

NEW YORK SUPREME COURT - COUNTY OF BRONX  
**PART 32**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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**MESHULEM ZUSIA TWERSKY and**  
**533-531 CONCORD LLC,**

Plaintiffs,

- against -

Index No. **803227/2022E**

Hon. **FIDEL E. GOMEZ**  
Justice

**SOLOMON STEINMETZ, USHER**  
**STEINMETZ, JACOB STEINMETZ, 528**  
**JACKSON REALTY LLC and NEW**  
**CONCORD REALTY LLC,**

Defendants.

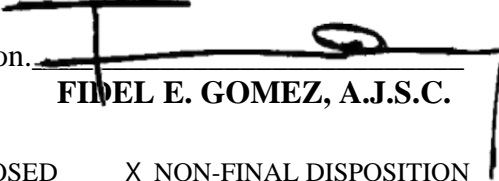
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The following papers numbered 1 to 3, read on this motion, noticed on 5/24/2022, and duly submitted as no. 1 on the Motion Calendar of 8/16/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Defendants Solomon Steinmetz, Usher Steinmetz, Jacob Steinmetz, 528 Jackson Realty LLC and New Concord Realty LLC's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 8/30/22

Hon.   
**FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE.....  CASE DISPOSED     NON-FINAL DISPOSITION
2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     DO NOT POST  
 FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT  
 NEXT APPEARANCE DATE: November 7, 2022, at 11:00 a.m.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X

**MESHULEM ZUSIA TWERSKY and  
533-531 CONCORD LLC,**

Plaintiffs,

**DECISION AND ORDER**

- against -

Index No. **803227/2022E**

**SOLOMON STEINMETZ, USHER  
STEINMETZ, JACOB STEINMETZ, 528  
JACKSON REALTY LLC and NEW  
CONCORD REALTY LLC,**

Defendants.

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Defendants Solomon Steinmetz, Usher Steinmetz, Jacob Steinmetz, 528 Jackson Realty LLC and New Concord Realty LLC (“Defendants”) move for an order dismissing this action pursuant to CPLR 3211(a)(1) and (a)(7); dismissing all claims asserted on behalf of Plaintiff 533-531 Concord LLC (“Concord LLC”) pursuant to CPLR 3211(a)(3); and canceling the notice of pendency. Plaintiffs Meshulem Zusia Twersky and Concord LLC (“Plaintiffs”) oppose.

For the reasons which follow, Defendants’ motion is granted, in part.

**BACKGROUND:**

On March 1, 2022, Plaintiffs commenced the instant action against Defendants by filing a summons and complaint, alleging causes of action for declaratory judgment, fraudulent inducement, breach of fiduciary duties, permanent injunction, common law indemnification, constructive trust, and constructive fraud.

The complaint alleges that in 2017, Defendants Solomon, Usher, and Jacob Steinmetz (the “Steinmetz Defendants”) owned the property located at 528 Jackson Avenue, Bronx, NY (the “Jackson Property”) through 528 Jackson Realty LLC (“Jackson LLC”) (Compl., ¶ 7, 18).

The complaint alleges that the parties agreed to a partnership under the following terms: that Plaintiff Meshulem Zusia Twersky (“Twersky”) would acquire the property located at 533-531 Concord Avenue, Bronx, NY (the “Concord Property”), which was adjacent to the Jackson Property (Compl., ¶ 7, 19, 22); that Twersky would combine the Concord Property and Jackson

Property for zoning purposes; that the parties would develop these properties; that the parties would share in the profits and losses from their interests in the two properties, with a 50/50 split between Twersky and the Defendants; that the parties would share in the proceeds of any joint sale of the properties, with a 50/50 split between Twersky and the Defendants; that they would not sell one property without the other; and that the Steinmetz Defendants would have sole ownership of a store located on the Jackson Property and receive all proceeds from the sale of that store (Compl., ¶ 22).

The complaint alleges that in furtherance of the partnership, Twersky created the Concord LLC, with himself as the sole member, and purchased the Concord Property (Compl., ¶ 23). Plaintiffs allege that in December 2017, Twersky amended Concord LLC's operating agreement to include Solomon and Usher Steinmetz, each as 25% members of the LLC (Compl., ¶ 24). Plaintiffs allege that Twersky is the managing member of the LLC (Compl., ¶ 10).

The complaint alleges that on November 20, 2019, pursuant to the terms of their partnership, the parties caused the Jackson LLC and Concord LLC to enter into a Zoning Lot Development and Easement Agreement, with Solomon Steinmetz signing on behalf of Jackson LLC, and Twersky signing on behalf of Concord LLC (Compl., ¶ 25). By doing so, the parties created a single zoned real estate parcel (Compl., ¶ 26).

The complaint alleges that once the parties obtained the combined zoning, they decided to use the Jackson Property and Concord Property to obtain additional funding for another joint real estate project. As such, the parties negotiated a \$1,200,000 loan, to be secured by the partnership's properties. Plaintiffs allege that as of January 21, 2020, Concord LLC and Jackson LLC had both executed a note for \$1,200,000, with Levon NY XX LLC as the lender. Twersky signed for Concord LLC and the Steinmetz Defendants authorized him to sign for Jackson LLC. As security, the parties mortgaged and pledged interests in the Concord Property and the Jackson LLC (Compl., ¶ 27).

The complaint alleges that pursuant to the parties' partnership and agreements, Twersky was responsible for doing the work to combine, market, develop, and sell the properties, and the Steinmetz Defendants were responsible for funding the projects. As such, the complaint alleges that the Steinmetz Defendants should have provided a personal guaranty for 100% of the loan amount. However, they refused to do so, and assured Twersky that they would be responsible for 100% of the payments if he signed the guaranty. Twersky alleges that he relied on such assurances and signed a personal guaranty of the \$1,200,000 loan (Compl., ¶ 30). Plaintiffs allege that the

Steinmetz Defendants had no intention of paying those monies, reimbursing Twersky, or otherwise ensuring that Twersky was not personally liable. The complaint alleges that the Steinmetz Defendants have not paid the debt. As such, Plaintiffs allege that the lender is threatening to foreclose and collect on the personal guaranty (Compl., ¶ 31).

The complaint also alleges that the Defendants are attempting to sell the Jackson Property in a deal that does not involve the Concord Property, and to claim that Twersky has no rights to participate in or to reject the transaction or to receive any of the proceeds (Compl., ¶ 33).

The complaint further alleges that the Steinmetz Defendants induced Twersky to execute a document transferring title of the Concord Property to Defendant New Concord Realty LLC (“New Concord”), with the understanding that the document would not be effective, and only be held in escrow as a show of good faith, unless and until Defendant Jacob Steinmetz (“Jacob”) guaranteed or otherwise fully paid the loan. Plaintiffs allege that Concord LLC did not receive any consideration for the transfer of title of the Concord Property from Concord LLC to New Concord (Compl., ¶ 36-37). Plaintiffs allege that the Steinmetz Defendants did not honor their agreement and promptly filed and recorded the document, even though Jacob did not make any payments on the loan, or otherwise become responsible for it (Compl., ¶ 38).

On May 2, 2022, Defendants filed the instant motion. On August 16, 2022, the motion was marked fully submitted.

#### DISCUSSION:

CPLR 3211(a)(7) provides that: “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action.”

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one’.

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [“ . . . 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’”]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1st Dept 2012]). The facts alleged in such affidavits must also be assumed to be true (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). However, “bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true” (*Id.*; *Cruciata v O’Donnell*, 149 AD3d 1034 [2d Dept 2017]).

A complaint must contain all essential facts to provide notice of the claim asserted (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Accordingly, vague and conclusory allegations will not suffice (*id.* at 239; *Fowler v American*, 306 AD2d 113, 113 [1st Dept 2003]) and a complaint suffering such affliction ought to be dismissed for failure to state a cause of action (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1994]; *O’Riordan v Suffolk Chapter*, 95 AD2d 800, 800 [2d Dept 1983]).

In support of their motion, Defendants submitted, *inter alia*, an affirmation of counsel, an affidavit of Solomon Steinmetz, and a copy of an email chain dated June 18, 2018, through June 20, 2018.<sup>1</sup>

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<sup>1</sup> The email chain indicates that Twersky sought a breakdown for “530 Concord”, and Chani Gamzon sent him an attachment. The email was then forwarded to Bernat Steinmetz. The attachment to the emails appears to show a breakdown of the purchase price and expenses associated with “530 Concord Ave LLC”. Other than asserting that this attachment demonstrates that Twersky did not fund the Concord project, Defendants do not make any arguments for dismissal of any of the causes of action on this basis. In any case, this document and the affidavit of Solomon Steinmetz are not sufficient to demonstrate that the purchase of the Concord Property was made by the Steinmetz Defendants only.

As a preliminary matter, the Concord Property has an address of 533-531 Concord Avenue, Bronx, NY, and the Concord LLC’s full name is 533-531 Concord LLC, not 530 Concord Ave LLC. As such, the document appears to be irrelevant to the instant action.

Moreover, the attachment is merely a breakdown of the purchase price and expenses associated with the purchase of the property. It is not evidence of payment. It is not a document, the contents of which are essentially undeniable, so as to qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*See VXi Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [holding that a document qualifies as “documentary evidence” for purposes of CPLR 3211(a)(1) if it is: (1) unambiguous, (2) of undisputed authenticity, and (3) its contents are essentially undeniable]; *Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 715 [2d Dept 2019] [holding that documents such as judicial records, mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable, have been found to qualify as documentary evidence]; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]).

First, Second, and Fifth Causes of Action:

On his first cause of action for declaratory judgment, Twersky seeks a judgment declaring that the Steinmetz Defendants are obligated to pay 100% of the loan, and are required to indemnify him for any payments he has made on the loan.

On his second cause of action for fraudulent inducement, Twersky seeks money damages resulting from the Steinmetz Defendants' alleged fraudulent misrepresentation that they would pay 100% of the amounts due under the loan and would guarantee its payment. Twersky alleges that he has been damaged as he has guaranteed the loan and made payments pursuant to that guarantee.

On his fifth cause of action for common law indemnification, Twersky seeks indemnification from Jackson LLC for payments he has made on the loan.

Defendants seek to dismiss the first, second and fifth causes of action, arguing that the allegation that the Steinmetz Defendants never intended to repay the loan cannot support a claim for fraud.

In opposition, Plaintiffs argue that if a promise was made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a material existing fact upon which an action for fraud may be predicated. Plaintiffs argue that the allegations in the complaint sufficiently allege a cause of action for fraudulent inducement.

“The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages” (*Minico Insurance Agency, LLC v AJP Contracting Corp.*, 166 AD3d 605, 607 [2d Dept 2018]; *Nerey v Greenpoint Mortg. Funding, Inc.*, 144 AD3d 646, 647 [2d Dept 2016]; *Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010] [“To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury”]).

CPLR 3016(b) states that: “Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the

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Even if the attachment constituted sufficient evidence of payment, it would not warrant a dismissal of the complaint on grounds that Twersky did not fund the Concord project, because the complaint alleges that the partnership agreement provided for the Steinmetz Defendants to provide the funds for the projects, and for Twersky to do the work “to combine, market, develop, and sell the properties” (Compl., ¶ 29). As noted above, the allegations in the complaint must be taken as true (*Dixon v 105 West 75th Street, LLC*, 148 AD3d 623, 626-627 [1st Dept 2017]).

circumstances constituting the wrong shall be stated in detail”. However, “[a]lthough under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008]; *Minico Insurance Agency, LLC* at 607-608).

It is axiomatic that “a fraud claim that ‘ar[ises] from the same facts [as an accompanying contract claim], s[eeks] identical damages and d[oes] not allege a breach of any duty collateral to or independent of the parties’ agreements’ is subject to dismissal as ‘redundant of the contract claim” (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]; *Gosmile, Inc.* at 81 [“Generally, to recover damages for a tort, such as fraud, in a contract action, plaintiff needs to plead and prove ‘a breach of duty distinct from, or in addition to, the breach of contract’”]; *RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516, 517 [1st Dept 2008]; *McGee v J. Dunn Constr. Corp.*, 54 AD3d 1010, 1010 [2d Dept 2008] [“A cause of action to recover damages for fraud does not lie where the only fraud claimed relates to an alleged breach of contract. A general allegation that the opposing party entered into the contract while lacking the intent to perform is insufficient to state a cause of action to recover damages for fraud”]).

Here, Defendants have not demonstrated that the second cause of action should be dismissed. Although, generally, “[m]ere promissory statements as to what will be done in the future are not actionable’, it is well-settled that, if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of ‘a material existing fact’”, which can form the basis of a fraudulent inducement claim (*Sabo v Delman*, 3 NY2d 155, 160 [1957]; *White v Davidson*, 150 AD3d 610, 611-612 [1st Dept 2017]; *Laduzinsky v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168-169 [1st Dept 2015]). The complaint sufficiently alleges that the Steinmetz Defendants made a promise with a “preconceived and undisclosed intention of not performing it” by alleging that they never intended to fulfill their promise and that they knew that they never intended to fulfill the promise (Compl., ¶ 31, 46). As such, Plaintiffs have alleged a misrepresentation of a material existing fact, which may form the basis of their cause of action for fraudulent inducement. Thus, the complaint states a cause of action for fraudulent inducement.

Defendants’ arguments raised for the first time in reply have not been considered (*Lee v Law Offices of Kim & Bae, P.C.*, 161 AD3d 964, 965-966 [2d Dept 2018] [“The function of reply

papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion. Here, the plaintiff's reply papers include new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in her original motion. Therefore, those contentions, and the grounds and evidence in support of them, were not properly before the Supreme Court"]; *Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Accordingly, Defendants' motion to dismiss the second cause of action is denied.

It appears that Defendants are arguing that the first and fifth causes of action should be dismissed, as Plaintiffs have not alleged a cause of action for fraud, and cannot allege a cause of action for breach of contract. However, in light of the fact that the Court has determined that the second cause of action for fraudulent inducement may not be dismissed at this juncture, Defendants' motion to dismiss the first and fifth causes of action on the basis that there is no cause of action for fraud must also be denied. Plaintiffs have not alleged a cause of action for breach of contract in the complaint, and as such, the Court declines to address the arguments directed towards a cause of action which does not exist.

Accordingly, Defendants' motion to dismiss the first and fifth causes of action is denied.

#### Eighth, Ninth, Tenth and Eleventh Causes of Action:

##### *Standing:*

Defendants move to dismiss the eighth, ninth, tenth and eleventh causes of action, alleged by Concord LLC against the Steinmetz Defendants and New Concord, for lack of standing. Specifically, Defendants argue that since Twersky does not hold majority control over Concord LLC, any claim brought on its behalf must be made derivatively and satisfy the requirements for such a claim, such as the making of a prior demand. Defendants argue that the complaint does not allege that Twersky made a prior demand or that the making of a demand would have been futile.

Business Corporations Law § 626(c) provides that in a shareholders' derivative action brought on behalf of a corporation, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reason for not making such effort". This demand requirement also applies to members of New York limited liability companies (*Barone v Sowers*, 128 AD3d 484, 484 [1st Dept 2015]; *Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013]).



“Demand is excused due to futility when a complaint alleges with particularity that: (1) a majority of the board of directors is interested in the challenged transaction; or (2) the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; or (3) the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors” (*Barone*, 128 AD3d at 484; *In re Comverse Technology, Inc.*, 56 AD3d 49, 53-54 [1st Dept 2008]). “Under New York law, a director may be interested under either of two scenarios: self-interest in the transaction or loss of independence due to the control of an interested director” (*In re Comverse Technology, Inc.* at 54).

Here, it is undisputed that the complaint does not allege that Twersky made a prior demand. However, the complaint alleges that Twersky is the managing member of Concord LLC (Compl., ¶ 10), while the two other members, Solomon and Usher Steinmetz, are each only 25% members (Compl., ¶ 24). As such, Twersky was not required to make a prior demand or allege that the making of such a demand would have been futile, because he is the managing member of the LLC to whom such a demand would be made (*See generally, Recine v Recine*, 201 AD3d 827, 829 [2d Dept 2022] [“a plaintiff shareholder must allege that he or she made efforts to secure initiation of the derivative action by *managing members* themselves or set forth the reasons for not making such effort”] [emphasis added]; *Hecht v Andover Associates Management Corp.*, 114 AD3d 638, 639-640 [2d Dept 2014] [holding that plaintiff, a non-managing member of the LLC, sufficiently pleaded with particularity that demand upon the managing member of the LLC would have been futile]).

Additionally, the complaint makes sufficient allegations from which it may be inferred that a prior demand on the other members of the Concord LLC would have been futile, as they were interested in the challenged transaction. The complaint alleges that the Steinmetz Defendants, which includes Solomon and Usher Steinmetz, defrauded Plaintiffs out of their interest in the Concord Property and that they induced Plaintiffs to execute a document transferring title of the Concord Property from Concord LLC to New Concord (Compl., ¶ 34-38). The complaint also alleges that Solomon and Usher Steinmetz’s brother Jacob is the sole member of New Concord (Compl., ¶ 83, 88).

Accordingly, Defendants’ motion to dismiss the eighth, ninth, tenth, and eleventh causes of action based on lack of standing is denied.

*Eighth, Ninth and Eleventh Causes of Action:*

On the eighth cause of action for fraudulent inducement and ninth cause of action for constructive fraud, Concord LLC seeks damages against the Steinmetz Defendants and New Concord, alleging that the Steinmetz Defendants, in their individual capacities and through New Concord, represented that if Twersky, on behalf of Concord LLC, executed a document transferring title of the Concord Property from Concord LLC to New Concord, the transfer would not be effective and would not be recorded unless Jacob guaranteed, or otherwise fully paid the loan.

Defendants move to dismiss the eighth, ninth and eleventh causes of action for fraud, arguing that a failure to abide by an agreement cannot serve as a predicate for a tort.

In opposition, Plaintiffs argue that Concord LLC raises claims for fraud in inducing the contract, not for breach of a contract. Plaintiffs argue that the complaint alleges that Defendants misrepresented the fundamental nature of the Concord Deed by telling Plaintiffs that it would merely serve as security, subject to triggering conditions, when Defendants knew that they would treat it as effectuating a transfer of the Concord Property regardless of the triggering conditions, and that such misrepresentation induced Concord LLC to execute the Concord Deed. Plaintiffs also argue that even if this constitutes a representation concerning a future act, they have sufficiently alleged that the Defendants purposely induced them to enter into an agreement with a knowingly false representation of an intent to perform a future act collateral to the agreement.

In reply, Defendants argue that the contention that Defendants promised that the deed would not be recorded is not a statement of present fact, but a representation concerning a future act.

Here, the alleged misrepresentation, that the Concord Deed would only serve as security, and that it would not be recorded, unless certain triggering conditions were met, is not a statement of a present fact. However, the complaint sufficiently alleges facts from which it may be inferred that the Steinmetz Defendants made such a promise “with a preconceived and undisclosed intention of not performing it”, thereby constituting a misrepresentation of a material existing fact, upon which a claim for fraudulent inducement may be based (*Sabo* at 160; *White* at 611-612; *Laduzinsky* at 168-169). Although a claim for fraudulent inducement which cites nothing more than statements of future intentions or expressions of hope is not actionable, it is well-settled that a claim alleging a misrepresentation of then-present facts that was collateral to the parties’ contract is not duplicative of a claim for breach of contract (*Island Intellectual Prop. LLC v Reich & Tang*

*Deposit Solutions, LLC*, 155 AD3d 542, 543 [1st Dept 2017]; *Shugrue v Stahl*, 117 AD3d 527, 528 [1st Dept 2014]; *Did-it.com, LLC v Halo Group, Inc.*, 174 AD3d 682, 683 [2d Dept 2019]). The complaint alleges, *inter alia*, that the Steinmetz Defendants sought to defraud Plaintiffs out of their interest in the Concord Property (Compl., ¶ 34), that the Steinmetz Defendants told Plaintiffs that in order to “make things right with Jacob” Concord LLC should execute a document transferring title of the Concord Property to New Concord, with the understanding that the document would not be effective and not recorded, unless and until Jacob guaranteed or otherwise fully paid the loan (Compl., ¶ 36, 77), that based on the Steinmetz Defendants’ representation, Twersky signed the document transferring title of the Concord Property (Compl., ¶ 37), but that the misrepresentation was false and made to induce Twersky to execute the document (Compl. ¶ 78), and that the Steinmetz Defendants promptly filed and recorded the document, “as they planned to do all along” (Compl., ¶ 38, 78). (*See Braddock v Braddock*, 60 AD3d 84, 89 [1st Dept 2009] [“[W]hether [Defendant] ever intended that his promises would be fulfilled, is one of fact that should not be determined on a CPLR 3211 motion. While an inference that the promisor never intended to fulfill his promise should not be based solely upon the assertion that the promise was not, in fact, fulfilled, we must recognize that a present intention not to fulfill a promise is generally inferred from surrounding circumstances, since people do not ordinarily acknowledge that they are lying”]).

Defendants also argue that the fraud claims should be dismissed because the underlying promise upon which they are based is barred by the statute of frauds.

In opposition, Plaintiffs argue that the statute of frauds will not defeat a claim for fraud if the plaintiff demonstrates a fraudulent misrepresentation. Plaintiffs argue that Concord LLC was fraudulently induced to execute the Concord Deed by Defendants’ false representations that the Concord Deed would serve only as security.

“If the proof of a promise or contract, void under the statute of frauds, is essential to maintain the action, there may be no recovery, but, on the other hand, one who fraudulently misrepresents himself as intending to perform an agreement is subject to liability in tort whether the agreement is enforceable or not. The policy of the statute of frauds is ‘not directed at cases of dishonesty in making’ a promise; never intended as an instrument to immunize fraudulent conduct, the statute may be so employed” (*Channel Master Corp. v Aluminum Limited Sales, Inc.*, 4 NY2d 403, 408 [1958]).

Here, the complaint does not allege a cause of action for breach of contract and these causes of action do not seek to enforce any promise made by the Steinmetz Defendants, at least with regards to the alleged agreement for the transfer of title of the Concord Property. Rather, Plaintiffs seek damages caused by the alleged fraud and to rescind the agreement between the parties (Compl., ¶ 80, 85). Moreover, the complaint sufficiently alleges that Concord LLC was fraudulently induced to execute the Concord Deed (Compl., ¶ 36-38, 76-80, 81-85).

The Court also notes that “parol evidence of a fraudulent misrepresentation including a misrepresentation as to intent is admissible to avoid an agreement induced by such fraud” (*Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sabo v Delman*, 3 NY2d 155, 161 [1957]).

Defendants’ arguments raised for the first time in reply have not been considered (*Lee* at 965-966; *Allstate Ins. Co.* at 827; *Dannasch* at 417).

Accordingly, Defendants’ motion to dismiss the eighth, ninth, and eleventh causes of action is denied.

*Tenth Cause of Action:*

On its tenth cause of action, Concord LLC seeks damages against Usher and Solomon Steinmetz for breach of fiduciary duty, alleging that they are members of Concord LLC, and thus owe fiduciary duties to it, and that they breached those fiduciary duties by facilitating the transfer of the Concord Property from Concord LLC to New Concord, an entity controlled by their brother Jacob Steinmetz.

Defendants move to dismiss the tenth cause of action for breach of fiduciary duty as duplicative of a breach of contract claim.

Here, Defendants have not demonstrated that the cause of action for breach of fiduciary duty should be dismissed. The cause of action is not duplicative of a cause of action for breach of contract, a cause of action which is not even alleged in the complaint, because it alleges breach of fiduciary duties owed by Defendants Usher and Solomon Steinmetz as members of Concord LLC to Concord LLC (Compl., ¶ 87-88). These duties are independent of the contractual duties that they may have had in the agreement regarding the transfer of the Concord Deed (*37 E. 50th St. Corp. v Restaurant Group Mgt. Servs., LLC*, 156 AD3d 569, 570 [1st Dept 2017] [“A contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract and [i]t is well settled that the same conduct which may

constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself” [internal quotation marks omitted]; *Board of Mgrs. of Brightwater Towers Condominium v FirstService Residential N.Y. Inc.*, 193 AD3d 672, 674 [2d Dept 2021] [“A defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations”]).

Accordingly, Defendants’ motion to dismiss the tenth cause of action is denied.

*Eleventh Cause of Action:*

On its eleventh cause of action, Concord LLC seeks a constructive trust over 100% of the Concord Property, alleging that Jacob Steinmetz, the sole member of New Concord, induced Twersky, on behalf of Concord LLC, to execute the document transferring the Concord Property from Concord LLC to New Concord, based on his promise that the transfer of the Concord Property would not be effective unless he was required to guarantee or otherwise fully pay the loan, and that New Concord was unjustly enriched by the transfer, as it obtained the Concord Property for just \$10, far below the market value.

“Generally, a constructive trust may be imposed ‘(w)hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest’” (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). “[A] party claiming entitlement to a constructive trust must establish: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment.” (*Wachovia Securities, LLC v Joseph*, 56 AD3d 269, [1st Dept 2008]; *Sanxhaku v Margetis*, 151 AD3d 778, 779 [2d Dept 2017]). “[T]hese factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established’ because ‘the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice’” (*Sanxhaku* at 779).

Here, Defendants have not demonstrated that the cause of action for constructive trust should be dismissed. Defendants do not dispute that Plaintiffs have sufficiently alleged all of the elements for a cause of action for a constructive trust. To the extent that Defendants may be arguing that this cause of action cannot survive because the fraud causes of action do not survive, the

argument is without merit for the reasons stated above. To the extent that Defendants may be arguing that this cause of action cannot survive because of the statute of frauds and the parole evidence rule, the argument is also without merit. The statute of frauds and the parole evidence rule are not defenses to a properly pleaded cause of action to impose a constructive trust on real property (*Pattison v Pattison*, 301 NY 65, 72 [1950]; *Matter of Alpert*, 234 AD2d 150, 150 [1st Dept 1996]; *Mackenzie v Croce*, 54 AD3d 825, 827 [2d Dept 2008]).

Accordingly, Defendants' motion to dismiss the eleventh cause of action is denied.

As stated above, Plaintiffs have not alleged a cause of action for breach of contract in the complaint, and as such, the Court declines to address the arguments directed towards a cause of action which does not exist.

### Third, Fourth, Sixth and Seventh Causes of Action:

#### *Third Cause of Action:*

On its third cause of action, Twersky seeks damages against the Steinmetz Defendants for breach of fiduciary duty, alleging that they are partners with Twersky, and thus owed fiduciary duties to him, that they breached those fiduciary duties by attempting to sell the Jackson Property without the Concord Property and by refusing to pay the loan.

Defendants move to dismiss the third cause of action, arguing that it merely alleges a breach of a promise, and a tort claim may not be predicated on such a claim. Defendants also argue that there is no claim for an attempted breach of a fiduciary duty, because there are no damages associated with such a claim.

In opposition, Plaintiffs argue that its cause of action for breach of fiduciary duty seeks damages, and that they sufficiently alleged a cause of action for breach of fiduciary duty by alleging that the Steinmetz Defendants breached their fiduciary duties "by refusing to pay" the loan. Plaintiffs also argue that the Steinmetz Defendants' duty to make payments pursuant to the loan arose from an independent fiduciary duty, under the parties' oral partnership, to provide funding for the partnership.

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner, LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity" (*Board*

*of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc.*, 193 AD3d 672, 673 [2d Dept 2021]; *Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]).

Here, Defendants have demonstrated their entitlement to dismissal of a portion of this cause of action. Plaintiffs allege that the Steinmetz Defendants breached their fiduciary duties to Twersky by “attempting to sell the Jackson Property without the Concord Property” (Compl., ¶ 51). As Defendants argue, and Plaintiffs do not deny, such allegations are not sufficient to state a cause of action for breach of fiduciary duty, as Plaintiffs cannot allege any damages arising out of an attempt to sell the properties. “Damages are an essential element of a cause of action to recover damages for breach of fiduciary duty” (*Celauro v 4C Foods Corp.*, 187 AD3d 836, 837 [2d Dept 2020]). Since Plaintiffs cannot allege damages for this alleged breach, this portion of the third cause of action is dismissed.

However, Plaintiffs have sufficiently alleged a cause of action for breach of fiduciary duty on the basis that Defendants failed to pay the loan. The third cause of action alleges that Twersky has suffered damages (Compl., ¶ 52), and that the Steinmetz Defendants breached the duty of loyalty by refusing to pay the loan (Compl., ¶ 51).

Additionally, the cause of action is not duplicative of a cause of action for breach of contract, a cause of action which is not even alleged in the complaint, because it alleges breach of fiduciary duties owed by the Steinmetz Defendants to Twersky as partners (Compl., ¶ 29-30, 50-51).<sup>2</sup> (*Bankers Conseco Life Ins. Co. v Wilmington Trust, N.A.*, 195 AD3d 109, 117-118 [1st Dept 2021] [“Even though the breach of contract and breach of fiduciary duty claims involved the same conduct, the fiduciary duty claim alleges a breach of a noncontractual duty relating to the trustee’s independent duty to perform nondiscretionary ministerial duties with respect to the negotiability of assets.”]; *37 E. 50th St. Corp. v Restaurant Group Mgt. Servs., LLC*, 156 AD3d 569, 570 [1st Dept 2017] [“A contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract and [i]t is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself”] [internal quotation marks omitted]; *Board of Mgrs. of Brightwater Towers Condominium*

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<sup>2</sup> Defendants refer to section I of their memorandum of law in support of this argument. However, section I does not discuss causes of action for breach of fiduciary duty. It is in section II of their memorandum of law that they discuss dismissal of causes of action for breach of fiduciary duty as duplicative of a breach of contract cause of action.

*v FirstService Residential N.Y. Inc.*, 193 AD3d 672, 674 [2d Dept 2021] [“A defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations”]).

Accordingly, Defendants’ motion to dismiss the third cause of action is granted, in part.

*Fourth Cause of Action:*

On its fourth cause of action, Twersky seeks a permanent injunction against Defendants. It appears that Twersky is seeking to enjoin Defendants from selling the Jackson Property without also selling the Concord Property as part of the same transaction.

Defendants argue that the fourth cause of action for an injunction is predicated on the breach of fiduciary duties and agreements. Defendants argue that this claim fails as there is no viable claim for breach of fiduciary duty, and no breach of contract claim has been pled.

In opposition, Plaintiffs argue that they sufficiently alleged a cause of action for breach of fiduciary duty. Plaintiffs also argue that an injunction may issue to prevent a future wrong, although no right has yet been violated.

Here, Defendants have not demonstrated their entitlement to dismissal of the fourth cause of action. In order to state a cause of action for a permanent injunction, a plaintiff must plead, *inter alia*, that “there was a violation of a right presently occurring, *or threatened and imminent*” (*Swartz v Swartz*, 145 AD3d 818, 828 [2d Dept 2016] [emphasis added]). Thus, courts have held that “the extraordinary relief of an injunction is protection for the future” (*Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, [1959]; *144-80 Realty Associates v 144-80 Sanford Apartment Corp.*, 193 AD3d 723, 725 [2d Dept 2021]). As such, Plaintiffs may allege a cause of action seeking a future relief by way of a permanent injunction to prevent a sale of the Jackson Property without also selling the Concord Property in the same transaction, despite their failure to allege damages for breach of fiduciary duty in the third cause of action. Defendants do not otherwise argue that Plaintiffs have not properly pleaded a cause of action for permanent injunction.

Accordingly, Defendants’ motion to dismiss the fourth cause of action is denied.

*Seventh Cause of Action:*

On its seventh cause of action, Twersky seeks a constructive trust over fifty (50%) percent of the membership interests in Jackson LLC.



Defendants argue that the seventh cause of action for a constructive trust cannot be sustained as it is predicated on promises barred by the statute of frauds. In opposition, Plaintiffs argue that the statute of frauds does not apply to constructive trust claims.

Here, Defendants have not demonstrated their entitlement to dismissal of this cause of action. As stated above, case law is well-settled that the statute of frauds is not a defense to a properly pleaded cause of action to impose a constructive trust on real property (*Pattison v Pattison*, 301 NY 65, 72 [1950]; *Matter of Alpert*, 234 AD2d 150, 150 [1st Dept 1996]; *Mackenzie v Croce*, 54 AD3d 825, 827 [2d Dept 2008]). Defendants do not argue that this cause of action was not properly pleaded.

Accordingly, Defendants' motion to dismiss the seventh cause of action is denied.

#### *Sixth Cause of Action:*

On its sixth cause of action, Twersky seeks a judgment declaring that he is entitled to fifty (50%) percent of the profits and losses derived from the parties' interests in the Jackson Property and Concord Property.

Defendants argue that the sixth cause of action for declaratory judgment should be dismissed, because no contract exists regarding Twersky's rights to the Concord Property and Jackson Property. Defendants argue that even if such a contract does exist, the cause of action for declaratory judgment should be dismissed as unnecessary, as Twersky could have sought a remedy under a cause of action for breach of contract.

In opposition, Plaintiffs argue that the mere existence of other adequate remedies does not mandate dismissal. Plaintiffs argue that their cause of action for declaratory judgment is not redundant or duplicative, because it seeks clarification of the parties' respective ownership interests in the Jackson and Concord Properties, which is a relief that cannot be obtained via a cause of action for breach of contract for damages, which involves compensation for past harm. Plaintiffs argue that they alleged the existence of an agreement which is not barred by the statute of frauds.

Here, Defendants have not demonstrated their entitlement to dismissal of the sixth cause of action. Defendants argue that there is no such agreement, but have not submitted any evidence in support.

Moreover, while it is true that a declaratory judgment is "usually unnecessary where a full and adequate remedy is already provided by another well-known form of action" (*James v Alderton*

*Dock Yards*, 256 NY 298, 305 [1931]; *Anonymous v Axelrod*, 92 AD2d 789, 789 [1st Dept 1983]), “the mere existence of other adequate remedies does not mandate dismissal” (*Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140-141 [1995]; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]). As Defendants concede, Plaintiffs have not alleged a cause of action for breach of contract in this action. As such, Defendants have not demonstrated that there is another adequate remedy available. Furthermore, Plaintiffs have demonstrated that the cause of action for declaratory judgment would not be duplicative of a cause of action for breach of contract, because the cause of action for declaratory judgment bears on the parties’ ownership interests in the properties and arguably has a bearing on future profits and losses of the properties, whereas a cause of action for breach of contract would deal with past damages (*Nationstar Mtge., LLC v Generation Mtge. Co.*, 191 AD3d 535, 536 [1st Dept 2021] [“The declaratory judgment claim is not duplicative of the indemnification claim, as it would permit recovery of future damages”]). In any case, Defendants do not deny the existence of a genuine, justiciable controversy (*Seneca Ins. Co., Inc. v Lincolnshire Management, Inc.*, 269 AD2d 274, 275 [1st Dept 2000] [“The contention that a declaratory judgment action cannot be maintained here because an adequate remedy at law exists is also unsupported. Defendants fail to show the existence of such remedy, and, even if they did, it would not require that Supreme Court decline to render declaratory judgment, since a genuine, justiciable controversy exists”]).

The Court also notes that a declaratory judgment “generally seeks a determination of rights before a ‘wrong’ occurs, rather than collateral review of a court’s ruling” (*Matter of Morgenthau* at 150; *Smyley v Tejada*, 171 AD2d 660, 661 [2d Dept 1991]).<sup>3</sup>

Accordingly, Defendants’ motion to dismiss the sixth cause of action is denied.

#### Notice of Pendency:

Defendants made no arguments in support of their motion to cancel the notice of pendency. As such, Defendants’ motion to cancel the notice of pendency is denied.

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<sup>3</sup> Contrary to Defendants’ arguments in reply, the sixth cause of action deals with the parties’ ownership interest in the properties, not sale of the properties.

It is hereby

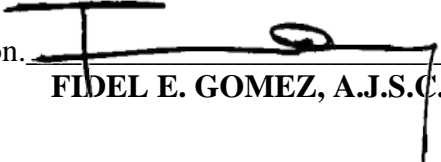
**ORDERED** that the Clerk dismiss the portion of the third cause of action which seeks damages against Defendants Solomon Steinmetz, Usher Steinmetz, and Jacob Steinmetz for breach of fiduciary duty based on their attempt to sell the property located at 528 Jackson Avenue, Bronx, NY (the “Jackson Property”) without the property located at 533-531 Concord Avenue, Bronx, NY (the “Concord Property”); and it is further

**ORDERED** that this matter is scheduled for a **Preliminary Conference** on **Monday, November 7, 2022, at 11:00 a.m.**; and it is further

**ORDERED** that Plaintiffs serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 8/30/22

Hon.   
**FIDEL E. GOMEZ, A.J.S.C.**