Horizon, Inc. v Wolkowicki

2008 NY Slip Op 30207(U)

January 15, 2008

Supreme Court, New York County

Docket Number: 0600305/2005

Judge: Richard B. Lowe

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SCANNED ON 1/25/2008

[* 1]

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

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 600305/2005

HORIZON

vs

WOLKOWICKI, SHIMON

Sequence Number : 005

DISMISS

INDEX NO. ______

MOTION DATE 9/21/07

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	

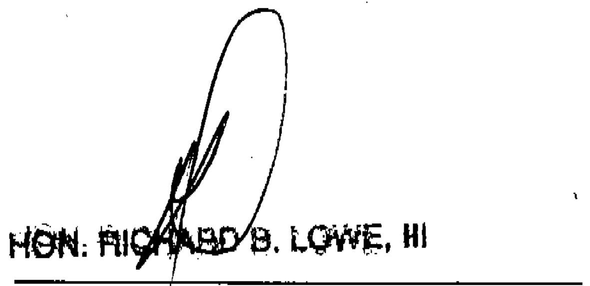
Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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



Dated: 1/15/08

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

---X

HORIZON, INC. and KURIER WEEKLY, INC.,

Plaintiffs,

Index No. 600305/05

-against-

SHIMON WOLKOWICKI (a/k/a SAM WOLKOWICKI), RHODA RYKLIN, NEW YORK REAL ESTATE GROUP, INC. and S&R MEDALLION CORP.,

Defendants.

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FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE, III, J:

Motion sequence numbers 003 and 005 are consolidated for disposition.

In this action, plaintiffs seek to recover $1,799,152 in funds transferred to defendant New York Real Estate Group, Inc. (NYREG), now a dissolved corporation. According to the amended complaint, defendants engaged in a scheme to induce plaintiffs, through plaintiffs' agent and principal, non-party Oleg Pogrebnoy (Pogrebnoy), to transfer $3,360,152 to NYREG, a company owned by defendant Shimon Wolkowicki (Wolkowicki).

The first transfer was allegedly made by plaintiffs in 1997, in the amount of $660,000, to finance a new company called Taxi Wheels To Lease, Inc. (Taxi Wheels). According to plaintiffs, non-party Alex Bezpalco (Bezpalco), acting as agent for Wolkowicki and defendant S&R Medallion Corp. (S&R), and Alex Field (Field), Pogrebnoy's former business associate and employee, instructed Pogrebnoy not to transfer the funds directly to Taxi Wheels, but rather, to NYREG accounts.

In 1998, Bezpalco allegedly represented to Pogrebnoy that Wolkowicki and S&R sought

to borrow additional money "for business needs," and represented "that any moneys advanced to them would yield 7.75% interest per annum and would be repayable on demand." Amended Complaint, ¶ 14. Plaintiffs allege that all of the transferred funds, totaling $3,360,152, were transferred by plaintiffs to NYREG. Plaintiffs claim that, thereafter, they received payments totaling $1,561,000 from S&R and other entities owned by Wolkowicki, leaving $1,799,152 unpaid.

Wolkowicki and his wife, defendant Rhoda Ryklin (Ryklin), owned S&R. In 2002, Wolkowicki transferred his 50% interest in S&R to Ryklin.

The original complaint, dated January 10, 2004, sought monetary damages of $1,799,152, asserting causes of action for breach of contract, money had and received and fraud. The 10-count amended complaint, dated February 5, 2007, in addition to the three causes of action in the original complaint, asserts causes of action for breach of implied contract, unjust enrichment, violations of sections 275 and 276 of New York's Debtor and Creditor Law, piercing the corporate veil, breach of fiduciary duty and contract, and inducement of breach of fiduciary duty and contract.

Defendants now move, in motion sequence number 003, to strike plaintiffs' demand for a jury trial contained in their May 16, 2007 note of issue (NOI), pursuant to CPLR 4101 and 4102 (c). Defendants also move, in motion sequence number 005, for summary judgment dismissing all claims asserted against Wolkowicki, Ryklin and S&R, and limiting the damages that may be recoverable against NYREG.

Plaintiffs cross-move for an order, pursuant to CPLR 3126, striking defendants' amended answer and affirmative defenses; or, in the alternative, resolving all issues in the amended

complaint that relate to defendants' discovery failures in favor of plaintiffs; or, in the alternative, precluding defendants from introducing any documents or witness testimony into evidence not produced during discovery relating to an alleged real estate project in Israel, and certain checks to third parties issued by some of the defendants, and other documents relating to the alleged repayment of funds advanced by plaintiffs to defendants.

Discussion

Summary Judgment (Motion Sequence Number 005)

Agency

Defendants seek dismissal of plaintiffs' first through fourth causes of action for breach of contract, money had and received, breach of implied contract, and unjust enrichment, respectively. These causes of action are all based upon plaintiffs' assertion that they loaned money to Wolkowicki and S&R that was never repaid.[1] According to plaintiffs, Bezpalco acted as agent for Wolkowicki and S&R, and bound them to repay funds provided by plaintiffs to NYREG. Defendants argue that Bezpalco had neither actual nor apparent authority. Plaintiffs do not dispute that Bezpalco did not have actual authority to bind defendants, but they argue that he had apparent authority, and that issues of fact exist concerning the existence and scope of the agency.

Apparent authority involves "words or conduct of the principal, communicated to a third

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[1] The first cause of action is asserted against Wolkowicki and S&R only. The second, third and fourth causes of action are asserted against Wolkowicki, S&R and NYREG. The court notes that defendants also purport to direct this argument at the fifth cause of action for fraud. However, defendants do not explain how their agency or statute of frauds arguments are applicable to plaintiffs' common-law fraud cause of action. Rather, the parties address the fraud claim independently, and, therefore, that claim is addressed independently in this decision, below.

party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *Hallock v State of New York*, 64 NY2d 224, 231 (1984). There must be "'a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent.'" *Id.* (citation omitted). In addition, "a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." *Id.* Where "the circumstances raise the possibility of a principal-agent relationship but no written authority of the agent has been proven, questions of agency and of its nature and scope ... are questions of fact to be submitted to the jury under proper instructions by the court." *Fogel v Hertz Intl., Ltd.*, 141 AD2d 375, 376 (1st Dept 1988) (citations and internal quotation marks omitted).

Here, Pogrebnoy testified that, in 1998, after the initial transfer of funds to NYREG, he was approached by Bezpalco about making additional loans. Pogrebnoy stated that he never talked about the loans directly with Wolkowicki (and that he never spoke to Wolkowicki directly until 2003), but that:

> at some point Bezpalco called [Wolkowicki] and raised the issue that [Pogrebnoy is] nervous about the, worry about the ... security of the loans, and [Wolkowicki] was acting, come on, didn't you tell him who I am, and, you know, didn't you tell him about the Taxi Wheels [S&R] and so just tell him I'll give him the promissory note and I'll personally guarantee the money.

Gould Aff., Ex. A, at 25-26. Pogrebnoy stated that he listened in on this telephone conversation between Bezpalco and Wolkowicki but did not participate in it. *Id.* at 26-27. He also testified that Wolkowicki did not know that Pogrebnoy was listening to the conversation. *Id.* at 28.

The parties dispute whether this telephone conversation confirmed to Pogrebnoy that

Bezpalco was Wolkowicki's agent, acting with apparent authority, and whether, through Bezpalco, Wolkowicki solicited the loans to be paid to NYREG. While Wolkowicki never mentioned in the telephone conversation that Bezpalco was his agent, defendants do not dispute plaintiffs' assertion that NYREG accepted wire transfers sent by plaintiffs after Bezpalco's telephone conversation with Wolkowicki.

Whether this telephone conversation, together with the parties' conduct, gave rise to the appearance and belief that Bezpalco possessed authority to enter into a transaction on behalf of Wolkowicki, and the reasonableness of Pogrebnoy's reliance upon the conversation, "raise triable issues with respect to the nature of the relationship between" Wolkowicki and Bezpalco as to whether a principal-agent relationship existed, and, if so, the nature and scope of that agency. *Fogel*, 141 AD2d at 376. Therefore, defendants' motion for summary judgment dismissing the first through fourth causes of action, based upon Bezpalco's lack of authority to bind Wolkowicki, is denied.

Statute of Frauds

Defendants' statute of frauds argument is based upon plaintiffs' allegation that Wolkowicki promised to be responsible for plaintiffs' advances to NYREG, and that S&R issued promissory notes and checks to plaintiffs that were signed by Wolkowicki. Defendants argue that the statute of frauds precludes plaintiffs' claims against Wolkowicki and S&R, because plaintiffs cannot produce any writing by these defendants evidencing a promise to repay funds allegedly loaned by plaintiffs to NYREG. Defendants argue that, therefore, plaintiffs' claim for repayment relies upon an oral promise that is unenforceable under the statute of frauds. Plaintiffs counter that the "leading object" rule takes the oral promise out of the statute of frauds. Plaintiffs

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also argue that notes issued by defendants were stolen, and that, therefore, parol evidence can be used to prove their existence. In addition, plaintiffs argue that payments by S&R and Wolkowicki's friends constitute part performance.

Under New York General Obligations Law (GOL) section 5-701 (a) (2), "a special promise to answer for the debt, default or miscarriage of another person" is void, "unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent ... ." An exception to the statute exists, where "the promise need not be in writing if it is (1) supported by new consideration moving to the promisor and beneficial to him, and (2) the promisor has become in the intention of the parties a principal debtor primarily liable." *Carey & Assoc. v Ernst*, 27 AD3d 261, 263 (1st Dept 2006) (citation omitted). Under these circumstances, it is plaintiff's burden "to produce evidence showing a consideration moving to defendant and showing that the parties intended, as ascertained from the language used and from all the facts and circumstances surrounding the transaction, that an independent contract was created between them which obligated defendant to satisfy the ... debt in any event." *Martin Roofing, Inc. v Goldstein*, 60 NY2d 262, 265 (1983) (internal citation omitted). "Courts have generally required that the new consideration be both tangible and directly beneficial to the promisor in order to satisfy this exception." *Carey & Associates*, 27 AD3d at 263-64, citing *Martin Roofing*, 60 NY2d at 266-267.

Here, the pleading avers that the funds at issue were transferred from plaintiffs to NYREG, not Wolkowicki or S&R. Plaintiffs' responses to defendants' interrogatories, and the evidence of wire transfers submitted therewith, are consistent with this allegation. There is no allegation or evidence of any *new* consideration moving to Wolkowicki or S&R. Therefore,

neither the allegations of the amended complaint, nor the documentary evidence submitted by the parties, show any consideration received by Wolkowicki or S&R, or any direct and tangible benefit from the purported transfers to NYREG. Thus, defendants have made a prima facie showing that neither Wolkowicki nor S&R became principal debtors primarily liable for the re-payment of the loans allegedly made to NYREG.[2]

Plaintiffs' argument in favor of the application of the "leading object" rule is without merit, because "[t]he rule is not recognized in this state ... ." *Martin Roofing, Inc.*, 60 NY2d at 269.

Plaintiffs' argument that parol evidence can be used to prove the existence of the notes is also unpersuasive. Plaintiffs concede that enforcement of the first alleged note, made on May 27, 1998 for $1,393,152, is time-barred. Pogrebnoy states in his affidavit that S&R issued checks and a second note, made in December 1999 for $2,600,152, but that those documents were stolen several years ago by Field. According to Pogrebnoy, Field admitted the theft to Pogrebnoy's former attorney, Peretz Bronstein (Bronstein). Pogrebnoy claims that, in an action in the Supreme Court, Kings County, in connection with litigation against Field, Bronstein submitted an affidivat "to the effect that Field admitted that he took a document." 9/10/07 Pogrebnoy Aff., ¶ 8.

The best evidence rule requires a party seeking to prove the contents of a writing to

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[2] The court notes that, as discussed above, questions of fact exist as to whether Wolkowicki and S&R were already bound by the agreement allegedly struck by Bezpalco on their behalf. Under plaintiffs' agency theory, any guaranty by Wolkowicki to repay the funds would be redundant. In other words, it is not clear to the court why Wolkowicki would guaranty a promise that plaintiffs claim he was already obligated to pay, based upon the agreement allegedly struck between plaintiffs (through Pogrebnoy) and defendants (through Bezpalco).

produce the original writing. *Dependable Lists, Inc. v Malek*, 98 AD2d 679, 680 (1st Dept 1983). However, in the absence of the original writing, secondary evidence may be used to prove the contents of the writing. *Id.* "Where a proper excuse has been shown for the nonproduction of the original writing, such as its loss or destruction, the admissions of the adversary, whether oral or written, can be received in evidence to prove the former existence as well as the contents of the writing." *Id.* The parol evidence may also consist of "the testimony of others who have first-hand knowledge of the existence of the writing and its terms." *Nicosia v Muller*, 229 AD2d 964, 965 (4th Dept 1996); *see also Lynch v Savarese*, 217 AD2d 648, 650 (2d Dept 1995) (although appellants were unable to locate a signed copy of a lease, proof of the existence of the lease was permitted on summary judgment by an affidavit of the non-party former managing agent of the leased premises, who asserted that he observed the third-party defendant sign the lease).

Here, however, plaintiffs do not offer the admission of an adversary. Rather, the only proof of the contents of the note is the self-serving testimony of Pogrebnoy, and plaintiffs fail to identify the terms of the writing. Moreover, plaintiffs' only excuse for the disappearance of the note is Pogrebnoy's recounting of the statement of his former attorney concerning Field's alleged theft.[3] Thus, plaintiffs' excuse is inadmissible hearsay. Therefore, plaintiffs' argument that parol evidence can be used to prove the existence of the notes fails to rebut defendants' prima facie showing.

Plaintiffs also claim that they can avoid the statute of frauds because they received three

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[3] The court notes that plaintiffs offer no explanation of what efforts, if any, where made to retrieve their purportedly stolen property, such as contacting law enforcement or commencing proceedings for recovery of the property.

payments from S&R, totaling $300,000, together with payments made by Wolkowicki's friends, evidencing part performance. Plaintiffs cite no legal authority in support of their argument; and, as a preliminary matter, "[t]he exception to the statute of frauds for part performance applies to General Obligations Law § 5-703, which deals with real estate transactions, but it has not been extended to General Obligations Law § 5-701." *Stephen Pevner, Inc. v Ensler*, 309 AD2d 722, 723 (1st Dept 2003). Therefore, the doctrine of part performance is inapplicable.

In any event, even assuming for the moment that the doctrine of part performance were applicable, that doctrine

> may be invoked only if [a party's] actions can be characterized as "unequivocally referable" to the agreement alleged. It is not sufficient ... that the oral agreement gives significance to [a party's] actions. Rather, the actions alone must be "unintelligible or at least extraordinary", explainable only with reference to the oral agreement.

Anostario v Vicinanzo, 59 NY2d 662, 664 (1983) (internal citations omitted).

Here, plaintiffs claim that they received $1,561,000 "from S&R and other entities owned by Wolkowicki ... as payment on the prior advances." Amended Complaint, ¶¶ 20, 26. Plaintiffs do not claim that Wolkowicki made any of these payments. Therefore, Wolkowicki cannot be responsible for any part performance. Moreover, it is not clear what payments were made by Wolkowicki's friends, on his behalf, or that any such payments can be explained only with reference to the alleged oral agreement.

Of the $1,550,000 allegedly repaid, Pogrebnoy testified that $300,000 was repaid by S&R. However, plaintiffs submit no documentary evidence in support of their claim that S&R made this payment, or of any checks issued by S&R for repayment. Moreover, plaintiffs do not

claim that the money was repaid to them, but rather, Pogrebnoy testified that $1,550,000 was paid to non-parties DSOP Investments (DSOP) and Publishing International. Defendants claim that $898,000 of the alleged repayment was paid to DSOP by non-party ELS. Thus, it is not clear whether S&R's alleged $300,000 payment was made to satisfy a guaranty agreement between the parties, or as an obligation of S&R to another entity, such as ELS, another entity controlled by Wolkowicki.[4] Thus, the agreement alleged by plaintiffs "provides a possible motivation for [S&R's] actions, [but] the performance is equivocal, for it is as reasonably explained by the possibility of other expectations ... ." *Anostario*, 59 NY2d at 664. Therefore, S&R's purported payment of $300,000 (only approximately 20% of the amount repaid) is not unequivocally referable to an alleged oral promise by S&R to repay funds transferred to NYREG.

Based upon plaintiffs' argument and the affidavit of Pogrebnoy, the strongest conclusion that can be drawn in favor of plaintiffs is that questions of fact exist as to whether the purported repayments by Wolkowicki's friends and S&R constitute part performance of debt obligations of Wolkowicki and S&R. However, "[i]n this context, 'the existence of a question of fact supports, rather than precludes, summary judgment.'" *Pizza Pub. Co. Ltd. v Tricon Global Rest., Inc.*, 2000 WL 1404716, *2, 2000 US Dist LEXIS 13944 (SD NY 2000) (citations and internal quotation marks omitted). Accordingly, plaintiffs' argument that part performance takes the alleged oral agreement outside the statute of frauds is without merit.

For the foregoing reasons, plaintiffs fail to rebut defendants' prima facie showing. Accordingly, defendants' motion for summary judgment is granted to the limited extent that the

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[4] Plaintiffs do not respond to this argument, but merely conclude that the payments constitute part performance.

first through fourth causes of action are dismissed only as to Wolkowicki and S&R's alleged guaranty of repayment of funds transferred to NYREG. For the sake of clarity, these causes of action are sustained as asserted against NYREG and with respect to the alleged direct agreement between plaintiffs and Wolkowicki and S&R.

Fraud

Defendants seek dismissal of the fifth cause of action for fraud, arguing that there was no misrepresentation or justifiable reliance. This cause of action is asserted against Wolkowicki, S&R and NYREG.

To establish fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996).

Here, Pogrebnoy admitted at his deposition that he did not communicate with Wolkowicki until 2003, *after* all of plaintiffs' money transfers to NYREG. Therefore, there were no misrepresentations by Wolkowicki that plaintiffs could have relied upon in making the transfers. Moreover, plaintiffs do not allege that any misrepresentations were made by S&R. The only misrepresentation alleged in the amended complaint claims that defendants "asserted in this litigation" that money transferred by plaintiffs to NYREG was to be used to fund a real estate project in Israel. Amended Complaint, ¶ 38. Thus, the alleged misrepresentation occurred only after plaintiffs commenced this action, and plaintiffs do not allege any misrepresentations made at the time of the transfers that induced plaintiffs to make those transfers.

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Furthermore, the only reliance alleged is plaintiffs' purported reliance upon Wolkowicki and S&R's "integrity" (*id.*, ¶ 39), without any specific allegations explaining the nature of the fraud, or any misrepresentation or omission. Therefore, defendants have made a prima facie showing that plaintiffs' fraud claim should be dismissed for failure to allege a misrepresentation, reliance, or the specificity required by CPLR 3016 (b), which requires "the circumstances constituting the wrong" to be "stated in detail."

The only legal authority cited by plaintiffs is *Wall Street Transcript Corp. v Ziff Communications Co.* (225 AD2d 322, 322 [1st Dept 1996]), where the First Department found that "[t]he alleged non-disclosures [did] not constitute fraud since there was no duty to speak under the circumstances." Although it is not entirely clear from the papers before the court, plaintiffs appear to be arguing that defendants had a duty to disclose that Wolkowicki's intended and continued use of plaintiffs' funds was not for a real estate investment in Israel maintained through NYREG, as was allegedly promised by defendants. Rather, NYREG was allegedly created and used by Wolkowicki to defraud potential investors, and to launder the proceeds of Wolkowicki's alleged frauds. Wolkowicki allegedly knew that this conduct would leave NYREG unable to repay the funds owed to plaintiffs.

However, Pogrebnoy testified that he did not know anything about the business of NYREG at the time of the transfers, and that he loaned over $3 million to Wolkowicki without ever speaking to him. Pogrebnoy testified that he understood NYREG to have been "nothing, one of the million companies which opens and closings [*sic*] every day." Lang Aff., Ex. F, at 38. When asked if he knew what NYREG was doing in 1998, at the time of the transfers, Pogrebnoy responded: "No. No, why would I care? Even if I knew, I would never lend money to some

company. I didn't even care about that." *Id.* at 39.

This testimony underscores plaintiffs' lack of knowledge of what the transferred funds were to be used for, and the lack of specificity in the pleading makes it difficult, if not impossible, to determine how or why a duty to disclose arose. In other words, plaintiffs appear to be claiming on the one hand that the funds transferred to NYREG were to be used for the particular purpose of real estate development in Israel, while on the other hand claiming that they did not know anything about NYREG's business. In short, plaintiffs fail to explain, factually or legally, how a duty to disclose arose. For the foregoing reasons, plaintiffs fail to rebut defendants' prima facie showing. Accordingly, defendants' motion for summary judgment dismissing the fifth cause of action for fraud is granted, and that claim is dismissed as to defendants Wolkowicki and S&R.

Violations of Debtor & Creditor Law

Defendants next seek summary judgment dismissing the sixth and seventh causes of action for violations of sections 275 and 276 of New York's Debtor and Creditor Law (DCL), respectively. These causes of action are asserted against Wolkowicki, Ryklin and S&R.

Under section 275 of the DCL, "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Under section 270, a "creditor" is "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Under section 276, "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or

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future creditors, is fraudulent as to both present and future creditors." Section 276 "addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency." *Wall Street Assoc. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999) (citation omitted). Moreover, to establish the element of intent, the plaintiff

> is allowed to rely on badges of fraud to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance.

Id. (internal quotation marks and citations omitted).

Defendants argue that plaintiffs are not creditors of Wolkowicki, and that the affidavit of defendants' accountant, Samuel Shuster (Shuster), states that Wolkowicki's stock transfer to Ryklin had no effect upon Wolkowicki's ability to pay his personal debts as they matured. However, Shuster submits no documentary evidence in support of his conclusion, and presumably assumes that Wolkowicki is not responsible for the corporate obligations of NYREG. As discussed in further detail below, plaintiffs' cause of action to pierce the corporate veil is sustained, potentially exposing Wolkowicki to the corporate obligations of NYREG. *Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 (1993). Therefore, these arguments are unpersuasive.

Defendants also argue that these claims should be dismissed, because S&R, as a named defendant in this action, cannot avoid liability. However, defendants cite no legal authority in support of this argument. Moreover, the parties do not dispute that Wolkowicki transferred his

interest in S&R to his wife, Ryklin, in March of 2002, at a time when the amount allegedly owed to plaintiffs remained outstanding. Based on the papers before the court, factual issues exist concerning the adequacy of the consideration and Wolkowicki's ability to pay his debts as a result of the transfer.

In addition, the transfer took place while a criminal investigation was pending against Wolkowicki concerning insurance fraud. Wolkowicki testified that he pleaded guilty to charges arising out of that investigation, and, according to plaintiffs, he served time in jail and paid a penalty of approximately $1 million. Thus, Wolkowicki's exposure to incarceration, lost income and penalties further support denial of defendants' motion for summary judgment dismissal. *Matter of Shelly v Doe*, 249 AD2d 756 (3d Dept 1998) (sustaining claim under DCL section 275 where transfer was made while defendant faced prospect of incarceration and/or loss of income).

Moreover, with respect to the claim under DCL section 276, it is not clear at this juncture whether the transfer was made in the usual course of business, and whether Wolkowicki retained control of the property after the transfer. The determination of intent "is ordinarily a question of fact which cannot be resolved on a motion for summary judgment," and "[t]ransfers between husband and wife are ordinarily scrutinized very carefully." *Grumman Aerospace Corp. v Rice*, 199 AD2d 365, 366-367 (2d Dept 1993) (citations omitted). "Thus, enough indicia of fraud exist to warrant denial of the defendants' motion for summary judgment." *Id.* (sustaining claim under DCL section 276 where conveyance occurred while defendant was under investigation by the federal government for fraud, which would expose him to financial liability, and defendant pleaded guilty to charges arising out of that investigation and continued to live in marital home). For the foregoing reasons, defendants' motion for summary judgment dismissing the sixth and

seventh causes of action is denied.

Piercing the Corporate Veil

Defendants next move for summary judgment dismissing the eighth cause of action, which seeks to pierce the corporate veil of NYREG to hold Wolkowicki personally liable for the funds transferred by plaintiffs. This cause of action is asserted against Wolkowicki and NYREG.

"[C]ourts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity." *Matter of Morris*, 82 NY2d at 140.

> Generally, ... piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.

Id. at 141-42. "Under New York law, the corporate veil can be pierced where there has been, inter alia, a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment." *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 (1st Dept 1996).

Here, defendants submit the affidavit of Shuster, the accountant of NYREG, Wolkowicki,

Ryklin and S&R. Shuster states that NYREG maintained books and records, and that NYREG's funds were never mingled with Wolkowicki or Ryklin's personal funds or used to satisfy personal debts. However, it is not clear to the court that NYREG adhered to corporate formalities. Wolkowicki testified that he was the president and 100% owner of NYREG, and that, at some point, non-party Abramov obtained an interest in NYREG. However, he also testified that there is no written agreement reflecting Abramov's interest, and Wolkowicki did not know if shares were ever issued.

Nor were any documents maintained by NYREG reflecting plaintiffs' transfers. Wolkowicki also testified that he used his personal friends and funds from other corporations to fund NYREG and pay some of NYREG's debts to plaintiffs, and that some of the funds were reimbursed to third parties in cash. In essence, Wolkowicki testified that he used third parties to pay NYREG's debts, without any written contracts evidencing the third-party loans, and he kept no records indicating which companies were providing money to NYREG. He testified that, when money went from non-party ELS or S&R into NYREG, "as far as [Wolkowicki was] concerned, it's all [his] money, it's going from one entity that [he] control[led] to another entity that [he] control[led.]" Gould Aff., Ex. B, at 90.

Moreover, as discussed in further detail below, defendants have consistently failed to produce bank records, or any other documents evidencing NYREG's corporate transactions. Wolkowicki testified that he kept no records of NYREG's debt obligations, even though he used the assets of other entities and friends in order to pay those obligations. Other than Wolkowicki's testimony, there is no evidence of NYREG's assets or investments, business conducted, or income, other than funds transferred by plaintiffs (and, according to Wolkowicki,

by his friends and other companies). Nor is there any evidence that NYREG held any regular meetings or maintained corporate records or minutes.

Taken together, the allegations of the amended complaint, Wolkowicki and Pogrebnoy's testimony, and the documentary evidence raise questions of fact as to whether NYREG followed corporate formalities. Tellingly, defendants consistently failed to produce documentary evidence of NYREG's business transactions, bank records and other corporate formalities, making it difficult to determine whether NYREG was engaged in a legitimate business enterprise, such as real estate development overseas, or was used by Wolkowicki as a "dummy" or "shell" entity to induce plaintiffs to transfer funds to NYREG. *Ventresca Realty Corp. v Houlihan*, 41 AD3d 707, 709 (2d Dept 2007). For the foregoing reasons, defendants fail to make a prima facie showing that plaintiffs' cause of action to pierce the corporate veil should be dismissed. Accordingly, defendants' motion to dismiss the eighth cause of action is denied.

Breach of Fiduciary Duty and Contract and
Inducement of Breach of Fiduciary Duty and Contract

Defendants next seek dismissal of plaintiffs' ninth and tenth causes of action as to Wolkowicki, arguing that there was no confidential relationship between plaintiffs and Wolkowicki, because they never communicated prior to the monetary transfers. The ninth cause of action for breach of fiduciary duty is asserted against Wolkowicki and NYREG, and the tenth cause of action is asserted only against Wolkowicki.

"Without an agreement providing for a relationship of trust, or special circumstances indicating the same, none can be inferred from the mere relationship of the parties." *Mobil Oil Corp. v Joshi*, 202 AD2d 318 (1st Dept 1994). Moreover, the fiduciary "relationship between the

parties must have existed prior to the transaction from which the alleged wrong emanated, and not as a result of it." *Elghanian v Harvey*, 249 AD2d 206, 206 (1st Dept 1998).

Here, Pogrebnoy admits that he did not speak to Wolkowicki until 2003, several years after plaintiffs' last transfer to NYREG. Therefore, there was no prior relationship of trust or special circumstances for plaintiffs to "repose[] faith in the fidelity and integrity of Wolkowicki as the owner and operator of the NYREG," as is alleged in paragraph 60 of the amended complaint. Therefore, defendants have made a prima facie showing that there was no fiduciary relationship between plaintiffs and Wolkowicki.

Plaintiffs argue that, under defendants' version of the facts, involving a real estate project in Israel, Wolkowicki never provided plaintiffs with any written documentation reflecting plaintiffs' interest, and plaintiffs were unable to make a visual inspection of the project because it was overseas.[5] According to plaintiffs, this created an extraordinary relationship, whereby defendants were empowered and plaintiffs were vulnerable and prevented from protecting themselves. However, plaintiffs' argument is unpersuasive, because, as discussed above, Pogrebnoy and Wolkowicki never communicated until *after* the transfers to NYREG. Moreover, Pogrebnoy testified that he did not know or care about the business of NYREG when he transferred the funds, and Bezpalco testified that Pogrebnoy refused to meet Wolkowicki prior to making the transfers.

For the foregoing reasons, plaintiffs fail to rebut defendants' prima facie showing that Wolkowicki did not owe them a fiduciary duty. *See Societe Nationale D'Exploitation*

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[5] The court notes that plaintiffs' argument, that they were unable to make a visual inspection of the property, is belied by Pogrebnoy's deposition testimony that he sent someone to inspect the property in Israel. Gould Aff., Ex. A, at 62.

Industrielle Des Tabacs Et Allumettes v Salomon Bros. Intl. Ltd., 251 AD2d 137, 138 (1st Dept 1998) (summary judgment dismissal affirmed where "plaintiff's subjective claims of reliance on defendants' expertise did not give rise, under ... particular circumstances ..., to a confidential relationship. We again note, in this regard, that the requisite high degree of dominance and reliance must have existed prior to the transaction giving rise to the alleged wrong, and not as a result of it").

In any event, the essence of plaintiffs' lawsuit is that they loaned $3,360,152 to Wolkowicki and S&R, in exchange for receiving 7.75% interest per annum. Thus, based upon plaintiffs' version of the facts, the parties engaged in "an arms' length lender-borrower or creditor-debtor contractual relationship [that] may not give rise to a fiduciary obligation on the part of the lender or creditor." *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 (1st Dept 1998). Accordingly, the ninth cause of action for breach of fiduciary duty and contract is dismissed as to Wolkowicki, and the tenth cause of action for inducement of breach of fiduciary duty and contract is dismissed in its entirety.

The court notes that defendants' opening brief states that the ninth cause of action should also be dismissed as to NYREG, but defendants' legal arguments are directed only at Wolkowicki (none of them mention NYREG), and defendants' notice of motion seeks dismissal of these claims only as to Wolkowicki. Therefore, the ninth cause of action is sustained as to NYREG.

Statute of Limitations

Defendants argue that the six-year statute of limitations, based upon contractual liability to return loaned funds, bars plaintiffs' claims against NYREG to the extent that those claims are

[* 22]

based upon repayment of money loaned before January 26, 1999.

Under CPLR 213 (2), an action for enforcement of a contractual liability to return loaned funds must be commenced within six years. "The Statute of Limitations affecting a note payable upon demand ... begins to run from the date of its execution." *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 143 (1993).

Here, plaintiffs claim that the funds transferred to NYREG were "repayable on demand." Amended Complaint, ¶¶ 14, 19, 24. This action was commenced on January 26, 2005. Therefore, defendants have made a prima facie showing that their damages against NYREG should be limited to funds transferred by plaintiffs after January 26, 1999.

Plaintiffs' opposition argument is a single sentence stating that "[t]he promissory note issued by S&R and [Wolkowicki] in December 1999 covered advances made before January 26, 1999, and takes them out of the Statute of Limitations." Plaintiffs' Opp. Mem. of Law, at 25. However, this argument deals only with the alleged promissory note made by S&R and Wolkowicki, which, as discussed in this decision, is barred by the statute of frauds. Therefore, plaintiffs fail to rebut defendants' prima facie showing. Accordingly, plaintiffs' claims against NYREG are barred as untimely with respect to funds transferred to NYREG prior to January 26, 1999.

<u>Cross Motion To Strike Answer and Affirmative Defenses</u>

Plaintiffs' cross motion for penalties under CPLR 3126 (1) and (3) is based upon their assertion that, since the inception of this litigation, defendants have thwarted and obstructed plaintiffs' ability to develop their case by refusing to respond to discovery requests. Defendants counter that the cross motion is untimely under 22 NYCRR 206.12 (c), because plaintiffs already

filed their note of issue.

22 NYCRR 206.12 (c) allows the court to permit "additional pretrial proceedings" to be conducted "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness" if such proceedings are necessary "to prevent substantial prejudice ... ."

The cases cited by defendants deal with plaintiffs seeking disclosure after the note of issue has been filed. Here, however, plaintiffs' cross motion does not seek additional disclosure, but rather, seeks to strike defendants' answer and affirmative defenses, resolve causes of action in favor of plaintiffs, or preclude defendants from introducing evidence not produced during discovery. Citing 22 NYCRR 202.21 (d), the First Department held that a "[p]laintiff's motion for disclosure sanctions, which was made after he filed a note of issue but was based upon notices and orders that predated the note of issue, was not precluded ..., since the relief sought was not in the nature of disclosure."[6] *Magee v City of New York*, 242 AD2d 239, 240 (1st Dept 1997). Therefore, defendants' reliance upon 22 NYCRR 206.12 (c) is misplaced, because plaintiffs' cross motion in the instant action does not seek additional disclosure.

Turning to the merits of plaintiffs' cross motion, CPLR 3126 permits the court to impose penalties against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article ... ." Under this provision, "willfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults." *Siegman v Rosen*, 270 AD2d 14, 15 (1st Dept 2000).

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[6] 22 NYCRR 202.21 (d) contains language identical to 22 NYCRR 206.12 (c).

Under CPLR 3126 (1), the court may "order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order," and under CPLR 3126 (3), the court may make "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Here, plaintiffs' first request for documents, dated March 1, 2005, sought, among other things: documents relating to the purchase of real estate projects in Israel involving Wolkowicki, or companies in which he had an interest or was affiliated with, from 1997 to present; documents evidencing repayment of funds advanced, invested or loaned by plaintiffs to NYREG, or any other company in which Wolkowicki had an interest or was affiliated with, from 1997 to present; and copies of bank statements issued to NYREG from 1997 to 2001, showing fund transfers from plaintiffs.

Defendants' response to plaintiffs' first document request, dated December 16, 2005, states that defendants "possess no documents" responsive to the request involving real estate projects in Israel. As a response to the second request, defendants submitted copies of eight checks from ELS Funding Corp. to DSOP, totaling $898,000. Defendants failed to respond to the request for bank statements of NYREG. According to plaintiffs, this was the extent of defendants' response to their first request for documents.

Defendants' only opposition is that they "produced the various documents demanded by plaintiffs and which were the subject of various discovery orders of this Court and plaintiffs effectively utilized those documents in the pretrial deposition of Wolkowicki." Def. Opp. Mem. of Law, at 14. For the following reasons, defendants' argument is unpersuasive.

In response to plaintiffs' first set of interrogatories, dated February 26, 2006, Wolkowicki is identified as the sole source of the information provided. Wolkowicki is also identified as the sole officer of NYREG, as the custodian of the documents responsive to plaintiffs' first request for documents, and his home is identified as the location of the documents. Thus, any defaults in document production are attributable to Wolkowicki.

In their response to plaintiffs' interrogatories, defendants stated that funds received by defendants were returned to plaintiffs, and that Wolkowicki was the sole person who, on behalf of defendants, had responsibility for, and knowledge of, the funds returned to plaintiffs. Plaintiffs' interrogatory number 33 sought an explanation of the exact amount of funds returned, whether the funds were returned by check or wire transfer, from what bank account the funds returned were drawn, the exact date upon which the funds were returned, and who authorized the transmittal of the returned funds. In response, defendants referred to the eight checks from ELS Funding Corp. to DSOP, totaling $898,000, that defendants submitted in response to plaintiffs' first request for documents.

Defendants do not dispute that no further information was provided to plaintiffs, concerning alleged repayments by defendants to plaintiffs, until May 7, 2007, approximately one week prior to depositions and plaintiffs' NOI date. This belated document production included checks totaling $500,000 issued to Field and Bezpalco, and defendants allegedly claimed a credit for those payments. Defendants do not respond to plaintiffs' argument that they have been prejudiced by defendants' late production, because claims against Bezpalco and Field are now likely barred by the statute of limitations.

Plaintiffs' second request for production of documents, dated November 14, 2006,

requested some of the same information as the first request for documents over a year and a half earlier, including, among other things: bank statements from Israeli banks used by defendants to receive funds transferred by plaintiffs to NYREG from 1997 through 2001; documents related to defendants' alleged real estate investments in Israel; and documents evidencing repayments of money advanced, invested or loaned by plaintiffs. By stipulation and court order dated January 18, 2007, defendants were required to respond to plaintiffs' request for bank documents by January 29, 2007. Defendants did not produce the documents by this date.

Nor did defendants produce the documents by the subsequent status conference held on February 22, 2007. Defendants also do not dispute plaintiffs' assertion that, at the February 22nd conference, defendants' attorney represented that the District Attorney's Office had Wolkowicki's files, even though Wolkowicki later testified that those files had been returned to him the previous year. Defendants' representation to the court is embodied in the stipulation and order, dated February 22, 2007, which states that, if necessary to respond to plaintiffs' request for documents, "defendants shall make application request to any appropriate governmental agency prior to March 8, 2007 and provide plaintiffs with a copy of said application or request and any response thereto." Gould Aff., Ex. J. Defendants did not provide plaintiffs with a copy of any application or responses, presumably because, as admitted by Wolkowicki, those documents had already been returned the previous year.

Another status conference was held on March 29, 2007. At this time, another stipulation and order was issued, requiring *defendants to comply with plaintiffs'* March 1, 2005 request, *over two years earlier*, for copies of bank statements issued to NYREG from 1997 to 2001, showing fund transfers from plaintiffs, and plaintiffs' second request for documents dated

November 14, 2006. The stipulation and order permitted either party to move "to strike pleadings and/or preclude" for failure to comply within 20 days. Gould Aff., Ex. K.

Defendants responded to plaintiffs' second document request on April 18, 2007. In this response, for the first time since plaintiffs' initial request for documents over two years earlier, defendants state that they requested documents from one of the Israeli banks, but no bank documents were produced at that time. In response to plaintiffs' request for documents related to defendants' alleged real estate investments in Israel, defendants stated that there were no documents, but in response to another request provided what appears to be a marketing brochure, in Hebrew, for "Vardia Heights." *Id.*, Ex. L. Defendants do not dispute that this was the only document defendants ever provided relating to the alleged existence of a real estate project in Israel. Defendants never produced a contract to purchase land, a deed evidencing ownership, construction contracts, invoices on construction work, evidence of sales, mortgages or financing arrangements. In response to plaintiffs' request for documents evidencing repayments of money advanced, invested or loaned by plaintiffs, defendants stated that they "have no documents responsive to this demand" except for wire transfers produced by plaintiffs during this litigation, and information requested, but not yet received, from the Israeli bank. *Id.*

On May 7, 2007, approximately one week before depositions were to be held, and well over two years after plaintiffs' initial request for documents, defendants produced an amended response to plaintiffs' second request for documents. However, in addition to the grossly belated production, these documents are not indexed coherently or paginated. Moreover, it is not clear what information the records contain, because defendants offer no explanation of the documents. Nor do these documents include back-up documentation, such as cancelled checks or wire

transfers, in order to determine to whom funds were disbursed. It also appears that some of the document responses are incomplete, missing pages, many of the documents are in Hebrew, and several documents are illegible photocopies. In addition, according to plaintiffs, many of the Hebrew documents are merely duplicates of documents produced in English.

Thus, defendants have wilfully and "repeatedly fail[ed] to respond to discovery demands and/or to comply with discovery orders," and they failed to offer any "excuses for those defaults." *Siegman*, 270 AD2d at 15. The documents sought by plaintiffs are critical to the prosecution of their claims, and also critical to defendants' seventh affirmative defense, in their second amended verified answer, which states that "[a]ny funds allegedly advanced to [NYREG] were repaid in full by [NYREG]." Lang Aff., Ex. B, at 6.

For the foregoing reasons, defendants are precluded from offering evidence at trial that was not produced prior to defendants' May 7, 2007 amended response to plaintiffs' second request for the production of documents, including evidence of defendants' purported repayment of funds advanced by plaintiffs, of payments to Alexander Bezpalco and Alexander Field, and of defendants' alleged real estate project in Israel.[7]

<u>Demand for Jury Trial (Motion Sequence Number 003)</u>

Defendants move to strike plaintiffs' demand for a jury trial, arguing that plaintiffs are not entitled to a jury trial because the amended complaint asserts five claims for equitable relief.

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[7] The court notes defendants' assertion that plaintiffs' complaints are due to their own conduct by failing to take Wolkowicki's deposition "until the penultimate moment." 9/13/07 Lang Aff., ¶ 10. This argument is disingenuous, because it would make little sense for plaintiffs to depose Wolkowicki, the central figure of plaintiffs' case, without first obtaining the documents that they sought to question him about. Moreover, while defendants complain of "the paucity of records produced by plaintiffs" (*id.*, ¶ 11), defendants fail to identify any discovery request with which plaintiffs failed to comply.

Plaintiffs counter that their rescission claims involve separate transactions, and that the additional equitable claims are ancillary and incidental to the claims for monetary damages.

Under CPLR 4101, equitable claims "shall be tried by the court," and the following issues of fact are triable by a jury: actions "which would permit a judgment for a sum of money only"; actions for ejectment, dower, waste, abatement and damages for nuisance, recovery of a chattel, or determination of a claim to real property; and actions "in which a party is entitled by the constitution or by express provision of law to a trial by jury." Under CPLR 4102 (c), "[a] party shall not be deemed to have waived the right to trial by jury of the issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction ... ."

A plaintiff waives its "right to a jury trial by joining legal and equitable claims" that are based upon the same transaction. *Willis Re Inc. v Hudson*, 29 AD3d 489, 489-90 (1st Dept 2006) ("reject[ing] plaintiff's argument that its original claim for injunctive relief, arising out of the same transactions and occurrences as the claim for damages and seeking to stop defendants from diverting plaintiff's business to themselves, was a 'tag along claim'"); *Winterview Inc. v Karin Models, LLC*, 294 AD2d 120, 121 (1st Dept 2002) ("jury demand was properly struck in view of ... joinder of legal and equitable causes of action based upon the same transaction"). However, a plaintiff seeking equitable relief will not result in a waiver of the right to a jury trial if the equitable relief is "incidental to the monetary relief sought ... ." *Decana Inc. v Contogouris*, __ AD3d __, __, 2007 NY Slip Op. 08768, *1-2 (1st Dept 2007).

Here, defendants concede that "all of the plaintiff[s'] claims relate to the ability to collect on an allege[d] loan." Def. Reply Brief, ¶ 4. Defendants concede that plaintiffs' first five claims

seek money damages. With respect to the additional claims, the claim for piercing the corporate veil to hold Wolkowicki liable for the debt obligations of NYREG is incidental to plaintiffs' ability to collect from NYREG, purportedly a dissolved corporation. The ninth cause of action for breach of fiduciary duty seeks money damages for amounts not repaid, or an accounting. However, "although defendants seek an accounting, their primary demand is for money. The accounting is merely a method to determine the amount of the monetary damages. The action therefore sounds in law and not in equity." *Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316 (1st Dept 1991).

The claims for violations of the DCL, in the sixth and seventh causes of action, involve a stock transfer that is a "separate transaction" under CPLR 4102 (c). Defendants argue that these claims are "inextricably entwined [*sic*] with plaintiffs' theory of the case," as part of a scheme to defraud plaintiffs of the outstanding funds. Def. Reply Brief, at 3. However, this argument implicitly concedes that these claims are incidental to plaintiffs' claims that seek recovery of amounts advanced by plaintiffs but not returned, thereby undermining defendants' argument.

For the foregoing reasons, while plaintiffs assert equitable claims, "when viewed in its entirety, the primary character of the case is legal," because plaintiffs' claims seek recovery of amounts allegedly owed by defendants. *Cadwalader Wickersham & Taft*, 177 AD2d at 316. "Where, as here, money damages alone afford a full and complete remedy, the action sounds in law and may be tried by a jury." *Id.* Therefore, defendants' motion to strike plaintiffs' demand for a jury trial is denied.

Accordingly, it is hereby

ORDERED that defendants' motion (motion sequence number 003) to strike plaintiffs'

demand for a jury trial is denied; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence number 005) is granted to the extent that: (1) the first, second, third and fourth causes of action are dismissed as against defendants Shimon Wolkowicki and S&R Medallion Corp. only as to these defendants' alleged promise to guaranty repayment of funds transferred by plaintiffs to defendant New York Real Estate Group Inc.; (2) the fifth cause of action is dismissed as to defendants Shimon Wolkowicki and S&R Medallion Corp.; (3) the ninth cause of action is dismissed as to Shimon Wolkowicki; (4) the tenth cause of action is dismissed in its entirety; and (5) plaintiffs' claims against defendant New York Real Estate Group, Inc. are time-barred with respect to funds transferred to this defendant prior to January 26, 1999; and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is granted to the extent that defendants are precluded from offering evidence at trial that was not produced prior to their May 7, 2007 amended response to plaintiffs' second request for the production of documents, including evidence: (1) concerning defendants' purported repayment of funds advanced by plaintiffs, (2) of payments to Alexander Bezpalco and Alexander Field, and (3) concerning defendants' alleged real estate project in Israel; and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 14, 2008

FILED
JAN 25 2008
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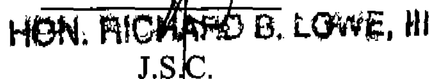

HON. RICHARD B. LOWE, III
J.S.C.