Kaufman v Cohen
2007 NY Slip Op 31136(U)
January 24, 2007
Supreme Court, New York County
Docket Number:
Judge: Judith J. Gische
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SCANNED ON 1/30/2007

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

PRESENT: HON. JUDITH J. GISCHE PART _____

Index Number : 601320/2001

KAUFMAN, GERALD S.

vs

COHEN, IRWIN B.

Sequence Number : 010

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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

FILED
JAN 30 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/24/07

HON. JUDITH J. GISCHE 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: PART 10

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GERALD S. KAUFMAN and STUART E. SEIGEL, Suing Individually and as Partners in, and/or Beneficial Owners of, and on behalf of, SIG PARTNERS, a Domestic General Partnership, SIG-L.I. CITY, INC., a Foreign Corporation, and 31-02 47th AVENUE ASSOCIATES, L.P., a Foreign Limited Partnership,

Plaintiffs,

-against-

IRWIN B. COHEN,

Defendant.

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Decision/Order
Index No.: 601320/01
Seq. No. : 010

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Deft Notice of Motion	1
Affid. KB	2
Affid CCE	3
MF affirmation with exhibits	4
Pl's Notice of Cross-Motion	5
PAM affirmation.	6
Exhibit volumes	6b-l
Affid SES with exhibits	7
Affid GEK with exhibits	8
ASB affirm with exhbits	9
Stipulated Confidentiality Order	10

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant ("Cohen") moves for summary judgment in his favor on all outstanding causes of action in the amended complaint. Plaintiffs have cross-moved for summary judgment on the issue of liability only on the First, Second and Fourth causes of action

asserted in the amended complaint. They also seek an inquest on damages, severance and trial on the Eleventh cause of action and dismissal of the First counterclaim and affirmative defenses.

In or about October 10, 2001 plaintiff served an amended verified complaint. Pursuant to a May 27, 2003 decision by the Appellate Division, First Department, only the First and Second causes of action for breach of fiduciary duty, the Fourth cause of action for an accounting and the Eleventh cause of action for fraud remain. On or about June 27, 2003, Cohen interposed an answer with affirmative defenses and a counterclaim for breach of contract. Plaintiffs, thereafter, interposed a reply. Issue has, therefore, been fully joined. CPLR §3212.

The Note of Issue was filed March 21, 2005. The motion in chief was served on April 26, 2005, within the 120 days permitted under CPLR § 3212(a). Although the cross-motion was not served until February 24, 2006, the prior Justice assigned to this case "So Ordered" stipulations extending the time for the filing of a cross-motion. In addition, no issue of untimeliness was raised by Cohen. The motion and cross-motion are, therefore, properly before the court for its consideration. Brill v. City of New York, 2 NY3d 648 (2004).

Facts of the Case

Certain facts are either undisputed by the parties or indisputable due to the existence of documentary evidence. Other facts are disputed. Since the essence of summary judgment is whether relief is available on facts that are not in dispute (see: Morejon v. Rais Const. Co., 7 NY3d 203 [2006]), the first task for the court on these motions is to parse out the two categories of information (ie. disputed and undisputed)

from the voluminous information that has been provided by the parties.[1]

It is undisputed that on or about September 19, 1985 the two individual plaintiffs, Gerald S. Kaufman and Stuart S. Seigel, formed a partnership with defendant Irwin B. Cohen. The partnership known as SIG Partners ("SIG Partners") , was formed pursuant to a written agreement. Although the stated purpose of the partnership included engaging in all forms of trade and business for profit, its primary objective was to own real estate. Paragraph 13 of the partnership agreement provides in part:

> "Each partner may engage in any other business activities, whether or not competitive with the business of the partnership, and neither the partnership nor any of the other partners shall have any rights with respect to any such activity."

The partnership agreement also expressly provides that it shall continue until the occurrence of certain terminating events. SIG Partners still exists and continues to hold certain investments made prior to 1990. The partners, however, stopped actively acquiring new investments in or about 1990.

This particular law suit concerns an interest held by SIG Partners in a commercial building located at 31-02 47th Avenue, Long Island City, New York, known as the "Falchi building" ("Falchi building"). 31-02 47th Avenue Associates LP, a Delaware Limited partnership ("31-02"), was formed to take legal title to the Falchi building, which it did on December 22, 1986.[2] Although the structure and identity of the

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[1]The parties collectively filed hundreds of exhibits consisting of thousands of pages.

[2]In 1990 the New York City Industrial Development Agency became the titled owner of the Falchi building, but 31-02 (and its partners) remained the beneficial owners.

general and limited partners of 31-02 changed over time, SIG Partners essentially held a 49% limited partner interest in 31-02 and, through various other entities, a 1% general partnership interest of. [3]

The original purchase by 31-02 was structured with a $1,000,000 capital contribution by SIG Partners and a $15,000,000 mortgage from its financing partner, East Bank Savings. East Bank Savings held a combined 50% interest in 31-02 through its related entities. Cohen originally identified the investment for SIG Partners. His partnership responsibilities, after acquisition of the Falchi building, were largely managerial. In 1990 the parties formed yet another co-owned SIG entity, SIG Management, that was responsible for the management of the Falchi building. In 1991 Kaufman and Seigel relinquished, for nominal consideration, their ownership interest in SIG Management to Cohen and his daughter Cheryl G. Cohen ("Cheryl") who then collectively had 100% ownership of the management company[4]. This was in recognition of the fact that Cohen performed essentially 100% of the management responsibilities for running the Falchi building.

Over the several years following acquisition of the Falchi building, the identity of the financing partner in 31-02 changed and the building was refinanced multiple times. By the early 1990s, however, the project was failing financially, which the parties all

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[3]Other "SIG" entities were formed that held interests in 31-02. SIG L.I. City, Inc. a Delaware Corp. was always a general partner with a 1% interest. In addition, SIG-Riverbridge Partners (a New York General partnership) and SIG 47th Avenue Partners (a New York General partnership) were also formed, in which SIG Partners had an interest and which, themselves, were at different times limited partners of 31-02.

[4]Cohen had 99% ownership and Cheryl had 1% ownership of SIG Management after the assignment.

largely attribute to a depressed real estate market. In 1992 Equitable Life Assurance Society ("Equitable") held a mortgage on the building in excess of $30,000,000. 31-02 did not have the financial wherewithal to make the mortgage payments and eventually, in May 1992, Equitable commenced foreclosure proceedings. 31-02 failed to answer the complaint or raise any objection to the foreclosure proceeding. Plaintiffs represent and Cohen does not deny that the decision to default in the foreclosure proceeding was made upon the advice and representations of Cohen to plaintiffs that the SIG Partners interest in the building could not be salvaged and that they should abandon their interest. A default judgment was entered against 31-02 on September 1, 1993.

While the foreclosure action was proceeding, and plaintiffs claim through the Fall of 1993, the parties discussed finding a new financial partner who might be able to help them salvage their collective interest in the building. According to plaintiffs, the conversations included the possibility of finding a third party who could purchase the mortgage from Equitable at a discount. Cohen does not dispute that these conversations took place; he claims, however, that by the time a default judgment was entered against 31-02 in the foreclosure action these conversations had ended without fruition.

Sometime in 1993 Cohen was introduced by his friend, Steve Mukamal ("Mukamal") to Michael Cherney who, on behalf of himself and others, was interested in investing in real estate in the United States. The parties factually dispute exactly when the introduction took place. Plaintiffs place the introduction in the summer of 1993, which predates the judgment of foreclosure. Cohen claims that the introduction did not take place until late September or early October 1993, which is after the court

entered a judgment of foreclosure.

Following the entry of a judgment of foreclosure but prior to the actual foreclosure sale, LIC Mortgage Corporation ("LIC"), an entity controlled by Cherney, entered into an agreement to purchase Equitable's mortgage for $14,500,000. Closing on that mortgage sale took place on April 28, 1994, with funds supplied by CMC Falchi Holding Co ("CMC"). In December 1994 LIC then purchased the Falchi building at public auction for the amount it paid for the mortgage. On March 10, 1995 LIC's fee interest in the Falchi building was transferred by referee's deed to an affiliated entity, Falchi Building Co., LP.

It is undisputed that Cohen made Cherney aware of the opportunity to purchase the Equitable mortgage at a favorable discount and to thereby acquire the Falchi building at the subsequent public auction. At or about the same time, Cohen also made Cherney aware of other, unrelated real estate investment opportunities.

Plaintiffs claim that Cohen had an ownership interest in the Falchi building since at or about the time LIC agreed to purchase the Equitable mortgage. While Cohen admits that he acquired an interest in the Falchi building in July 1996, he disputes that the interest existed before then. Cohen claims that the interest he acquired in 1996 was in consideration of his continuing management of the building and had nothing to do with SIG. He also claims it was part of a larger arrangement by which he managed three other buildings in which Cherney had invested. Cohen managed the Falchi building from the time Cherney acquired the interest until 2001, when it was sold to a third party.

