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

PRESENT: Hon Joel A. Miller PART 11

Index Number : 105584/2006
DON, GARY
vs
SINGER, BARUCH
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 1/11/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for dismiss.

	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 w/the annexed memorandum Decision + order.

FILED
MAY 30 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: May 16, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X INDEX NO. 105584/06

GARY DON, LAWRENCE H. GERSTEIN, and NEW YORK DEVELOPERS COLLABORATIVE, LLC

Plaintiffs,

--against--

BARUCH SINGER, MARK JUNGER, MOSES ROSNER, HERALD SQUARE DEVELOPMENT LLC, ROSMA DEVELOPMENT LLC, and MNM INVESTORS GROUP LLC,

Defendants.

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JOAN A. MADDEN, J.:

In this action seeking to recover damages in connection with the alleged wrongful ouster of plaintiffs from their role in a multi-million dollar real estate development project, defendants Baruch Singer ("Singer") and Herald Square Development LLC ("Herald Square") move to dismiss the complaint against them, and seek an order awarding them costs and expenses in this action. Plaintiffs oppose the motion which is granted only to the extent of dismissing that part of the eleventh cause of action which seeks a judicial accounting.

Background[1]

During the relevant time period, plaintiffs Gary Don ("Don") and Lawrence Gerstein ("Gerstein") were partners in commercial real estate development business and in furtherance of this business, used plaintiff New York Developers Collaborative, LLC ("NYDC"), as their corporate vehicle. In 2005, Don and Gerstein identified the site located on the Avenue of the Americas between 30th and 31st Street in Manhattan ("the Site") as an area for development of a

[1]The following facts are based on the allegations of the complaint, which for the purposes of this motion must be accepted as true, and the documentary evidence before the court.

residential and commercial real estate project ("the Project"). The broker acting for the owners of the Site informed plaintiffs that the owners were seeking $75 million and by letter dated March 16, 2005, plaintiffs offered $68,500,000.

To develop a viable business plan to attract investors and financial institutions to fund the Project, plaintiffs at their sole expense employed professional consultants to conduct, *inter alia*, a zoning review, architectural studies, financial analysis, engineering feasibility studies, and a marketing review. Plaintiffs generated a document summarizing their business plan which eventually became a Confidential Memorandum, which included, *inter alia* (i) an executive summary of the Project, (ii) property information, (iii) a tax map, (iv) sales and rental data, (v) acquisition and development costs, and (vi) estimated a net profit of $75 million on the Project. The Confidentiality Memorandum stated that by the receipt of the memorandum the recipient agreed that the memorandum and its contents were confidential, that copying and duplication were prohibited, and that if the recipient did not wish to pursue negotiations that the memorandum be returned.

Plaintiffs, on advice of counsel, also prepared a confidentiality and non-circumvention agreement ("CNC Agreement") which was to be signed by any potential investor prior to the receipt of the Confidentiality Memorandum. In April 2005, a broker hired by plaintiffs found as potential partner, defendant Mark Junger ("Junger"), who signed the CNC Agreement on behalf of himself and defendant Rosma Development LLC ("Rosma"), which was countersigned by Don. Under the CNC Agreement, defendants Junger and Rosma and their affiliates or persons to whom they make disclosures agreed to "hold Confidential Information (regarding the Project) in the strictest confidence and [not to] contact the owner of the Property to promote participate or

engage in any business which is or may be competitive with the business of NYDC at the Property, including, without limitation any acquisition, financing, purchase or other transaction involving the Property (other than through NYDC)...."

In May 2005, Junger informed Don and Gerstein that he and Rosma were interested in participating as partners in acquiring the Site and developing the Project, and shortly thereafter, Don and Gerstein met with Junger and his partner, defendant Moses Rosner ("Rosner"), of defendant MNM Investors Group, LLC ("MNM") who agreed to provide the required capital amount of $20 million. Junger and Rosner made it clear, however, that although neither they nor their companies had the financial strength to finance the project, they had a partner who could provide the needed capital.

Prior to permitting Junger and Rosner to meet with the sellers, and after a May 13, 2005 meeting involving extensive negotiations, Don and Gerstein and Junger and Rosner agreed to be partners and entered into a joint venture relationship regarding the acquisition of the Site and development of the Project. A Joint Venture Agreement ("the JV Agreement") dated May 13, 2005, was signed by Don, Gerstein, Junger and Rosner which provided, *inter alia*, that Junger, Rosner, and MNM at their sole option would decide whether plaintiffs would make a $500,000 capital contribution and receive an 18% ownership interest or not make a capital contribution and receive a 12% ownership interest. It was also agreed that plaintiffs would receive 40 % and Junger, Rosner and MNM would receive 60% of all projected net profits (which was $68,000,000 at the time the JV Agreement was entered). Entry in the JV Agreement did not affect the confidentiality and non-circumvention provisions of the Confidentiality Memorandum and the CNC Agreement and, in fact, defendants Junger and Rosner were told that they were not

to disclose the Confidentiality Memorandum or proprietary development plans to any third person without such third person first entering into confidentiality and non-circumvention agreement.

During the week the JV Agreement was signed, Junger and Rosner informed Don and Gerstein that defendant Baruch Singer ("Singer") was their partner on various projects and would be participating as a partner in the JV Agreement to purchase the Site and to develop the Project, and that before Singer was provided with any information about the purchase of the Site and the Project, Singer had entered into the CNC Agreement, and that after he signed the CNC Agreement (hereinafter "The Singer CNC Agreement"), they gave him the Confidentiality Memorandum and the proprietary development information.

Junger and Rosner further informed plaintiffs that Singer wanted to participate as a partner in the Joint Venture and would be contributing all or most of the $20 million equity contribution. The complaint alternatively alleges that Junger, Rosner and MNM were acting as agents for Singer when they entered into the JV Agreement and when they entered into the CNC Agreement At the initial meeting between plaintiffs and Singer, Singer was given another copy of the Confidentiality Memorandum, and Singer reviewed its contents in detail and posed numerous questions to Don and Gerstein about the information contained in the memorandum and never returned it to plaintiffs. Singer was also given a copy of the JV Agreement by both Junger and Rosner and later by Don. Singer reviewed the JV Agreement in Don's presence and agreed to be a partner in the joint venture relationship and to contribute $20 million to the Project, which he was to receive back along with his share of net profits.

Subsequently, plaintiffs submitted a second written offer for the Site to the sellers in the

amount of $72 million, and arranged a negotiating session with the sellers and Singer requested to attend the meetings which plaintiffs permitted based on Singer's agreement to be bound by the CNC Agreement and Confidentiality Memorandum. On May 24, 2005, a meeting regarding the purchase of the Site was held between Don, Gerstein, Junger, Rosner, Singer, and the sellers and their representatives from the brokerage firm, and the parties agreed to a $72 million purchase price.

During May and June of 2005, there were at least two other meetings regarding the Project which were attended by Don, Gerstein, Junger, Rosner, and Singer, and numerous correspondences and telephone conversations took place between Don, Gerstein, Junger, Rosner, and Singer regarding the Project. Moreover, based on Singer's representations in the CNC Agreement, plaintiffs permitted Singer's attorney Andrew Alberstein, Esq. ("Alberstein") and Goldberg, Weprin & Ulster to act as lead counsel on the deal, conditioned on Singer's attorney keeping plaintiffs informed.

After further negotiations in June 2005, plaintiffs decided, in consultation with their development team, that it would be in the best interest of the joint venture to include a third plot of land, and the parties agreed to an increased price of $115 million. Shortly thereafter, defendants Singer, Junger and Rosner, informed plaintiffs that pursuant to the profit sharing terms of the JV Agreement, they had elected to have plaintiffs contribute no capital and thus have 12% ownership interest in the Project.

However, in mid-June 2005, defendants tried to renegotiate the terms of the JV Agreement with plaintiffs to curtail plaintiffs' participation and decrease plaintiffs' economic return. Specifically, defendants sought to limit plaintiffs' ownership interest to 7% but later increased it

to 9% and then limited to profits from sales of residential units, and to have plaintiffs relinquish their right to the agreed-upon 40% of net profits. If plaintiffs refused to accept the new terms, defendants threatened not to honor their commitments with respect to the Project.

When plaintiffs refused to accept these new terms, defendants, along with Singer's counsel Alberstein, ceased providing plaintiffs with information, data or updates regarding negotiations with the sellers. Once it became clear that plaintiffs would not agree to substantial modifications in the JV Agreement, defendants took steps to oust plaintiffs from the purchase and development of the Project. In August of 2005, Singer met with plaintiffs and offered them a $3.5 million dollar pay-off. When plaintiffs refused, defendants ceased any further communications with plaintiffs. In October 2005, defendant Herald Square Development LLC was established by defendants Singer, Junger, Rosner, Rosma and MNM for the purpose of purchasing the Site from the sellers, and in February 2006, defendants completed the purchase of the Site.

Plaintiffs commenced with this action by filing a Verified Complaint on April 25, 2006. The Verified Complaint contains the following causes of action: (1) breach of the CNC Agreement by defendants Singer, Junger, Rosner and Rosma; (2) breach of the Singer CNC Agreement by Singer; (3) breach of the Confidentiality Memorandum by defendants Singer, Junger, Rosner, and MNM; (4) breach of the JV Agreement and the joint venture relationship by defendants Singer, Junger, Rosner, and MNM; (5) breach of fiduciary duties owed to plaintiffs by defendants Singer, Junger, Rosner, and MNM; (6) inducement and participation by Singer in Junger's, Rosner's, and MNM's breach of fiduciary duties to plaintiffs; (7) breach of duties of implied faith and fair dealing by defendants Singer, Junger, Rosner, and MNM; (8) misappropriation of confidential information and business opportunities by defendants Singer,

Junger, Rosner, MNM, and Herald Square Development; (9) tortious interference with contract, i.e. the CNC Agreement by defendants Singer, Junger, Rosner, MNM, and Herald Square Development; (10) tortious interference with contract, i.e. the JV Agreement by defendants Singer, Rosma and Herald Square Development; and (11) constructive trust and accounting against all defendants.

Defendants Singer and Herald Square Development (together "the moving defendants") move to dismiss the complaint against them in its entirety. In support of the motion, the moving defendants submit Singer's affirmation, in which he denies that he has any contractual relationship with plaintiffs or signed any agreements related to the Project, including the CNC Agreement. Singer also denies that he saw the Confidentiality Memorandum as described in the complaint and, in any event, states that the information in the memorandum would not be of value to him since it contains publicly available information and analysis that his own professional and advisors could have performed.

Singer also denies that any joint venture existed, and states that he was never advised of any JV Agreement between Junger and plaintiffs and that even if one existed, he was not a party to it. Singer also states that he learned of the properties through Junger, and that he had Junger has been involved in real estate deals together in the past, but that he was not Junger's partner. Singer further states that he negotiated for the properties with the broker for the sellers and that he has "no knowledge of what offer or offers Plaintiffs may have made to the seller," and that he only knows that his offer to purchase the properties was accepted.

In opposition, plaintiffs submit the affidavits of Gerstein and Don, together with documentary evidence, including excerpts from the Confidentiality Memorandum, a copy of the

CNC Agreement executed by Junger, a copy of the JV Agreement executed by Junger and Rosner as representatives of MNM and Gerstein and Don, as representatives of NYDC, correspondence with the seller's broker to both Singer and NYDC, draft purchase agreements for the purchase of the Site by NYDC which apparently were prepared by Singer's attorneys, and correspondence reflecting negotiations between plaintiffs and Junger and Rosner referencing meetings between plaintiffs and Singer regarding modifying the JV Agreement. However, plaintiffs submit no documentary evidence that Singer executed any joint venture agreement with plaintiffs or a CNC Agreement.

In his affidavit, and consistent with the allegations in the verified complaint, Gerstein describes the genesis of the Project and how Junger, Rosner and Singer became involved as joint venturers and agreed to the terms of the CNC Agreement. Gerstein also refutes Singer's statement that the Confidentiality Memorandum did not contain confidential and proprietary information and states that "during our meetings I explained to Defendant Singer in great detail all this information including cost breakdown and potential profits from the sale of the commercial and residential units" and that Singer told him on May 24, 2005, that the Project was "his first development project and in the past he had renovated buildings which he purchased." He also states that contrary to Singer's affirmation, he met with Singer on numerous occasions and attended numerous meetings with the sellers which included Singer, Rosner and Junger where he was the "main and lead participant on behalf of the Joint Venture in relation to negotiations, presenting our original and proprietary plans, ideas and concepts for the purchase of the Site and development of the Project."

In his affidavit, Don states that:

> [O]n several occasions including our initial meeting with the Sellers on May 24, 2005, I personally handed copies of the CNC Agreement signed by Junger and Rosma in April 2005, together with the Confidential Memorandum and the JV Agreement to defendant Singer. I thereafter observed Singer reviewing the CNC Agreement, the Confidential Memorandum and the JV Agreement and I discussed the terms and content with him. At no time did he ever object to any of the terms or conditions in the JV Agreement or the CNC Agreement or Confidential Memorandum. Defendant Singer informed me that approximately $20,000,000 designated in the JV Agreement for the Project was going to be coming from him. Defendant Singer also informed me that he will pay defendants Junger and Rosner 30% of any profits he realizes on the project....Subsequently, I provided [Singer] with revised copies of the Confidential Memorandum when the purchase expanded to include Site #3. I observed Defendant Singer review the copies of [the] Confidential Memorandum, Plaintiff Gerstein and myself discussed with Defendant Singer in detail the proprietary and confidential development information contained within the Confidential Memorandums....

Don also states that he met with Singer regarding the project on numerous occasions, both with and without the sellers and that the last meeting with Singer took place in Gerstein's car during which Singer offered him and Gerstein $3.5 million to withdraw from the Project.

DISCUSSION

When considering a dismissal motion based on the pleadings "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977)(citations omitted). The court must "construe the complaint liberally and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion and accord plaintiffs the benefit of every favorable inference." Richbell Informational Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 289 (1st Dept

2003), citing, 511 West 232nd Owners Corp. v. Jenifer Realty Corp., 98 NY2d 144, 152 (2002).

Under this standard, the first three causes of action related to Singer's alleged breach of the CNC Agreement and the Confidentiality Memorandum are sufficient to state a cause of action against Singer despite the lack of a written CNC agreement evidencing Singer's signature. Under New York law, a party can be said to have accepted the terms of an agreement when such intent can be inferred from his conduct, such as the receipt and retention of a document without challenge, and where silence is inconsistent with fair dealing and misleads another (Russell v. Raynes Assocs Limited Partnership, 166 AD2d 6, 14-15 (1st Dept 1991)(finding a question of fact as to whether Sponsor's receipt and retention of subscription agreement without challenge resulted in a binding agreement); Club Chain Manhattan Ltd. v. Christopher & South Gourmet, Ltd., 74 AD2d 277 (1st Dept 1980), aff'd, 53 NY2d 703 (1981)(holding that failure of defendant to return and reject written lease for billboard space at a certain monthly rate, its silence could be deemed acquiescence where "it is inconsistent with honest dealings and misleads another.").

Here, the complaint alleges, and Gerstein and Don state in their affidavits, that Singer reviewed both the CNC Agreement and the Confidentiality Memorandum on numerous occasions and asked questions about them, and by his conduct led plaintiffs to believe he agreed to their terms. In fact, the Confidentiality Memorandum stated that by its receipt and retention, the recipient agreed that the memorandum and its contents were confidential. Next, while Singer maintains that the material in the Confidentiality Memorandum was available to the public and could have been replicated by his own professionals, both the allegations in the complaint and the statements in Gerstein's and Don's affidavits are to the contrary. In addition, given the alleged efforts by plaintiffs in compiling this information, and retaining its confidentiality it

cannot be said at this juncture that the Singer's assertions that the information was readily available provides a grounds for dismissal.

Moreover, to the extent it is alleged that Junger and Rosner were Singer's partners, that they agreed to the terms of the CNC Agreement and Confidentiality Memorandum, and that Singer knew about the agreements and benefitted from them, Singer would be bound by these agreements based on partnership law and theories of agency and/or ratification. See generally, Partnership Law § 20; In re Securities Group v. Morgan Guaranty Trust Co. Of New York, 926 F2d 1051 (11th Cir. 1991)(applying New York law regarding partnerships and finding that guaranty of loan agreement which was within the apparent authority of the partner signing them was binding on limited partners and/or was ratified by the partnership); compare, Tamir v. Lamb, 75 AD2d 810 (2d Dept 1980), aff'd, 53 NY2d 978 (1981)(reversing trial court determination granting sum of money owed under agreement with two of three purported partners, where there was no evidence presented that partner who has not entered into the agreement was involved in or had any knowledge of the agreement or that the partnership derived any benefit from the agreement).

The fourth cause of action alleges Singer's breach of the JV Agreement and/or joint venture relationship. The moving defendants argue that this claim must be dismissed as the relationship between parties did not constitute a joint venture as there was no agreement among them to share losses, and that any joint venture claim asserted against Singer would be barred by the Statute of Frauds since there is no written joint venture agreement executed by Singer. These arguments are without merit.

"A joint-venture is a 'a special combination of two or more persons wherein some

specific venture a profit is jointly sought without actual partnership or corporate designation.'" Natuzzi v. Rabady, 177 AD2d 620, 622 (2d Dept 1991)(citations omitted), quoting Forman v. Lumm, 214 AD 579, 583 (1st Dept 1925).

> The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated with the joint venturers, mutual contribution to the joint undertaking through the combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise and a provision for sharing profits and losses....the intent of the parties, as one of the factors in determining whether the joint venture exists, may be express or implied.

Richbell Information Services,Inc. v. 529 Jupiter Partners, L.P., 309 AD2d at 298 (citations omitted).

While it has been held that a joint venture does not exist in the absence of a provision or agreement to share losses as well as profits (Chipman v. Steinberg, 106 AD2d 343 [1st Dept 1984], aff'd, 65 NY2d 842 [1985]), even in the absence of an specific allegation of an explicit agreement to share losses, such an agreement may be implied from the facts, particularly at the pleading stage. Richbell Information Services,Inc. v. 529 Jupiter Partners, L.P., 309 AD2d at 298; Dundes v. Fuersich, 6 Misc3d 882, 885-886 (Sup Ct NY Co. 2004).

Here, taking into account the allegations in the complaint regarding the nature of the joint venture and plaintiffs' alleged role in it, it can be inferred that plaintiffs and defendants implicitly agreed to share not only in profits but losses from the Project. Furthermore, in his opposition affidavit, Gerstein states that:

> Plaintiffs, Don, NYDC and myself expressly and implicitly agreed to share losses if the Project was not successful which is also evidenced by all of the obligations and duties which we agreed to undertake from the commencement of the Project to its

> completion including the sale of residential and commercial units. Based on our obligations and duties, if the Project was not successful. Plaintiffs would incur both financial losses and lost time, effort, and business opportunities. ....[I]n fact, Plaintiffs, Don, NYDC and myself did incur in 2005 direct and actual losses in furtherance of the Joint Venture amount to thousand of dollars, including but not limited to fees and expenses for zoning review and analysis....legal work and services...[and] were also responsible for repayment of the financial package for the Project including any and all loans needed for the Project.

Next, a joint venture agreement formed for the purpose dealing in real property is not void under the Statute of Frauds, since the interest of each joint venturer is deemed to be personalty. See Barash v. Estate of Sperlin, 271 AD2d 558 (2d Dept 2000); Walsh v. Rechler, 151 AD2d 473 (2d Dept 1989). The moving defendants argue, however, that the provision of the Statute of Frauds requiring a signed writing to pay for compensation for services rendered in negotiating the purchase or sale of any business opportunity, or a business or an interest therein (General Obligations Law § 5-701(a)(10)[2]), bars any oral joint venture agreement between Singer and plaintiffs. This argument is unavailing since based on the allegations of the complaint, the affidavits of Gerstein and Don, and as suggested by the documentary evidence, plaintiffs were not intermediaries who negotiated the purchase of the property for defendants and the sellers in exchange for a fee or other compensation, but rather were the initiators of the Project who became partners with defendants to obtain financing, and who sought to profit from the Project's anticipated financial success. Compare Rogoff v. San Juan Racing Association, 77 AD2d 831

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[2]General Obligation Law § 5-701(a)(10) provides, in relevant part, that an agreement must be in writing and signed by the party charged if it "is a contract to pay compensation for services rendered in negotiating the purchase or sale...of a business opportunity, business ... or an interest therein....'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction...."

(1st Dept 1980), aff'd, 54 NY2d 883 (1981)(plaintiff's claim for a finder's fee in connection with a proposal to defendants which identified three radio stations later acquired by defendants was barred by the Statute of Frauds).

Furthermore, as the complaint, fairly read, does not seek to recover commissions earned by plaintiffs as real estate brokers for defendants but, instead, to obtain his share of profits as a principal acting for a joint venture, the complaint cannot be dismissed on the ground that plaintiffs are not licensed real estate brokers. Accordingly, there is no basis for dismissing the fourth cause of action.

Next, as the complaint is sufficient to establish a joint venture relationship between the plaintiffs and defendants, including Singer, and joint venturers owe fiduciary duties to each other (Blue Chip Emerald LLC v. Allied Partners, Inc., 299 AD2d 278 [1st Dept 2002]), there is no basis for dismissing the fifth cause of action alleging a breach of fiduciary duties in connection with plaintiffs' exclusion from the Project. Next, plaintiffs may seek punitive damages in connection with their breach of fiduciary duty claim since the allegations in the complaint provide a sufficient predicate to find that defendants engaged in "intentional or deliberate wrongdoing" or a "conscious act in disregard for the rights [of plaintiffs]," and there is no requirement that there be an allegation of "either a public or an outrageous wrong." Don Buchwald & Associates v. Rich, 281 AD2d 329, 330 (1st Dept 2001).

The sixth cause of action, which alleges inducement and participation by Singer in breach of fiduciary duties owed by Junger, Rosner, and MNM to plaintiffs, is also actionable as even if it is found that Singer was not a joint venturer, there are allegations and evidence that Singer knew about the joint venture between Junger, Rosner, MNM and the plaintiffs and of these defendants'

confidentiality obligations under the CNC Agreement, and aided and abetted Junger, Rosner, and MNM in breaching their fiduciary duties owed to plaintiffs. Kaufman v. Cohen, 307 AD2d 113, 125-126 (1st Dept 2003).

The seventh cause of action alleges that Singer, Junger Rosner and MNM breached their implied duties of good faith and fair dealing contained in the parties' agreements and in particular the CNC Agreement and JV Agreement by "[d]estroying Plaintiffs' rights to receive the fruits of their work and agreements with defendants...[and]...exclud[ing] Plaintiffs from purchase of the Site and development of the Project."

"Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party 'acts in a manner that, although not expressly forbidden by a contractual provision, would deprive the other party of a right to receive benefits under their agreement.'" O'Neil v. Warburg, Pincus & Co., ___ AD3d ___, 2007 WL 1052907, *2 (1st Dept April 10, 2007), quoting, Jaffe v. Paramount Communications, 222 AD2d 17, 22-23 (1st Dept 1996); see also, Gross v. Empire Health Choice Assurance, Inc., 12 Misc3d 1155(A), *4 (Sup Ct NY Co. 2006)

Here, allegations that defendants, including Singer, acted in a manner to deprive plaintiffs of their rights under the CNC Agreement and JV Agreement are sufficient to state a claim against Singer. Moreover, although there is no evidence that Singer signed either agreement, as indicated above, if accepted as true, the allegations in the complaint and the evidence submitted in opposition to this motion, are sufficient to support of theory that Singer assented to the terms of these agreements, and is bound by them.

The eighth cause of action seeks to recover for the misappropriation of confidential information contained in the Confidentiality Memorandum. The moving defendants argue that

this claim must be dismissed as memorandum did not contain any trade secrets or other information entitled to protection.

"Business information is entitled to trade secret protection if it consists of 'any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain advantage over competitors who do not know how to use it.'" Shmueli v. Corcoran Group, Inc., 9 Misc3d 589, 597 (Sup Ct NY Co. 2005), quoting, Ashland Management v. Janien, 82 NY2d 395, 407 (1993), quoting, Restatement (Second) Torts § 757. The question of whether an alleged trade secret is secret is generally an issue of fact. Ashland Management v. Janien, 82 NY2d at 407.

In this case, based on plaintiffs' allegations and sworn statements that they expended substantial time, effort, and money in obtaining the information contained in the Confidential Memorandum, and made substantial efforts to maintain the confidentiality of such information, and affording them every favorable inference, there is a sufficient basis for the misappropriation claim and it will not be dismissed.[3]

The ninth cause of action is for tortious interference with the CNC Agreement by defendants Singer, Junger, Rosner, MNM, and Herald Square Development and the tenth cause of action is for tortious interference with the JV Agreement by defendants Singer, Rosma and Herald Square Development.

A claim alleging tortious interference with a contract is properly pleaded if it shows: 1) the existence of a valid contract, 2) defendants' knowledge of the contract, 3) defendants'

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[3]Plaintiffs alternatively argue that the claim is for misappropriation of confidential information as opposed to trade secrets. However, there does not appear to be a basis for such a claim under New York law.

intentionally procuring of a breach of the contract, 4) actual breach of the contract, and 5) damages. See Foster v. Churchill, 87 NY2d 744, 749-750 (1996). A party to a contract cannot tortiously interfere with it. See Koret, Inc. v. Christian Dior, S.A.,. 161 AD2d 156 (1st Dept), appeal denied, 76 NY2d 714 (1990).

Singer's argument that as an alleged party to the CNC Agreement a clam cannot be asserted against him for tortious interference with such agreement is unavailing since plaintiffs can plead alternative theories of liability, particularly as the moving defendants deny that Singer was a party to the CNC Agreement. Moreover, fairly read, the complaint is sufficient to satisfy the elements of tortious interference with contract based on allegations and substantiating evidence that the CNC Agreement was a valid contract, that the moving defendants knew about the CNC Agreement and intentionally procured its breach by, inter alia, using the information in the Confidentiality Memorandum to exclude plaintiffs from the purchase of the Site from the sellers, thus causing plaintiffs to lose anticipated profits from the Project. Furthermore, it is premature to dismiss this claim on the grounds that plaintiffs will be unable to prove lost profits.

The tenth cause of action for tortious interference with the JV Agreement likewise states a viable claim and contrary to the moving defendants' position, and as indicated above, the allegations in the complaint and the evidence submitted in opposition to this motion, are adequate to demonstrate a joint venture relationship between the parties and in any event, plaintiffs have provided documentary evidence of the JV Agreement at the center of this claim.

The eleventh cause of action seeks (i) the imposition of a constructive trust to prevent the moving defendants from wrongful diverting the profits of the joint venture and (ii) a judicial accounting. "It is an accepted principle of long standing that profits which are wrongfully

diverted from a joint venture are subject to the imposition of a constructive trust, and a faithless fiduciary must account to his associates in the enterprise." Chipman v. Steinberg, 106 AD2d at 344. Here, as a joint venture has been sufficiently pleaded and is supported by evidence there is no basis for dismissing the eleventh cause of action to the extent it seeks the imposition of a constructive trust to prevent the diversion of the profits from the Project. On the other hand, since New York law requires a demand for an accounting and a failure or refusal to provide one as a prerequisite to obtaining a judicial accounting (Blaustein v. Lazar Borck & Mensch, 161 AD2d 507, 508 [1st Dept 1990]), that part of the eleventh cause of action seeking this remedy must be dismissed.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss by Baruch Singer and Herald Square Development LLC is denied, except to the extent of dismissing that part of the eleventh cause of action seeking a judicial accounting; and it is further

ORDERED that defendants Baruch Singer and Herald Square Development shall answer the complaint within 20 days of the date of this decision, a copy of which is being mailed by my chambers to counsel to the parties; and it is further

ORDERED that a preliminary conference shall be held on June 21, 2007 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: May 16 2007

J.S.C.