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

PRESENT: HON. RICHARD B. LOWE III PART 56

Index Number : 600869/2007
SMALL, LEWIS
VS.
ARCH CAPITAL GROUP LTD.
SEQUENCE NUMBER : 001
DISMISS COMPLAINT

INDEX NO. _____
MOTION DATE 12/20/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
MAY 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

HON. RICHARD B. LOWE III

Dated: 5/20/08

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

LEWIS SMALL, Individually and as Trustee of the RICHARD SMALL VOTING TRUST and the AMERICAN INDEPENDENT COMPANY VOTING TRUST; RICHARD SMALL; DAVID WILSTEIN; LEONARD WILSTEIN; DENISE WILSTEIN; GARY WILSTEIN; RONALD WILSTEIN; and FREDERICK GITTERMAN,

Index No. 600869/07

Plaintiffs,

-against-

ARCH CAPITAL GROUP, LTD.; AMERICAN INDEPENDENT COMPANIES, INC., as successor by merger to AMERICAN INDEPENDENT INSURANCE HOLDING COMPANY; TDH CAPITAL PARTNERS; and TDH III, L.P.,

Defendants.

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Hon. Richard B. Lowe, III

In motion sequence 001, defendants Arch Capital Group Ltd. And American Independent Companies, Inc. move pursuant to CPLR 3016(b), 3024(b) and 3211(a)(1), (3), (5), and (7). In motion sequence 002, defendants TDH Capital Partners and TDH III, LP seek an order pursuant to CPLR 3211 dismissing the complaint in its entirety or in the alternative, dismissing Count IV in so far as it is pleaded by plaintiff Frederick Gitterman and dismissing all demands for punitive damages. Motion sequences #001 and #002 are consolidated for disposition.

Background

Plaintiff Lewis Small sues in his individual capacity as a former shareholder of the corporate defendants, and as trustee for two voting trusts, (collectively "Small"). Five of the six individual plaintiffs, David, Leonard, Denise, Gary and Ronald Wilstein have claims that parallel Small's, and so are grouped with the Small plaintiffs. The sixth individual defendant, Frederick Gitterman (Gitterman), was never a shareholder in the subject corporation but was a director and legal and business advisor of the corporate defendants. Gitterman is allegedly a third-party beneficiary of the "Agreement," described herein.

Defendant American Independent Companies (AmCo) is sued as the successor by merger to American Independent Insurance Holding Company (AmCo Holding). Arch Capital Group Ltd. (Arch) is a former creditor and reinsurer of AmCo Holding, and is currently its parent company. The other defendants, TDH Capital Partners, and TDH III, L.P. (collectively, TDH) are former AmCo Holding creditors.

Plaintiffs allege that Arch and its shareholders and affiliates in the insurance and reinsurance industry are inextricably inter-related in a complex web of cross-ownership and common interests, which relationships have motivated them to act in complicity, against plaintiffs' interests.

In the complaint, plaintiffs allege that they sold their shares in AmCo Holding for $1.25 million in cash, and a contingent interest in the recovery from certain legal

proceedings in which AmCo Holding and Lewis Small were named as parties. The terms of this sale of stock to Arch are set forth in a Reorganization Agreement dated December 31, 2000 (the Agreement), which closed on February 28, 2001. According to plaintiffs, TDH, Smalls, AmCo Holding, and Gitterman all received a right to share in any proceeds from such lawsuits pursuant to the Agreement.

Plaintiffs allege that a joint venture with the defendants in this action was created in order to prosecute the parties' mutual interest in the outcome of three legal proceedings and a claim that was filed under AmCo Holding's Directors and Officers liability insurance policy (the D&O Claim).

In addition, the individual plaintiff Lewis Small claims that, as an attorney and the former chairman of AmCo Holding, the Agreement granted him the right to continue to manage the lawsuits and the D&O Claim being prosecuted for the benefit of the joint venture. (Plaintiffs concede that two of these lawsuits had been submitted to binding arbitration prior to execution of the Agreement.). Lewis Small claims that his right to manage the lawsuits was subject only to the right of AmCo Holding and TDF to "information and to consultation, and to their prior written approval of strategic decisions, including settlement and the selection or removal of lead counsel." In addition, claim plaintiffs, AmCo Holding agreed to continue to fund the costs and expenses of the lawsuits up to a maximum of $500,000, after the closing of the Agreement in February 2001. Plaintiffs claim that AmCo Holding's agreement to fund the prosecution of the

lawsuits and the D&O Claim after the closing of the Agreement constitutes an implicit agreement to use good faith.

Plaintiffs claim that AmCo and AmCo Holding successfully recovered $3 million in the binding arbitration of two of the three lawsuits before the closing. Despite this success, defendants are alleged to have failed to prosecute the third lawsuit, which will be referred to hereafter as the *Lederman* Action, and failed to prosecute the D&O Claim, as they promised in the Agreement.

Count I of the complaint alleges that Arch fraudulently induced plaintiffs to enter into the Agreement. Plaintiffs claim that Arch failed to disclose certain conflicts of interest it had which gave it a strong business and financial motive to sabotage the *Lederman* Action.

Count II addresses Arch's alleged fraudulent failure and prevention of the continued funding of the *Lederman* Action.

Count III alleges a breach of fiduciary duty against Arch and the TDH defendants, as joint venturers with plaintiffs, in failing to pursue the *Lederman* Action.

Count IV alleges breaches of express and implied contractual obligations owed by Arch and TDH to plaintiffs, through the same conduct previously cited.

Plaintiff Gitterman alleges that the breaches alleged in Count IVof the complaint caused him damage as a third-party beneficiary of the Agreement, and that he was also damaged by the misrepresentations alleged in the common-law fraud claim in Count II.

In prior proceedings between these same parties and two individual defendants not named in this action, plaintiff commenced an action in the Federal District Court, Southern District of New York, alleging nearly identical common-law claims as are here alleged. In addition, the complaint alleged a claim for securities fraud in violation of the Securities Exchange Act of 1934, as amended, 15 USC § 78j (b) (the Exchange Act), and Rule 10b-5, promulgated thereunder. The basis of the claim for securities fraud in violation of the Exchange Act was the assertion that, at the time that Arch entered into the Agreement, it secretly intended never to perform the contractual obligations that it was undertaking in connection with the continued litigation and continued funding of the lawsuits, i.e., Arch implicitly misrepresented its intent to perform such obligations.

In an unreported Opinion and Order by United States District Judge John F. Keenan, dated September 26, 2006, *Small v Arch Capital Group, Ltd.*, 2006 WL 2708448. 2006 US Dist LEXIS 67910 (SD NY), Arch's motion to dismiss the Second Amended Complaint (SAC) in the district court action was granted, for failure to state a claim in connection with the claim for federal securities fraud in Count I of the SAC. The district court applied the rule reiterated in *Campaniello Imports, Ltd. v Saporiti Italia S.p.A.*, (117 F3d 655, 664 [2d Cir 1997]) in dismissing the complaint. According to the district court, *Campaniello* held:

> Normally, allegations of mere nonperformance under a contract do not provide strong evidence of fraudulent intent.... In such circumstances, fraudulent intent may only be inferred "when a defendant violates an agreement so maliciously and

> so soon after it is made that his desire to do so before he entered into the agreement is evident."

Small v Arch Capital Group, Ltd., 2006 WL 2708448, *8, 2006 US Dist LEXIS 67910, attached to Defendants' Memorandum of Law in Support, dated June 1, 2007, Appendix.

In dicta, the district court stated that, even if the rule in *Campaniello* did not exist, "[p]laintiffs' complaint fails to satisfy the scienter standard because it does not sufficiently allege facts showing that Arch had the motive and opportunity to commit fraud, or facts constituting strong circumstantial evidence of conscious misbehavior or recklessness on Arch's part," required in securities fraud cases, pursuant to FRCP 9(b). *Id.*

The district court then dismissed all of the remaining common-law claims, refusing to exercise supplemental jurisdiction over these pendant claims following the dismissal of the federal question claim.

A threshold issue in these proceedings, following the dismissal in federal court, is whether the district court's dismissal of the SAC, with prejudice, has a collateral estoppel effect on the action now before this court.

Discussion

Collateral Estoppel

"The doctrine of collateral estoppel, a narrower species of *res judicata,* precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or

not the tribunals or causes of action are the same." *Ryan v New York Telephone Co.*, 62 NY2d 494, 500 (1984).

For a prior decision to have a collateral estoppel effect, "the issue must have been material to the first action or proceeding and essential to the decision rendered therein, and it must be the point actually to be determined in the second action or proceeding such that 'a different judgment in the second would destroy or impair rights or interests established by the first'." *Id.* at 500 - 501 (citations omitted).

Where a party claims that he was not afforded a "full and fair opportunity" to contest the decision now said to be controlling, he must be afforded such an opportunity.

> A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of ... the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation.

Id. at 501 (internal citations omitted).

While there are no rigid rules for determining whether a party must be collaterally estopped from prosecuting a claim in a subsequent action, there must be an identity of issue with the issue previously determined, and a full and fair determination must have been had, on the merits, before estoppel will be had. *See Buechel v Bain*, 97 NY2d 295 (2001).

While there is near identity of the parties and the facts at issue in this litigation and the proceedings before the district court, the district court rendered a decision on a claim rooted in federal statutory law, based on federal rules of pleading. All of the common-law claims which bear a similarity to the claims at issue in the present action were dismissed on a procedural ground and were never fully or fairly determined in the district court.

Thus, this court finds that plaintiffs are not collaterally estopped from pursuing their claims in this proceeding.

Whether the present complaint pleads its claims with sufficiency, however, requires a further inquiry. CPLR 3211.

Failure to State a Cause of Action

On a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2nd Dept 1999). A complaint should not be dismissed so long as a cause of action exists. *Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). In an action for fraud, the circumstances constituting the wrong must be pleaded in sufficient detail so as to clearly inform the defendant of the incidents complained of. *Lanzi v Brooks*, 43 NY2d 778 (1977). An action for breach of contract requires proof of the contract, performance of the contract by one party, a breach by the other party, and damages. *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021 (Sup Ct, NY County 1999).

The breach of contract claim alleged in the plaintiffs' fourth cause of action contains allegations which underlie all of the claims in the complaint. The examination of the complaint, pursuant to CPLR 3211, will thus begin with a review of the fourth cause of action.

The language contained in paragraph 9.10 of the Agreement is at the heart of the claim for breach of contract. Since the meaning and intent of this language is hotly contested by the parties, it seems best to include the text of this paragraph, in full:

> After the Closing, Lewis Small will continue to assist and manage the Lawsuits on behalf of [AmCo Holding] and TDH to the extent his health permits, subject to the following: (i) Small will provide the Company and TDH with all information relating to each Lawsuit, including the status thereof, and will consult with the Company and TDH regarding the Lawsuits at any time requested by the Company or TDH; (ii) the prior written approval of the Company and TDH will be required for any strategic decisions relating to the Lawsuits, including without limitation settlement of all or any portion of any Lawsuit and selection or removal of legal counsel or other professional advisors ... (iii) Small agrees not to take any position that would, directly or indirectly, negatively affect in any material respect the reputation of the Company, its shareholders, TDH or its partners; and (iv) the Company will continue to fund reasonable fees and reasonable expenses of the Lawsuits (based on appropriate supporting written invoices) up to a maximum of $500,000.

Plaintiffs complain that they fully and timely complied with their respective

obligations under the Agreement, but that Lewis Small was repeatedly frustrated in his efforts to obtain the defendants' compliance with this provision of the Agreement. Most, if not all, of the 70 pages of the complaint are devoted to describing actions which defendants took or failed to take, which put them in breach under the Agreement. The complaint sums up these actions in the fourth cause of action: "[defendants] breached both their respective agreements that the Company would continue to fund the reasonable fees and expenses of the Lawsuits, up to a maximum of $500,000, and that Lewis Small would continue to manage the Lawsuits, including the Lederman Lawsuit and the D&O Claim, on behalf of the Company and TDH, and their respect [sic] implied covenants of good faith and fair dealing in connection with the continued pursuit, funding and management of the Lawsuits and D&O Claim." Complaint, ¶ 214. The Company is alleged to have failed to properly account for the proceeds received from some of the relevant lawsuits, and to have failed to distribute those proceeds properly. Plaintiffs seek to recover damages as a result of these breaches, not limited to the consequential damages measured by the loss of the value of their respective shares of the proceeds from the *Lederman* Action.

Defendants seek to dismiss this breach of contract claim for 10 different reasons, among them a lack of damages; allegations of breach regarding the D&O Claim outside of the express language of the Agreement; a misinterpretation of the contractual language as granting control over the management and funding of the

Lawsuits to Lewis Small; the collateral estoppel effect of findings by the District Court regarding whether or not plaintiffs have met their burden of pleading; plaintiffs' misinterpretation of paragraph 4.1 of the Agreement regarding the expenses to be deducted from, and the method of disbursing, the proceeds of the Lawsuits; the absence of any prohibition on defendants from obtaining releases from some of the plaintiffs; and language in paragraph 17.5 of the Agreement which forecloses plaintiffs from alleging claims based on defendants' extra-contractual knowledge. *See* Memorandum of Law of Arch Capital Group LTD., *et al.* in Support of their Motion to Dismiss the Current, Fifth, Version of Plaintiff's Complaint, dated June 1, 2007, at 61-64.

Each of these objections to the fourth cause of action requires an examination of the factual evidence in this case, clearly a burden which is beyond the scope of the court's inquiry on this motion to dismiss, pursuant to CPLR 3211. Defendants argue that "the allegations of Count IV are grounded in fabricated "express agreement[s]," referring to paragraph 214 of the complaint, quoted above. Defendants also cite to irrelevant decisions as authority for dismissal of this complaint (*see Mass v Cornell University*, 94 NY2d 87 [1999]; *Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202[A)], 2006 NY Slip. Op. 52381[U], [Sup Ct NY County 2006], *affd* 49 AD3d 408 [1st Dept 2008]). Defendants again raise the collateral estoppel argument regarding the district court's factual findings, which has been wholly rejected by this court.

While it is entirely possible that a summary judgment motion could be resolved in

defendants' favor at an appropriate time, this is not such a motion. The court's inquiry is limited to determining whether plaintiffs have stated any cause of action at all. After examining the complaint, the court finds that the fourth cause of action states a claim for breach of contract, upon which relief may be granted. Plaintiffs have sufficiently pleaded the existence of the Agreement, plaintiffs' own performance under the Agreement, defendants' alleged breach, through various acts of commission and omission, and damages. That defendants dispute almost every piece of plaintiffs' allegations does not diminish the sufficiency of the pleading.

Dismissal based on Documentary Evidence

Defendants' application to dismiss the complaint based on documentary evidence also fails. "'To succeed on a motion under CPLR 3211 (a) (1), a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim.'" *Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202(A), 2006 NY Slip Op 52381 (U) (citation omitted). Defendants claim that the Agreement "undercuts" plaintiffs' claim of breach of its express terms. But "undercutting" is not tantamount to definitively disposing of plaintiffs' claims. Defendants' list of 10 reasons why the express terms of the Agreement "cannot be reconciled" with the plaintiffs' claims raises discrepancies with plaintiffs' interpretation of the Agreement, but does not definitively resolve those discrepancies. Dismissal of the fourth cause of action is also denied.

Fraud

The crux of the plaintiffs' claim for fraudulent inducement, in the first cause of action, is that Marsh & McLennan Companies, Inc. (Marsh) dominated and controlled Arch, and that Arch stood to gain more from its insurance and reinsurance affiliates, in the form of ongoing premiums, than it stood to recover from the *Lederman* Action, thus creating a clear disincentive for Arch to prosecute the *Lederman* Action in good faith, despite its representations to the contrary to these plaintiffs.

Plaintiffs allege that from the time that Arch first informed plaintiffs that it wanted to acquire AmCo Holding, up through and including the period of negotiations surrounding the Agreement, Arch had superior knowledge of certain material and essential facts which were not known by, or readily available to plaintiffs. These unavailable facts included Arch's alleged intention to enter into the reinsurance business; the fact that Arch's single largest shareholder was a subsidiary of Marsh, which in turn was the "largest provider of insurance brokerage and consulting services in the world" (Complaint, ¶ 142); the fact that Marsh was also the parent company of the "world's leading reinsurance brokerage firm" (Complaint ¶ 143); the fact that another Marsh company provided investment services to Arch and managed its portfolio of public and private equity securities; the fact that a Marsh subsidiary was the investment advisor to one of the third largest shareholders in Arch; the fact that directors and senior executives at Marsh held significant individual investment interests in some of Arch's major

corporate shareholders; and the fact that Arch was dependent on the good will of Marsh and Marsh's customers and investors.

Plaintiffs allege that Arch had a duty to disclose its relationship with Marsh and all of the Marsh affiliates, and that Arch deliberately failed to disclose the "Essential Facts." The complaint also alleges that Arch intentionally and unlawfully misrepresented material facts to the plaintiffs at the time it executed the Agreement, and as of the closing date, concerning its motives not to perform the specific promises that it made in the Agreement relating to the *Lederman* Action and the D&O claim.

To state a claim for fraud, a plaintiff must allege "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,* 88 NY2d 413, 421 (1996). CPLR 3016 requires that these elements of fraud be pleaded in detail. *Brown v Wolf Group Integrated Communications, Ltd.*, 23 AD3d 239 (1st Dept 2005).

Plaintiffs must allege something more than the fact that defendants never intended to perform in order to state a cause of action for fraud. *Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323-324 (1st Dept 2004). The defrauded party must allege specific facts showing that the promisor intended not to honor his obligations at the time the promise was made. *Pope v New York Prop. Ins. Underwriting Assn.*, 112 AD2d 984,

985 [2d Dept], *affd in part, appeal dismissed in part* 66 NY2d 857 (1985). The conclusory allegations in the complaint require the court to accept the plaintiffs' logic, which is based on disconnected and speculative information. This information fails to satisfy the specificity requirement of pleading scienter.

A further ground for dismissal of the first cause of action resides in the well-settled principle that "[a] cause of action based upon breach of contract cannot be converted into one for fraud merely by alleging that defendants did not intend to fulfill the contract." *Bencivenga & Co. v. Phyfe,* 210 AD2d 22, 22 (1st Dept 1994).

> It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract [internal citations omitted].

Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 (1987).

Plaintiffs claim that Arch had a duty to disclose the Essential Facts to them under the "special facts" doctrine, which creates a duty to disclose where none would otherwise exist, "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair," citing *Swersky v Dreyer and Traub* (219 AD2d 321 [1st Dept 1996]). In *Swersky*, the Court found that there were outstanding issues as to the disparity in the level of information available to the two parties, placing the case within

the ambit of the "special facts" doctrine. The Court questioned "whether plaintiffs could have through 'the exercise of ordinary intelligence' independently ascertained that [defendant] had acquired" the stockholder interests complained of in the complaint. *Id.* at 327. In the present action, plaintiffs concede that a Marsh affiliate's ownership interest in Arch was a matter of public record. *See* Complaint ¶ 141.

The special facts doctrine requires satisfaction of a two-pronged test before a duty of disclosure may be imposed on defendants: the facts about which plaintiffs allege a duty to disclose must be "peculiarly within the knowledge" of the defendants, and the information must be of such a nature that it could not have been discovered by the plaintiffs through the exercise of ordinary intelligence. *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 (1st Dept 2005). As evidenced by plaintiffs' own pleadings, the information supposedly kept from them was publicly available in SEC filings, and therefore falls outside of the "special facts" duty they seek to impose on defendants. *See Matter of Dean Witter Managed Futures Ltd. Partnership Litigation*, 282 AD2d 271 (1st Dept 2001). The first cause of action for fraudulent inducement is thus dismissed.

In the second cause of action, for fraud, plaintiffs complain that, following the closing of the Agreement, the defendants misrepresented facts regarding the status of the $500,000 funding obligation under the Agreement. Defendants are alleged to have intended to induce plaintiffs to execute releases with respect to the settlement of pending litigation, in favor of Arch, and to lull plaintiffs into waiving their rights under the

Agreement, or hiring their own attorney. Arch is alleged to have failed to account for expenditures under its funding obligation, and to have engaged in a series of partial disclosures, characterizations and affirmative representations that it had affirmatively satisfied its obligation to fund the Lawsuits.

These facts fail to satisfy the requirements for pleading a claim for fraud. All of the conduct alleged occurred after the Agreement was already in existence, as an inducement to plaintiffs to release Arch from further performance under the Agreement. At most, plaintiffs state a basis for seeking an accounting in connection with their breach of contract claim. The fraud claim in the second cause of action is dismissed.

Breach of Fiduciary Duty

The third cause of action, for breach of fiduciary duty, rests on plaintiffs' claim that the Agreement exhibited an intent on the part of the plaintiffs and defendants to enter into a joint venture, with the common aim of continuing to pursue the Lawsuits. Each aspect of the alleged joint venture, from contributions of property, financial resources, effort, skill, and knowledge, to control over the enterprise and sharing of profits and losses is allegedly spelled out in the Agreement. Plaintiffs claim that, as a result of their relationship to defendants as joint venturers defendants were in a fiduciary relationship with plaintiffs, and owed them the customary fiduciary duties of due care, loyalty, candor and full disclosure. According to the district court, this theory of liability, that the parties were joint venturers, was raised for the first time in the plaintiff's SAC. *See Small v Arch*

Capital Group, Ltd., 2006 WL 2708448, *13, 2006 US Dist LEXIS 67910.

This count of the complaint relies entirely on allegations that Section 9.10 of the Agreement was breached. The claim is thus based entirely on allegations of misconduct alleged in the fourth cause of action, for breach of contract. Claims of fiduciary duty where are merely duplicative of a contract claim must be dismissed. *See Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268 (1st Dept 2003). Furthermore, a claim for breach of the implied covenant of good faith and fair dealing must be dismissed where the claimed damages are concurrent with the damages claimed for breach of contract. *Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, *supra.*

Gitterman's Claims

This leaves the issue of plaintiff Gitterman's claims against defendants based on the theory that Gitterman was a third-party beneficiary of the Agreement. Gitterman, you will remember, is a former director and officer, and a non-shareholder plaintiff.

> Parties asserting third-party beneficiary rights under a contract must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost."

Mendel v. Henry Phipps Plaza West, Inc. 6 NY3d 783, 786 (2006) (citation omitted).

Plaintiffs' only argument in support of this theory of recovery on Gitterman's

behalf rests on omissions in Gitterman's pre-existing letter agreement with defendants. Plaintiffs claim that the Gitterman letter agreement was silent on how "net proceeds" from the Lawsuits were to be calculated, before applying Gittermans' agreed-to four percent recovery. The same letter agreement also allegedly omitted the D&O Claim from Gitterman's percentage of net proceeds, as well as any reference to defendants' commitment to fund the litigation fees and expenses. The Agreement, conclude plaintiffs, reflects an intention by the parties that Gitterman would derive these benefits from its terms, giving rise to third-party beneficiary status. Other than the omissions in Gitterman's own letter agreement, plaintiffs have failed to point to any language in the Agreement which gives Gitterman standing as a third-party beneficiary of the Agreement. Gitterman's claims in the fourth cause of action, for breach of contract, are therefore dismissed.

The court has considered the remaining contentions of the parties and found them to be without merit.

Accordingly, it is

ORDERED that the defendants' motions to dismiss the complaint are granted in part and the first, second, and third causes of action are dismissed; and it is further

ORDERED that the claims of plaintiff Frederick Gitterman in the fourth cause of action are dismissed, based on plaintiff Gitterman's lack of standing; and it is further

ORDERED that the motions are denied with respect to dismissal of the fourth

cause of action as to the remaining plaintiffs; and it is further

ORDERED that the action shall continue.

Dated: May 20, 2008

ENTER:

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