ALP, Inc. v Moskowitz
2020 NY Slip Op 33764(U)
October 30, 2020
Supreme Court, New York County
Docket Number: 652326/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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ALP, INC.,

Plaintiff,

- v -

LAWRENCE MOSKOWITZ, BENDER CICCOTTO & COMPANY CPA'S, LLP, ROBERT FRANK, ROBERT J. FRANK, GENE LUNTZ, LAUREN MOSKOWITZ,

Defendants.

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DECISION AND ORDER
Action No. 1
Index No. 652326/2019
MOT SEQ 002, 003, 004, 005, 006

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ALP, INC.,

Plaintiff,

- v -

PARK WEST GALLERIES, INC., GENE LUNTZ, GENE LUNTZ MANAGEMENT, INC.,

Defendants.

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DECISION AND ORDER
Action No. 2
Index No. 153949/2019
MOT SEQ 005, 006, 007

NANCY M. BANNON, J.:

I. INTRODUCTION

In Action No. 1, ALP, Inc. v Larry Moskowitz et al., Index No. 652326/2019 (the Moskowitz action), the plaintiff, ALP, Inc. alleges, *inter alia*, causes of action against the defendants Lawrence Moskowitz (Moskowitz), Bender Ciccotto & Company CPA's, LLP (Bender), Bender owner Robert Frank (Frank), his son, Robert J. Frank (Frank Jr.), Gene Luntz (Luntz), and Lauren

Moskowitz (Lauren) for conversion, rescission of certain contracts, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and replevin of approximately 23,300 pieces of valuable art known as "Peter's Keepers," which were created by the iconic American painter Peter Max.

Bender, Frank, and Frank Jr. move to sever and stay the causes of action against them and compel arbitration of those causes of action against them in the first amended complaint pursuant to CPLR 7503(a)(MOT SEQ 002). Moskowitz moves, pre-answer, pursuant to CPLR 3211(a)(1) and (7) and CPLR 3016(b) to dismiss the complaint against him (MOT SEQ 003). Luntz moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as against him (MOT SEQ 005). Lauren moves, pre-answer, pursuant to CPLR 3211(a)(1), (5), and (7) and CPLR 3016(b) to dismiss the complaint as against her (MOT SEQ 006).

By separate motion sequence (MOT SEQ 004) the plaintiff moves to consolidate the Moskowitz action with the Park West action.

In Action No. 2, (the Park West action) ALP, Inc. v Park West Galleries, Gene Luntz, and Gene Luntz Management, Inc., Index No. 153949/2019, defendants Gene Luntz and Gene Luntz Management, Inc. (collectively Luntz) move, pre-answer, to dismiss the first amended complaint as against them (MOT SEQ

007), upon the same papers as used in Luntz's motion to dismiss in Action No. 1. Defendant Park West Galleries (Park West) also moves, pre-answer, to dismiss the complaint as against it pursuant to CPLR 3211(a)(1), (4) and (7) (MOT SEQ 007).

The plaintiff also moves separately in the Park West action (MOT SEQ 006) to consolidate the Moskowitz action with that action.

The motions are granted in part.

II. BACKGROUND AND PROCEDURAL HISTORY

The following allegations are taken from ALP, Inc.'s complaints in both actions and are assumed to be true for purposes of these motions unless otherwise noted.

Peter Max, Adam, Libra and ALP. Inc.

Peter Max is a world-renowned artist who is presently in his 80s and suffering from Alzheimer's disease. Until 2012, Peter Max worked out of his 7th floor studio at 37 West 65th Street in New York City. Prior to 2000, he ran his business through ViaMax, LLC. In 2000, he formed the plaintiff, ALP, Inc., to engage in the production, maintenance, marketing, licensing and sale of his artwork.

Peter Max named ALP for himself and his two children. Specifically, the "A" in "ALP" is for his son, defendant Adam Max (Adam)and the "L" is for his daughter, Libra Max (Libra). Adam and Libra each own a 40% interest in ALP with the remaining 20% belonging to Peter. Although Adam and Libra have been officers, directors, and shareholders of ALP since its formation, it was Peter who ran ALP's day-to-day operations until approximately 2012.

As Peter Max's health declined in 2012, he became less involved in the day-to-day management of ALP. As such, he allowed Adam to assume the position of Chief Executive Officer and President. The plaintiff alleges that, when formed, ALP adopted bylaws limiting the president of ALP to making such "contract[s] as the ordinary conduct of the corporation's business requires."

However, when Peter Max ceded control of the company to Adam, Adam became CEO and President of ALP in name only. The complaint alleges that, in reality, ALP was not being run by Adam, but instead by defendants Moskowitz, Luntz, Bender, Frank, and Park West. The complaint refers to Moskowitz, Luntz, Bender, Frank, and Park West, Adam's alleged co-conspirators in the looting ALP as "the Gang of Five."

The plaintiff alleges that Adam has suffered multiple mental and physical illnesses, including diabetes, which caused him to be hospitalized in 2015 for a lengthy period. It was at that time that Libra came from California to New York to assist in the management of ALP. Alp alleges that some of its employees reported that Adam would sit in his office at ALP listening to white noise all day without doing ALP business. His behavior was described as silent, with a flat affect, and at meetings, Moskowitz and Frank would speak for him.

Lawrence Moskowitz, Gene Luntz and Robert Frank Appear

According to the plaintiff, when Adam took control of the company in 2012, Moskowitz appeared claiming to be 'an old friend of Peter Max' and took control of the company. Notwithstanding Moskowitz' claim, neither Libra nor any other person close to Peter, had ever heard of him. The plaintiff further alleges that Moskowitz fabricated a story about having expended over $500,000.00 of his own money in loans to Peter, ALP, or its predecessor ViaMax, and having rented Peter's home in St. John, U.S. Virgin Islands, and spent his own money to pay for improvements to the home.

The accounting firm of Bender Ciccotto also claims to have been retained by ALP no later than May 30, 2012. Bender submits

an engagement letter purportedly signed on ALP's behalf by Peter and Adam. The engagement letter provides that:

> "[Our] consulting services will be limited to providing comments to your questions to assist you with general business purposes. Due to the limited information presented to us from you and the limited amount of time we will spend together, our consulting services are general in nature, based on limited facts, circumstances and documents, and not intended to be relied upon by you without further analysis and research, and a written report of our review and analysis."

The plaintiff alleges that this consulting agreement was a ruse to allow Bender access to ALP's book and records to facilitate their own scheme to misuse their role as accountants and loot the company.

As to Luntz, the complaint alleges that he coerced the ailing Peter Max to make numerous appearances, often requiring coast-to-coast trips, and made over $1.7 million in commission fees for Peter Max's appearances at Park West shows, and millions more in total commissions for sales that he did nothing to facilitate. The complaint also alleges that Luntz, in conjunction with Bender, Frank, Frank Jr., Moskowitz, and Park West capitalized on the tragic events of Hurricane Sandy to loot ALP.

Specifically, in October 2012, Hurricane Sandy caused extensive damage to Peter Max's artworks stored in ALP's warehouse in Lyndhurst, New Jersey. Moskowitz is alleged to have immediately seized on this opportunity to hold himself out to be an insurance professional. He claimed to be associated with New York Life Insurance Company and, despite not being licensed as an insurance adjustor or broker in New York or New Jersey, took part in negotiating the insurance settlement following the storm. Relying on a purported November 26, 2012 agreement signed by Adam, Moskowitz claims entitlement to 10% of any insurance proceeds that ALP recovered as a result of the damages caused by Hurricane Sandy.

In addition to Moskowitz inserting himself in the insurance dispute following Hurricane Sandy, he arranged to hire Bender to help catalogue the damaged artwork and work with ALP's insurance counsel and consulting experts to prosecute the insurance claims. Frank inserted his son, Frank Jr., as the *de facto* manager of ALP's warehouse where the valuable Peter Max artworks were stored. In an 18-month to two-year period commencing in 2012, Bender was paid approximately $3 million by ALP, even though its bills contain no detail to support such large payments. By 2019, Bender Ciccotto had billed $13 million.

In late 2012 and early 2013, ALP received partial payments of $15 million from its insurers for the losses ALP incurred in Hurricane Sandy, with additional amounts to be determined at an arbitration. Moskowitz claims that on March 29, 2013, Peter Max executed an unsecured demand note in his favor in the amount of $500,000.00 in connection with a $500,000.00 loan by Moskowitz to ALP. However, according to the plaintiff, there is no evidence of any such loan or note being made in March 2013. Rather, the plaintiff alleges, Frank and Bender attempted to aid Moskowitz in creating a false trail to document this fraudulent loan within the company.

In November 2012, Peter Max transferred $800,000.00 of his personal savings to ALP. Then, on November 30, 2012, he transferred $500,000.00 for the stated purpose of paying down a Bank of America line of credit, which was in fact paid down shortly thereafter. According to the plaintiff, at some point, Bender's staff recorded in ALP's books and records a bogus journal entry recording this November 30, 2012, $500,000.00 deposit, as a loan payable to Moskowitz.

To further loot ALP, Moskowitz and Frank used their control to arrange for (i) defendant Lauren Moskowitz to have a $100,000.00 no-show job with ALP and (ii) Frank to place his son, Frank Jr., a Bender employee, in charge of the warehouse

where he could bill hundreds of thousands of dollars to ALP for no other reason than to oversee its inventory of artwork.

In 2015, Libra Max began investigating the events at ALP. Notwithstanding Libra's increased involvement in the ALP's affairs, Moskowitz remained steadfast in retaining his control over ALP and looting it to the maximum extent possible. As such, in a letter dated March 2, 2015 which the plaintiff claims Moskowitz drafted and Adam Max signed, Adam purportedly agreed to give Moskowitz 10% of the insurance proceeds:

> "Dear Larry: It has recently come to my attention that when you were retained by my father to oversee and settle the insurance claims of my father, ALP and ViaMax arising out of Superstorm Sandy, you were offered by my father 10% equity interest in ALP as partial consideration for your services. However, as you and I have discussed, in lieu of any equity interest in ALP for such services, you have agreed that your compensation for such services will be an amount equal to 10% of the aggregate insurance proceeds received from my father, ALP and ViaMax as a result of such claims."

To ensure that he and Frank remained in control of ALP, Moskowitz orchestrated the firing of, among others, ALP's long-time accountants and lawyers and replaced them with Pryor Cashman LLP. Pryor Cashman allegedly answered only to Moskowitz and Frank, and as part of their purported legal services to ALP set up an escrow account to control the $15 million of insurance proceeds as an alleged "war chest for future litigation."

The plaintiff further alleges that, in the meantime, at the end of 2015, Moskowitz unleashed a tirade of threats against Libra when she asked him to temporarily vacate Peter's Virgin Islands home. It was in 2015 and 2016 that Libra began to become seriously involved in the day-to-day operations of ALP. Libra made an informal request for access to the books and records of ALP, initially through herself and later through counsel. Her requests were refused.

In 2016, as Libra's involvement with the company increased, Moskowitz and Frank allegedly exerted more influence over Adam Max to convince him to enter into a consulting agreement on behalf of ALP to provide compensation for all of Moskowitz's services to the company. Those services included advising Adam, running the day to day operations of the company, reviewing financial transactions and documents involving the Max family and the company, and generally coordinating responses and actions in an effort to protect Peter Max and the company from fraud. The 2016 Consulting Agreement provided that Moskowitz would be paid a cash payment of $15,000.00 per month to reimburse the him for out-of-pocket expenses, as well as other payments at the request of and on behalf of the company or any member of the Max family.

The plaintiff claims that instead of the $15,000.00 per month denominated in the agreement, Moskowitz and Frank received in excess of $20,000.00 per month without showing any back-up for these fees. To obtain these sums, the plaintiff alleges that Moskowitz would use his longstanding-authority at ALP to direct its bookkeeper to pay him whatever amounts that he wanted.

As for Luntz, the complaint in both actions allege that he is an "artist representative" and was ALP's in-house art dealer for many years. While Luntz was not an employee of ALP he conducted business with ALP through his own company, Gene Luntz Management, Inc. but maintained an office at ALP. His assistant was on ALP's payroll.

Critically, the complaints in both the Moskowitz and Park West Actions allege that Luntz maintained his role at ALP through intimidation tactics, harassment, bullying, threats, verbal abuse, and physical violence. For example, when Peter Max hired another art dealer, Luntz purportedly shouted at him, followed him around the studio and stood close to his face, and pushed him to the ground even though he knew he had just recovered from surgery. Luntz is also alleged to have harassed employees, leading to a lawsuit suing Luntz for harassment.

Indeed, Libra herself also claims to have been a victim of Luntz's harassment. After she took control of Peter Max's art

studio in 2019, Libra claims she was harassed by Luntz with constant vicious communications, forcefully requesting that he be paid commissions on the sale of Peter Max's artwork. Libra further alleges that she had to get her attorneys involved to make Luntz stop.

Park West Becomes Exclusive Dealer

According to the plaintiff, prior to Luntz alienating other art dealers, ALP generally dealt with a variety of galleries and high-profile projects and had many different revenue streams. However, once Luntz completely took over ALP's art sales, he sold ALP's art almost exclusively to Park West, thereby increasing Park West's profits and Luntz's commissions at the same time. According to the complaint, by 2018, there were almost no sales from ALP that that were not to Park West and did not result in commissions to Luntz.

As Libra became more active in her efforts to stop Moskowitz and the other defendants from looting the company, the plaintiff alleges that Moskowitz had Pryor Cashman draft an escrow agreement for Adam's signature dated February 7, 2017. The plaintiff contends, however, that it can produce documentary evidence to show that this escrow agreement was back dated by several months.

This escrow agreement states in part "WHEREAS, the Company has retained the services of Moskowitz to assist with the settlement of such insurance claim" despite Moskowitz not being licensed as a public adjuster in New York or New Jersey. The escrow agreement also ensured that any insurance proceeds received by ALP would be in the Pryor Cashman escrow account, which the plaintiff alleges was wholly controlled by Moskowitz.

Litigation Commences

Allegedly unable to make progress without litigation, in July 2017, Libra commenced a special proceeding before this court entitled Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017. This proceeding sought (i) access to the books and records of ALP and (ii) a special shareholder vote to reconstitute ALP's board of directors

By order of this court dated May 30, 2018, ALP and Adam were ordered to respond in full to the schedule of documents requested in the Libra's petition on or before June 20, 2018. Libra was ordered to notify the respondents by letter on or before July 6, 2018 of any objections or omissions in that production. This court further ordered Adam to give notice of a special meeting or before August 17, 2018, the meeting to be held at least 10 days and not more than 30 days from the date the notice was given.

Nine days before this court issued its order, ALP, Adam Max in his capacity as President of ALP, and Moskowitz executed an assignment agreement whereby Moskowitz purported to memorialize his entitlement to repayment of a $500,000.00 loan by ALP, which was allegedly to be secured by Peter Max's Virgin Island home. The assignment agreement was purportedly made to replace a prior agreement to assign Moskowitz a 10% interest in all proceeds payable under the insurance policies governing the art lost in Hurricane Sandy. However, the complaint alleges that at a meeting that took place on May 25, 2017, Frank informed Libra's counsel that the purported loans were not made in Moskowitz's name but that the loans to ALP actually came from Peter Max himself.

Months before ALP received more insurance proceeds in December 2018, and immediately before the litigation in the special proceedings between Libra and Adam, Moskowitz allegedly caused Pryor Cashman to wire $1.5 million from ALP to its escrow account.

On June 28, 2018, the court modified its order dated May 30, 2018 to the extent of directing Adam Max to give notice calling a shareholders special meeting on or before July 5, 2018, with the meeting to be held on or before August 8, 2018. On June 29, 2018 ALP and Adam Max appealed this court's May 30,

2018 and June 28, 2018 decisions. On August 2, 2018, the Appellate Division, First Department stayed this court's orders pending appeal.

Thereafter, by notice dated September 28, 2018, Libra called a special meeting of the shareholders of ALP pursuant to BCL § 603 in order to reconstitute ALP's board of directors so that ALP would no longer be looted. By verified petition dated December 4, 2018 entitled ALP, Inc. v Libra Max and Lawrence Flynn, Index No. 161352/2018, Adam Max sought a temporary restraining order preventing the December 10, 2018 meeting from going forward. By order to show cause dated December 5, 2018 this court denied the temporary restraining order.

With the TRO having been denied, the December 10, 2018 special meeting of the shareholders of ALP was held. At that meeting, a new board of directors was elected. The new board consisted of Libra, Adam, and third member named Michael Anderson. In nominating Michael Anderson as a third board member, Libra described him as "deeply involved for ten years running Dave LaChapelle photography studios" and "very involved in the art world." Adam attended the meeting but abstained from voting on the grounds that he objected to the meeting.

Notwithstanding the election of a new board of directors, on December 12, 2018, two days after the board meeting that

installed this new board, a sale of 23,300 of Peter's Keepers, artwork created by Peter Max and valued in the hundreds of millions of dollars, was expedited by Adam, Luntz, and Moskowitz to Park West for a mere $14.7 million broken up into two installment payments.

The first of two installment payments to ALP was made on December 10, 2018 as the pieces of art were prepared for shipment on a rush basis after a two-month long negotiation of price conducted by emails that were exchanged between Adam Max and Park West Galleries in November 2018. On December 13, 2018, the day after the first wire from Park West was sent, Luntz immediately collected a $1.125 million commission on monies received from the sale.

On December 17, 2018 the newly constituted board of directors, unaware of this sale, held a meeting, which Adam attended in his capacity as director and again in which he elected not to vote in protest of the validity of the newly formed board. At the December 17, 2018 meeting, the newly constituted board specifically resolved that:

> "all checks payments, or other transactions of business that expend, relate to assets or claimed assets of the company or obligate the company for over $25,000 in one transaction or in a series of checks or transactions for the same purpose, shall require prior Board approval, indicating, for the sake of clarity that this would include

> the potential distribution of the insurance funds currently held in escrow."

On January 11, 2019 ALP's board of directors held another meeting, wherein it resolved that Libra would be named as CEO and president effective immediately, and Adam was appointed as the company's Executive Vice President and Chief Operating Officer. At that meeting the board further resolved that:

> "The Executive Vice President/COO shall coordinate the daily operations of the Company subject to and in accordance with the direction of the Board and the President and shall have such powers as the President may from time to time delegate to him and shall have such other powers and perform such COO duties as may be assigned to him by the Board of Directors. The Executive Vice President/COO shall not otherwise transact business on behalf of the Company, except as expressly authorized by the Board or the President, as appropriate. The Executive Vice President/COO is not an authorized signatory on the Company's checking accounts and shall have no authority to hire or engage counsel or other advisors to the Company or its officers, or to execute contracts, loan documents or other financial instruments on behalf of the Company unless specifically granted by resolution of the Board."

Despite the resolutions passed at the prior shareholders' meetings on December 10 and 17 meetings, the complaint alleges that Adam purportedly continued to represent to ALP's employees that he was still president of ALP and that the recent board election and subsequent resolutions were invalid.

In the meantime, Libra suspected that the so-called Gang of Five, with the assistance of her brother were looting ALP by

denuding it of its most valuable artwork. As such, Libra and her counsel, Leonard Benowich, of Benowich Law LLP, visited ALP's warehouse in New Jersey January 18, 2019. According to a February 19, 2019 affidavit from Benowich, Libra visited the warehouse because she had grave concerns regarding misconduct by her brother, Moskowitz and Frank in connection with older pieces of Peter Max's art. In his affidavit, Benowich averred that Libra was concerned that these older pieces had been sold, or worse that they had been taken by Adam or his "advisors", *i.e.* Moskowitz, Luntz, and Park West. Libra wanted to know where these pieces were, whether they were still in the warehouse or whether, they had been sold, damaged, or destroyed during Hurricane Sandy. Libra further made a formal request as to the status of these artworks. Unbeknownst to Libra, many of the missing artworks were in the process of being shipped to Park West between January 2 and 21, 2019.

Instead of responding to Libra's request, on January 30, 2019, Adam filed an action entitled Adam Max v ALP, Inc., Index No. 650618/2019 (the Adam Max Action), seeking to undo the election of Libra and have a temporary receiver be appointed to run ALP's day-to-day-operations.

The receivership motion was denied. A notice of appeal of the order was filed, but no appeal of that order was ever perfected nor did Adam seek to reargue the motion.

After the warehouse visit and still unaware of the ongoing illicit sale and shipment of Peter's Keepers to Park West, on February 28, 2019, Libra, on behalf of ALP, filed a petition, entitled ALP, Inc. v Adam Max, under Index No. 651181/2019 seeking to enjoin the sale or waste of ALP's property, including its artwork, and to restrain Adam from obstructing Libra's access to ALP's books and records. The TRO was granted by this court. In all of the proceedings before the court, Adam Max did not disclose that the sale of Peter's Keepers to Park West had already occurred and that ALP had been denuded of its most valuable artwork.

Libra and ALP claim that they only learned of this sale in April 2019. While ALP was preparing its complaint and motion papers in the Park West Action, Adam filed an anticipatory action against ALP on April 15, 2019 in the United States District Court for the Southern District of New York, captioned Park West, Inc. v. ALP, Inc., Civil Action No. 19-cv-03360.

Notwithstanding Park West's anticipatory filing attempting to preempt ALP's state court claims, on April 16, 2019 Libra commenced the Park West Action. A few days later, on April 19,

2019, Libra commenced the Moskowitz action. In the Park West Action, ALP immediately sought and obtained a temporary restraining order enjoining Park West and anyone acting in concert with it from selling, transferring, encumbering, hypothecating or otherwise disposing or taking any action with regard to any of the Peter's Keepers other than to (i) hold such works in a secure and segregated location and (ii) cease and desist from any already scheduled auctions or sales of such works and to withdraw such pieces from any such auctions or sales until further ordered by the court. By so-ordered stipulation, the parties to the Park West action agreed that "The Court's April 17, 2019 Temporary Restraining Order shall remain in effect until the above-captioned case is disposed of."

On April 29, 2019, Park West removed the Park West action to the United States District Court for the Southern District of New York on purported diversity of citizenship grounds. On May 24, 2019, the plaintiffs filed a complaint in federal court, which added Frank Jr., Gene Luntz, and Lauren Moskowitz as defendants. By memorandum and order dated July 9, 2019, United States District Judge Deborah Batts remanded this action back to this court on the grounds that the federal court lacked subject matter jurisdiction.

On July 16, 2019, the plaintiff filed essentially the same complaint it had already filed in federal court as the operative complaint in the Moskowitz action. In August 2019, defendants Bender, Frank, and Frank Jr. filed MOT SEQ 002 seeking to stay the action as against them pending arbitration and Moskowitz filed MOT SEQ 003 seeking to dismiss, pre-answer, the complaint against him. In September 2019, defendants Gene Luntz in MOT SEQ 005 and Lauren Moskowitz in MOT SEQ 006 filed pre-answer motions seeking to dismiss the claims against them in the Moskowitz action. Also in September 2019 Park West in MOT SEQ 005 and Gene Luntz and Gene Luntz Management, Inc. in MOT SEQ 007 moved to dismiss the claims against them in the Park West action.

By Decision and Order dated May 19, 2020, Judge Laura Swain of the United States District Court for the Southern District of New York dismissed the complaint in Park West, Inc. v ALP, Inc., as an anticipatory filing to secure Park West's preferred forum.

By amended complaint dated May 20, 2020, the ALP amended the complaint in the Moskowitz action to add Adam Max as a defendant and to add allegations concerning events that had occurred since the original complaint was filed. By stipulation dated June 17, 2020, the parties agreed that MOT SEQ 002, 003, 005, and 006 were deemed to apply to the amended complaint such that no further response to the First Amended Complaint was

required by the defendants who had already moved against the complaint.

The amended complaint in the Moskowitz action pleads eight causes of action. The first cause of action is for conversion against all defendants. The second cause of action is for a judgment declaring that various agreements and transactions among Moskowitz, Bender, Frank and ALP should be rescinded. The third cause of action alleges a claim for breach of fiduciary duty and aiding and abetting breach of fiduciary duty against all of the defendants. The fourth cause of action is for actual and constructive fraud against all of the defendants except Adam Max. The fifth cause of action is for civil conspiracy against all of the defendants. The sixth cause of action is for replevin against all of the defendants. The seventh cause of action is for recoupment/set off against defendants Luntz, Moskowitz, Frank and Bender. The eighth cause of action is for accounting malpractice against Frank and Bender Ciccotto.

The complaint in the Park West action asserts similar causes of action. The first cause of action is for conversion against Luntz and Park West. The second cause of action is for a declaratory judgment reversing the sale of Peter's Keepers. The third cause of action seeks the reversal of any commission payments paid as a result of the sale of Peter's Keepers. The

fourth cause of action seeks a judgment declaring that Gene Luntz be forced to disgorge his commissions regarding all of sales of Peter Max's artwork. The sixth cause of action seeks replevin of the Peter's Keepers purportedly sold by Adam Max as the change in leadership was occurring.

III. DISCUSSION

1.Action One - ALP, Inc. v Larry Moskowitz et al., Index No. 652326/2019

A. Bender Ciccotto, Frank, and Frank Jr.'s Motion To Stay This Action, Compel Arbitration, and Sever Remaining Actions

Bender, Frank, and Frank Jr. move to stay the causes of action against them and compel arbitration pursuant to CPLR 7503(a) based upon their May 20, 2012 retainer agreement with ALP. That agreement provides, in pertinent part as follows:

> "Client and accountant both agree that any dispute *over fees charged by the accountant* to the client will be submitted for resolution by arbitration in accordance with the Rules for Professional Accounting and Related Services Disputes of the American Arbitration Association or other association." (Emphasis Added).

Bender, Frank, and Frank Jr.'s attempt to avoid litigation based upon this agreement is without merit. It is well settled that where "parties have agreed to submit only particular issues to arbitration, the rule is clear that unless the agreement to

arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute, a party cannot be compelled to forego the right to seek judicial relief and instead submit to arbitration." E. Minerals Int'l, Inc. v Cane Tennessee, Inc., 274 AD2d 262, 266 (1st Dept. 2000); see Bowmer v Bowmer, 50 NY2d 288 (1980).

> "The reason for this requirement, quite simply, is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent. Thus, because of the nature of arbitration, where a party forfeits the right to a trial, often before a jury, in a judicial forum bound by legal precedent and the rules of evidence, the decisions of which are subject to broad appellate review, an agreement to arbitrate 'may not be implied or depend upon subtlety for its existence.'"

M.I.F. Sec. Co. v R.C. Stamm & Co., 94 AD2d 211, 212-13 (1st Dept. 1983), aff'd, 60 NY2d 936 (1983).

Thus, where, as here, the arbitration clause at issue is narrow in scope, as it is only related to fees charged to ALP by Bender, arbitration should only be compelled when it is clear that the allegations within the complaint should "expressly and unequivocally" be considered one "over fees". E. Minerals Int'l, Inc. v Cane Tennessee, Inc., supra.

However, contrary to Bender, Frank, and Frank Jr.'s contention, the allegations within the complaint cannot expressly and unequivocally be considered a dispute over fees.

Although the complaint does allege that Bender, Frank, and Frank Jr. siphoned money from ALP through fraudulent or inflated accounting fees, the plaintiff correctly argues that the gravamen of this action is not an accountant billing dispute, but one for the breaches of fiduciary duty committed by Frank as a *de facto* officer through his wasting corporate assets and self-dealing. Thus, the narrow arbitration clause, which is limited to disputes concerning fees for accounting work, is not a sufficient ground to compel arbitration of all of the causes of action against them in the complaint.

Moreover, to the extent that Bender, Frank, and Frank Jr. argue that the claims relating to their billing for accounting services should be severed and arbitrated, the plaintiff is correct that the disputed billing does not arise from a typical disagreement regarding pricing or performance of accounting duties, but rather a claim that the billing was the vehicle by which Bender, Frank, and Frank Jr. fraudulently extracted money from ALP, which was possible because of their control over Adam Max, their coordinated domination over the company with Moskowitz and Luntz, and their conspiracy to further each other's own systematic looting of the company. Therefore, there are clearly common questions of law and fact such that the claims against Bender, Frank, and Frank Jr. are "inextricably intertwined" with the claims made against the other defendants,

such that the claims should all be resolved in the same forum. See Young v Jaffe, 282 AD2d 450, 450-51 (2nd Dept. 2001).

B. Moskowitz, Luntz, and Lauren's Motions to Dismiss Pursuant to CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). Applying these standards, defendants Moskowitz, Luntz, and Lauren have failed to meet their burden on their respective motions to dismiss pursuant to CPLR 3211(a)(1).

1. Lawrence Moskowitz

In support of his motion to dismiss pursuant to CPLR 3211(a)(1), Moskowitz submits, *inter alia*, the contracts between him and ALP such as the 2016 consulting agreement, the previous 2012 consulting agreement, the demand notes dated December 17, 2012 and March 29, 2013, and a 2014 security agreement.

Moskowitz claims that his submissions establish that he (i) was a shareholder of ALP, (ii) performed specialized insurance adjusting services for ALP, (iii) had a relationship with Peter that spanned decades, and (iv) had a consulting agreement to

"[p]rovide guidance in running the day to-day operations of the Company," to "review financial transactions and documents involving the Max family and the Company," and to "[p]rovide guidance, and coordinate responses and actions, in an effort to protect Peter Max and the Company from various nefarious financial schemes and otherwise seek to block actions by others intent on defrauding Peter Max and/or the Company." Moskowitz further claims that based upon these submissions he did not owe ALP any fiduciary duties and is entitled to compensation for his loans and work as an insurance adjuster for ALP.

However, inasmuch as ALP has credibly disputed the authenticity of many of these contracts, as they allege that these contracts are the result of either outright fraud or Moskowitz' control over Adam Max, they do not constitute documentary evidence. See Fontanetta v John Doe 1, supra at 86 ("[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity."). There is no merit to Moskowitz' claims that these submissions establish that he did not owe ALP any fiduciary duties. Rather, these documents neither conclusively establish his lack of duty, as the consulting agreement purports to give Moskowitz broad authority within the company that could give rise to fiduciary duties, nor do they address the various employee accounts referenced in the

complaint that allege that he was, in actuality, running the company.

As for Moskowitz' claims that the demand notes and security agreement demonstrate that he is entitled to the monies referenced therein for his work relating to the insurance arbitration following Hurricane Sandy, the plaintiff is correct in asserting that they fail to conclusively establish Moskowitz' entitlement to the monies such that dismissal is warranted. According to Moskowitz, the December 17, 2012 demand note for $1 million was issued in connection with ALP's receipt in December 2012 of the $10 million advance from the insurance company and represents Moskowitz's 10% interest in those funds. Similarly, according to Moskowitz, the March 29, 2013 demand note for $500,000 was issued in connection with ALP's receipt in March 2013 of the $5 million advance from the insurance company and represents Moskowitz's 10% interest in those funds. The security agreement, Moskowitz claims, was entered into for the purposes of securing the demand notes. However, the 2018 assignment upon which Moskowitz also relies makes no mention of the December 17, 2012 demand note at all, and states that the March 29, 2013 demand note relates, not to the insurance proceeds, but rather to the "$500,000 loan by Moskowitz to ALP."

In addition to pointing out Moskowitz' changing reasoning for claiming entitlement to the money, the plaintiff is also correct in arguing that it appears Moskowitz is attempting to recover for services performed as a public adjuster although lacking the requisite license. See Public Adj. Bur., Inc. v. Greater N.Y. Mut. Ins. Co., 135 AD3d 41, 44 (1st Dept. 2015) ("the lack of a certificate absolutely precluded a public adjuster from recovering for services it rendered on behalf of an insured").

2. Gene Luntz

In support of his motion to dismiss pursuant to CPLR 3211(a)(1), Luntz submits, *inter alia*, a series of checks which he claims shows that he has consistently been paid a 15% commission rate since 2010, a November 2016 email in which the court in Peter Max's guardianship proceeding declined to interfere with Peter Max's appearance schedule, an inventory report showing the remaining items in ALPs warehouse, and the signed confirmation of the sale of Peter's Keepers and a series of emails wherein Adam Max approves the sale.

Luntz claims that these submissions demonstrate that (i) Adam Max had the authority to enter into the sale of Peter's Keepers, and therefore any claims for his aiding and abetting conversion or breach of fiduciary duty must be dismissed, (ii)

he has always been entitled to a 15% commission of his sales, as Peter Max had agreed to this payment structure, and therefore any claims for conversion relating to his commissions are without merit, and (iii) any allegations that he was somehow abusing Peter Max by forcing him to make appearances is without merit.

Luntz' own conclusion that Adam Max had authority to enter into the sale of Peter's Keepers is premised on his interpretation of BCL § 909. BCL § 909 requires shareholder approval for the sale of all or substantially all of the assets of a corporation if not made in the regular course of business. Luntz argues that the Peter Keeper's transaction was not for "all or substantially all of the assets of ALP," as the inventory report of the remaining items in ALPs warehouse shows that ALP retained significant assets following the transaction.

However, to support his position, Luntz cites only to an unpublished lower court case, Barasch v Williams Real Estate Company, Inc. 33 Misc. 3d 1219(A) (Sup Ct, NY County 2011). That case is inapposite for several reasons. In Barasch, the court reached the conclusion that a sale was in the ordinary course of business, as that term is defined under BCL § 909, only after the record was developed on a summary judgment motion. It was not, as here, a pre-answer motion to dismiss that

took place prior to conducting any discovery in which the complaint alleges an extraordinary sale outside the course of the company's business.

Additionally, the holding in Barasch was grounded in the Second Department's holding in Dukas v Davis Aircraft Prod Co., 131 AD2d 720 (2nd Dept. 1987). The Dukas Court held that the purpose of BCL § 909 was to "prevent a corporation from disposing of a major portion of its property without obtaining prior shareholder approval." Id. citing In re Timmis, 200 NY 177 (1910). Here, the allegations in the complaint, specifically that ALP rarely sold any of Peter's Keepers and Adam Max unilaterally and secretly authorized the sale of them to quickly generate money before Libra could assume control of ALP, are sufficient to demonstrate, at the pre-discovery stage, that the sale of Peter's Keepers, in which Gene Luntz undisputedly participated, may have been outside the ordinary course of ALP's business, and thus required shareholder approval. Therefore, Luntz' submissions fail to conclusively demonstrate that Adam Max had authority to enter into the sale of Peter's Keepers, such that dismissal pursuant to CPLR 3211(a)(1) is warranted.

Luntz' submissions further fail to conclusively establish that Peter Max set his 15% commission structure in 2010. The "documentary evidence" Luntz relies upon are two checks purportedly signed by Peter in 2011, one check dated July 29,

2011 regarding a sale to Park West, and one check dated August 2, 2011 regarding a sale to "Haban." The fact that Peter signed these two checks establishes, at best, that Peter believed these two particular payments were justified. They do not prove as a matter of law that Peter authorized Luntz to receive a 15% commission across the board for all ALP sales, regardless of the size of the order, whether it was a client that Luntz procured, or whether Luntz in fact facilitated the closing of the deal. Furthermore, other than the two checks purportedly signed by Peter, Luntz' exhibit contains copies of 11 check requests, three of which appear to claim something less than a 15% commission.

As to Luntz' claim that documentary evidence shows that Peter Max's appearances were not coerced, Luntz cites a November 2016 email in which the court in Peter Max's guardianship proceeding declined to interfere with Peter Max's scheduled appearances. That email does not establish as a matter of law that Peter Max was not coerced by Luntz into attending the appearances; it merely indicates that, on the evidence available to that court at that particular time, the court did not think it was appropriate to grant relief.

Therefore, Luntz' motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

3. Lauren Moskowitz

In support of her motion to dismiss pursuant to CPLR 3211(a)(1), Lauren submits, *inter alia*, an affidavit from Adam Max, a series of ten various email chains ranging in date from 2014 to 2018 from Lauren to Peter Max, Adam Max, or other members of ALP regarding events or scheduling meetings, and a series of four photographs purportedly showing Lauren at a work event. Lauren contends that these submissions establish that she did in fact work at ALP, and therefore the claims that she defrauded the company by receiving checks for her 'no-show' job are without merit. However, Lauren's submissions do not "resolve all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, supra at 383. Indeed, the emails and photographs demonstrate, at most, that Lauren attended one ALP-related work event, and occasionally emailed members of ALP regarding work or work-related appearances. They fall far short of establishing that she consistently worked at ALP so as to justify her compensation, much less a defense to the plaintiff's claims. Further, Adam Max's affidavit, in which he merely disputes allegations in the complaint and avers that Lauren did in fact work at ALP, may not be considered in support of the motion. It is well settled that affidavits do not constitute documentary evidence within the meaning of CPLR 3211(a)(1). See

Bou v Llamoza, 173 AD3d 575 (1st Dept. 2019); Asmar v 20th and Seventh Assocs., LLC, 125 AD3d 563 (1st Dept. 2015); Art and Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436 (1st Dept. 2014); Tsimerman v Janoff, 40 AD3d 242 (1st Dept. 2007).

Therefore, Lauren's motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

C. Moskowitz, Luntz, and Lauren's Motions to Dismiss Pursuant to CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152

(internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Additionally, CPLR 3013 requires that, with regard to claims sounding in fraud, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved."

1. First Cause of Action - Conversion Against All Defendants

Defendants Moskowitz, Luntz, and Lauren each move pursuant to CPLR 3211(a)(7) to dismiss the first cause of action against them for conversion of ALP's assets. However, they each fail to demonstrate that the allegations of the complaint fail to state a claim for conversion.

To plead a cause of action for conversion, a plaintiff must sufficiently allege that a defendant, intentionally and without authority, assumed or exercised control over the property belonging to someone else, thereby interfering with that person's right of possession. See William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1st Dept. 2018). The two key elements to establish a cause of action for conversion are "1) the plaintiff's possessory right or interest in the property, and 2) the defendants dominion over the property or interference with it, in derogation of the plaintiff's rights." Reif v Nagy, 175

AD3d 107, 118 (1st Dept. 2019). Here, ALP has satisfied these elements with respect to each defendant.

The complaint alleges that Moskowitz siphoned significant amounts of money and valuable artwork away from ALP as purported payments which he was not entitled to, and that the money and artwork is properly ALP's. The complaint also alleges that Moskowitz paid to himself on an allegedly fraudulent and unauthorized basis millions of dollars collected by ALP from the insurance claim on ALP's artwork that was destroyed by Hurricane Sandy even though he had no legal authority to do so as he had no license as an insurance broker.

The complaint also adequately pleads a cause of action for aiding and abetting conversion against Moskowitz inasmuch as it alleges that Moskowitz was a co-conspirator in the fire-sale of Peter's Keepers to Park West, consisting of highly valuable older artworks by Peter Max that he never intended to sell, but which Moskowitz, against Peter Max's wishes, sold at a bargain price.

In moving to dismiss the first cause of action for conversion, Moskowitz argues that the allegations in the complaint, particularly inasmuch as there was a conspiracy to loot the company, are inherently lacking in credibility, and therefore should be dismissed. He also claims that the payments

that he received were the result of bargained for arms-length transactions. However, affording every favorable inference to the allegations contained within the complaint, dismissal of the allegations is not warranted on these grounds. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra.

The plaintiff adequately pleads a cause of action for conversion against Luntz based on his retention of the commissions on the unauthorized sale of numerous work of art, including Peter's Keepers, a sale that Luntz is alleged to have engineered entirely for his own personal benefit to collect $1.1.25 million in commissions. The complaint further adequately pleads a cause of action for aiding and abetting conversion against Luntz inasmuch as he is alleged to be a co-conspirator in the fire-sale of Peter's Keepers to Park West.

In moving to dismiss the first cause of action for conversion, Luntz incorrectly argues that because the then-president of the corporation, Adam Max, purportedly authorized the commissions, he is immune from liability for accepting the benefits of those transactions.

However, the plaintiff correctly argues that the complaint sufficiently pleads that Luntz exercised undue influence over Adam to pay himself millions of dollars in commissions. Specifically, the elements of undue influence are motive, opportunity, and the actual exercise of that undue influence.

See Kotick v Schvako, 130 AD3d 472 (1st Dept. 2015). "As direct proof of undue influence is rare, its elements may be established by circumstantial evidence." Kotick v Schvako, supra at 473.

Contrary to Luntz's argument, the allegations in the complaint amply plead the elements of Luntz's undue influence over Adam. ALP has alleged that Luntz had a motive to unduly influence Adam while he was CEO and President of ALP by virtue of the millions of dollars in commissions he stood to obtain from the sale of ALP's artwork, including the $14.7 million sale of Peter's Keepers. ALP has also satisfactorily pleaded the element of opportunity to exercise undue influence over Adam inasmuch as the complaint alleges that Luntz and Adam worked closely together and that Adam had various mental and health issues that caused him to spend all of his work days sitting in the office listening to white noise, leading ALP employees to wonder whether Adam had a substance abuse problem or was suffering from the onset of dementia. In addition to alleging motive and opportunity, ALP also adequately pleads the exercise of undue influence by Luntz through threats intimidation, bullying and physical violence to secure millions of dollars in commissions for himself.

The plaintiff also sufficiently pleads a cause of action for conversion against Lauren based upon her retention of

approximately $100,00.00 in payments from ALP that were unearned. In moving to dismiss the claim, Lauren merely denies being a no-show employee. As previously discussed herein in regard to CPLR 3211(a)(1), this is not a sufficient basis to dismiss the conversion claim pursuant to CPLR 3211(a)(7). See 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra.

Therefore, the respective motions pursuant to CPLR 3211(a)(7) are denied.

2. Second Cause of Action - Declaratory Judgment and Rescission Against Moskowitz, Frank, and Bender Ciccotto

Moskowitz moves pursuant to CPLR 3211(a)(7) to dismiss the second cause of action in which ALP seeks a declaration that indemnification agreements and various other contracts and agreements signed by Adam Max are without effect, and rescission of those agreements based upon the theory of fraudulent inducement. However, Moskowitz fails to demonstrate entitlement to such relief.

The elements of a claim for fraudulent inducement are: 1) a false representation of material fact 2) known by the utterer to be untrue, 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) results in damages. See Schumaker v Mather, 133 NY 590 (1892).

Here, the plaintiff alleges that Moskowitz and Frank induced Adam Max to sign, *inter alia*, release/indemnity agreements, dated July 28, 2016, immunizing them from liability for actions undertaken at ALP. Specifically, the complaint alleges that Moskowitz and Frank controlled Eric Hellige of Pryor Cashman and that Hellige was loyal to them, not to Adam or ALP. At their direction, Hellige, who acted as outside general counsel of ALP, did not disclose to Adam the serious dangers to ALP of signing the numerous agreements that Pryor Cashman drafted to benefit Moskowitz and Frank including the release/indemnity agreements and payments to Moskowitz from the insurance payouts following Hurricane Sandy.

As such, ALP has sufficiently plead 1) a false representation by Moskowitz through Pryor Cashman, 2) knowledge of their falsity inasmuch as it is alleged that Moskowitz knew he was not entitled to the insurance payments or that the release/indemnity agreements were not in ALP or Adam Max's best interest, 3) the intention to induce reliance and forbearance from further inquiry from Adam Max, 4) justifiable reliance, as the agreements were submitted to Adam by ALP's in-house counsel, and 5) damages.

In moving to dismiss the second cause of action for seeking rescission, Moskowitz incorrectly argues that the allegations in

the complaint are not plead with the required specificity under CPLR 3016(b) as significant portions therein, particularly with respect to ALP's in-house counsel being loyal to Moskowitz and Frank, are plead upon information and belief.

CPLR 3016(b) "imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013." Edison Stone Corp. v 42nd St. Dev. Corp., 145 AD2d 249, 257(1st Dept. 1989). Moreover, where allegations of fraud are based on information and belief, a plaintiff must apprise the court of their grounds for such a conclusion. See Kanbar v Aronow, 260 AD2d 182(1st Dept. 1999); Wall St. Transcript Corp. v Ziff Communications Co., 225 AD2d 322 (1st Dept. 1996). However, at this early stage of the litigation, "plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants and plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs." DDJ Mgmt., LLC v. Rhone Grp. L.L.C., 78 AD3d 442, 443 (1st Dept. 2010) citing Pludeman v Northern Leasing Sys., Inc., 40 AD3d 366 (1st Dept. 2007); see also Bernstein v Kelso & Co., 231 AD2d 314 (1st Dept. 1997). Applying this standard, ALP has clearly plead fraud with sufficient particularity to apprise the defendants of the alleged wrongs. Thus Moskowitz's motion pursuant to CPLR 3211(a)(7) to dismiss the second cause of action is denied.

3. Third Cause of Action - Breach of Fiduciary Duty and/or Aiding and Abetting Breach of Fiduciary Duty As Against All Defendants

Moskowitz, Luntz, and Lauren all move pursuant to CPLR 3211(a)(7) to dismiss the third cause of action for breach of fiduciary duty or the aiding and abetting thereof. However, they each fail to demonstrate their entitlement to such relief.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 (2nd Dept. 2010). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." Swartz v Swartz, 145 AD3d 818, 823 (2nd Dept. 2016). Here, affording the complaint a liberal construction, accepting the facts alleged therein to be true, and granting the plaintiff the benefit of every possible favorable inference, the complaint adequately pleads the existence of a fiduciary relationship between Frank, Moskowitz, Luntz and ALP. See Castellotti v Free, 138 AD3d 198 (1st Dept. 2017); Chasanoff v Perlberg, 19 AD3d 635 (2nd Dept. 2005).

Specifically, the complaint alleges that Frank, Moskowitz, and Luntz owed fiduciary duties to ALP as *de facto* officers of ALP as they all assumed roles within the company that allowed

them to control and manage it. In that capacity, ALP reposed special trust and confidence in them, and therefore they owed fiduciary duties to ALP. The complaint further alleges that all of the defendants, including Lauren, were aware that Frank, Moskowitz, and Luntz had divided up ALP and were collectively looting the company, in violation of their fiduciary duties.

In their roles as *de facto* managers of ALP, Frank, Moskowitz, and Luntz are alleged to have undertaken a series of bad acts including: (1) exerting control over Adam and making certain that he did whatever they wanted; (2) inserting family members, such as Frank Jr., as manager of ALP's warehouse where valuable Peter Max artworks were stored, who, in turn, misappropriated artwork, facilitated thefts by Moskowitz, Luntz, and Frank of artwork, and was integral in the theft of the Peter's Keepers; (3) directing payments in the hundreds of thousands of dollars to Moskowitz, who never submitted any invoice or back up of any kind, and was, by his own admission, not licensed for the work he was performing on ALP's behalf; (4) causing Adam to sign agreements that purport to release them from all the bad acts they had committed and provide them with indemnification rights; (5) enabling Luntz, to act as the manager of ALP's sales, and once in that role, vastly increased business to Park West in order maximize Park West's profits and his own commissions; (6) causing the Peter's Keepers transaction

to occur; and (7) firing those who might oppose them and hiring friendly parties in their stead.

As such, ALP has sufficiently pled 1) the existence of a fiduciary relationship between ALP and Frank, Moskowitz, and Luntz, (2) misconduct by Frank, Moskowitz, and Luntz, and (3) damages directly caused by the misconduct.

ALP has also sufficiently pled the elements of a claim for aiding and abetting a breach of fiduciary duty against Moskowitz, Luntz, and Lauren. "[A] claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." Epiphany Cmty. Nursery Sch. v Levey, 171 AD3d 1, 11 (1st Dept. 2019). Here, complaint alleges that Moskowitz and Luntz were both working in accord with the 'Gang of Five' to loot ALP, and that they used their respective spheres of influence within the company to aid one another with their own schemes to loot the company. The complaint also sufficiently pleads that Lauren, in receiving a no-show job at ALP at her father's behest, participated in her father's breach of fiduciary duty.

In moving to dismiss the third cause of action for breach of fiduciary duty or the aiding and abetting thereof, Moskowitz,

Luntz, and Lauren attempt to disclaim that Frank, Moskowitz, and Luntz had any fiduciary duty to ALP. Specifically, they argue that: (i) Frank owed no fiduciary duty, as accountants generally have no fiduciary duty to the company that they serve, (ii) Moskowitz owed no fiduciary duty as his relationship with ALP was governed solely by the 2012 and 2016 consulting agreements which do not affirmatively impose any fiduciary duty, and (iii) Luntz had no fiduciary duty as he was merely the salesperson for ALP's artworks.

However, these positions are without merit. It is well settled that a claim for breach of fiduciary duty against an accountant stands "where the allegations include knowledge and concealment of illegal acts and diversions of funds." Nate B. & Frances Spingold Found. v Wallin, Simon, Black & Co., 184 AD2d 464, 466 (1992). Moreover, liability for breach of a fiduciary duty "is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation" (Sergeants Benevolent Assn. Annuity Fund v Renck, 19 AD3d 107 [1st Dept. 2005]) and ALP has sufficiently pled that Moskowitz ingratiated himself with ALP based upon his purported relationship with Peter Max, and Luntz had assumed control over ALPs sales based upon his longstanding relationship with ALP. Therefore, the respective motions pursuant to CPLR 3211(a)(7) to dismiss the third cause of action are denied.

4. Fourth Cause of Action - Actual and Constructive Fraud As Against All Defendants Except Adam Max

Moskowitz, Luntz, and Lauren all move pursuant to CPLR 3211(a)(7) to dismiss the fourth cause of action for fraud and constructive fraud. However, they fail to demonstrate their entitlement to such relief.

To plead a cause of action for fraud, a plaintiff must sufficiently allege that the defendant 1) made a material representation that was false; 2) with knowledge of the falsity and intent to deceive the plaintiff; 3) caused the plaintiff's justifiable reliance on the representation; and, 4) caused damages to be suffered by the plaintiff as a result of the representation. See New York Univ. v Continental Ins., 87 NY2d 308 (1995); J.A.O. Acquisition Corp. v Stavisky, 18 AD3d 389 (1st Dept. 2005); Cohen v Houseconnect Realty, 289 AD2d 277 (2nd Dept. 2001). Similarly, to plead a cause of action for constructive fraud, the element of knowledge of the falsity of the representation is replaced by a requirement that that the plaintiff allege the existence of fiduciary relationship between the defendant and the plaintiff. See Schoen v Martin, 187 AD2d 253 (1st Dept. 1992).

ALP has sufficiently pled both fraud and constructive fraud. The complaint alleges, *inter alia*, that Moskowitz, as a *de facto* manager of ALP, knowingly made several

misrepresentations such as his entitlement to the insurance proceeds following Hurricane Sandy or that he had loaned $500,000.00 to ALP, when in actuality the money came from Peter Max, that Adam Max and therefore ALP reposed a special trust in him such that there was justifiable reliance upon his misrepresentations, causing financial damage to the company.

As to Luntz, the complaint alleges, *inter alia*, that Luntz, who had assumed control of all of ALP's sales, knowingly misrepresented that he was entitled to a 15% commission on all sales, despite the fact that neither Peter Max nor ALP had ever agreed to such terms, that Adam Max, and therefore ALP, reposed a special trust in him such that there was justifiable reliance upon his misrepresentations, causing financial damage to the company.

As to Lauren, the complaint alleges that she, as a purported 'employee' of ALP knowingly represented that she was a full-time employee of ALP, when in actuality she rarely, if ever, worked, that ALP justifiably relied on her representation, and that she collected approximately $100,000.00 in payments that she is not entitled to.

In moving to dismiss the fourth cause of action for actual or constructive fraud, Moskowitz, Luntz, and Lauren again attempt to disclaim that Frank, Moskowitz, and Luntz had any

fiduciary duty to ALP, while also arguing that the claims fail to meet the required specificity under CPLR 3016(b).

As already discussed herein, the complaint adequately alleges that the defendants owed fiduciary duties to ALP based upon their positions within the company. Moreover, the complaint sets forth with sufficient particularity their claims so as to apprise defendants of the alleged wrongs. DDJ Mgmt., LLC v. Rhone Grp. L.L.C., supra. As the plaintiff has amply pleaded the alleged wrongs by the defendants, dismissal is not warranted.

5. Fifth Cause of Action - Civil Conspiracy As Against All Defendants

Moskowitz, Luntz, and Lauren all move pursuant to CPLR 3211(a)(7) to dismiss the fifth cause of action for civil conspiracy. However, they each fail to demonstrate their entitlement to such relief.

To plead a cause of action for civil conspiracy, a plaintiff must sufficiently allege 1) an underlying tort, such as fraud, was committed, 2) there was an agreement between the parties to commit such tort, 3) an intentional act in furtherance of the agreement was committed, and 4) there was an injury to the plaintiff. See Abacus Fed. Sav. Bank v Lim, 75 AD3d 472 (1st Dept. 2010).

As discussed herein, an underlying tort of fraud was properly alleged against, *inter alia*, the 'Gang of Five.' The complaint further alleges that not only did they effectively control ALP, they all acted in concert, supporting each other's various thefts and frauds. This was a "single overarching scheme to wrest control of ALP from its true owners... and then to loot ALP of as much cash and artwork as possible."

The complaint alleges that Bender and Frank hijacked ALP diverting its funds and other assets through fraudulent accounting and billings. The complaint further alleges that Moskowitz was fraudulently attempting to siphon millions of dollars relating to his unlicensed work as an insurance adjuster in the wake of Hurricane Sandy, and that Frank and Moskowitz worked together to install their own in-house counsel at ALP and used their influence over Adam Max to have him sign off on documents purportedly legitimizing their looting of ALP.

Frank and Moskowitz, along with Luntz, allegedly conspired to sell ALP's most valuable assets, the Peter's Keepers, to Park West in order to generate as much money as possible in commissions prior to Libra Max taking control over the company. To further their ends, it is alleged that Frank and Moskowitz installed Frank Jr. in ALP's warehouse to effectuate that theft

and steal other works, and that they provided a no-show job to Lauren to further siphon money from the company.

In moving to dismiss the fifth cause of action for civil conspiracy, Moskowitz, Luntz, and Lauren all argue that as the underlying cause of actions for fraud and various other torts should be dismissed, the claim for civil conspiracy must likewise fail. However, as dismissal of the underlying tort actions is not warranted, their argument is without merit.

6. Sixth Cause of Action - Replevin As Against All Defendants

Defendants Moskowitz, Luntz, and Lauren each move pursuant to CPLR 3211(a)(7) to dismiss the cause of action against them for replevin of ALP's assets. Similarly to ALP's cause of action for conversion, ALP also pleads a viable cause of action for replevin. To plead a cause of action for replevin, a plaintiff must sufficiently allege a superior possessory right to property in the defendant's possession. See Reif v Nagy, supra; Pivar v Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212 (1st Dept. 2002). Here, the plaintiff has adequately done so. The complaint alleges that ALP had a superior possessory right to the artwork and funds misappropriated by each of the defendants. ALP further pleads that it made a demand for the return of its property from the defendants and they

refuse to return them. As such, the defendant's motion to dismiss is denied.

7. Seventh Cause of Action - Recoupment/Set Off As Against Moskowitz, Luntz, Frank and Bender Ciccotto

The seventh cause of action for recoupment/setoff fails to plead a cause of action against all of the defendants. The defendants correctly argue that the legal theories of setoff and recoupment may be pleaded as a defense or a counterclaim but not as an affirmative cause of action. See Demille v Demille, 5 AD3d 428 (2nd Dept 2004). That cause of action must be dimissed.

D. Lauren's Motion to Dismiss Pursuant to CPLR 3211(a)(5)

Lauren Moskowitz also moves to dismiss the claims as against her pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations. Specifically, Lauren contends that the claims against her for conversion and replevin are subject to a three-year statute of limitations and, as such, any claims regarding payments made to her prior to May 24, 2016 are time-barred. However, as correctly argued by the plaintiff, the complaint sufficiently pleads that Libra was unable to get basic information about the company and to access its books, records, and bank accounts prior to this court's order on February 28, 2019, and therefore ALP is sheltered by equitable tolling rules. See O'Hara v. Bayliner, 89 NY2d 636 (1997).

2. Action Two - ALP, Inc. v Park West Galleries, Gene Luntz, and Gene Luntz Management, Inc., Index No. 153949/2019

A. Park West's Motion to Dismiss

In Action No. 2, Park West moves pursuant to CPLR 3211(a)(1), (4), and (7) to dismiss the complaint as against it.

In its complaint, ALP alleges causes of action against Park West for conversion and replevin of Peter's Keepers, and for aiding and abetting Luntz' breach of fiduciary duty inasmuch as he facilitated the sale of Peter's Keepers. ALP also alleges a cause of action for breach of contract against Park West relating to a payment dispute for a separate sale of artworks to Park West. However, by Notice of Partial Discontinuance dated December 10, 2019, ALP discontinued its claim for breach of contract.

As discussed herein, to plead a cause of action for conversion, a plaintiff must sufficiently allege that a defendant, intentionally and without authority, assumed or exercised control over the property belonging to someone else, thereby interfering with that person's right of possession. See William Doyle Galleries, Inc. v Stettner, supra. Similarly, to plead a cause of action for replevin, a plaintiff must sufficiently allege a superior possessory right to property in the defendant's possession. See Reif v Nagy, supra; Pivar v Graduate School of Figurative Art of N.Y. Academy of Art, supra.

Here, ALP sufficiently pleads that Luntz, along with Moskowitz and Frank, worked with Park West to sell ALP's most valuable assets, purportedly worth $400 million, to Park West at a fire-sale price of $14.7 million in order to enrich themselves prior to Adam Max being replaced as president of ALP. The complaint further alleges that pursuant to ALP's bylaws Adam could not authorize such a transaction without board approval, and both Luntz and Park West knew that Adam Max neither had the authority at the time to engage in the transaction and that he was going to be replaced and therefore could not authorize the Peter's Keepers sale.

As such, ALP sufficiently pleads that ALP has a superior right to possession of Peter's Keepers inasmuch as they claim that the sale was extraordinary and was not authorized by ALP's board of directors, and that Park West, currently in possession of Peter's Keepers, intentionally and without authority, assumed or exercised control over the artworks.

ALP also sufficiently pleads that Park West aided and abetted Luntz' breach of fiduciary duty. As already discussed herein, "a claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered

damage as a result of the breach." Epiphany Cmty. Nursery Sch. v Levey, supra. Furthermore, as discussed herein, ALP sufficiently pleads that Luntz owed fiduciary duties to ALP. Inasmuch as ALP also pleads that Park West knowingly participated in the breach by purchasing Peter's Keepers despite knowing that Adam Max was not authorized to make such a sale, dismissal of ALP's claim for aiding and abetting Luntz' breach of fiduciary duty is not warranted.

In moving to dismiss the complaint pursuant to CPLR 3211(a)(1), (4), and (7), Park West argues that (i) ALP's claims should be dismissed pursuant to CPLR 3211(a)(4) under the first-in-time rule as Park West had filed a federal action in the United States District Court for the Southern District of New York, captioned Park West, Inc. v ALP, Inc., Civil Action No. 19-cv-03360 on April 15, 2019, one day prior to this action being commenced on April 16, 2019, and (ii) Adam Max had actual and apparent authority to enter into the sale of Peter's Keepers, and therefore the sale was valid such that Park West is the proper owner of Peter's Keepers.

These arguments are without merit. By decision and order dated May 19, 2020, Judge Laura Swain of the United States District Court for the Southern District of New York dismissed the complaint in Park West, Inc. v ALP, Inc., as an anticipatory

filing to secure Park West's preferred forum. Thus, dismissal under the first-in-time rule is not warranted.

In support of its motion pursuant to CPLR 3211(a)(1) Park West submits, *inter alia*, correspondence and documentation relating to the Peter's Keepers sale. However, inasmuch as these submissions do not address whether Adam Max was authorized to engage in the sale of Peter's Keepers, they cannot be said to "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, supra; see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., supra; Fontanetta v John Doe 1, supra.

As to Park West's contentions that Adam Max was authorized to sell Peter's Keepers, Park West maintains that the sale was not extraordinary and, since Adam was the president at the time that the sale was approved, he had actual and apparent authority to make the sale. Neither part of the argument is correct, As to Adams' authority, ALP correctly notes that, according to ALPs bylaws and BCL § 909, Adam was only entitled to approve transactions in the ordinary course of business, and that based upon the scale of the transaction, purportedly selling $400 million of ALP's most valuable artworks for $14.7 million, an issue of fact remains as to Adam Max's authority such that

dismissal is not warranted. See Hardin v Morgan Lithograph Co., 247 NY 332, 339 (1928) ("The authority of the president, his apparent power to make or ratify the contract in question, may be presumed, but the corporation should be allowed to prove that, by reason of its own course of business or the custom of the trade, authority was in truth lacking."),

Park West's argument that the sale was neither unusual or extraordinary ignores the clear allegations in the complaint. The complaint alleges that, until the sale of the Peter's Keepers, Park West's regular practice was to wire $2 million a month in four installments that were applied towards weekly shipments of artwork. Park West would order pieces that were created to fulfill the specific order, which were shipped to Park West when completed. Peter's Keepers were rarely used to fill any order, and generally only when there was a shortage on ALP's end. In sharp contrast, the subject "sale" of the Keepers involved two extraordinary payments of about $7 million each designated specifically for this special order of artworks that were rarely sold to Park West.

B. Luntz' Motion to Dismiss

In Action No. 2, Luntz, and his company Gene Luntz Management, Inc. move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as against them.

ALP alleges causes of action against Luntz for aiding and abetting Park West's conversion of Peter's Keepers, conversion and replevin of his commissions, and breach of fiduciary duty. Inasmuch as the claims for conversion and replevin of Luntz's commissions and his breach of fiduciary duty mirror those in Action No. 1, to the extent that Luntz filed the same motion to dismiss in both actions, and Luntz's motion to dismiss those claims in Action No. 1 is denied, Luntz's motion to dismiss those causes of action in Action No. 2 is likewise denied.

Of the remaining cause of action against Luntz for aiding and abetting Park West's conversion of Peter's Keepers, Luntz argues only that the cause of action should be dismissed as the underlying tort of conversion by Park West should be dismissed. However, as ALP has sufficiently pled a cause of action for conversion against Park West, Luntz' motion to dismiss is denied.

3. Motions to Consolidate - MOT SEQ 004 in Action No. 1 and MOT SEQ 006 in Action No. 2

"Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right.'" Raboy v McCrory Corp., 210 AD2d 145, 147 (1st Dept. 1994) quoting Amtorg Trading Corp. v Broadway & 56th

St. Assoc., 191 AD2d 212, 213 (1st Dept. 1993). The movants correctly argue that the two actions present common questions of law and fact. See CPLR 602; DeSilva v Plot Realty, LLC, 85 AD3d 422 (1st Dept. 2011); Kern v Shandell, Blitz, Blitz & Bookson, 58 AD3d 487 (1st Dept. 2009). Specifically, both actions stem from an alleged civil conspiracy amongst the defendants in both actions to misappropriate the plaintiff's assets, culminating in the sale of approximately 23,000 pieces of art prior to a change in control of the company.

Therefore, the court finds that consolidation for joint discovery and trial is warranted. The defendants, in opposing joint discovery, predict that there would be additional and duplicative discovery burdens and also that consolidation for joint discovery would be unnecessary as the parties have agreed to coordinated discovery. To the extent that these arguments are not contradictory, they are specious inasmuch as both actions are in the early stages of discovery, will not be unduly delayed if consolidated for joint discovery, and, as seemingly conceded by the defendants, arise from circumstances in which the necessary document discovery and deposition testimony would be relevant in both cases. See Bernstein v Silverman, 228 AD2d 325 (1st Dept. 1996).

The defendants, in opposing a joint trial argue (i) that there is insufficient overlap between the two actions, as one deals solely with the sale of Peter's Keepers while the other deals with the alleged fraud committed by Moskowitz and Frank, and (ii) consolidation would be prejudicial because the presentation of all of ALP's claims to the same jury would bolster each individual claim.

The defendant's contentions are without merit. As demonstrated herein, there is significant overlap between the two actions, each of which deal with specific instances of fraud and looting within ALP by the various defendants. Moreover, the sale of Peter's Keepers is central to both actions, such that two separate trials could yield inconsistent determinations as to the proper owner of Peter's Keepers.

To the extent that the defendants claim that consolidation would allow ALP to bolster its claims, the defendants misconstrue the caselaw on bolstering of claims. Consolidation may be properly denied on grounds of bolstering where there is a risk of multiple plaintiffs attempting to prove their cases cumulatively based upon a defendant's propensity to have engaged in misconduct. See Tarshish v Associated Dry Goods Corp., 232 AD2d 246 (1st Dept. 1996). That is not the case here. Indeed, ALP properly seeks to prosecute its claims against all of the

participants in what is alleged to be an ongoing effort to loot Peter's Keepers and other ALP assets at the same time.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that Bender Ciccotto & Company CPA's LLP, Robert Frank, and Robert Frank Jr.'s motion to compel arbitration pursuant to CPLR 7503(a) and sever the causes of action as against them in Action No. 1 (Index No. 652326/2019) is denied in its entirety (MOT SEQ 002); and it is further,

ORDERED that Lawrence Moskowitz's motion to dismiss the complaint in Action No. 1 (Index No. 652326/2019) as against him pursuant to CPLR 3211(a)(1) and (7) is granted to the extent that the seventh cause of action for recoupment/setoff is dismissed, and is otherwise denied (MOT SEQ 003); and it is further,

ORDERED that Gene Luntz's motion to dismiss the complaint in Action No. 1 (Index No. 652326/2019) as against him pursuant to CPLR 3211(a)(1) and (7) is granted to the extent that the seventh cause of action for recoupment/setoff is dismissed, and is otherwise denied (MOT SEQ 005); and it is further

ORDERED that Lauren Moskowitz's motion to dismiss the complaint in Action No. 1 (Index No. 652326/2019) as against her pursuant to CPLR 3211(a)(1), (5) and (7) is granted to the extent that the seventh cause of action for recoupment/setoff is dismissed, and is otherwise denied (MOT SEQ 006); and it is further,

ORDERED that Park West Galleries, Inc.'s motion to dismiss the complaint in Action No. 2 (Index No. 153949/2019) as against it pursuant to CPLR 3211(a)(1), (4) and (7) is granted to the extent that the seventh cause of action for breach of contract is deemed withdrawn upon the plaintiff's December 10, 2019 Notice of Partial Discontinuance, and is otherwise denied (MOT SEQ 005); and it is further,

ORDERED that Gene Luntz and Gene Luntz Management, Inc.'s motion to dismiss the complaint in Action No. 2 (Index No. 153949/2019) as against them pursuant to CPLR 3211(a)(1) and (7) is denied (MOT SEQ 005); and it is further,

ORDERED that the motions to consolidate the actions entitled ALP, Inc. v Park West Galleries, Inc., Index No. 153949/2019 (MOT SEQ 006), and ALP, Inc. v Lawrence Moskowitz, Index No. 652326/2019 (MOT SEQ 004), pending in the Supreme Court, New York County, are granted to the extent that the two actions are consolidated for joint discovery and joint trial and

the consolidated actions shall retain their separate captions and separate index numbers; and it is further,

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall mark the files accordingly.

This constitutes the Decision and Order of the court.

Dated: October 30, 2020 **ENTER:**

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON