CIT Healthcare LLC v Sonix Med. Resources, Inc.
2020 NY Slip Op 34310(U)
December 28, 2020
Supreme Court, New York County
Docket Number: 601736/2009
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

----------X

CIT HEALTHCARE LLC,

Plaintiff,

- v -

SONIX MEDICAL RESOURCES, INC., MRI RESOURCES, INC., TOMS RIVER RESOURCES, INC., STONY ACQUISITIONS, INC., SONIX MANAGEMENT RESOURCES, INC., CHATMANHAD RESOURCES, INC., QKSI RESOURCES, INC., BROOKLYN 49TH STREET RESOURCES, INC., ENGLEWOOD RESOURCES, INC., CHATHAM MEDICAL RESOURCES, INC., BRICK RESOURCES, INC., ADVANCED HEALTHCARE RESOURCES, INC., SONIX, INC., OM P. SONI, individually, JOHN COLBERT, individually, and JOHN DOE (1) through JOHN DOE (12),

Defendants.

----------X

INDEX NO. 601736/2009

MOTION DATE

MOTION SEQ. NO. 012, 013, 014

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 012) 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 277, 278, 280, 282, 285, 286, 287, 289, 290, 291, 292, 293, 294, 299, 300, 306, 308, 312, 313, 314, 327

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 268, 269, 270, 271, 272, 273, 274, 275, 276, 279, 281, 283, 284, 288, 295, 296, 297, 298, 301, 302, 303, 304, 305, 307, 309, 315, 316, 317, 328

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 318, 319, 320, 321, 322, 323, 324, 325, 326, 329

were read on this motion to/for AMEND CAPTION/PLEADINGS.

This action arises out of two loans made by plaintiff CIT Healthcare LLC (CIT) to defendant Sonix Medical Resources, Inc. (SMR). CIT claims, among other things, that SMR and

the guarantors of the loans (a number of defendant entities affiliated with SMR, collectively defined below as the guarantor defendants), misrepresented SMR's outstanding payroll tax liability in an effort to induce CIT to make its loans, and that SMR and the guarantor defendants thereafter defaulted on the loans, causing CIT damages. CIT also claims that defendant Advanced Healthcare Resources Inc. (AHR), another SMR affiliate, converted payments received from SMR and the guarantor defendants which belonged to CIT under the terms of the parties' agreements. Finally, CIT claims that individual defendants Om Soni and John Colbert, each of whom is an officer and director of the defendant entities, aided and abetted the fraud and conversion described above.

On October 15, 2009, SMR and the guarantor defendants filed for chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of New York. As a result of that filing, a bankruptcy stay is in effect as against those defendants (collectively, the debtor defendants). The action has continued against AHR, defendant Sonix, Inc. (Sonix), and the individual defendants Soni and Colbert (collectively, the remaining defendants). (See Order, dated Nov. 17, 2009 [Fried, J.] [NYSCEF Doc. No. 3].) CIT now moves, pursuant to CPLR 3212, for summary judgment in the amount of $3,356.998.37 against AHR on its fourth cause of action for conversion, and against Soni and Colbert on its fifth cause of action for aiding and abetting conversion. CIT also seeks monetary sanctions against the remaining defendants, pursuant to CPLR 3126, for certain storage fees and copy and delivery charges incurred by CIT during discovery. By separate motion, defendant Soni moves, pursuant to CPLR 3211 (a) (7), to dismiss CIT's third and fifth causes of action for aiding and abetting fraud and conversion, respectively, for failure to state a claim. In the alternative, defendant Soni seeks summary

judgment on those causes of action, pursuant to CPLR 3212. CIT also moves to amend the caption to reflect that CIT has merged with THE CIT GROUP/EQUIPMENT FINANCING INC.

MOTION TO AMEND

As a threshold matter, the motion to amend will be granted without opposition and for good cause shown. The court notes that the Agreement of Merger (Aff. Of Adrienne Rogove [CIT's Atty.] In Support, Ex. D) names the surviving corporation as THE CIT GROUP/EQUIPMENT FINANCING INC., whereas the caption in the amended complaint names the plaintiff as CIT HEALTHCARE LLC N/K/A THE CIT GROUP/EQUIPMENT FINANCE INC. This error in the caption must accordingly be corrected.[1]

CIT MOTION FOR SUMMARY JUDGMENT AND SONI MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Background

The parties' respective contractual obligations are set forth in three agreements. The first is a Credit and Guaranty Agreement (the Credit Agreement), dated as of December 26, 2007. (Soni Aff. In Supp., Exh. C.) This Agreement was entered into between and among CIT as Administrative Agent and Lender; SMR as Borrower; and MRI Resources Inc., Tom's River Resources, Inc., Stony Acquisitions, Inc., Sonix Management Resources, Inc., Chatmonhad Resources, Inc., QKSI Resources, Inc., Brooklyn 49th Street Resources, Inc., Englewood Resources, Inc., Chatham Medical Resources, Inc., and Brick Resources, Inc. as Guarantors (the

[1] In connection with the motion to amend, CIT filed a First Amended Verified Complaint changing the caption and setting forth allegations regarding the occurrence of the merger. (First Am. Compl., ¶¶ 5-6.) As the redline of this complaint shows, it is identical to the complaint in effect at the time the substantive motions were briefed, with the exception of the change of the plaintiff's name and the merger allegations. (Rogove Aff. In Supp. Of Motion To Amend, Redline, Exh. A.) As a result of these changes, the paragraphs in the amended complaint are two numbers higher than the paragraphs in the original complaint. All references to the complaint in this decision will be to the original complaint.

guarantor defendants).[2] (Id., signature pages.) Defendant Colbert signed the Agreement on behalf of SMR and the guarantor defendants. CIT claims that, pursuant to this Agreement and "related documents," it provided to SMR and the guarantor defendants a $7,490,000 term loan and a $2,000,000 Revolving Credit Loan, of which approximately $300,000 was advanced. (Compl., ¶ 1.) Section 9.01 (a) of the Agreement provides, among other things, that the failure of SMR or the guarantor defendants to make a required payment of principal and/or interest within a specified time period constitutes an Event of Default.

On or about December 26, 2007, CIT also entered into a Subordination Agreement with AHR, SMR, and the guarantor defendants. (Soni Aff. In Supp., Exh. D.) This Agreement was also signed by Colbert on behalf of SMR and the guarantor defendants, and by non-party James Frazzetta on behalf of AHR. (Id., signature pages.) Section 1 of the Agreement provides that "the principal of and interest on all indebtedness, and all liabilities and obligations" of SMR and the guarantor defendants to AHR, including specified management fees (collectively defined as the Subordinated Debt), are "expressly subordinated" to the obligations of SMR and the guarantor defendants to CIT under the Credit Agreement (defined as the Senior Debt). (See id., § 1.)[3] Section 2 prohibits payments from SMR or the guarantor defendants to AHR following an Event of Default under the Credit Agreement. Section 2 thus provides, in pertinent part:

---

[2] It is noted that the names of three of the entities that signed the Credit Agreement as Guarantors (MRI Resources Inc., Tom's River Resources, Inc. and Chatmonhad Resources, Inc.) differ slightly in spelling from the names of the defendants in the caption of the verified complaint (MRI Resources, Inc., Toms River Resources, Inc. and Chatmanhad Resources, Inc.).

[3] More particularly, Section 1 provides that "[t]he payment of any and all Subordinated Debt is expressly subordinated to the Senior Debt to the extent and in the manner set forth in this Subordination Agreement." "Subordinated Debt" is defined as "the principal of and interest on all indebtedness, and all liabilities and obligations of Loan Party [SMR and the guarantor defendants], or any of them, now existing or hereafter arising, to the Undersigned [AHR], including but not limited to: (i) obligations owing by Loan Party, or any of them, to the Undersigned pursuant to the terms and conditions of that certain Management and Services Agreement dated as of December 26, 2007 among Sonix [SMR] and the Undersigned . . . and (ii) any other obligations owing by Loan Party, or any of them, now or hereafter to the Undersigned." (Id., § 1.) "Senior Debt" is defined as "any and all Obligations of Loan Party to Agent and Lenders [CIT] under or in connection with the Credit Agreement . . . ." (Id.)

> "Until the Senior Debt [as defined above] is paid in full, Loan Party [SMR and the guarantor defendants] (or any person on behalf of Loan Party) shall not pay, and Undersigned [AHR] shall not accept, any payments of any kind (including prepayments) associated with Subordinated Debt [as defined above], provided however that so long as no Event of Default or Default under the Credit Agreement has occurred, and so long as no Event of Default or Default under the Credit Agreement would result from the making of any such payment(s) and Loan Party is otherwise permitted to make such payment under Section 7.06 (d) of the Credit Agreement, Loan Party may pay and the Undersigned may accept regularly scheduled management fees under the Management Agreement in an aggregate amount not to exceed the lesser of (i) $4,000,000 or (ii) twelve percent (12%) of gross revenues of Sonix Medical Resources, Inc. annually. Notwithstanding the foregoing, upon the occurrence of an Event of Default or Default under the Credit Agreement, Loan Party (or any person on behalf of Loan Party) shall not make and the Undersigned shall not receive, any payments (including, without limitation, fees, interest, management fees, expenses or otherwise) on the Subordinated Debt, without Agent's [CIT's] prior written consent."

Section 3 of the Subordination Agreement provides, in full: "Any payments on the Subordinated Debt received by the Undersigned [AHR] in violation of the provisions of Section 2 above (including, without limitation, prepayments on the Subordinated Debt) shall be held in trust for Agent [CIT] and the Undersigned will forthwith turn over any such payments in the form received, properly endorsed, to Agent to be applied to the Senior Debt as determined by Agent."

Finally, CIT entered into a Non-Recourse Guaranty and Pledge Agreement (the Pledge Agreement), also as of December 26, 2007, with defendant Sonix. Colbert signed the Agreement on behalf of Sonix. (Pledge Agreement, signature page [Rogove Aff. In Supp., Exh. A-3].) Section 5 of this Agreement provides in pertinent part:

> "Upon the occurrence and during the continuation of an Event of Default, Pledgor [Sonix] shall, at the written direction of Agent [CIT], immediately send a written notice to the Company [SMR] instructing the Company, and shall cause the Company, to remit all cash and other distributions payable with respect to the Ownership Interests [defined in section 1 (a) as "all of the stock, ownership, economic, partnership, membership and other

> interests of the Company now or hereafter held by Pledgor"] (until such time as Agent notifies Pledgor that such Event of Default has ceased to exist) directly to Agent."

In this action, CIT claims, among other things, that SMR and the guarantor defendants misrepresented SMR's outstanding payroll tax liabilities to CIT in order to induce CIT to make its loans. (Compl., ¶¶ 41-A.) According to CIT, individual defendants Colbert and Soni directed and/or permitted this fraudulent conduct to occur. (Id., ¶¶ 46-51.)

CIT also claims that, on September 8, 2008, SMR and the Guarantor Defendants failed to make a required interest payment to CIT, triggering an Event of Default under the Credit Agreement. (Id., ¶¶ 15-16; see also CIT Memo. In Supp., at 8.) CIT claims that SMR, with the knowledge and assistance of Soni and Colbert, thereafter continued to pay $3,356,998.37 in management fees to AHR, in violation of the Subordination Agreement. (Compl., ¶ 27; CIT Memo. In Supp., at 8.)

The following causes of action are unaffected by the bankruptcy stay: the third, which pleads that defendants Colbert and Soni aided and abetted SMR and the guarantor defendants in, among other things, fraudulently inducing CIT to issue the loans (Compl., ¶¶ 46-51; see also id., ¶¶ 40-45); the fourth, which pleads that AHR converted payments it received from SMR and the guarantor defendants following those entities' default under the Credit Agreement (id., ¶¶ 52-58); the fifth, which pleads that Colbert and Soni aided and abetted AHR's conversion (id., ¶¶ 59-64); and the sixth, to the extent that it pleads breaches of contract by Sonix and AHR (id., ¶¶ 65-67).

As noted at the outset of this decision, CIT moves for summary judgment against AHR on its conversion cause of action and against Soni and Colbert on its aiding and abetting conversion cause of action. Soni moves to dismiss the two aiding and abetting claims and, in the

alternative, seeks summary judgment on those claims. Neither party makes any motion with respect to the breach of contract claim.[4]

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

Conversion & Aiding and Abetting Conversion Causes of Action

In support of its motion for summary judgment on the conversion and aiding and abetting conversion causes of action, CIT contends that SMR and the guarantor defendants defaulted on

[4] The only memorandum submitted in opposition to CIT's summary judgment motion was filed by Marc S. Bresky, Esq., who serves as counsel for defendants Soni, Sonix, and AHR (the Soni defendants) in this action. Although the memorandum makes arguments in favor of all of the Soni defendants and is signed by Mr. Bresky as counsel for those defendants, the memorandum is entitled "Defendant Om P. Soni's Memorandum of Law in Opposition . . . ." When the court asked Mr. Bresky at oral argument whether he was also opposing CIT's motion on behalf of AHR, Mr. Bresky answered in the affirmative. (See Oral Arg. Tr., at 21.) CIT did not object. Under these circumstances, the court will treat the opposition memorandum filed by Mr. Bresky as the opposition memorandum of the Soni defendants collectively, notwithstanding its title.

In contrast, Mr. Bresky confirmed at oral argument that defendant AHR does not join in Soni's motion to dismiss and for summary judgment. He did not make any arguments on behalf of Sonix in connection with that motion. (See id., at 14.)

Colbert, who appears pro se, submitted an affidavit in opposition to CIT's motion. He did not file any papers in connection with Soni's motion for summary judgment.

the Credit Agreement on September 8, 2008 by failing to make a required interest payment, giving rise to an Event of Default. (See CIT Memo. In Supp., at 13-14; Compl., ¶¶ 15-16.) CIT further contends that, notwithstanding the Event of Default, SMR made payments to AHR totaling $3,356,998.37 between September 8, 2008 and October 9, 2009, when SMR filed for bankruptcy. (CIT Memo. In Supp., at 14.) CIT submits purported transfer request forms and wire transfer records in support of this claim. (See Rizack Aff. In Supp., Exhs. B-C.) According to CIT, AHR was legally obligated to "return" those funds to CIT after CIT notified AHR of CIT's "superior interest in the funds" and demanded their return. (CIT Memo. In Supp., at 14-15.) CIT contends that defendants Colbert and Soni "had actual knowledge that AHR was not entitled to post-default payments from SMR and substantially assisted AHR in receiving such payments," by transferring the funds themselves or directing others to do so. (Id., at 15-19.)

In opposition to CIT's motion for summary judgment, the Soni defendants contend that the alleged conversion underlying the fourth and fifth causes of action "is nothing more than a reformulated breach of contract claim," and that the causes of action are therefore "legally insufficient and cannot be maintained." (See Soni Memo. In Opp., at 11.) Specifically, the Soni defendants contend that the underlying conversion is predicated upon the allegation "that Defendant AHR violated its obligation under paragraphs 2 and 3 of the Subordination Agreement by accepting payments from Defendant SMR and then, by not turning over all payments it received." (Id., at 10.) The Soni defendants and defendant Colbert make a number of additional arguments in opposition which, for the reasons stated below, the court need not and does not address.[5]

[5] For example, the Soni defendants argue that CIT fails to make a prima facie showing that individual defendant Soni had actual knowledge of CIT's right to the funds allegedly converted by AHR (Soni Memo. In Opp., at 12-13), or that he "directed, authorized or actively assisted in SMR's alleged post-default payment of management fees to AHR and AHR's alleged retention of such payments." (Id., at 14.) With respect to defendants Sonix and AHR, the

It is well settled that a tort obligation is a duty "apart from and independent of promises made and therefore apart from the manifested intention of the parties to a contract." (New York Univ. v Continental Ins. Co., 87 NY2d 308, 316 [1995] [internal quotation marks and citation omitted].) "Thus, [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." (Id.; see also Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 55 [1st Dept 1988] ["[T]he focus is on whether a noncontractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement"].)

"[T]he 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." (E.g. Phipps Houses Servs., Inc. v New York-Presbyterian Hosp., 139 AD3d 480, 481 [1st Dept 2016]; Mandelblatt v Devon Stores, Inc., 132 AD2d 162, 167–68 [1st Dept 1987] [same].) A duty independent of the contract may arise "when a special relationship of 'trust and confidence' exists between the contracting parties (such as is typically found between bailor and bailee, lawyer and client, principal and agent, public carrier and

---

fn 5 continued from previous page
Soni defendants contend that summary judgment is not warranted against those entities because factual issues exist as to whether CIT consented to AHR's use of the allegedly converted funds. Although the Soni defendants acknowledge that the Subordination Agreement contains a clause prohibiting oral modification, they contend that the doctrines of waiver, partial performance, and/or equitable estoppel apply here and render that clause inapplicable as a bar to proof of CIT's consent. (Id., at 18-23.)

Defendant Colbert similarly argues in opposition that CIT fails to make a prima facie showing in support of its conversion and aiding and abetting conversion causes of action. Colbert argues, among other things, that the documents and records submitted by CIT as proof of improper transfers "are not 'business records' of the Debtor [SMR] that accurately reflect the transfer of funds from the Debtors to AHR during those [the relevant] periods of time." (Colbert Aff. In Opp., ¶ 7.) He also argues that CIT fails to submit any evidence in support its allegation that SMR and the guarantor defendants defaulted on the loans or provided notice of an event of default to those entities. (Id., ¶ 11.) Finally, Colbert contends that CIT was aware of SMR's payment of management fees to AHR, and that CIT authorized him to continue paying such fees so that AHR had the necessary funds to continue performing services vital to SMR's operation and, accordingly, to CIT's security interest in SMR. (Id., ¶¶ 13-17, 19.)

passenger or innkeeper and guest), so that born of this relation is a special duty, which, when betrayed, is made actionable in tort." (Apple Records, Inc., 137 AD2d at 55].) An independent tort claim is also maintainable "where a party engages in conduct outside the contract but intended to defeat the contract" (New York Univ., 87 NY2d at 316), or where the breach of contract is but one aspect of a larger, fraudulent scheme to harm the plaintiff. (See e.g. Albemarle Theatre, Inc. v Bayberry Realty Corp., 27 AD2d 172, 176 [1st Dept 1967].)

"Conversely, where a party is merely seeking to enforce its bargain, a tort claim will not lie." (New York Univ., 87 NY2d at 316.) Put another way, "[i]f the only interest at stake is that of holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort." (Hargrave v Oki Nursery, Inc., 636 F2d 897, 899 [2d Cir 1980] [applying New York law], rehearing denied 646 F2d 716.)

Here, the court is not persuaded that AHR's duty to set aside funds received from SMR following a default, and to pay such funds to CIT, was independent of and distinct from its contractual obligations to CIT. The priority of the parties' respective interests in payments from SMR—i.e., CIT's interest in repayment of its debt, and AHR's interest in payment of its management fees—is established by the terms of the Subordination Agreement, not by any common law duty or special relationship of trust between CIT and AHR.

As discussed above, in the Subordination Agreement, the parties squarely addressed the possibility that SMR would prioritize payments to its affiliate AHR over repayment of CIT's loan following a default. They expressly agreed in sections 2 and 3 of that Agreement that AHR's right to management fees would be subordinated to CIT's right to repayment of its debt, and that any funds received by AHR from SMR following a default would be paid to CIT. Although denominated a claim for conversion, CIT's fourth cause of action is in fact a claim for

breach of those express contractual obligations. (See e.g. M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc., 47 AD3d 408, 409 [1st Dept 2008] [dismissing as duplicative of its breach of contract claim, plaintiff property manager's conversion claim based on defendant's alleged failure to collect utility payments from tenants and pay the funds to plaintiff, as required by the parties' service agreement]; Wolf v National Council of Young Israel, 264 AD2d 416, 417 [2d Dept 1999] [affirming dismissal of conversion counterclaim "essentially based upon allegations that the plaintiff improperly deducted late fees from its monthly mortgage payments in a manner not authorized by the mortgage agreements"]; Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc., 837 F Supp 2d 162, 204 [SD NY 2011], reconsideration denied 2012 WL 13065889 [2012] [applying New York law and dismissing a conversion claim predicated on REMIC (real estate mortgage investment conduit) servicers' self-dealing in recouping advances, at the expense of the securitizations, and in violation of duties and obligations specifically enumerated in the governing contract]; see also Sebastian Holdings, Inc. v Deutsche Bank, AG, 108 AD3d 433, 433-434 [1st Dept 2013] [dismissing conversion claim as duplicative of breach of contract claim]; Richbell Info. Servs. v Jupiter Partners, L.P., 309 AD2d 288, 306 [1st Dept 2003] [same].)

In holding that CIT's conversion claim is premised on a breach of the Subordination Agreement, and not on the breach of any distinct fiduciary obligation or special relationship arising from that contract, the court rejects CIT's argument that a fiduciary obligation arose from section 3 of the Subordination Agreement, which requires AHR to hold funds wrongfully received from SMR "in trust" for CIT. (See CIT Reply Memo., at 2-4.) CIT cites no authority that a contractual provision requiring money to be held in trust upon the occurrence of certain conditions establishes an independent relationship of trust and confidence between the parties,

like that, for example, between an agent and a principal. Here, notwithstanding the language of section 3 of the Subordination Agreement, the parties indisputably have potentially adverse interests in the funds transferred by SMR to AHR. Moreover, the duty to hold and ultimately pay funds to CIT is the very essence of section 3. This duty is simply not capable of conception as independent of, or distinct from, an obligation created by the contract.

The court also rejects CIT's contention that "once the Debtor Defendants defaulted under the Credit & Guaranty Agreement, the possessory right to Defendant AHR's management fees and other payments from Defendant SMR vested exclusively in CIT." (CIT Memo. In Supp., at 14-15.) CIT cites no authority in support of its contention that it became the legal owner of the funds transferred from SMR to AHR immediately upon SMR's default. Nor does the language of any of the parties' contracts support that contention. It is also undisputed that CIT has never possessed any of the funds it now seeks to recover from AHR and others. Absent a showing of legal ownership or possession, as opposed to a mere contractual expectancy interest, CIT's conversion claim is not viable. (See M.D. Carlisle Realty Corp., 47 AD3d at 409 ["Dismissal of the conversion claim was also warranted for lack of showing that plaintiff had ever exercised rights of ownership, possession or control over the collected funds"]; Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883, 883-884 [1st Dept 1982] [holding that "[c]onversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights," and dismissing the conversion claim upon the finding, among others, that "[t]he plaintiff has never had ownership, possession or control" of the commissions allegedly wrongfully transferred between the defendants].)

Finally, the court rejects CIT's argument that an independent conversion claim is maintainable because AHR allegedly "willfully and intentionally" refused CIT's demand to turn

over the funds and "achieved a substantial benefit from the breach." (CIT Reply Memo., at 2-3 [internal quotation marks and emphasis omitted].) If this were the standard for asserting a conversion claim independent of a contract claim, a conversion claim could be based upon virtually any failure to pay or turn over money owed under a contract. Moreover, CIT's attempt to analogize the facts of this case to the wrongful conduct in Albemarle Theatre, Inc. v Bayberry Realty Corp. (27 AD2d 172, supra) is unpersuasive.[6]

As the conversion claim is not maintainable, the aiding and abetting conversion claim against Colbert and Soni is also not maintainable. The branch of CIT's motion for summary judgment on its conversion cause of action against AHR and its aiding and abetting conversion cause of action against Soni and Colbert will accordingly be denied.[7] As defendant Colbert, pro se, submitted an affidavit in opposition to CIT's motion, the court will search the record and grant summary judgment to Colbert dismissing the conversion aiding and abetting cause of action against him. The branch of Soni's motion for summary judgment dismissing the conversion aiding and abetting causes of action against him will be granted.

[6] In Albemarle Theatre, the plaintiff, the owner of a movie theatre, alleged that the defendant theatre lessees had conspired against the plaintiff by leasing the theatre and then operating it irresponsibly in an effort to benefit other theatres owned by defendants. The defendants argued that the claim was merely one for breach of the lease. The Court disagreed, holding that the defendants had a duty independent of their contract to manage the plaintiff's property responsibly, and that they had breached such duty by acting "in a manner calculated drastically to decrease [the theatre's] competitive position and value, to their own substantial benefit. This constituted not only a breach of their contract with the plaintiff, but a violation of their legal common-law duty extraneous to the contract not to act willfully to destroy the property of another, including the plaintiff." (27 AD2d at 177.)

[7] Although CIT's notice of motion includes a request for summary judgment against Sonix, Inc. (Sonix) on the fourth cause of action for conversion, CIT does not address Sonix's alleged liability at all in the sections of its memoranda addressed to that cause of action. (See CIT Memo. In Supp., at 13-15; CIT Reply Memo., at 2-4.) Moreover, the fourth cause of action arguably is not pleaded against Sonix. (See Compl., ¶¶ 52-58.) Accordingly, to the extent that CIT does in fact seek summary judgment against Sonix on the fourth cause of action, that relief will be denied on this ground in addition to the grounds set forth above.

Aiding and Abetting Fraud

Soni argues that the third cause of action fails to state a claim because the fraud alleged in that cause of action—similar to the conversion alleged in the fourth and fifth causes of action—is merely a reformulated breach of contract claim. (Soni's Memo. In Supp., at 6-9.) More particularly, Soni claims that the alleged fraud is based on breaches of representations and warranties in the Credit Agreement concerning SMR's payment of payroll taxes.[8] (Id.) Soni further argues that CIT fails either to plead that, or to raise a triable issue of fact as to whether, Soni substantially assisted or had actual knowledge of the alleged fraud. (Id., at 9, 12-13.)

CIT argues in opposition that its aiding and abetting fraud claim is separate and distinct from its contract claim because it is based, among other things, on "pre-contractual misrepresentations or concealment" about payroll taxes, which were intended by the debtor defendants to induce CIT to grant the loans. (CIT Memo. In Opp., at 32.) CIT further argues that a question of fact exists as to whether Soni substantially assisted the fraud. According to CIT, the record shows that Soni controlled the debtor defendants and had a motive to ensure that CIT's loans were made, as the loans enabled him to discharge an earlier debt to Merrill Lynch, on which he had provided a limited personal guarantee. (See id., at 29-31, 35-38.)

[8] Section 5.11 of the Credit Agreement provides, in full:

> "The Loan Parties [SMR and the guarantor defendants] have filed all federal, state and other material tax returns and reports required to be filed, and have paid all federal, state and other material taxes, assessments, fees and other governmental charges levied or imposed upon them or their properties, income or assets otherwise due and payable, except those which are being contested in good faith by appropriate proceedings diligently conducted and for which adequate reserves have been provided in accordance with GAAP. There is no proposed tax assessment against any Loan Party that could, if made, have a Material Adverse Effect."

As pleaded in CIT's complaint, the fraud claim is expressly based on breaches of Article 5. (Compl., ¶ 41-A.)

The general standards for maintaining a tort claim independent of a contract claim are discussed above in the section of this decision on CIT's conversion claim. As to fraud claims in particular, courts have repeatedly held that "[a] cause of action for fraud does not arise where the only fraud charged relates to a breach of contract." (See Krantz v Chateau Stores of Canada, Ltd., 256 AD2d 186, 187 [1st Dept 1998] [internal quotation marks and citation omitted]; see also Vue Mgt., Inc. v Photo Assocs., 81 AD3d 569, 569 [1st Dept 2011]; Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114, 115 [1st Dept 1998] ["A fraud claim that only restates a breach of contract claim may not be maintained"].) As with any tort, the critical issue is whether the defendant "has breached a duty of reasonable care distinct from its contractual obligations, or . . . has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations." (New York Univ., 87 NY2d at 316; see Wyle Inc. v ITT Corp., 130 AD3d 438, 439 [1st Dept 2015]; Shugrue v Stahl, 117 AD3d 527, 528 [1st Dept 2014].) Thus, "[w]here a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort, or where a party engages in conduct outside the contract but intended to defeat the contract, its extraneous conduct may support an independent tort claim." (New York Univ., 87 NY2d at 316 [internal citations omitted].)

There is substantial authority that a fraud claim is maintainable based on misrepresentations about present facts made to induce a party to enter into a contract, even where the misrepresentations are incorporated into the contract as representations and warranties. (Wyle Inc., 130 AD3d at 440-441; MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 293-294 [1st Dept 2011]; First Bank of Ams. v Motor Car Funding, Inc. (257 AD2d 287, 291-292 [1st Dept 1999]; Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2016 WL

7475831, * 4 [Sup Ct, NY County, Dec. 29, 2016, No. 651359/2013] [this court's decision discussing authorities].) As the First Department has explained:

> "'[I]f a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim . . . Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty. . . .
>
> 'Nor is the fraud claim rendered redundant by the fact that these alleged misrepresentations breached the warranties made by [defendant] in the Agreement . . . The core of plaintiff's claim is that defendants intentionally misrepresented material facts about various individual loans so that they would appear to satisfy those warranties . . . This is fraud, not breach of contract. A warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim.'"

(Wyle Inc., 130 AD3d at 440-441, quoting First Bank of Ams., 257 AD2d at 291-292 [internal citations omitted, brackets supplied, ellipses and emphases in Wyle Inc.].)

Based on this authority, the court rejects CIT's contention that the fraud alleged in the third cause of action is merely a reformulated breach of contract claim. The complaint expressly pleads that, "[i]n order to induce [p]laintiff into granting the loans," SMR and the guarantor defendants "willfully and intentionally represented that there were no outstanding taxes when, in fact, there were outstanding Federal 941 payroll taxes for all four (4) quarters of 2007 for Sonix Management Resources, Inc. in the approximate amount of $5,302,813.50 . . . contrary to Article 5 Representations and Warranties of the Credit and Guaranty Agreement dated December 26, 2007." (Compl., ¶ 41 [A].) It is of "no consequence" that this representation ultimately was incorporated into the Credit Agreement, as it "simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by

incorporating it verbatim into the language of a contract." (MBIA Ins. Corp., 87 AD3d at 294 [internal quotation marks and citation omitted].)

In addition, CIT claims, with supporting evidence, that it was provided financial documents while conducting due diligence on SMR which disguised or omitted the fact that SMR's payroll taxes had not been paid. (See CIT Memo. In Opp., at 10-11.) The provision of allegedly misleading financial statements is conduct collateral to the contractual representation and warranty in the Credit Agreement that no payroll taxes were outstanding.

The court accordingly holds that the alleged fraud underlying the fifth cause of action is not duplicative of CIT's breach of contract claim. The court turns to the remaining issues as to whether the complaint adequately pleads that Soni had actual knowledge of, and substantially assisted other defendants in perpetrating, the alleged fraud, and whether Soni demonstrates as a matter of law that the cause of action is without merit.

"To state a claim for aiding and abetting fraud, a plaintiff must allege 'the existence of the underlying fraud, actual knowledge, and substantial assistance.'" (Chambers v Weinstein, 135 AD3d 450, 450 [1st Dept 2016], quoting Oster v Kirschner, 77 AD3d 51, 55 [1st Dept 2010].) "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." (Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co., 64 AD3d 472, 476 [1st Dept 2009], lv denied 13 NY3d 709 [Stanfield] [internal quotation marks and citations omitted].) "'Absent a fiduciary duty or some other independent duty owed by defendant alleged aider and abettor to the plaintiff,' there is no duty to disclose, and, thus, defendant's silence does not constitute the requisite 'substantial assistance' to sustain a claim for

aiding and abetting fraud." (Churchill Fin. Cayman, Ltd. v BNP Paribas, 95 AD3d 614, 614 [1st Dept 2012] [brackets omitted], quoting Stanfield, 64 AD3d at 476; accord Pomerance v McGrath, 124 AD3d 481, 485 [1st Dept 2015], lv dismissed 25 NY3d 1038.) Accordingly, an aiding and abetting claim is not properly stated by the allegation "that defendant remained silent regarding a purported misrepresentation in a loan agreement between plaintiffs and defendant's borrower . . . unless the defendant owes an independent duty to the plaintiff." (See Jebran v LaSalle Bus. Credit, LLC, 33 AD3d 424, 424-425 [1st Dept 2006].)

An aiding and abetting fraud claim must be pleaded with particularity. (See CPLR 3016 [b]; Weinstein v CohnReznick, LLP, 144 AD3d 1140, 1141 [2d Dept 2016].) However, the purpose of the CPLR 3016 (b) pleading requirement "is to inform a defendant with respect to the incidents complained of." (Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491 [2008].) The Court of Appeals has "cautioned" that the pleading requirement "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud," as "where concrete facts are peculiarly within the knowledge of the party charged with the fraud." (Id., at 491-492 [internal quotation marks and citations omitted].)

In the context of aiding and abetting claims, the Appellate Division has held that "actual knowledge of the fraud may be averred generally." (Stanfield, 64 AD3d at 476; Oster, 77 AD3d at 55-56.) The Court has reasoned that "particularly at the pre-discovery stage, [] a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind. As the Appellate Division has noted, "[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud." (Oster, 77AD3d at 55-56.) The

details of a defendant's assistance of a fraud may, for similar reasons, also be difficult for a plaintiff to allege at the pleading stage. (See Pludeman, 10 NY3d at 491.)

Here, although the complaint is undoubtedly summary, it pleads, among other things, that Soni was an officer and director of the defendant entities (Compl., ¶¶ 47-48); controlled, managed and directed the daily affairs and business operations of those entities (id., ¶ 49); and "direct[ed] and/or permitt[ed]" the fraudulent conduct alleged in the complaint. (Id., ¶ 50.) The allegations as to Soni's corporate position and his control of and involvement in the day-to-day operations of SMR and the guarantor defendants give rise to a plausible inference in support of the further allegation that he directed the fraudulent conduct to occur.

Given that critical facts regarding Soni's knowledge of and involvement in the loan transaction with CIT are peculiarly within Soni's knowledge, the court holds that the aiding and abetting cause of action is adequately pleaded. (Cf. Pludeman, 10 NY3d at 491-492.) In so holding, the court notes that the complaint is dated June 3, 2009 and was pleaded prior to discovery. Soni has since had extensive discovery and does not argue that he does not have notice of the incidents complained of. On the contrary, he has addressed the merits of the claims on a developed evidentiary record. The court will therefore deny the branch of Soni's motion to dismiss the third cause of action, and address the branch of his motion for summary judgment on this cause of action.

In claiming that he did not affirmatively assist SMR and the guarantor defendants in misrepresenting or concealing SMR's outstanding payroll tax liabilities, Soni submits an affidavit in which he states: "I unequivocally and categorically deny that I had any actual knowledge of the fraud and/or conversion as alleged in the Verified Complaint. Nor did I ever assist, substantially or otherwise, in any manner, in achieving the alleged fraud and/or

conversion." (Soni Aff. In Supp., ¶10.) He further attests: "I also state, unequivocally and categorically, that I never helped, concealed or failed to act when required to do so, in order to enable the fraud and/or conversion to proceed. To the contrary, I did not participate in the negotiation and execution of the credit and Guaranty Agreement . . . nor the Subordination Agreement. . . . Nor during the relevant time period, did I have any personal knowledge as to the terms, provisions, representations and/or covenants contained in those documents." (Id., ¶ 11.)

The court holds that these wholly conclusory assertions are insufficient to shift the burden to plaintiff to raise a triable issue of fact on the aiding and abetting cause of action. Moreover, they involve issues of credibility, which are not properly resolved on a motion for summary judgment. (See S.J. Capelin Assoc., Inc., 34 NY2d at 341.)

Even if Soni's showing in the moving papers were sufficient to shift the burden, Soni continues on the reply to rely largely on conclusory evidence which involves issues of credibility. For example, he cites his deposition testimony that he "did not see the credit and guarantee agreement when it was assumed in 2008" (Soni Dep., at 438 [Rogove Aff. In Opp., Exh. I]); and that he "had no interaction with the lenders in terms of due diligence." (Id., at 436.) He also submits an affidavit in which he states that he "did not get involved in the day-to-day operations or minute details of Sonix nor any of its numerous subsidiaries, including the payment of management fees." (Soni Reply Aff., ¶ 17.) Rather, he asserts that James Frazzetta, as Controller of Sonix, was "primarily responsible for monitoring the daily operations of the Accounting Department," and that his duties included the payment of management fees." (Id., ¶ 18.) He further asserts that Mr. Colbert, as Chief Financial Officer of Sonix and its subsidiaries, was "involved with decisions concerning payment of management fees." (Id., ¶ 19.) According to Soni, Frazetta and Colbert "had full authority to ratify transactions as part of their functional

roles and did so without [his] apprisal or approval, including the payment of management fees." (Id., ¶ 20.)

Soni also claims that the evidence in the record confirms that he had no direct involvement in negotiating the Credit and Guaranty Agreement or discussing management fees with CIT. (Soni Reply Aff., ¶¶ 25-26, citing Dep. of Leland Richards, CIT's underwriter, that he received financial compliance information from Colbert and had periodic conversations with Colbert about the performance of the company. [Rogove Aff. In Opp., Exh. E, at 127.) He also claims that there was testimony from Colbert that Colbert did not know if Soni knew there were outstanding payroll taxes. (Soni Reply Aff., ¶¶ 33-34, citing July 25, 2011 Colbert Dep., at 208-209 [Rogove Aff. In Opp., Exh. J].) In fact, this deposition testimony was vague and equivocal.[9]

Significantly, additional testimony by Colbert raises questions of fact as to whether Soni was aware of SMR's outstanding payroll tax liabilities, had actual knowledge of the misrepresentations in the Credit Agreement and in the financial documents provided to CIT, and directed the fraudulent conduct. For example, Colbert testified at his deposition that he reported to Soni, and that he and Soni had monthly meetings to discuss the business operations and financial condition of the defendant entities. (July 29, 2014 Colbert Dep., at 20-23 [Rogove Aff. In Opp., Exh. K].) He answered in the affirmative and without qualification to a question as to whether Soni "had full knowledge of the financial and operational aspects of each of the[] businesses." (Id., at 23.) Thus, although it is undisputed that Colbert, not Soni, was a signatory to the Credit Agreement, and although it appears to be undisputed that Soni was not directly

[9] For example, Soni cites snippets from the Colbert testimony which do not specify the date as of which Colbert testified that he did not know whether Soni knew of the outstanding payroll taxes. Soni also omits to inform the court that in the same testimony, Colbert was asked the following question and gave the following answer: Q: "Had you ever discussed with him [Soni], as of the [unspecified] date of that meeting with Merrill Lynch, that there were outstanding payroll taxes that had not been paid?" A: "I believe we did discuss it." (Rogove Aff. In Opp., Ex. J, at 208.)

involved in negotiations with CIT, or actual provision to CIT of the financial documents containing the misrepresentations, it cannot be conclusively determined on this record that Soni did not know about and direct, or substantially assist, the fraudulent conduct. The branch of Soni's motion for summary judgment will accordingly be denied.[10]

Sanctions (CPLR 3126)

CIT's motion also seeks monetary sanctions against the remaining defendants for the amount of certain fees incurred by CIT in connection with its acquisition of records from the bankruptcy Chief Restructuring Officer (CRO) for the debtor defendants. CIT contends that, because the remaining defendants "never requested permission from the CRO to retrieve documents responsive to CIT's discovery requests," CIT was "forced to obtain records from the Bankruptcy CRO" by subpoena and to file a Limited Objection to a motion by the Plan Administrator for leave to abandon or destroy the records. (CIT Memo. In Supp., at 20.) CIT claims that "[a] resolution of the Limited Objection was reached whereby CIT agreed to pay any storage fees incurred as a result of any delay in obtaining the records from the Plan Administrator, as well as copy charges and other attendant fees." (Id.) Those fees and other charges total $17,749.95. (Id., at 21, 22.) CIT contends that, "[b]ut for the Remaining Defendants' failure to produce the records in its [sic] possession or to which they had access, CIT would not have had to incur costs to obtain the records from the Plan Administrator." (Id.)

Defendant Soni denies that he ever "willfully failed to produce responsive documents to CIT's discovery demands." (Soni Aff. In Opp., ¶ 66.) According to Soni, "following the bankruptcy filing, the CRO Rizack entered upon the premises in which SMR and other Sonix

[10] CIT does not move for summary judgment in its favor on the fraud abetting and abetting cause of action and claims at most that a triable issue of fact exists as to whether Soni substantially assisted the other defendants' alleged fraud. (Pl.'s Memo. In Opp., at 35-38.)

related entities maintained their offices and immediately assumed custody, possession and control of all relevant servers, as well as numerous boxes of hard copies of unknown documentation and records." (Id., ¶ 69.) Soni further states that "numerous, unsuccessful attempts were made on the behalf of the defendants herein to secure access to the servers," but that "[f]or several years, we were unable to retrieve [] documents despite good faith efforts." (Id., ¶¶ 70-71.)

Defendant Colbert also submits an affidavit in opposition, in which he claims, among other things, that "I had no involvement in the storage of records or the lack thereof, either during my employment or after I left the Company [SMR]" (Colbert Aff. In Opp., ¶ 26), and that "[a]ll Debtor assets and documents were turned over to the CRO who had sole custody, control and possession of same throughout this action." (Id., ¶ 29.)

On this record, the court is unable to determine whether the remaining defendants should be held responsible for the storage and other fees incurred by CIT in retrieving relevant documents from the bankruptcy CRO. This branch of CIT's motion will be denied without prejudice to a new application for sanctions at trial or upon the ultimate resolution of this action.

ORDER

It is accordingly hereby ORDERED that the motion (Mot. Seq. No. 12) of plaintiff CIT Healthcare LLC for summary judgment against defendant Advanced Healthcare Resources, Inc. (AHR) and Sonix, Inc. on the fourth cause of action for conversion, and against defendants Om P. Soni (Soni) and John Colbert (Colbert) on the fifth cause of action for aiding and abetting conversion, and for sanctions, is denied in its entirety; and it is further

ORDERED that the motion (Mot. Seq. No. 13) of defendant Om P. Soni to dismiss the third (aiding and abetting fraud) and fifth (aiding and abetting conversion) causes of action

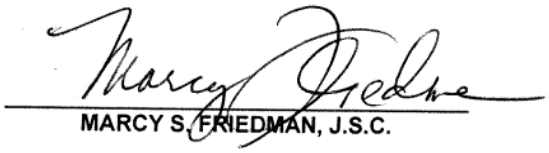
against him or, alternatively, for summary judgment dismissing said causes of action, is granted to the following extent: Defendant Soni is awarded summary judgment dismissing the fifth cause of action against him, and the motion is otherwise denied; and it is further

ORDERED that, upon searching the record, the court awards summary judgment to defendant Colbert dismissing the fifth cause of action for aiding and abetting conversion against him; and it is further

ORDERED that the motion (Mot. Seq. No. 14) of plaintiff CIT Healthcare LLC to amend the caption to change plaintiff's name to CIT Healthcare LLC n/k/a The CIT Group/Equipment Financing Inc. is granted, provided that: Plaintiff shall promptly comply with all requirements of the Clerk of the Court to effectuate the change; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.



12/28/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE