SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

MICHAEL APPELL, individually and derivatively on behalf of LAG ASSOCIATES, LP,

Plaintiff,

-against-

LAG CORP., ALAN KAHN, SIDNEY YOSKOWITZ, ROBERT TANNENHAUSER, DAVID TANNENHAUSER, EMILY TANNENHAUSER, ERIC ROSENFELD, and ROBERT BERNSTEIN and L.A.G. ASSOCIATES, L.P.,

Defendants.

INDEX NO. 602846/2005

MOTION DATE 003

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: December 10, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 03

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MICHAEL APPELL, individually and derivatively on behalf of LAG ASSOCIATES, LP,

Index No. 602846/2005

Plaintiff,

-against-

LAG CORP., ALAN KAHN, SIDNEY YOSKOWITZ, ROBERT TANNENHAUSER, DAVID TANNENHAUSER, EMILY TANNENHAUSER, ERIC ROSENFELD, and ROBERT BERNSTEIN and L.A.G. ASSOCIATES, L.P.,

DECISION and ORDER

Defendants.

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Moskowitz, J.:

Plaintiff Michael Appell ("Appell") brought this action, individually, and derivatively on behalf of L.A.G. Associates, L.P. ("LAG Assoc"), claiming that defendant LAG Corp. and the seven individual defendants engaged in self-dealing and breached fiduciary duties in connection with the sale of partnership interests in non-party Nassau Bay Associates, LP ("Nassau Bay"). The original complaint asserted causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive trust and unjust enrichment.

Appell bases his claims upon Nassau Bay's ownership of an office building located in Manhattan. Appell claims that, in May 2004, LAG Assoc's limited partners (other than Appell) purchased limited partnership interests in Nassau Bay. Appell alleges that LAG Assoc excluded only him, and not other limited partners, from the purchase opportunity. The other limited partners purportedly used their control over LAG Corp., the general partner of LAG Assoc, to exclude Appell by causing LAG Assoc to consent to the purchase and sale.

Defendants moved (in motion sequence number 001) to dismiss the complaint. In a

footnote of his opposition brief, Appell requested leave to replead his causes of action, pursuant to CPLR 3211(e). By decision and order dated April 27, 2006, this court granted defendants' motion ("Decision"). The Decision recognized that CPLR 3211(e) permitted Appell to ask in his opposition papers for leave to replead. The court cited the Practice Commentary to CPLR 3211(e), that states, "the court [should] not grant leave to replead unless it is convinced that the opposing party can support the claim or defense." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:64). Finding that Appell offered no indication of how he would amend the complaint to state sustainable causes of action, the court denied Appell's request for leave to replead.

Appell served an amended complaint dated April 25, 2006 (two days before the court issued its Decision), while defendants' motion to dismiss was pending. The amended complaint repeats the four causes of action of the original complaint that were the subject of the motion to dismiss and adds four new causes of action for breach of a partnership agreement, tortious interference with contract, breach of fiduciary duty, and dissolution of LAG Assoc and appointment of a liquidating trustee. Appell claims that he served the amended complaint "as of right," pursuant to CPLR 3025 (a).

Appell now seeks (in motion sequence number 003) to renew, reargue and/or resettle the Decision. Alternatively, Appell seeks an order clarifying and confirming that the Decision does not dismiss the four new causes of action of his amended complaint. Appell also seeks leave to serve a proposed second amended complaint.

I stated the facts of this case in detail in the Decision and presume familiarity with them except for additional, necessary facts in the Discussion. Further, unless otherwise stated, terms

in this decision have the same meaning as in the Decision.

Discussion

Reargument & Renewal

Appell argues that he served the amended complaint as of right, because defendants' then pending motion to dismiss tolled the time to respond to the pleading and defendants had not answered the complaint. Appell bases his motion to reargue and renew on his argument that the court overlooked facts contained in the amended complaint.

CPLR 3025(a) provides that "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it."

Appell's amended complaint is dated April 25, 2006. He amended the pleading as of right within the time constraints of CPLR 3025(a). Therefore, the amended complaint superseded the original complaint and became the operative pleading. (*Titus v Titus*, 275 AD2d 409 [2d Dept 2000]). Defendants directed their motion to dismiss at the original complaint, and the Decision examined and dismissed the claims in that pleading. Defendants have not moved to dismiss the amended complaint, and, as a result, they have not challenged those claims that were not in the original complaint and the Decision did not dispose of those new claims.

Appell contends that he notified the court of the amended complaint in the papers he submitted in connection with motion sequence number 002, when he moved for appointment of an interim receiver pending the dissolution of LAG Assoc. In his affidavit in support of motion sequence number 002, Appell refers to defendants' motion to dismiss, that at the time was sub judice. He states that motion sequence number 002 is based primarily upon facts contained in his

amended complaint. However, while he filed motion sequence number 002 on April 26, 2006, its return date was not until May 11, 2006, two weeks *after* the court filed the Decision. Appell never notified the court, while the motion to dismiss was pending, that he submitted the amended complaint as of right, pursuant to CPLR 3025(a). Nor did Appell request an adjournment, attempt to ask defendants to withdraw the motion as moot, or take any other action to prevent disposition of defendants' motion to dismiss.

The first four causes of action of the amended complaint are identical to the first four causes of action in the original complaint. I dismissed those claims in the Decision and the dismissal of those claims is now the law of the case. (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975] ["when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"]). Having chartered his own procedural course, Appell is "bound by the consequences attendant upon the exercise of that prerogative." (*Sean M. v City of New York*, 20 AD3d 146, 150 [1st Dept 2005]). For the foregoing reasons, I deny Appell's motion to reargue and/or renew his opposition to defendants' motion to dismiss the original complaint, because the original complaint no longer exists and the operative pleading is the amended complaint.

Leave to Replead

Only the fifth through eighth causes of action of the proposed second amended complaint are at issue with respect to Appell's request for leave to replead. In opposition to Appell's request for leave to replead, defendants argue that none of the new claims in the proposed second amended complaint is sufficient as a matter of law.

Under CPLR 3025(b), a court freely grants leave to amend. As stated in Practice

Commentary C3025:4, "[t]he policy is to permit amendment, for almost any purpose, as long as the adverse party cannot claim prejudice." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:4). However, the court should not grant leave where "the proposed amendment is obviously without merit." (*Mobil Oil Corp. v Joshi*, 202 AD2d 318, 319 [1st Dept 1994]).

Breach of Contract

The fifth cause of action for breach of contract alleges that LAG Assoc breached paragraph 5(b) of its limited partnership agreement ("LP Agreement") by failing to distribute Appell's capital account. Defendants argue that, under the LP Agreement, LAG Assoc may set aside funds to deal with known obligations and that paragraph 7 provides that "[t]he General Partner shall manage the partnership business."

To state a cause of action for breach of contract, Appell must establish the existence of a contract, plaintiff's performance, defendants' breach and plaintiff's damages sustained as a result of the breach. (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

Appell's proposed amended complaint attaches the LP Agreement in Exhibit A. Paragraph 5(b) states that "[a]vailable funds of the partnership shall be distributed to the partners quarterly. Funds shall be deemed available for distribution only after amounts sufficient to satisfy known obligations have been set aside ... ." The proposed second amended complaint alleges that, according to Appell's Schedule K-1 for the tax year 2005, Appell's capital account with LAG Assoc contained $1,166,323. The K-1 also showed income allocated to Appell in the amount of $1,348,484. Appell alleges that he received no distribution from LAG Assoc and that there are no "known obligations" of LAG Assoc that would justify LAG Assoc withholding his

entire distribution. These allegations, together with the LP Agreement, state a cause of action for breach of contract. For the foregoing reasons, the court grants Appell's request for leave to add the proposed fifth cause of action.

The court notes that defendants do not deny that they have withheld Appell's distribution. Moreover, while the purpose of paragraph 5 is clearly to ensure that LAG Assoc pays creditors before the distribution of partner profits, defendants fail to explain how or why they used Appell's entire capital account to satisfy his proportionate share of known obligations. Nor do defendants make any showing as to how they will suffer prejudice as a result of permitting the amendment or that the claim is obviously without merit.

Tortious Interference with Contract

The sixth cause of action alleges that LAG Corp. and the LP Defendants knew of the LP Agreement and the distribution requirements contained in paragraph 5(b) but, through their control of LAG Assoc, caused LAG Assoc to breach paragraph 5(b) of the LP Agreement, thereby damaging Appell.

"The elements of a tortious interference with contract claim are well established - the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages." (*Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]). However, "[t]here is no valid cause of action for tortious interference" with contract where "one of the alleged tortfeasors[] is not a stranger to the contract, and the other alleged tortfeasors, the individual defendants, acted in their official capacity as principals[.] Further, economic self-interest is a defense to plaintiff's tortious interference claim[.]" (*Waterfront NY Realty Corp. v Weber*, 281 AD2d 180 [1st Dept 2001]

[internal citations omitted]).

Here, LAG Corp. and the LP Defendants were acting on behalf of LAG Assoc as its general partner and the officers of its general partner, respectively. These defendants all have an economic interest in LAG Assoc's actions, and, as officers of LAG Corp. and limited partners of LAG Assoc, the LP Defendants are not strangers to the LP Agreement. Moreover, Appell's allegation that he received a Schedule K-1 showing the amount held in his capital account indicates that LAG Corp. and the LP Defendants have not taken Appell's money for their own personal profit.

Therefore, the proposed sixth cause of action is obviously without merit and the court denies leave to amend this claim. (*See Zapin, Endlich & Lombardo, Inc. v CBS Coverage Group, Inc.*, 26 AD3d 231, 232 [1st Dept 2006] [tortious interference claim properly dismissed for lack of allegations that defendant "acted outside her corporate capacity, maliciously and for personal profit at plaintiff's expense"]; *MTI/The Image Group, Inc. v Fox Studios East, Inc.*, 262 AD2d 20, 23-24 [1st Dept 1999] [dismissal of tortious interference claim appropriate where all the named companies are affiliates, either as parent or sister companies]; *Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990] ["corporate parent[] had a right to interfere with the contract of its subsidiary in order to protect its economic interests"]).

Breach of Fiduciary Duty

The seventh cause of action alleges that the LP Defendants distributed $3 to $5 million to themselves, as limited partners of LAG Assoc, but withheld distributions to Appell. Appell alleges that the LP Defendants were allocated distributions, whereas Appell never received a distribution but nevertheless incurred tax liability. In other words, the seventh cause of action

alleges that LAG Corp. and the LP Defendants breached their fiduciary duties by causing the allocation of taxable income only to Appell, without a corresponding distribution, thereby treating Appell differently from the other limited partners of LAG Assoc.

Defendants counter that, of the $2.7 million withheld from all partners, they withheld approximately $1 million from Appell and the rest from the other 5 partners. Defendants claim that they deposited the withheld funds into a segregated reserve fund created for LAG Assoc to pay obligations arising out of litigation that Appell prosecuted. Defendants also argue that the business judgment rule protects them because it creates a presumption in favor of a fiduciary's business decisions.

However, defendants' arguments implicitly concede impermissible disparate treatment among LAG Assoc's limited partners. (*See Alpert v 28 Williams Street Corp.*, 63 NY2d 557, 572 [1984] ["there exists a fiduciary duty to treat all shareholders equally"]; *Drucker v Mige Associates II*, 225 AD2d 427, 428 [1st Dept 1996] [breach of fiduciary duty found where defendant's conduct "would have resulted in him receiving an amount of money in excess of what the other general partners were going to obtain and would have reduced the amount that was left over for the limited partners"]; *RJ Associates, Inc. v Health Payors' Org. Ltd. Partnership, HPA, Inc.*, 1999 WL 550350, *10 [Del Ch 1999] [diversion from partnership of revenue, a portion of which rightfully belonged to plaintiff, constitutes breach of fiduciary duty]). None of defendants' arguments demonstrates prejudice or establishes that Appell's claim obviously lacks merit. For the foregoing reasons the court grants Appell's request for leave to add the proposed seventh cause of action.

Dissolution of LAG Assoc and Appointment of Liquidating Trustee

The eighth cause of action alleges that the parties formed Nassau Bay for the purpose of owning and operating real estate located at 240 West 35th Street, New York, New York. LAG Assoc's purpose was allegedly to act as the general partner of Nassau Bay. Nassau Bay allegedly sold the property for $32 million in October 2005. Appell claims that Nassau Bay has no other business purpose now that it has sold the property. The proposed eighth cause of action alleges that LAG Assoc has concluded its sole business and that, therefore, the court should dissolve it and a liquidating trustee should wind up its affairs.

Although defendants do not raise the issue of subject matter jurisdiction, LAG Assoc, as a Delaware limited partnership, is a creature of statute. Under Delaware law, "[o]n application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement." (6 Del C § 17-802). Thus, only the Court of Chancery may decree the dissolution of LAG Assoc. This court lacks subject matter jurisdiction over Appell's proposed eighth cause of action. Therefore, the court denies leave to amend to add this claim as futile, without prejudice to Appell bringing this claim in the proper jurisdiction.

Accordingly, it is hereby

ORDERED that the trial support office is directed to change the designation of this case from disposed to actively pending; and it is further

ORDERED that plaintiff's motion is granted to the extent that leave to amend is granted and the second amended complaint is deemed served with respect to the fifth and seventh causes of action, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the second amended

complaint within 10 days after service of a copy of this order with notice of entry.

Dated: December 28, 2006

ENTER:

J.S.C.