Plaintiff's rely on certain "evidence" to prove that Cohen's interest predated the

1996 documentation. The evidence includes: Cohen's admission that when he met Cherney SIG still had an ownership interest; that in September 1993 Cohen provided Cherney with voluminous information about and a tour of the Falchi building without telling plaintiffs; Cherney's associate, Mr. Kislin's ("Kislin") testimony that Cohen and Cherney never talked about Cohen managing the building as part of the deal; the hiring of Cohen's son in law and his law firm to work on the Cherney transaction and the identification of plaintiffs as adverse parties to that transaction; that although Mukamal was nominal shareholder of LIC, he denied ownership, documents showing Cohen's intense personal involvement in Cherney's acquisition of the Falchi building and Mukamal's testimony that from the inception of the Cherney transaction there was an "oral relationship" between Cherney, Cohen, Mukamal and Kislin.

Cohen denies that he had any ownership interest in the Falchi building between the time Equitable obtained a judgment of foreclosure and July 1996, when Cohen and his daughter Cheryl obtained a documented interest in the Falchi building. It is undisputed that no formal agreement of a relationship between Cohen and Cherney was signed until July,1996, although extensive negotiations continued for over a year prior thereto. Cohen relies upon the written agreements, his own testimony and the testimony of others in support of his position, that the interest he acquired in 1996 was the result of his management of the Falchi building from the time Cherney acquired an interest therein. He also claims that his daughter, Cheryl, similarly acquired a personal interest in the Falchi building because she also was actively involved in the management of the building and other properties for Cherney.

The July 1996 agreements give Cohen and his daughter Cheryl an interest in

future profits from the Falchi building[5]. The right to share in profits exists only after the Falchi building generates a rate of return over a base rate of return (10% in year one and 18.87% thereafter) that is first distributed Cherney investors.

In 1998 the Cherney interest in the Falchi building was sold to a new group of investors. Cohen and Cheryl each received in excess of $1,000,000 from that sale. The exact amount is subject to dispute.

Cohen and Cheryl then each contributed equity to the new ownership arrangement and continued to manage the building. In 2001 the Falchi building was sold to a third party. Cohen and Cheryl recognized millions of dollars in gain on the 2001 sale. The exact amount is in dispute. It is not disputed, however, that the monies are the profits that Cohen and Cheryl received as a consequence of their post foreclosure ownership interest in the Falchi building.

DISCUSSION

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do.

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[5]These interests were held by out of state corporations, one of which was wholly owned by Cohen's wife and one of which was wholly owned by Cheryl. Although Cohen admits that he is the beneficial owner of the interest held in his wife's name, he claims that Cheryl's interest has nothing to do with him. Plaintiff, however, claims that Cheryl holding was merely that as Cohen's nominee. This dispute, which turns upon factual disputes regarding the nature and extent of Cheryl's contributions, cannot be resolved on a motion for summary judgment.

CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003). In disposing of such a motion the court is free to grant summary judgment on some, but not all of the issues presented and may narrow the issues that must be tried. CPLR § 3212(e). Each party has moved for summary judgment on the remaining causes of action in the amended complaint; therefore they each bear the initial burden of making out a prima facie case on these causes of action. However, since only plaintiffs have moved for summary adjudication on the counterclaim and affirmative defenses, only plaintiffs have the initial burden on those issues.

Fraud [eleventh cause of action]

Cohen seeks summary judgment dismissing the eleventh cause of action for fraud. The elements of an action for fraud are a misrepresentation or an omission of fact, which is false, and known to be false by the defendant, scienter, reasonable reliance and injury. Small v. Lorillard Tobacco Co, Inc., 94 NY2d 43, 57 (1999).

Cohen claims that the plaintiffs are unable to proceed on this claim because they cannot prove that Cohen made any false representation or that any representation was made for the purpose of having Kaufman and Seigel rely on it. Cohen also argues that

plaintiffs are unable to prove damages.

As the Appellate Division previously held, the gravamen of plaintiffs' fraud claim is that Cohen falsely represented to plaintiffs that the SIG Partners' interest in 31-02 could not be salvaged, while he was at the same time, making plans to salvage such interest to the exclusion of plaintiffs. Cohen's argument for summary judgment relies primarily on the allegation in the amended complaint, that these conversations between the parties took place in 1992, at a time before Cohen ever met Cherney. Thus he argues, the representation were true at the time he made them and plaintiffs cannot prove otherwise. Now that discovery has been completed, plaintiffs claim that these conversations took place in 1992 and continued into 1993, after Cohen met Cherney. There is sufficient evidence in the record developed so far, that this issue remains factually disputed and not susceptible to summary adjudication. Cohen's argument, that plaintiffs are limited to the pleadings, ignores the right to conform pleadings to the proof at the end of trial, particularly when the other side is not prejudiced by the amendment. Ford v. Martino, 281 AD2d 587 (2nd dept. 2001). Thus, Cohen's argument that his representations were only made at a point in time when they were true, is factually disputed.

If, however, no damages can be proven in a fraud action, then it should be dismissed. During discovery plaintiffs were asked to particularize the damages they suffered and what they intend to seek at trial. The damages articulated consist entirely of disgorging the profits that Cohen and his family received as a result of their continued financial interest in the Falchi Building. Thus, plaintiffs claims that the measure of their damages is the $2 million dollar in profits Cohen and his family netted

when the Cherney interest was sold in 1998 , and, the more than $5 million dollars in profits Cohen and his family netted when the building was sold to a third party in 2001. Cohen argues that measuring damages as profits he obtained is really the same as a measure of lost profits to plaintiffs. He argues that, as a matter of law, lost profits are not recoverable on a claim for fraud. Consequently he claims that the fraud cause of action should be dismissed because of plaintiffs' inability to prove compensable damages.

In opposition plaintiffs do not dispute that the damages they seek are for lost profits. Indeed that argue that they should be allowed to disgorge Cohen of his "ill gotten gains." Plaintiffs argue that it would be improper for their claim to be dismissed and to allow Cohen to benefit from fraudulent conduct simply because damages does not fit into the recognized legal paradigm. They cite cases where lost profits are permitted as an element of damages. They also argue that the Appellate Division decision, which reinstated plaintiffs' fraud action is law of the case on this issue.

Plaintiffs' argument, that law of the case precludes any argument at this time about the sufficiency of damages, is rejected. Law of the case is an intra action *res judicata* that prevents re-litigation of issues of law that have been determined at an earlier stage of the proceeding. People v. Evans, 94 NY2d 499 (2000). The doctrine applies only to those issues that have actually and necessarily been resolved at a prior stage in the proceedings. Gay v. Farella, 5 AD3d 540 (2nd dept. 2004). At bar, the Appellate Division decision reinstating plaintiffs' fraud claim did not in any way address the legal sufficiency of plaintiffs' claimed damages. Moreover, it is black letter law that the legal standard applicable to a motion to dismiss (see: Guggenheimer v. Ginzberg,

43 NY2d 268 [1977]) is different from and more favorable to the plaintiff than the standards applied on a summary judgment motion. Thus, a prior court determination on a motion to dismiss is not law of the case relative to a subsequently brought motion for summary judgment. Gay v. Fallela, *supra*.

Turning to the merits of the argument, in the seminal case of Lama Holding Co. V. Smith Barney, Inc., (88 NY2d 413 [1996]) the Court of Appeals held that the available damages for fraud are the actual pecuniary loss sustained as a direct result of the wrong. Known as the "out of pocket rule", it seeks to value the difference between the value of what plaintiff parted with and what it received. While unusual circumstances may require flexibility in the application of the rule and uncertainty is not a reason to measure damages by some practical just means (see: Mills Studio, Inc. v. Chenango Valley Realty Corp., 15 AD2d 138 [3rd dept. 1961]); the courts have expressly rejected damages in fraud cases as a measure of lost profits, i.e. what plaintiffs would have gained had the fraud not occurred. Lama, supra; Kaddo v. King Service Inc., 250 AD2d 948 (3rd dept. 1998); Delcor Laboratories, Inc. V. Cosmair, Inc. 169 AD2d 639 (1st dept. 1991). The cases relied upon by plaintiffs that permit lost profit damages are inapposite because they primarily concern causes of action other than fraud.

As a matter of law, plaintiffs cannot establish fraud damages by relying on the profits the Cohens are claimed to have reaped from any sale of the Falchi building subsequent to the judgment of foreclosure. Since plaintiffs offer no other basis for damages on account of the alleged fraud, the cause of action for fraud cannot withstand a motion for summary judgment. AFA Protective Systems, Inc. v. American

Telephone and Telegraph Co., 57 NY2d 912 (1982).

Plaintiffs' argument that the court should not dismiss the fraud cause of action and let Cohen get away with bad behavior is misplaced. This is a civil action, the primary point of which is to compensate plaintiffs for their losses, not to punish Cohen for bad behavior. Rosenfeld v. Isaacs, 79 AD2d 630 (2nd dept. 1980). Rozelle v. Rozelle, 256 AD 61 (3rd dept. 1939). In any event, as more fully set forth below, the breach of fiduciary duty claims survive this motion and lost profits as a measure of damages is recoverable on such remaining causes of action. Matter of Rothko, 43 NY2d 305 (1977); Scalp & Blade, Inc., Advest, Inc., 309 AD2d 219 (4th dept. 2003).

Breach of Fiduciary Duty [first and second causes of action]

Cohen seeks summary judgment dismissing the first and second causes of action for breach of fiduciary duty.

All partners are fiduciaries of one another and owe each other a duty of undivided loyalty. Birnbaum v. Birnbaum, 73 NY2d 461 (1989); Blue Chip Emerald LLC v. Allied Partners, Inc. 299 AD2d 278 (1st dept. 2002). In business contexts, fiduciary duties include a duty to communicate business opportunities to one another and not to exclude partners from such opportunities while the venture is ongoing. Meinhard v. Salmon, 249 NY 458 (1928); Salm v. Fedlstein, 20 AD3d 469 (1st dept. 2005). A claim for lost business opportunities involves a showing that the plaintiffs had an interest or tangible expectancy in the opportunity at issue. Burg v. Horn, 380 F.2d 897 (2nd Cir. 1967); Blaustein v. Pan American Pet. & Trnasp. Co, 263 AD 97 (1st dept. 1941)

Cohen argues that the claim for breach of fiduciary duty fails for the following

reasons: [1] plaintiffs have no standing to assert the claim; [2] plaintiffs did not have an interest or a tangible expectancy in the business opportunity; [3] plaintiffs did not have the financial wherewithal to take advantage of the business opportunity; and [4] the partnership agreement permits Cohen to have acquired a personal interest in the Falchi building.

With respect to the issue of standing, it was not raised by Cohen as an affirmative defense in his answer or in any pre-answer motion to dismiss. It is, therefore, waived. CPLR §§3211(a)(3); (e). ICC International Cargo Charters, Canada Ltd v. Aero Transporte de Carga Union, S.A. 32 AD3d 746 (1st dept., 2006). In any event, the agreements on which Cohen relies do not divest the individual plaintiffs of any interest SIG Partners, but rather serve as a security pledge for certain financial obligations to banking institutions.

Cohen raises many arguments to support his assertion that plaintiffs had no interest or tangible expectancy in the business opportunity. His claims, however, are all subject to factual dispute. Cohen claims that the personal interest he acquired in the Falchi building from Cherney was in consideration of his management of the building after the foreclosure. Cohen argues that since plaintiffs gave up any interest they had in SIG Management in 1991, they have no right to claim any right to participate in ownership derived as part of the management of the building. Plaintiffs claim, however, that Cohen's interest in the building preceded any post foreclosure management by him. They claim further that his identification, knowledge of and participation in a business opportunity in the Falchi building, while 31-02 still had an interest in such building, resulted in Cohen obtaining a personal interest. These factual disputes need

to be decided at trial.

Cohen argues that the structure of the transaction with Cherney was a new transaction, entirely separate from SIG Partners and/or 31-02. Certainly the structure of Cherney's acquisition of the Falchi building was entirely different than the prior structuring of the business relationships SIG Partners had with financing partners in 31-02. The issue of the actual structure of the relationship, however, begs the question. At some point Cherney and his investors were willing to pay $14,500,000 for an ownership interest in the Falchi building. The issue is not how it was eventually structured, but whether it could have been structured in such a way that SIG Partners could have reacquired some interest in the building. While Cohen argues that SIG Partners did not have an identifiable interest in the Falchi building at the time he met Cherney, the timing of the events is disputed. In addition even after the judgment of foreclosure, 31-02 and by extension SIG Partners, still had a right of redemption. up until the sale of the building, which did not take place until years after. The public sale took place in December 1994. Norwest Mortgage Inc. v. Brown, ___ AD2d __ (2nd dept. 2006).

Cohen argues that because plaintiffs concede that they could not pay the Equitable mortgage any time either before or after they defaulted in the foreclosure proceeding, they could not exercise any business opportunity that would allow them to reacquire any interest in Falchi building. For this argument, Cohen relies on Delaware law since 31-02 is a Delaware partnership. Wherewithal to exercise the lost business opportunity is a consideration on a breach of fiduciary claim like the one at bar. McGowan v. Ferro, 859 A2d 1012, 1038 (Del. Ch. 2004); see also: Hewlett v. Staff,

235 AD2d 696 (3rd dept. 1997). The parties financial contribution in the Falchi building, however, historically was relatively small, with a separate financial partner providing the bulk of the money invested. The original financing and refinancing of the building before the default on the Equitable mortgage were structured in this matter. Thus, the inability of SIG Partners or the partners individually to finance the outstanding mortgage does not, as a matter of law, preclude a claim of lost business opportunity. It may, however, be considered by the trier of fact in determining the issue.

Plaintiff argues that the right to compete clause contained in paragraph 13 of the SIG partnership agreement precludes any claim based upon Cohen having obtained a personal interest in the Falchi building. Cowen v. Ross, 64 AD2d 552 (1st dept. 1978). The SIG partnership agreement permits the partners to engage in competing business ventures. Right to compete provisions, however, are not interpreted in such a way as to allow a partner to avail himself of a business opportunity in which the partnership itself had an interest. Although Cohen claims that SIG Partners had no interest in the Falchi building at the time he acquired his personal interest, this issue is the factual dispute at the heart of this action. A partnership agreement giving a partner a right to engage in competing business ventures for the partners own account is not a waiver of fiduciary obligations and does not give one partner the right to exclude the other from a partnership opportunity. See: Lyall v. Graycon Builders, Inc. 180 AD2d 7 (1st dept. 1992); Polygram Diversified Theatrical Entertainment Inc. v. Maxwell, NYLJ June 2, 1997 p27 col 4 (Sup. Ct. NY Co.,).

Accounting [fourth cause of action]

A cause of action for an accounting is an equitable remedy where the essential

elements are an allegation of a fiduciary relationship and a charge of wrongdoing against the parties having the duty. Lio v. Zhong, 10 Misc3d 1068(a), 814 NYS2d 562, 2006 WL 37044 (NY Co. Supreme Ct. 2006) (and cases cited therein); Hamilton v. Patrolman's Benevolent Association of City of New York, 88 NYS2d 683 (Sup Ct Queens Co 1949).

At bar, since the claims for breach of fiduciary duty claims survive, so does the ancillary claim for an accounting.

Cross motion for Summary Judgment on the Complaint

Plaintiffs have cross-moved on the issue of liability only on the causes of action asserted in the amended complaint for breach of fiduciary duty and an accounting. Plaintiffs' motion for summary judgment relies heavily upon circumstantial evidence. Although Cohen denies the facts are as plaintiffs claim them to be, he acknowledges that the issues raised are in dispute. Cohen argues, however, that in connection with his motion for summary judgment, adjudication of these disputed issues is irrelevant. Cohen's contentions have been previously dealt with in this decision. In opposition to the cross-motion Cohen argues that the factual disputes preclude summary judgment in plaintiffs' favor.

There are fundamental disputed facts regarding whether Cohen acquired a personal interest in the Falchi building while SIG Partners still had an interest in Falchi building or a tangible expectancy of an interest in the building. Plaintiffs' motion relies mostly on circumstantial evidence from which a jury could reasonably conclude that Cohen did acquire an interest. While there are circumstances when summary judgment can be supported and granted entirely on circumstantial evidence, this is not such a

case. Morejon v. Rais Construction Co., 7 NY3d 203 (2006). Cohen has raised facts from which a finder of fact could reach an opposite conclusion. Thus there is no basis to grant plaintiff summary judgment on its cross-motion.

Statue of limitations

The issue of statute of limitations continues to plague this case. It was the subject of the prior Appellate Division decision in this matter. The Appellate Division decision still guides the out come of this motion. Cohen argues that since the fraud claim does not survive summary judgment, using the date of discovery as the accrual date for statute of limitations purposes is no longer appropriate. Consequently he argues, the entire complaint must be dismissed.

Although the court dismissed the fraud claim, it did so based solely on a conclusion that damages could not be proven. This court otherwise held that the issue of whether any misrepresentation was made by Cohen remains a disputed factual issue for trial (see decision page 10, *infra*). It is this misrepresentation which forms the predicate for the breach of fiduciary duty claims. As the Appellate Division held:

> " Nevertheless, plaintiffs' argument for application of the fraud discovery accrual rule to this claim is persuasive. 'A cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence have discovered it.' The discovery accrual rule also applies to fraud-based beach of fiduciary duty claims." (307 AD2d at 122, citations omitted) .

Thus while the eleventh cause of action for fraud is being dismissed by the court due to failure to prove damages, the fraud based conduct claimed is still the predicate basis for the breach of fiduciary causes of action, so that a date of discovery accrual rule is still applicable.

Cohen's collateral argument that, as a matter of law, there was notice inquiry as of fall of 1993, is rejected. Cohen claims that at that time plaintiffs were aware that Cohen was continuing to manage the Falchi building. Alternatively Cohen claims that plaintiffs should have known this in 1994 because they learned that Cohen had an ownership interest in another real estate venture with Cherney. Neither of these acts were unequivocal and do not establish inquiry notice as a matter of law. Whether A question of fact exists as to whether plaintiffs could reasonably have inferred from these facts that Cohen had made misrepresentations to them regarding the Falchi building.

Cheryl's Interest in the Falchi Building as a Measure of Damages

A tangential issue raised in these motion is whether, as a matter of law, plaintiff is precluded from seeking the value of Cheryl's interest in the Falchi building as a measure of damages. As already indicated, lost profits are not recoverable on a claim of fraud, but they are recoverable on a claim for breach fo fiduciary duty. Plaintiffs' are not seeking Cheryl's interest per se, but they are arguing that Cheryl's interest is really that of nominee for her father. Cheryl is not even a named party to the action. Plaintiff seek, however, to use her profits as part of a measure of their lost profits. Although Cheryl is factually denying that she is her father's nominee and claims she earned this money herself, there is at least a dispute to be decided by the trier of fact. In this regard Cheryl the argument asserted merely goes to the measure of damages to be assessed against Cohen alone, should plaintiffs ultimately prevail.

Breach of contract counterclaim [first counterclaim]

Plaintiffs seek summary judgment dismissing the counterclaim and the twelfth affirmative defense. In his counterclaim and 12th affirmative defense Cohen is seeking money damages and/or setoff for amounts that he claims he was required to pay to Chemical Bank in 1996 to satisfy SIG obligations.[6] Cohen claims that under the SIG partnership agreement the parties were required to share the debt equally and that he is therefore entitled recoupment in the amount of $1.3 million dollars.

Plaintiffs' prima facie case is based upon: [1] a so-called admission in the moving Memorandum of Law that following the collapse of the real estate market in the early 1990's the SIG partners "attempted to separate and mitigate their individual losses."; [2] a SIG cash reconciliation sent by Kaufman in June 1995 and [3] Cohen's payment in 1999 of $60,000 on account of SIG Partners debt without claiming any time before that he was owed the $1.3 million dollars. These facts do not prima facie entitle plaintiffs to summary judgment. Ayotte v. Gervasio, 81 NY2d 1062 (1993).

The general statement by counsel about the parties' activities in the 1990s, which does not even specifically relate to this debt, is not a binding judicial admission. Kaufman's reconciliation predates the date Cohen claims to have made payment of the debt for which he is now seeking reimbursement. In any event the reconciliation is not a binding agreement or acknowledgment by Cohen. The $60,000 paid by Cohen refers to an entirely different debt by a different lender than Chemical or its predecessor lender.

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[6]Plaintiffs do not seek summary judgment on that part of the counterclaim for breach of contract in which Cohen is seeking to recoup his legal fees for having to defend this action. Thus the court does not reach the issue of the viability of such claim.

Affirmative Defenses

Plaintiffs' also cross-move for summary judgment dismissing Cohen's other asserted affirmative defenses ("AD") consisting of : failure to state a claim [1st AD]; laches [4th AD]; waiver [5th AD]; consent, ratification and release [6th AD] ; estoppel [8th AD]; failure to mitigate damages [9th AD]; speculative damages [16th AD]; breach of SIG agreement [17th and 19th AD]; unclean hands [20th AD]; breach of fiduciary duty [19th AD] . Cohen raises blunderbuss reasons why certain categories of affirmative defenses should remain.

The first affirmative defense is dismissed as surplusage. Konow v. Sugarman, 71 AD2d 1016 (2nd dept. 1979). The 8th affirmative defense of estoppel is dismissed because Cohen cannot prove its elements. Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175 (1982). The 9th AD has no application to the facts of this case. The 17th and 19th ADs are dismissed because there is no legal basis to claim that any breach of the SIG agreement or any claimed breach of any fiduciary duty owned to Cohen is a defense to the claims made against Cohen in the amended complaint. Cohen has a counterclaim that may proceed (see decision page 20, *infra*) and if there are cross judgments, the court may provide for a set off; however, the claims are not affirmative defenses *per se* and could not proceed as such. The 20th AD is dismissed. There is simply no basis for a claim of unclean hands. Goldberg v. Goldberg, 173 AD2d 679 (2nd dept 1991).

As to laches, waiver and ratification, Cohen claims that this arises from plaintiffs' delay in bringing the action. Since the Statue of Limitations issues are still in dispute, including the issue of when plaintiffs either knew or could have known about the

misrepresentations, so too are these collateral affirmative defenses to the extent they pertain to the timing of the bringing of this action.

The affirmative defense of speculative damages also remains. Although plaintiffs argue that the measure of lost profits is clearly calculable, general issues of whether plaintiff actually suffered the damages they claim or any damages at all is disputed. Even if lost profits is the measure, plaintiffs' are seeking two levels of lost profits and arguments about speculation and attenuation are even stronger as to the later transactions. These claims are subject to determination by the trier of fact. See: Cipriani v. RCPI Landmark, 4 M3d 850 (NY Co. Sup Ct. 2004).

Sealing of Files

The parties have filed much of this motion under seal, purportedly pursuant to a stipulated confidentiality order. The stipulated order provides that information covered under the stipulation shall be kept under seal until further order of the court. An agreement to keep documents confidential does not necessarily mean that the documents are entitled to be sealed in what otherwise should be a public court record. The parties have chosen to use the confidentiality stipulation to file under seal even the most benign documents submitted as part of this motion. Even some of the memoranda of law are stamped "FILED UNDER SEAL".

Although not raised by either party, the court itself is concerned that most of the information self selected as "confidential" is not in the nature of information that is otherwise entitled to be sealed in a court file. Section 216.1 of the Uniform Rules of the Trial Courts provides that:

> "...Except where otherwise provided by statute or rule, a court shall not

enter an order in any action or proceeding sealing the court records, whether in whole or part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown the court shall consider the interest of the public as well as of the parties..."

While the parties can agree to keep documents private as between them, once the documents are filed with the court, they are not generally subject to sealing, regardless of the parties' preference or agreement. Gryphon Domestic VI, LLC v. APP International Finance Company, 28 AD3d 322 (1st dept. 2006). Filed court documents, even those covered by a confidentiality agreement, are subject to the same scrutiny for sealing as any other document filed with the court in the regular course of dealing. There is an important societal interest in conducting any court proceeding in an open forum. Open hearings are more conducive to the ascertainment of the truth, and the presence of the public historically has been believed to enhance the integrity and quality of what transpires. Anonymous v. Anonymous, 263 AD2d 341 (1st dept. 2000). Free access to filed court papers involves the same considerations. The public needs to know that all who seek the court's protection will be treated evenhandedly. Matter of Marshal, 2006 WL 2546192 (N.Y.Sup. 2006). [7]

Thus, the court directs that the parties reassess and identify those documents filed on this motion which they are claiming are entitled to legal seal. In this regard the parties should bear in mind the unlikelihood that the bulk of the hundreds of exhibits and thousands of pages filed on these motion are entitled to the narrowly circumscribed right of sealing. As to the identity of those documents which the parties still claim are

[7]The court's concern at this time is to be distinguished from disputes arising between the parties as to what should be kept confidential as between them under the confidentiality stipulation and order. See: Decision/Order, Kornreich J., June 30, 2006.

entitled to be sealed, the parties are to appear before this court on March 1, 2007 at 2:30 pm to show good cause why the filed documents should remain sealed. All documents filed on this motion and cross-motion for which no finding of good cause to seal them is made, shall be unsealed. Regardless of whether any particular documents remain sealed, this court's decision and order is being filed without seal.

CONCLUSION

In accordance herewith it is hereby:

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted only to the extent that the eleventh cause of action for fraud is dismissed, and it is further

ORDERED that in all other respects defendant's motion for summary judgment is denied, and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is granted only to the extent that the 1st , 8th, 9th, 17th, 19th, and 20th Affirmative Defenses set forth in the defendant's answer are dismissed , and it is further

ORDERED that in all other respects plaintiffs' cross-motion for summary judgment is denied, , and it is further

ORDERED that the parties reassess and notify the court of the identity of those documents filed on this motion which they are claiming are entitled to a sealing order. As to the identity of those documents which the parties claim are still entitled to be sealed, the parties are to appear before this court on **March 1, 2007 at 2:30 pm** to show good cause why, the documents should remain sealed. All documents filed on

this motion and cross-motion for which no finding of good cause to seal them is made, shall be and it is further

ORDERED that the remaining causes of action in the complaint and the counterclaim are certified for trial and the plaintiff is directed to, within 10 days of the date hereof, file a copy of this decision and order with trial support so that the matter can appear on the trial assignment calendar, and it is further

ORDERED that any requested relief not expressly granted herein is denied, and that this shall constitute the decision and order of the Court.

Dated: New York, New York
January 24, 2007

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
JAN 30 2007
NEW YORK
COUNTY CLERK'S OFFICE