Raceway**, 21 AD2d 798, 799, 2nd Dept., 1964). CPLR 3211[c], by providing that "either party may submit any evidence that could properly be considered on a motion for summary judgment," leaves this question free from doubt. As the Court of Appeals stated in **Rovello v. Orofino**:

"affidavits received on an unconverted motion to dismiss for failure to state a cause of action [into a motion for summary judgment] are not to be examined for the purpose of determining whether there is evidentiary support for the pleading. On the other hand, affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims * * * Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one' * * * In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action" (**Rovello v. Orofino**, 40 NY2d 633 [1976])

[citations omitted]).

Thus,

"[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail * * * When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate * * * (Guggenheimer v. Ginzburg, supra [citations omitted]).

In advancing the allegations in their Answer (sought to be dismissed by the movants) the Partnerships submit, *inter alia*, the sworn affidavit of Peter Robert Perpignano, a general partner of PJ Alizio. Having submitted his affidavit, the Partnerships are required to show that they "have" a cause of action; not just "stated" one; in other words, in order to survive dismissal, the Partnerships must show that the material facts they plead are not in dispute (Guggenheimer v. Ginzburg, supra). For the sake of clarity, this Court will address each claim separately and in turn determining only whether there is a cause of action against the movants.

Fraud Claims

The Court notes that the fraud claims asserted by Irving Eisenberg, as managing partner of the Partnerships, against PJ Alizio are virtually identical to those asserted by the Partnerships in the Partnership Answer and thus will be addressed simultaneously.

In support of their motion to dismiss, PJ Alizio and Peter Alizio claim that the Partnerships' purported claims based on fraud and breach of fiduciary duty are related to an alleged garden variety breach of contract. Movants submit that these claims are based on, related to, and duplicative of, an alleged breach of the Managing Agreements by PJ Alizio which is compensable, if proven, by a contract measure of damages. Movants submit that the allegations of fraud and a breach of fiduciary duty are wholly conclusory and merely duplicate the Partnerships' allegations of PJ Alizio's purported breach of the Managing Agreements.

A review of the Partnerships' and Eisenberg's allegations makes clear that they are not simply a restatement of the breach of contract claim. Under New York law, when claims for fraud and breach of contract arise out of the same facts, in order to state a fraud claim, the aggrieved party must *either*: (I) demonstrate a legal duty separate from the duty to perform under the contract; *or*, (ii) demonstrate a fraudulent misrepresentation

collateral or extraneous to the contract; *or*, (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages (**Bridgestone/Firestone v. Recovery Credit Servs.**, 98 F.3d 13, 20, 2nd Cir., 1996; see also, **Cirillo v. Slomin's Inc.**, 196 Misc.2d 922, 927 [Sup. Ct. Nassau 2003] citing **P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.**, 301 AD2d 373, 1st Dept., 2003 [Emphasis Added]). These factors are disjunctive, meaning that satisfaction of any one of them is sufficient to sustain the claim (**Cirillo v. Slomin's Inc.**, *supra*).

The Partnerships' and Eisenberg's breach of contract allegations set forth terms contained in the Management Agreements that were not complied with, such as taking certain expenses prohibited by the Management Agreements, or failing to provide certain documents or services that are required by the Agreements. The fraud allegations however allege that PJ Alizio, *inter alia*, "*knowingly and intentionally* paid itself management fees far in excess of the maximum permitted by HUD," "*concealed* from defendants and HUD the fact that it was taking excessive management fees by *providing incomplete financial statements* to HUD and the Partnerships;" "*caused the financial statements to materially overstate the expenses of the Partnerships* and, therefore, understate the income by charging to the partnerships as expenses amounts that should have been borne by [PJ Alizio] who was already receiving a management fee;" and "*concealed* that it was paying itself improper expenses in the financial statements that it prepared" (*Partnership Answer*, ¶¶141-142, 145, 147). Essentially, the Partnerships allege that PJ Alizio stole from the Partnerships and used false and misleading financial statements to cover the theft. These allegations of wrongdoing are different from the allegations of breach of contract and thus a separate claim for fraud has been stated in this case (**34-35th Corp. v. 1-10 Indus. Assocs., LLC.**, 2 AD3d 711, 2nd Dept., 2003; see also **North Shore Bottling Co. v. C. Schmidt & Sons, Inc.**, 22 NY2d 171 [1968]).

Having demonstrated that a legal duty, separate from its duty to perform under the Management Agreements, existed, this Court finds that PJ Alizio and Peter Alizio's motion to dismiss pursuant to CPLR 3211(a)(7) the Partnerships' and Eisenberg's claims for fraud is **denied**.

Breach of Fiduciary Duty Claims

Based upon the papers submitted for this Court's consideration, this Court finds that there, in fact, existed a fiduciary relationship between the Partnerships and PJ Alizio. While a conventional, arms-length business relationship does not give rise to a fiduciary obligation absent additional factors (**WIT Holding Corp. v. Klein**, 282 AD2d 527, 529, 2nd Dept., 2001; **Feigen v. Advance Capital Management Corp.**, 150 AD2d 281, 1st Dept., 1989), a fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the

scope of the relationship (Mandleblatt v. Devon Stores, 132 AD2d 162, 1st Dept., 1987). A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge (WIT Holding Corp. v. Klein, supra).

In this case, the Partnerships had been in existence for over thirty years by the time the instant actions were commenced, and for over twenty years by the time PJ Alizio took over as a Managing Agent of the Partnerships' properties. At the time that the Partnerships made the determination in 1991 to hire PJ Alizio as the managing agent of each of the Partnerships, Anthony Alizio had been a general partner of the Partnerships since their inception. Thus, at the time that the Partnerships made the determination in 1991 to hire PJ Alizio as Managing Agent, the Partnerships, in actuality, made the determination to entrust management of their properties to their partner, Anthony Alizio, who was the Vice President of the Partnerships and signed the Managing Agreements on their behalf. Essentially, the Partnerships contracted for one of its partners to act as its managing agent. Thus, it is clear that PJ Alizio had a fiduciary duty to the Partnerships springing from their special and interrelated relationship. Furthermore, while the Management Agreements put PJ Alizio into such a position that it was able to breach its fiduciary duty, a duty separate from the contract clearly existed.

In moving for dismissal, PJ Alizio and Peter Alizio simply argue that the Partnerships' claims based on an alleged breach of fiduciary duty should be dismissed since it is duplicative of their breach of contract claim. However, "[t]he same conduct constituting the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by the contract but independent of the contract itself" (La Barte v. Seneca Res. Corp., 285 AD2d 974, 976, 4th Dept., 2001; Davis v. Dime Sav. Bank, FSB, 158 AD2d 50, 52, 3rd Dept., 1990). It is clear that the approximately 10 year relationship between the Partnerships and PJ Alizio was more than a conventional, arms-length business relationship. The facts demonstrate that while the Management Agreements put PJ Alizio into such a position that it was able to breach its fiduciary duty, a duty separate from the contract clearly existed. Accordingly, the motion to dismiss the Partnerships' claims of breach of fiduciary duty for failure to state a cause of action is **denied**.

Claims against Peter Alizio personally - Piercing Corporate Veil

Movants argue that the Partnerships' claims to pierce the corporate veil of PJ Alizio and impose personal liability against Peter Alizio should also be dismissed, as a matter of law, since paragraph 32 of the Managing Agreements specifically and expressly limits the personal liability of officers and shareholders of PJ Alizio to claims of "fraud" or "fraudulent misappropriation of funds." Movants submit that since the Partnerships' fraud claims are merely duplicative of their contract claim and subject to dismissal, the

Partnerships are barred from piercing the corporate veil to impose liability against Peter Alizio for any other claims. Moreover, Peter Alizio argues that the veil piercing claims should be dismissed, as a matter of law, because the Partnerships failed to allege any factual basis in support of the alleged "complete domination and control" of PJ Alizio by Peter Alizio. The movants argue that the Partnerships' conclusory allegation that Peter Alizio exercised complete domination and control over PJ Alizio is insufficient to survive dismissal since the Partnerships are required to specifically allege the factual basis which supports the legal conclusion that Peter Alizio completely dominated and controlled PJ Alizio.

Paragraph 32 of the Management Agreements specifically and expressly limits the personal liability of officers and shareholders of PJ Alizio to claims of "fraud" or "fraudulent misappropriations of funds." Paragraph 32 of the Management Agreements states, in pertinent part:

“no partner, officer, director, or shareholder of [PJ Alizio] or any constituent principal of [PJ Alizio] shall have any personal liability or obligation under this Agreement for or with respect to the obligations or liabilities of [PJ Alizio] hereunder except with respect to fraud or fraudulent misappropriation of funds”.

Given that the Partnerships have stated a claim for actual fraud and fraudulent misappropriation of funds, this exculpatory clause, which is generally unenforceable with respect to claims for reckless or intentional conduct (Sommer v. Federal Signal Corp., 79 NY2d 540, 549, 1992), will not bar claims against Peter Alizio herein on this CPLR 3211(a)(7) motion.

Moreover, this Court is permitted to disregard the corporate form and pierce the corporate veil in order to prevent fraud or achieve equity (Walkovszky v. Carlton, 18 NY2d 414 [1966]). The Court of Appeals in Morris v. State Dep't of Taxation & Fin., 82 NY2d 135, set forth a two part inquiry which must be satisfied to pierce the corporate veil: (1) the owner exercised complete domination of the corporation with respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong against the pleader which resulted in the pleader's injury (Morris v. State Dep't of Taxation & Fin., 82 NY2d 135, 141 [1993]). Though the term "owner" is used, the *Morris* Court itself makes clear that an individual need not be an owner of a corporation in order to be found liable under a veil piercing theory. It is control that is key, not ownership (*Id.* at 140). Thus, Peter Alizio, the President of PJ Alizio, is clearly subject to this two-part test. Whether the test set forth in Morris has been satisfied is a factual issue that should not be decided on a motion (Williams Oil Co. v. Randy Luce E-Z Mart

One, LLC., 302 AD2d 736, 3rd Dept., 2003). Accordingly, this Court cannot dismiss this action based on an *alter ego* theory prior to disclosure based on an individual's unsubstantiated representation that the corporation is independent of him (Ross v. Jill Stuart Int'l Ltd., 275 AD2d 650, 1st Dept., 2000).

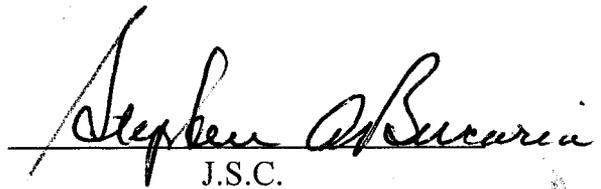
While domination can be proven by factors like whether corporate formalities were observed; whether capitalization was adequate; and whether there was commingling of funds, these are evidentiary factors to be considered by the fact-finder at trial (American Fuel Corp v. Utah Energy Dev. Co., 122 F.3d 130, 134, 2nd Cir., 1997). This is not a pleading standard. Thus, based on the foregoing, this Court finds that Peter Alizio's motion to dismiss the piercing of the corporate veil claims asserted by the Partnerships is also **denied**.

Accordingly, the motion by the plaintiff, PJ Alizio, and by the third-party defendant, Peter Alizio, pursuant to CPLR 3211(a)(3) and (a)(7) for an Order dismissing the various claims is **denied** in its entirety.

This shall constitute the decision and order of this Court.

Please be advised that a Preliminary Conference has been scheduled for July 11, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated SEP 02 2008


J.S.C.

ENTERED
SEP 04 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE