Heritage Partners, LLC v Modlin
2009 NY Slip Op 30528(U)
March 2, 2009
Supreme Court, New York County
Docket Number: 603570/06
Judge: Eileen Bransten
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SCANNED ON 3/11/2009

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

PRESENT: EILEEN BRANSTEN PART 3
Justice

HERITAGE PARTNER, LLC,
Plaintiff,

- v -

AVERY MODLIN, *et al.*

Defendants.

INDEX NO. 603570/06
MOTION DATE 5/6/08
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3 were read on this motion to amend and cross-motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, this motion and cross motion

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

ARE DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING
MEMORANDUM DECISION AND ORDER

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

Dated: 3-2-09

EILEEN BRANSTEN, *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 THREE

----------X

HERITAGE PARTNERS, LLC,

Plaintiff,

Index No.: 603570/06
Motion Date: 5/6/08
Motion Seq. Nos.: 03, 04, 05 and 06

- against -

AVERY MODLIN and THE MODLIN GROUP LLC,

Defendants.

----------X

THE MODLIN GROUP LLC,

Counterclaim-Plaintiff,

- against -

HERITAGE PARTNERS, LLC, JOEL J. SILVER, and ETHAN C. ELDON,

Counterclaim-Defendants.

----------X

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

BRANSTEN, J.:

Motion sequence numbers 003, 004, 005, and 006 are consolidated for disposition.

In motion sequence number 003, defendants Avery Modlin ("Modlin") and The Modlin Group LLC ("TMG") move for leave to amend their verified amended answer and counterclaims, and to join parties to this action. Plaintiff Heritage Partners, LLC ("Heritage") and counterclaim-defendants Heritage, Joel J. Silver ("Silver"), and Ethan C. Eldon ("Eldon") (collectively the "Heritage Parties") cross-move for summary judgment on Heritage's causes of action for fraudulent inducement, breach of fiduciary duty, fraud, and

unjust enrichment, and for summary judgment dismissing TMG's counterclaim against them for breach of contract.

In motion sequence number 004, Modlin and TMG move, pursuant to CPLR 3212, for summary judgment on the issue of liability on TMG's counterclaims and dismissal of Heritage's claims against them.

In motion sequence number 005, Modlin and TMG move for an order compelling the Heritage Parties and others, to submit to depositions and to disclose documents and other items. The Heritage Parties cross-move, pursuant to 22 NYCRR 130-1.1, for sanctions against Modlin and TMG.

In motion sequence number 006, Modlin and TMG move for an attachment, receivership, and/or preliminary injunction. Again, the Heritage Parties cross-move for sanctions.

Background

Modlin is a licensed real estate broker and chief executive officer of TMG. Silver and Eldon are the managing members of Heritage, a limited liability company.

In 2003, Silver and Eldon approached Modlin with plans to purchase and develop property located at 415 Greenwich Street in Manhattan ("Property"). Because Silver and Eldon had limited relevant experience and, given the scale of the project, anticipated that

they would need substantial financing, they sought the assistance of TMG and Modlin as their consultants.

Modlin and TMG contend that they and the other parties to this action eventually came to an oral agreement, whereby, as compensation for providing consulting services to Heritage, TMG would receive 15% of the fees generated by development of the Property, and 10% of Silver's and Eldon's profits. Allegedly, Heritage, Silver, and Eldon also agreed that TMG could negotiate a separate agreement entitling it to receive commissons from whichever broker Heritage enlisted to help secure financing. The Heritage Parties deny that any of the discussions with Modlin and TMG resulted in the creation of a binding agreement, although they state that the parties tentatively discussed the possibility that TMG could receive fees for its services from third parties.

On April 14, 2003, Modlin, acting for TMG, executed an agreement ("Commission Agreement") with Carlton Advisory Services, Inc. ("Carlton") , an entity with which Modlin was previously affiliated as a vice president. Pursuant thereto, the parties "agreed" that TMG had been influential in having Silver and Eldon sign an exclusive agreement with Carlton for the capitalization of the Property. They "further agreed" that if a transaction closed on the Property, and if Carlton was paid its commission pursuant to a brokerage agreement, Modlin would receive 22.5% of Carlton's net commission defined as "gross commission received

by Carlton at the closing less Carlton's actual out of pocket expenses related to this transaction."

Subsequently, TMG identified Carlton as a broker for Heritage. Heritage and Carlton entered into an "Exclusive Mortgage Agency Agreement," dated July 11, 2003 ("Brokerage Agreement"), pursuant to which Carlton was to serve as Heritage's sole and exclusive broker and agent regarding the Property, in return for a one percent commission of the maximum principal amount of the loan to be secured (or one-half percent in certain circumstances).

Later, on July 31, 2003, TMG and Heritage[1] entered into a "Consulting Agreement" ("Consulting Agreement"), which, according to defendants, memorialized the parties' earlier oral agreement, and which contained the following payment provisions:

> "1. 15 % of any development fees otherwise payable to the Managing Members of Heritage pursuant to Section 3.4 of the Heritage Operating Agreement dated July 11, 2003, as amended ('Operating Agreement'), after deduction of our actual out-of-pocket expenditures for office and administration expenses and after deduction of expenses of collection.
>
> "2. We shall also pay TMG 10% of the share of Cash Available for Distribution allocated to the managing members as Class B Members of Heritage pursuant to Section 8.2.4.2 of the Heritage Operating Agreement. This payment will be equal to 5% of the total Cash Available for Distribution after the return of capital to the Class A Members of Heritage and the payment of the Preferred Return, after deduction of expenses of collection."

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[1]Defendants contend that Silver and Eldon were parties to the agreement as well.

According to the Heritage Parties, Carlton's performance was disappointing and it failed to produce the necessary financing by November 11, 2003--the date on which the Brokerage Agreement was to expire. Although Heritage was able to obtain acquisition financing--$10 million of equity financing was provided by 415 Greenwich LLC, 415 Greenwich Mezzanine Owner, LLC, 415 Greenwich Senior Mezzanine Owner, LLC, 415 Fee Owner, LLC (collectively "415") and Daewoo Development Delaware Corporation as well as Daewoo America Development, Inc. (collectively "Daewoo ")-- allegedly Carlton's delays forced deferral of the closing.

Heritage commenced this action in November 2006. Its complaint contains four causes of action. The first alleges that TMG and Modlin induced Heritage to enter into the Consulting Agreement to its detriment through fraudulent misrepresentations by giving it a false sense of their trustworthiness and pledging to continue to provide advice without disclosing the existence of the Commission Agreement with Carlton and the effect it would have on such advice.

The second cause of action alleges that TMG breached its duty of loyalty to Heritage by entering into the Commission Agreement with Carlton that adversely affected Heritage's interest. Heritage maintains that Carlton's failure to present acquisition financing in a timely manner damaged it because it had to scramble to complete the financing package necessary for acquisition of the Property.

The third cause of action alleges that TMG and Modlin defrauded Heritage by failing to disclose the material fact that TMG was a party to the Commission Agreement with Carlton and committed to influence Heritage to hire Carlton as its mortgage broker in exchange for an enormous finder's fee of close to a quarter of Carlton's net commission.

The fourth cause of action alleges that Modlin and TMG have been unjustly enriched by benefitting from a breach of their duties to Heritage to disclose the Commission Agreement.

For their part, TMG and Modlin contend that, shortly after execution of the Consulting Agreement and the Brokerage Agreement, Silver and Eldon began sabotaging Carlton's efforts. Allegedly, after Carlton distributed 22.5% of its fee (after expenses) to TMG, Heritage, Silver, and Eldon breached the Brokerage Agreement and used another broker--Cooper Horowitz--to secure construction financing, which led to a different lawsuit that the parties have since settled (*Carlton Advisory Services, Inc. v Heritage Partners, LLC* , Index No. 601351/05). Defendants contend that Heritage, Silver, and Eldon made it clear that they did not intend to pay TMG the 15% of development fees due under the Consulting Agreement; thus, they interposed counterclaims.

The first verified amended answer originally contained two counterclaims. The first is against Heritage, Silver, and Eldon for breach of contract. It alleges that the parties entered into the Consulting Agreement, which formalized their prior oral agreement, and that

they each agreed to pay TMG, among other things, 15% of any development fees otherwise payable to the managing members of Heritage, pursuant to section 3.4 of the Heritage Operating Agreement, dated July 31, 2003, after the deduction of expenses. Allegedly, although Heritage, Silver, and Eldon received development fees, they have not disbursed TMG's portion of these fees.

The second counterclaim, which was already dismissed by this court (Moskowitz, J), alleged that to "the extent that Silver and Eldon are not found to be liable under the first counterclaim, [TMG] alternatively alleges that Silver and Eldon each personally guaranteed Heritage's obligations and performance under the Consulting Agreement" (Defendants' Verified Amended Answer and Counterclaims at ¶ 57).

The proposed second verified amended answer contains 15 counterclaims, and it seeks to add 415 and Daewoo into the mix.

The proposed second amended answer includes allegations that Silver, Eldon, and Heritage undertook to pay commissions to TMG in the amount of 15% of any development fees, and 10% of cash available for distribution to Heritage's Class B Members, which was to be paid to TMG in exchange for its services. Allegedly, the Heritage Parties have been paid all or most of the development fees resulting from TMG's efforts, in an amount exceeding $2 million, and will ultimately receive at least $3 to $5 million as part of the development fees.

All of the proposed counterclaims, except the eighth, are asserted against Heritage, Silver, Eldon, Daewoo and 415. The 15 proposed counterclaims are for breach of contract (proposed counterclaims 1 and 2), declaratory relief (3), fraud (4), fraudulent conveyance (5), misrepresentation (6), conversion (7), tortious interference with contract --asserted only as against Silver, Eldon, 415 and Daewoo (8), receivership, attachment, and equitable relief (9), quantum meruit (10), breach of the implied covenant of good faith and fair dealing (11) , piercing the corporate veil (12), unjust enrichment (13), promissory estoppel (14) and equitable estoppel (15).

Among other things, the parties now seek summary judgment disposing of all issues, contending that, except for the amount of damages, there are no material issues of fact preventing issuance of judgment as a matter of law.

Analysis

Leave to Amend.

Modlin and TMG's motion for leave to amend to add counterclaims and additional parties is denied.

Although leave to amend is to be liberally granted, permission should not be given when proposed counterclaims are "palpably insufficient as a matter of law" or "totally devoid of merit," or when a delay in seeking the amendment would cause prejudice or surprise

(*Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]; *Glassman v ProHealth Ambulatory Surgery Ctr., Inc.*, 23 AD3d 522 [2d Dept 2005]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003]).

The breach-of-the-covenant-of-fair-dealing-and-good-faith counterclaim is duplicative of Modlin and TMG's breach-of-contract counterclaim and is therefore entirely unnecessary (*Cerebus Intl., Ltd. v BancTec, Inc.*, 16 AD3d 126 [1st Dept 2005]; *see TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512, n3, *rearg denied* 11 NY3d 753 [2008]; *Spitzer v Schussel*, 48 AD3d 233, 234 [1st Dept 2008]).

The unjust-enrichment counterclaim is not viable because there is an enforceable agreement that governs the terms of the subject matter at issue (*Taddeo v Medallic Art Co.*, 40 AD3d 444 [1st Dept 2007], *lv. denied* 9 NY3d 817 [2008]; *Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221 [1st Dept 2007]).

The fraudulent-conveyance counterclaim is conclusory, and thus, not validly stated (*Riback v Margulis*, 43 AD3d 1023 [2d Dept 2007]). It merely alleges that the Heritage Parties and the proposed counterclaim defendants participated in a scheme whereby development financing funds that should have been paid to Heritage were paid to 415 and later embezzled or otherwise paid out of 415 to Silver and Eldon, leaving Heritage with an unreasonably small amount of capital. The same is true for the counterclaims alleging fraud, promissory estoppel, equitable estoppel, misrepresentation, conversion, tortious interference

with contract, piercing the corporate veil, and the counterclaim seeking a receivership, attachment, and equitable relief. All of the proposed counterclaims are based on nothing more than conclusory allegations.

To be sure, the proposed counterclaims contain one specific assertion about fraudulent conveyance, namely that "there is approximately $400,000-$500,000 in 415 LLC checks that are payable to Silver and Eldon personally, which are coded as 'expenses'; however, no proof appears on the company books that shows that any expenses have actually been incurred" (*see* Proposed Second Amended Answer at ¶ 68). Even if true, 415's ledger books have no bearing on what is essentially a breach of contract dispute between TMG and Heritage (and, perhaps, Silver and Eldon, as discussed below).

The motion to add new parties is denied because the proposed claims against them are insufficiently pleaded. Additionally, one of the alleged grounds for joinder--that the proposed additional counterclaim-defendants are third-party beneficiaries--is legally incorrect, because there is no evidence of clear intent by the contracting parties to confer a benefit upon them (*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Stearling*, 95 NY2d 427 [2000]; *PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.*, 25 AD3d 470 [1st Dept 2006]). Furthermore, typically, the third-party beneficiary doctrine is used by a party seeking to obtain that status so as to confer standing on it as a plaintiff and allow it to obtain the benefit arguably due (*see e.g. 243-249 Holding Co. v Infante*, 4 AD3d

184 [1st Dept 2004]). The doctrine is not generally used to sue a non-party for breach of contract.

The other ground for joinder--improper corporate activity--is also conclusory. The proposed pleading fails to set forth sufficient specific factual allegations to warrant piercing the corporate veil (*see AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6 [2d Dept 2008] [2d Dept 2008] ["Mere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to sustain a cause of action"]).

For example, the 12th proposed counterclaim (denominated "pierce the corporate veil") alleges in a summary fashion that "415 LLC was a mere instrumentality and alter ego of Silver, Eldon, and Heritage created for the primary purpose of funneling money through corporate shell entities in order to defraud The Modlin Group and other creditors" and that "415 LLC had no independent life of its own, but rather functioned entirely to serve the whims of the stakeholders as part of a scheme to defraud creditors." There are no allegations explaining these statements and, on this motion to amend, merit has not been established. In any event, New York does not recognize a separate action for piercing the corporate veil (*see Rosen v Kessler*, 51 AD3d 761 [2d Dept 2008]).

Summary Judgment Motions

Heritage's Claims

Heritage seeks summary judgment on all four of its causes of action for fraudulent inducement, breach of fiduciary duty, fraud, and unjust enrichment. Modlin and TMG, in turn, move for summary judgment in their favor on all of Heritage's claims.

The fraudulent inducement claim is based on the allegation that TMG and Modlin induced Heritage to enter into the Consulting Agreement to its detriment through fraudulent misrepresentations by (1) giving Heritage a false sense of their trustworthiness as its consultant, and (2) pledging to continue to provide Heritage with advice tailored to its goal of developing the Property, without disclosing the existence of the Commission Agreement with Carlton and the effect that it would have on such advice. To the extent that these are statements of future intentions or expressions of hope they are not actionable as fraudulent inducement (*Lincoln Place LLC v RVP Consulting, Inc.*, 16 AD3d 123 [1st Dept 2005]).

To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce that party to act upon the misrepresentation, causing injury (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Fraudulent inducement is grounds for rescinding an agreement (*see id.* at 70-71), which is relief that is sought here.

Heritage, however, has failed to demonstrate reliance upon a false representation to its detriment. There is no record evidence establishing that defendants induced Heritage to enter into the Consulting Agreement by withholding information that they stood to gain by the execution of the Brokerage Agreement between Heritage and Carlton. Instead, the evidence establishes that the Heritage Parties and Modlin discussed the arrangement whereby TMG would be entitled to receive fees from a third party, such as Carlton. Indeed, the Brokerage Agreement was executed on July 11, 2003, and three weeks later, on July 31, 2003, the parties executed the Consulting Agreement, which explicitly provided:

> "We acknowledge that TMG shall receive additional fees from third parties in connection with the financing of the property" (emphasis added).

According to Modlin, he discussed with Silver and Eldon, in the presence of, or otherwise known to, Peter Miller (who was formerly an attorney at Stroock & Stroock & Lavan LLP, counsel for the Heritage Parties), that TMG would receive and share in fees earned by Carlton upon its arranging financing for Heritage, Silver, and Eldon (Affidavit of Modlin, sworn to January 10, 2008, ¶ 6). Modlin claims, moreover, that neither Silver nor Eldon, Heritage's managing members, ever requested any information about the exact amount of compensation TMG would receive from Carlton before entering into the Consulting Agreement (*id.*, ¶ 7).

The evidence submitted by the Heritage Parties does not controvert defendants' contention as it is based primarily on the assertion that Modlin never showed them a copy of the Commission Agreement, and thus, that they were unaware of the precise amount of the commission that would be earned by Modlin and TMG. Even if true, and taking into consideration Silver's conclusory statement that had we "known of the large kickbacks Modlin and his firm stood to gain at our expense as an explicit *quid pro quo* for 'influencing' our business judgment, we would never have allowed Heritage to sign either the Consulting Agreement or the exclusive mortgage brokerage agreement with Carlton Advisory Services" (*see* December 4, 2007 Affidavit of Silver at ¶ 10), there is no support for the fraudulent-inducement claim.

Eldon's statements that at no time prior to signing with Carlton, did the Heritage Parties know of (1) the "secret agreement," (2) that "Modlin . . . already reached an agreement with Carlton to influence us," or (3) the "magnitude of the extra compensation Modlin intended to receive," are unavailing (September 27, 2006 Affidavit of Eldon at ¶¶ 6-7). Eldon acknowledges that the Consulting Agreement is written in such a way as not to exclude Modlin from getting paid fees by "third parties."

The Heritage Parties' reliance on Modlin's deposition testimony that he never showed the Commission Agreement to Eldon and Silver (December 7, 2007 Affidavit of Kevin L.

Smith, Esq. ["Smith Aff"], Ex. 8, at 84-85), entirely ignores Modlin's statement that he told them he had worked out the agreement with Carlton (*id.* at 85).

Modlin's testimony that the Heritage Parties knew of the arrangement, and that they stated that they did not need to see the agreement, is undisputed. At the very least, the information that Modlin disclosed put the Heritage Parties on inquiry notice of the facts claimed to have been fraudulently concealed (*Spinale v Tag's Pride Produce Corp.*, 44 AD3d 570 [1st Dept 2007]). There is no indication in the record that Modlin did anything to prevent Silver and Eldon from inquiring further or otherwise learning about the exact details of the commission arrangement.

Based on the foregoing, the breach-of-duty-of-loyalty and fraud claims (the second and third causes of action) fail because they are dependent on the assertion that defendants breached a duty to disclose all details of the Commission Agreement and the Heritage Parties have not demonstrated that such a duty existed under the circumstances.

The unjust enrichment claim (fourth cause of action), which is premised on Modlin and TMG having benefitted from a breach of their duties to disclose the Commission Agreement, must also be dismissed for the reasons discussed above and because there is an enforceable agreement that governs the terms of the subject matter at issue (*Taddeo v Medallic Art Co.*, 40 AD3d 444; *Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221).

Modlin and TMG Counterclaim

Modlin and TMG move for summary judgment on the issue of liability on TMG's counterclaims and for an inquest. Because the court denied leave to amend to add additional counterclaims and earlier (Moskowitz, J.) dismissed the second counterclaim, which alleged that Silver and Eldon were liable based on personal guarantees, the only remaining claim is asserted by TMG against Heritage, Silver, and Eldon for breach of contract.

A breach-of-contract claim requires a showing of the existence of a valid contract, plaintiff's performance of its obligations thereunder, defendant's breach, and resulting damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]; *Noise In The Attic Prods. v London Records*, 10 AD3d 303 [1st Dept 2004]).

The breach-of-contract counterclaim alleges that TMG and the Heritage Parties entered into the Consulting Agreement, which formalized their prior oral agreement, and that the Heritage Parties, among other things, agreed to pay TMG 15% of any development fees otherwise payable to the managing members of Heritage, pursuant to section 3.4 of the Heritage Operating Agreement, dated July 31, 2003, after the deduction of expenses. It further alleges that, although Heritage, Silver, and Eldon received development fees, they have not disbursed TMG's portion of these fees. Modlin contends that TMG performed the consulting services for which Heritage contracted, but that it has not been paid.

In opposition, the Heritage Parties argue that because they are entitled to summary judgment, the counterclaim must be rejected. At a minimum, they argue, that the counterclaim should be dismissed as against Silver and Eldon. They do not, however, otherwise raise any substantive arguments warranting denial of summary judgment in defendants' favor. To the extent that the Heritage Parties were unhappy with Carlton's performance, those allegations were to be addressed in the case against Carlton (Index No. Index No. 601351/05), not here.

TMG has demonstrated entitlement to judgment as to liability against Heritage for failure to pay the compensation due under the Consulting Agreement as against Heritage. The appropriate amount of damages remains to be resolved.

As for the individual liability of Silver and Eldon based on the Consulting Agreement, none of the parties has demonstrated entitlement to summary judgment. Individual liability is primarily premised on the following sentence in the Consulting Agreement:

> "The Managing Members, by their execution of this letter on behalf of Heritage, also confirm their individual acknowledgment and acceptance of its terms."

Notwithstanding this language, Silver and Eldon argue that they cannot be liable under the Consulting Agreement because (1) they only signed the agreement once, on behalf of Heritage, (2) extrinsic evidence reveals that they never intended to be liable, and (3) the

agreement should be construed against TMG because it was drafted by the Tannenbaum Firm, the law firm that had a conflict of interest.

An agent who signs an agreement on behalf of a disclosed principal will not be held liable for its performance in the absence of "clear and explicit evidence" of the agent's intention to add the agent's personal liability to that of the principal (*Paribas Props. Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989]). Here, the statement that the "Managing Members, by their execution of this letter on behalf of Heritage, also confirm their individual acknowledgment and acceptance of its terms" is ambiguous because, in addition to potentially signaling the acceptance of individual liability, it can also be reasonably construed as an indication that the persons acting on the limited-liability entity's behalf are cognizant of, and affirm, the extent of the entity's liability under the agreement.

Moreover, although in two instances the agreement contains the word "we," use of this word is not inconsistent with signature of the agreement on behalf of "Heritage Partners, LLC." Significantly, both Silver and Eldon signed the agreement only once. Although this, by itself, is not dispositive it does establish a question of fact about their intent to be held individually liable. Indeed, even if an agent signed more than once, an issue could nevertheless exist as to intent to be personally liable (*see. e.g. First Capital Asset Mgt. v North Am. Consortium,* 286 AD2d 263 [1st Dept 2001]).

According to the Heritage Parties, deposition testimony by the attorney who supervised the drafting of the agreement (Stephen Rosenberg, Esq.) establishes that the parties never intended to extend personal liability to Heritage's individual members (*see e.g.* Exhibit 13 to Smith Affidavit, at 66, 82, 83). Modlin, in contrast, contends that, prior to execution of the Consulting Agreement, Silver and Eldon orally agreed to be personally liable. The conflicting affidavits and deposition testimony raise credibility issues that cannot be resolved on these papers (*see Don Buchwald & Assoc., Inc. v Marber-Rich*, 11 AD3d 277 [1st Dept 2004]; *Paribas Prop., Inc. v Benson*, 146 AD2d 522).

Disclosure

Modlin and TMG seek an order compelling the Heritage Parties and others, to submit to depositions and to disclose, among other things, documents described in the attorney's affirmation in support of the motion.

The landscape of this action has changed; thus, the motion is granted only to the extent of directing a conference at which time any outstanding discovery issues will be addressed, as well as any other issues pertaining to the claim remaining in the action.

The Heritage Parties' cross-motion for sanctions based on frivolous motion practice is denied. Section 130-1.1 (c) "allows courts to sanction attorneys for engaging in frivolous conduct, including conduct [that is]: (1) completely without merit in law; (2) undertaken

primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserting material factual statements that are false" (*Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Cross-movants have not demonstrated that the discovery motion falls within any of those categories.

Provisional Remedies

Modlin and TMG's motion for an attachment, receivership, and/or preliminary injunction is denied.

To obtain an order of attachment, the movant must show by affidavit and other written evidence that: (1) there is a cause of action; (2) it is probable that the movant will succeed on the merits; (3) one of the grounds set forth in CPLR 6201 exists; and (4) the amount demanded exceeds all known counterclaims (CPLR 6212 [a]; *Faberge Intl. v Di Pino*, 109 AD2d 235 [1st Dept 1985]; *see also Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111 [1st Dept 1997]).

CPLR 6201(3), the ground invoked here, provides that attachment is available if the nonmovant, with intent to defraud creditors or frustrate the enforcement of a judgment that might be rendered in the movants' favor, has assigned, disposed of, encumbered, or secreted property, or removed it from the state, or is about to do any of these acts. Modlin and TMG allege that Silver and Eldon have designed and executed an elaborate scheme to evade

contractual obligations to TMG and others, by funneling income through shell entities and refusing to make any payments to TMG. Allegedly, some of the monies that were wrongfully funneled through 415 were given to, or controlled by Daewoo, and the remainder paid directly to Silver and Eldon personally.

Notwithstanding this assertion, Modlin and TMG have not alleged that defendants have actually removed, assigned, or made any other disposition of property, nor have they established fraudulent intent (*Abacus Fed. Sav. Bank v Lim*, 8 AD3d 12 [1st Dept 2004]). The claim is based on mere suspicion, which is an insufficient basis for the relief sought (*Shisgal v Brown*, 3 AD3d 434 [1st Dept 2004]).

To support the request for the extraordinary relief, defendants submit Modlin's affidavit (sworn to January 22, 2008), wherein he assert that the Heritage Parties created shell entities so as to hide monies lawfully payable to TMG. The only evidence that Modlin refers to, however, is Exhibit 26 to the Smith Affidavit, which consists of charts outlining corporate structure. That evidence does not, by itself, establish or even indicate, fraudulent intent, and Modlin expends no effort in explaining it. Fraudulent intent to frustrate the enforcement of a judgment must be proven, not merely alleged, and the facts relied upon must be fully set forth in the moving papers (*Abacus Fed. Sav. Bank v Lim*, 8 AD3d 12) because attachment is considered a harsh remedy and the statute authorizing the provisional remedy is to be

strictly construed in favor of those against whom it may be applied (*Glazer & Gottlieb v Nachman*, 234 AD2d 105 [1st Dept 1996]).

This analysis is equally applicable to the request for appointment of a receiver or a preliminary injunction seeking to restrain the Heritage Parties during the pendency of the action from transferring any fees received in connection with the Project.

The Heritage Parties' cross-motion for sanctions based on frivolous conduct in connection with defendants' provisional-remedies motion is denied. Contrary to their assertion, the Heritage Parties have not demonstrated that Modlin or TMG made "deliberate misstatements of law and fact." Although the Heritage Parties complain about the extent of the motion practice, they themselves have used their cross-motion for sanctions as a means to restate their arguments pertaining to other motions (*see* pages 1-15 of the Affidavit of Kevin l. Smith, Esq., sworn to February 27, 2008).

Accordingly, it is

ORDERED that motion sequence number 003 by defendants Avery Modlin and The Modlin Group LLC for leave to amend the verified amended answer and counterclaims, and to join parties to this action is denied and the cross-motion by plaintiff Heritage Partners, LLC and counterclaim-defendants Heritage, Joel J. Silver, and Ethan C. Eldon for summary judgment on Heritage's causes of action for fraudulent inducement, breach of fiduciary duty,

fraud, and unjust enrichment, and for summary judgment dismissing The Modlin Group LLC s sole remaining counterclaim for breach of contract is denied; and it is further

ORDERED that motion sequence number 004 by Avery Modlin and The Modlin Group LLC for summary judgment is granted only (1) as to liability in favor of The Modlin Group LLC, and against Heritage Partners, LLC, on TMG's counterclaim for breach of contract, and (2) dismissing Heritage's claims against them; and it is further

ORDERED that motion sequence number 005 by Avery Modlin and The Modlin Group LLC for an order compelling Heritage Partners, LLC, Joel J. Silver, and Ethan C. Eldon and other parties related to the litigation to submit to depositions and to disclose documents and other things described in the attorney affirmation annexed to the notice of motion is granted only to the extent that the parties are directed to appear in Room 442 of the Supreme Court, New York County, 60 Centre Street, New York, New York, for a conference on March 24, 2009, at 10:30 a.m. and the cross-motion for sanctions is denied; and it is further

ORDERED that motion sequence number 006 by Avery Modlin and The Modlin Group LLC for an order of attachment, receivership, and/or preliminary injunction is denied and the cross-motion for sanctions is denied as well.

This constitutes the Decision and Order of the Court.

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 2, 2009
New York, NY

ENTER:

Hon. Eileen Bransten