

Dayan v Witkoff

2009 NY Slip Op 30783(U)

April 6, 2009

Supreme Court, New York County

Docket Number: 109234/08

Judge: Richard B. Lowe

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

PRESENT: HON. EDWARD B. LOPE, Jr.

PART 56

Index Number : 109234/2008

DAYAN, CHARLES

vs.

WITKOFF, STEVEN

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE 11/2/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

APR 08 2009

COUNTY CLERK'S OFFICE

NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/6/09 4/6/09

HON. EDWARD B. LOPE, Jr.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X

CHARLES DAYAN and WEST 10TH 303 LLC,

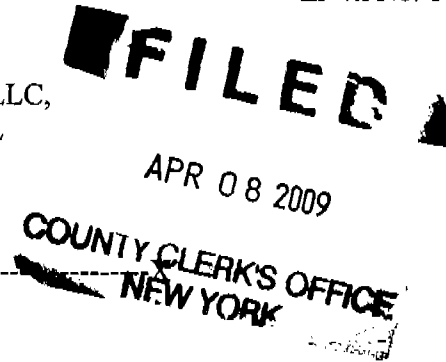
Plaintiffs,

Index No. 109234/08

-against-

STEVEN WITKOFF, WG CHARLES STREET LLC,
WG WEST VILLAGE LLC and WG INTERNAL
CHARLES STREET LLC,

Defendants.



RICHARD B. LOWE, III, J:

In this action, plaintiffs seek damages and declaratory relief arising from the alleged breach of a joint venture agreement between plaintiff Charles Dayan (Dayan) and defendant Steven Witkoff (Witkoff), involving the purchase and development of 303 West 10th Street, New York, New York (Premises). The four-count amended complaint asserts causes of action for breach of contract; breach of fiduciary duty; and declarations that plaintiff West 10th 303 LLC did not release or waive plaintiffs' claims against defendants, that their claims are not barred, and that defendants, because of their alleged fraud, are estopped from claiming any such release, waiver or bar.

Defendants now move to dismiss the amended complaint based upon documentary evidence, for failure to state a cause of action, for lack of standing, and for lack of particularity. Defendants also seek sanctions. Plaintiffs cross-move for sanctions.

Background

Dayan alleges that, in March 2004, he identified the Premises as a possible development project, and that shortly thereafter, he and Witkoff agreed to jointly purchase and develop the

Premises and share profits and losses on a 50-50 basis (Dayan-Witkoff joint venture). Plaintiffs claim that, on March 29, 2004, Dayan and Witkoff entered into a "NON-DISCLOSURE, NON-CIRCUMVENT AND CONFIDENTIALITY AGREEMENT" (Non-Disclosure Agreement), whereby Witkoff (and/or The Witkoff Group and its affiliates) agreed not to disclose information concerning the Premises to any other person or for any other purpose.¹ On March 30, 2004, Dayan and Witkoff allegedly jointly offered to purchase the Premises for \$60 million, and between March 30 and August 2004, Witkoff was allegedly negotiating the purchase of the Premises on behalf of the joint venture. Dayan and Witkoff allegedly understood and agreed that the March 30, 2004 offer was a "first offer" that they would increase, as necessary, to effect the purchase of the Premises (Amended Complaint, ¶ 23), and plaintiffs claim that Witkoff led Dayan to believe that he had communicated offers of up to \$80 million to purchase the Premises.

Plaintiffs claim that, meanwhile, Witkoff had a separate business relationship with non-party Lehman Brothers, and that between March 30 and August 23, 2004, Witkoff secretly formed a competing joint venture with Lehman Brothers to purchase and develop the Premises. Plaintiffs allege that, during this period, Witkoff and Lehman Brothers offered to purchase the Premises for \$85 million, a price that Dayan was allegedly willing and able to pay. The owner of the Premises allegedly accepted the Witkoff-Lehman Brothers offer, and plaintiffs claim that

¹ The court notes that Witkoff and/or "The Witkoff Group (and affiliates)" entered into the Non-Disclosure Agreement with "Bonjour Equity, LLC or any of their affiliates" (Dayan Aff., Ex. A). The amended complaint alleges that Dayan does business in his own name, and in the names of "Bonjour Equities" and the "Bonjour Group," and that references to "Dayan" in the pleading include "Bonjour Equities LLC" (Amended Complaint, ¶ 1). Dayan also states in his December 2, 2008 affidavit that "Bonjour Equities" is a trade name that he uses to conduct business on behalf of Bonjour Equities LLC (Dayan Aff., ¶ 8). The pleading further alleges that Witkoff conducts business in his own name and as the "Witkoff Group," and it refers to Witkoff and "The Witkoff Group LLC" interchangeably (*id.*, ¶ 4).

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Witkoff did not disclose his joint venture with Lehman Brothers until October 18, 2004, at which time Witkoff also allegedly informed Dayan that he would have only a 20 percent interest in, and no control over, the project. On October 21, 2004, Witkoff allegedly advised Dayan that his interest would be further reduced to 13 percent, which, according to plaintiffs, is Dayan's current ownership interest.

With respect to the formation of business entities used by the parties, the amended complaint alleges that Witkoff formed 150 Charles Street Holdings LLC on August 23, 2004, and that title to the Premises ultimately vested in this entity. According to defendant WG Charles Street LLC's Amended and Restated Operating Agreement submitted by defendants (Operating Agreement), Witkoff formed this entity on August 23, 2004, to hold Witkoff's interest in the Premises (through 150 Charles Street Holdings LLC), pursuant to the Witkoff-Lehman Brothers joint venture. The Operating Agreement was entered into by defendant WG West Village LLC, another entity allegedly formed by Witkoff, and by defendant WG Internal Charles Street LLC, an entity that, according to the amended complaint, was owned 92.5 percent by Witkoff. The Operating Agreement states that the primary purpose of WG Charles Street LLC "shall be limited to (i) owning a membership interest in 150 CHARLES STREET HOLDINGS LLC ... who shall acquire, own, hold, manage, maintain, operate, improve, develop, construct, sell, exchange and lease, that certain real property located at 287-303 West 10th Street, New York, New York" (Stomber Aff., Ex. 2, § 1.3), which includes the Premises. According to plaintiffs, prior to defendants transferring approximately 70 percent of their interest in WG Charles Street LLC to WG West Village LLC, WG Charles Street LLC was owned by The Witkoff Group (65.63 percent) and WG Internal Charles LLC (34.37 percent).

Defendants submit as documentary evidence an "ASSIGNMENT OF LIMITED LIABILITY COMPANY INTEREST IN WG CHARLES STREET LLC," dated January 19, 2005 (2005 Agreement), a document that plaintiffs also refer to in the amended complaint (Amended Complaint, ¶¶ 59-62, 70-76, 80-85; Recant Aff., Ex. 1). The 2005 Agreement was entered into between WG Internal Charles Street LLC and West 10th 303 LLC, of which Dayan is the managing member. Under the 2005 Agreement, WG Internal Charles Street LLC transferred 27.37 percent of its membership interest in WG Charles Street LLC to West 10th 303 LLC, and West 10th 303 LLC reimbursed WG Internal Charles Street LLC \$3,250,188 for capital contributions previously made relating to its 27.37 percent interest.² Paragraph 8 of the 2005 Agreement states as follows: "This Assignment together with the Agreement embodies and constitutes the entire understanding and agreement between the parties and all prior agreements, understandings, representations and statements, oral or written, are merged into this Assignment and the Agreement."

Discussion

Defendants claim that there was a novation, arguing that the parties entered into the 2005 Agreement, which extinguishes and supersedes all prior understandings that plaintiffs now seek to enforce, including the alleged joint venture agreement between Dayan and Witkoff. Plaintiffs counter that the 2005 Agreement does not exculpate or protect Witkoff, because he is not a party to, or a third-party beneficiary of, that agreement. Plaintiffs also argue that they were

² According to plaintiffs, the net result of these alleged transfers is that approximately 70 percent of WG Charles Street LLC was owned by WG West Village LLC, and 27.37 percent of WG Charles Street LLC was owned by West 10th 303 LLC. Because WG Charles Street LLC owned 47.5 percent of the Premises (through 150 Charles Street Holdings LLC), Dayan's interest (through West 10th 303 LLC) was 27.37 percent of 47.5 percent, or 13 percent.

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fraudulently induced to sign the 2005 Agreement, based upon Witkoff's false representation that the Premises had been "lost" to Lehman Brothers (Amended Complaint, ¶ 80).

The interpretation of an unambiguous contract is a question of law for the court (*Kass v Kass*, 91 NY2d 554, 566 [1998]). "There is a presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties; such a presumption should apply with even greater force when the instrument is between sophisticated, counseled businessmen" (*Quantum Chem. Corp. v Reliance Group*, 180 AD2d 548, 548-49 [1st Dept 1992] [internal citation omitted]).

Moreover, "[i]t is well settled that 'where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement'" (*Northville Indus. Corp. v Fort Neck Oil Terminals Corp.*, 100 AD2d 865, 867 [2d Dept 1984], *aff'd* 64 NY2d 930 [1985]; *see also Flaum v Birnbaum*, 120 AD2d 183, 192 [4th Dept 1986], citing 22 NY Jur 2d, Contracts, §401 [the elements of novation are a valid previous obligation, the parties' agreement to a new contract, the formation of a valid new contract, and the parties' indication of their intention to extinguish the old contract]).

Here, the integration clause in the 2005 Agreement applies to prior agreements "*between the parties*" (emphasis added), and the only parties to this agreement are WG Internal Charles Street LLC and West 10th 303 LLC. Plaintiffs have not alleged, and defendants have not established, any prior agreement between these parties. Significantly, the relevant joint venture in the amended complaint is between Dayan and Witkoff, not WG Internal Charles Street LLC and West 10th 303 LLC. Thus, if anything, the 2005 Agreement supersedes prior agreements

between WG Internal Charles Street LLC and West 10th 303 LLC, not the Dayan-Witkoff joint venture.

Moreover, while plaintiffs allege that WG Internal Charles Street LLC was an instrumentality of Witkoff (Amended Complaint, ¶ 8), at this juncture in the litigation, no showing has been made that this entity was the alter ego or successor of Witkoff as Dayan's co-joint venturer. Rather, at this juncture, it appears that Witkoff and Dayan, as individuals, are distinct from the above-referenced business entities. Furthermore, these individuals are sophisticated businessmen, fully capable of drafting an integration clause that would have expressly extinguished the rights of Witkoff and Dayan, as individuals or co-joint venturers, or made express reference to the purported 2004 joint venture between Dayan and Witkoff. Thus, defendants fail to show that the 2005 Agreement superseded the joint venture or constituted a novation.

While defendants argue that, under the Operating Agreement, "one of WG Charles Street's purposes was to develop the same Property identified in the Complaint" (Stomber Aff., ¶ 7 [emphasis in original]), defendants fail to explain how this constitutes a defense to this action, especially where plaintiffs are not parties to that agreement. In any event, at most, the evidence submitted by defendants merely raises an issue of fact concerning the interpretation of the integration clause in the 2005 Agreement.

Specifically, according to defendants, plaintiffs concede in the amended complaint that, under the 2005 Agreement, Witkoff caused "WG Internal Charles Street LLC to transfer a 27.37% interest in WG Charles Street LLC to West 10th 303 LLC *on behalf of Dayan*" (Amended Complaint, ¶ 59 [emphasis added]). The pleading states that the result of certain

transfers is that “Dayan’s effective interest in 150 Charles Street Holdings LLC (i.e., in the West 10th Street Development Project) was and is thirteen percent” (*id.*, ¶ 61). The pleading also states that “*Dayan accepted the transfer of a thirteen percent (13%) interest in 150 Charles Street Holdings LLC* in order to mitigate his damages, without release or waiver of any of his rights and claims” (*id.*, ¶ 62 [emphasis added]). However, none of these allegations show that, by entering into the 2005 Agreement, the parties to that agreement sought to, or could, extinguish the Dayan-Witkoff joint venture.

As discussed above, West 10th 303 LLC reimbursed \$3,250,188 to WG Internal Charles Street LLC for capital contributions previously made with respect to the 27.37 percent interest in WG Charles Street LLC. Defendants submit documentary evidence showing that plaintiffs also made additional capital contributions to 150 Charles Street Holdings LLC of \$2,884,045, beginning on August 3, 2005 and as recently as April 17, 2008. Requests for these contributions were sent to Dayan and non-party “Bonjour” (Stomber Aff., Ex. 3). Based upon defendants’ documentary evidence of wire transfers, the capital contributions appear to have been paid by “Bonjour Equities LLC” (which, as discussed above, is an entity through which Dayan admits that he conducts business), and the requests for payment indicate that these payments were for West 10th 303 LLC’s share (27.37 percent) of interest and pre-development costs of WG Charles Street LLC. Thus, the documentary evidence establishes that West 10th 303 LLC, Dayan and/or Bonjour Equities LLC acted under the 2005 Agreement by making capital contributions of over \$6 million during a three-year period on behalf of West 10th 303 LLC.

However, Dayan states in his affidavit that the earlier capital contributions were made before he knew that he had been fraudulently induced to enter into the 2005 Agreement, and that

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the later payments were made to protect plaintiffs' interests once he learned that Witkoff entered into a joint venture with Lehman Brothers that reduced Dayan's joint venture interest from 50 percent to 13 percent. Moreover, even assuming for the moment that defendants' interpretation is reasonable, thereby rendering the integration clause in the 2005 Agreement "susceptible to at least two reasonable interpretations" (*Yanuck v Simon Paston & Sons Agency*, 209 AD2d 207, 208 [1st Dept 1994]), nearly all of the evidence relied upon by defendants is extrinsic to the 2005 Agreement. Therefore, defendants' interpretation would require the court to glean intent "from disputed evidence or from inferences outside the written words," and, as a result, defendants' interpretation raises issues "of fact that must be resolved by trial" (*id.*). For the foregoing reasons, the 2005 Agreement does not "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]), but rather, at this juncture in the litigation, at most, it raises issues that cannot be resolved on defendants' motion to dismiss.

Defendants next argue that plaintiffs fail to plead a joint venture, because they have not alleged that they have duly performed all the terms and conditions required to be performed by them. However, paragraph 17 of the amended complaint alleges that, "[s]ubsequent to the formation of the Dayan-Witkoff Joint Venture, Dayan duly performed all of the terms and condition [*sic*] on his part to be performed." Defendants fail to explain why this allegation is insufficient to satisfy the pleading requirements. Nor have they conclusively demonstrated that "there was neither consideration for nor performance of the alleged agreement," or that plaintiffs did not "contribute anything of value to justify any recovery" (*Bell v Brown*, 12 AD3d 271, 272 [1st Dept 2004]), as defendants argue in their moving papers. Therefore, defendants' argument is

unpersuasive.

Defendants next argue that plaintiffs' claim for breach of fiduciary duty must fail, based upon plaintiffs' purported failure to properly allege the existence of a joint venture. However, as discussed above, defendants have not shown that plaintiffs failed to allege the existence of a joint venture. Therefore, this argument is without merit.

Defendants also argue that the claim for breach of fiduciary duty must be dismissed as duplicative of the claim concerning the joint venture. A cause of action for breach of fiduciary duty will be dismissed if it is duplicative of a breach of contract claim (*Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1st Dept 2008]). However, "while causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed [citation omitted], conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such contract" (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]). Here, defendants may be liable based upon the existence of the alleged joint venture between Dayan and Witkoff, and also, separately, based upon duties created by the terms of the Non-Disclosure Agreement, discussed above. Therefore, defendants' argument is unpersuasive.

Defendants argue that the claim for breach of fiduciary duty should be dismissed for failure to allege that Witkoff acted with deceitful intent, citing *Tray Wrap, Inc. v Pacific Tomato Growers Ltd.* (18 Misc 3d 1122[A], 2008 NY Slip Op 50156[U], 2008 WL 222495, *17 [Sup Ct, Bronx County 2008] [dismissing cause of action for breach of fiduciary duty based upon "[f]ailure to plead that the defendant acted with deceitful intent"]).

However, as a preliminary matter, in *Schneider v Wien & Malkin LLP* (5 Misc 3d

1011[A], 2004 NY Slip Op 51328[U], 2004 WL 2495843, *16 [Sup Ct, NY County 2004]), a court of concurrent jurisdiction (like the court in *Tray Wrap, Inc.*), the court held that “[d]eceptful intent is not an element of a cause of action for breach of fiduciary duty as it has consistently been articulated by the New York courts.” As cited by the court in *Schneider*, this holding is consistent with Court of Appeals precedent, which holds that “a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect” (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], citing *Meinhard v Salmon*, 249 NY 458, 463-64 [1928]). According to the Court of Appeals in *Birnbaum*, this “sensitive and inflexible rule of fidelity [bars] not only blatant self-dealing, but also requir[es] avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty” (*id.* at 466 [citation and internal quotation marks omitted]). Therefore, deceitful intent is not required, but rather, “[i]ncluded within this rule’s broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person ‘in such close relation [to the fiduciary] * * * that possible advantage to such other person might * * * consciously or unconsciously’ influence the fiduciary’s judgment” (*id.* [citation omitted]).

In any event, even assuming for the moment that deceitful intent were a required element, the pleading satisfies this requirement. Specifically, the amended complaint alleges that “Witkoff’s breaches of duty to Dayan and the Dayan-Witkoff Joint Venture were motivated by [Witkoff’s] pre-existing and ongoing business relationships with Lehman Brothers and desire to misrepresent and cover up the competing West 10th Street Development Project involving Lehman Brothers and his culpable conduct as alleged herein” (Amended Complaint, ¶ 54).

Plaintiffs allege that they were fraudulently induced to enter into the 2005 Agreement based upon "Witkoff's material misrepresentation to Dayan to the effect that the West 10th Street Premises had been 'lost' to Lehman Brothers" (*id.*, ¶ 80), that this "material misrepresentation was made by Witkoff knowing it was false" (*id.*, ¶ 83), and that it "was made by Witkoff intentionally for the sole purpose of covering up Witkoff's breaches of duty to Dayan and other culpable conduct, as hereinabove alleged, and thereby lulling and defrauding Dayan into accepting a lesser share in and no control over the West 10th Street Development Project" (*id.*, ¶ 84). Accordingly, defendants' argument is unpersuasive.

Defendants devote a single sentence of their brief to arguing that the claim for breach of fiduciary duty is time-barred, because the most recent alleged breach occurred on January 19, 2005, more than three years ago. Plaintiffs counter that they commenced the action in 2008, once the true facts became known to them.

When a plaintiff seeks money damages for breach of fiduciary duty, the statute of limitations is three years (*Papp v Debbane*, 16 AD3d 128 [1st Dept 2005]). However, "the case law in New York clearly holds that a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

As discussed above, plaintiffs' claim for breach of fiduciary duty is based upon allegations of Witkoff's false representations and omissions concerning the alleged Dayan-Witkoff joint venture and the Witkoff-Lehman Brothers joint venture, thereby subjecting the breach of fiduciary duty cause of action to the six-year statute of limitations. Therefore, assuming for the moment that the statute of limitations began to run on January 19, 2005,

plaintiffs had until January 19, 2011 to assert their claim for breach of fiduciary duty. The original complaint in this action was filed on July 3, 2008, well within the statute of limitations.

In any event, “the applicable statutory period ... does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated” (*Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131 [1st Dept 1999]). “The law requires proof of a repudiation by the fiduciary which is clear and made known to the beneficiaries viewed in the light of the circumstances of the particular case” (*Matter of Barabash*, 31 NY2d 76, 80 [1972] [internal citation omitted]). Furthermore, “[w]here factual issues exist as to the date of open repudiation, a motion to dismiss will not lie” (*Matter of Alpert*, NYLJ, Apr. 16, 1996, at 26, col 6 [Sur Ct, NY County], *affd* 234 AD2d 150 [1st Dept 1996]).

In addition, in support of their argument, plaintiffs cite 16 NY Prac, New York Law of Torts § 19:23, which states that a court may use its “inherent equity powers” to preclude a defendant from asserting a statute of limitations defense “when the defendant intentionally conceals from the plaintiff a cause of action until after the statute of limitations has expired,” in which case “the defendant’s own conduct operates to estop him or her from pleading the statute of limitations as a defense.”

Here, the pleading alleges that Witkoff did not openly announce the purported repudiation of his fiduciary obligation, and plaintiffs did not learn the falsity of Witkoff’s statement to Dayan (“to the effect that the [Premises] had been ‘lost’ to Lehman Brothers” [Amended Complaint, ¶ 80]), until May 2007, when Witkoff testified in another action, *IGDNYC, Inc. v Dayan et al.* (Sup Ct, NY County, Index No. 604189/05), where Dayan and Bonjour Equities were sued for broker fees concerning the sale of the Premises (Broker Fee

Action) (*id.*, ¶¶ 63, 86; 11/4/08 Dayan Aff., ¶¶ 8, 15 and Ex. C; 12/2/08 Dayan Aff., ¶ 9 and Ex. E). At a minimum, this raises factual issues as to the date of Witkoff's alleged open repudiation. Therefore, defendants' argument that plaintiffs' claim for breach of fiduciary duty should be dismissed as time-barred is denied for the additional reason that plaintiffs have alleged that they did not discover the alleged breach until Witkoff testified in the Broker Fee Action in May 2007.

Defendants next argue that plaintiffs fail to plead fraudulent inducement with sufficient particularity, pursuant to CPLR 3016 (b). Defendants' argument is based upon the purported insufficiency of plaintiffs' allegation that "West 10th 303 LLC [*sic*] execution of the [2005 Agreement] was fraudulently induced by Witkoff's material misrepresentation to Dayan to the effect that the West 10th Street Premises had been 'lost' to Lehman Brothers" (Amended Complaint, ¶ 80). Defendants argue that this representation was not false, because plaintiffs admit that, "between March 30, 2004 and August 23, 2004, the owner of the [Premises] accepted the offer of the Lehman Brothers-Witkoff Joint Venture to purchase the [Premises] for a purchase price of \$85,000,000" (*id.*, ¶ 32). Defendants conclude that, therefore, as of January 2005, the rights to the Premises were no longer available and "had been 'lost' to Lehman Brothers," rendering Witkoff's purported representation true. Defendants also argue that the fraud claim should be dismissed as duplicative of plaintiffs' breach of contract claim.

To prove a cause of action for fraudulent inducement, "plaintiffs must show 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" (*Shea v Hambros PLC*, 244 AD2d 39, 46 [1st Dept 1998] [internal quotation marks and citation omitted]; *see also P.T.*

Bank Cent. Asia v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003] [“cause of action for fraudulent concealment requires, in addition to the [elements of fraudulent misrepresentation], an allegation that the defendant had a duty to disclose material information and that it failed to do so”). In addition, CPLR 3016 (b) states that, “[w]here a cause of action or defense is based upon misrepresentation [or] fraud ..., the circumstances constituting the wrong shall be stated in detail.” However, as stated by the First Department in *P.T. Bank Cent. Asia*:

neither CPLR 3016 (b) nor any other rule of law requires a plaintiff to allege details of the asserted fraud that it may not know or that may be peculiarly within the defendant’s knowledge at the pleading stage. CPLR 3016 (b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud

(301 AD2d at 377 [internal quotation marks and citation omitted]).

As a preliminary matter, defendants have not established the truth of plaintiffs’ allegation that, between October 18, 2004 and January 19, 2005 (when the 2005 Agreement was signed), Witkoff misrepresented to Dayan that the Premises and development thereof had been “lost’ to Lehman Brothers” (*id.*, ¶¶ 40, 80). According to plaintiffs, the project was lost to the *Witkoff-Lehman Brothers joint venture*, not merely to Lehman Brothers. Moreover, as argued in plaintiffs’ opposition brief, taken in context, the project was not “lost,” but rather, plaintiffs claim that it was “handed over” in a “blatant sell-out” of Dayan’s interests (Plaintiffs’ Opp. Mem. of Law, at 18). Therefore, defendants’ characterization of plaintiffs’ allegation is unpersuasive.

Furthermore, plaintiffs claim that they were led to believe that Witkoff was negotiating for the Dayan-Witkoff joint venture, when he was actually pursuing his joint venture with Lehman Brothers. Specifically, plaintiffs allege that, between March 30, 2004 and August 2004, Witkoff was actively negotiating for the purchase of the Premises on behalf of the Dayan-Witkoff joint venture, and that Witkoff misrepresented to Dayan that “the Dayan-Witkoff Joint Venture was going to sign the deal any day” (*id.*, ¶¶ 21-22). Plaintiffs claim that, during the same period, Witkoff failed to disclose to Dayan that Witkoff had abandoned the Dayan-Witkoff joint venture and formed a rival joint venture with Lehman Brothers to purchase and develop the Premises (*id.*, ¶¶ 29-34). Plaintiffs allege that, on August 23, 2004, without disclosure to Dayan, Witkoff formed 150 Charles Street Holdings LLC (on behalf of himself and Lehman Brothers Holdings LLC, each of whom held a 47.5 percent ownership interest), and he also formed WG Charles Street Holdings LLC, which Witkoff ultimately used to hold his interest in 150 Charles Street Holdings LLC, the purported Witkoff-Lehman Brothers joint venture (*id.*, ¶¶ 36, 44-45, 55-56). Witkoff also allegedly negotiated the financing for the project, “on the basis that the sponsors of the project would be Witkoff and an entity which would transfer its interest to Lehman Brothers,” none of which was disclosed to Dayan (*id.*, ¶¶ 38-39).

Plaintiffs claim that they relied upon defendants’ fraudulent conduct when they entered into the 2005 Agreement and accepted a 13 percent interest in the development of the Premises instead of the 50 percent interest to which Dayan was allegedly entitled pursuant to his alleged joint venture with Witkoff. These allegations are “set forth in sufficient detail to clearly inform [defendants] with respect to the incidents complained of” (*P.T. Bank Cent. Asia*, 301 AD2d at 377), and they distinguish plaintiffs’ fraud claim from their breach of contract claim. For the

foregoing reasons, defendants' motion to dismiss plaintiffs' fraudulent inducement claim is denied.

Defendants argue that plaintiffs fail to comply with CPLR 3014, which requires pleadings to "consist of plain and concise statements in consecutively numbered paragraphs." In support of this argument, defendants cite *A. Cohen & Sons Corp. v Ratner* (19 AD2d 787, 787 [1st Dept 1963]), where the Court dismissed a complaint, citing CPLR 3014, based upon "a failure to set forth, with reasonable clearness, the nature and the bases of the alleged controversies between the parties." As discussed in greater detail above, plaintiffs' first cause of action seeks damages for Witkoff's alleged breach of contract, the second cause of action seeks damages based upon Witkoff's alleged breach of fiduciary duties, the third cause of action seeks a declaration that the 2005 Agreement does not bar plaintiffs' claims, and the fourth cause of action seeks a declaration that defendants are estopped by their fraudulent conduct from asserting the 2005 Agreement as a bar to this action. Therefore, defendants' argument is without merit.

Defendants argue that plaintiffs fail to comply with CPLR 3013, which provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Specifically, defendants argue that all of plaintiffs' claims involve the alleged wrongful conduct of Witkoff, and that the amended complaint fails to explain the specific nature of the claims asserted against the corporate defendants, WG Charles Street LLC, WG West Village LLC and WG Internal Charles Street LLC (together, Corporate Defendants).

However, the pleading alleges that West 10th 303 LLC owns 27.37 percent of WG Charles Street LLC, which, in turn, owns 47.5 percent of the overall project (through 150 Charles Street Holdings LLC), with the remainder of Witkoff's interest held by and through the Corporate Defendants (*id.*, ¶¶ 55-61). The pleading alleges that the Corporate Defendants "have been, and they remain, instrumentalities of defendant Witkoff" (Amended Complaint, ¶ 8), and it alleges how Witkoff formed and used these entities to transfer ownership interests in the Premises. Plaintiffs allege that, therefore, these Corporate Defendants "are necessary parties to this action whose rights will or may be adversely affected by the judgment sought herein" (*id.*, ¶ 9). At this juncture in the litigation, these allegations are "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense," pursuant to CPLR 3013.

Defendants argue that the only agreement or duty referred to in the amended complaint is the 2004 oral joint venture agreement between Witkoff and Dayan, and that, therefore, no privity exists between plaintiffs and the Corporate Defendants, and West 10th 303 LLC lacks standing to bring any claim against any defendant. Indeed, the primary focus of defendants' reply brief is that "the only parties to the alleged oral joint venture agreement were, in fact, Bonjour Equity, LLC ... and The Witkoff Group," neither of whom is a named party in this action (Def. Reply Mem. of Law, at 2). Plaintiffs counter that they have standing, and they also submit sur-reply papers to their cross motion.

The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution. The

most critical requirement of standing, and the one arguably implicated in this case, is the presence of injury in fact - an actual legal stake in the matter being adjudicated

(*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [internal citations and quotation marks omitted]).

Here, Dayan alleges that he was a party to the Dayan-Witkoff joint venture, including the Non-Disclosure Agreement between himself, through “Bonjour Equity, LLC or any of their affiliates,” and Witkoff, through “The Witkoff Group (and affiliates),” which plaintiffs allege was an entity used by Witkoff to conduct business (Dayan Aff., Ex. A; Amended Complaint, ¶ 4). Plaintiffs also submit with their opposition and cross motion papers a “letter of intent ... on behalf of Bon Jour Equities and The Witkoff Group LLC,” dated April 2, 2004 and signed by Dayan and Witkoff on behalf of these entities, which plaintiffs claim was Dayan and Witkoff’s joint offer to purchase the Premises for \$60 million (Dayan Aff., Ex. B; Amended Complaint, ¶ 19). Dayan submits the Non-Disclosure Agreement and the letter of intent as evidence of the joint venture, and the involvement of the various parties.

Dayan alleges that he was fraudulently induced to accept an interest in the development of the Premises that was less than he had agreed with Witkoff, and that he took and presently holds this interest in the name of West 10th 303 LLC. Moreover, as discussed above, the pleading alleges that the Corporate Defendants “have been, and they remain, instrumentalities of defendant Witkoff” (Amended Complaint, ¶ 8), and it alleges how Witkoff formed these companies and used them to transfer ownership interests in the Premises, and that, as a result, the rights of the Corporate Defendants may be adversely affected in this action. Based upon these allegations, at least at this juncture in the litigation, defendants’ argument that plaintiffs lack

standing is unpersuasive, as it appears that plaintiffs and the Corporate Defendants have “an actual legal stake in the matter being adjudicated” (*Security Pac. Natl. Bank*, 31 AD3d at 279).

Defendants argue that the Non-Disclosure Agreement and the letter of intent confirm that the only parties to the alleged oral joint venture were Bonjour Equity, LLC and The Witkoff Group, neither of which is a named party in this action. This argument is unpersuasive for several reasons. The Non-Disclosure Agreement expressly states that it concerns “Bonjour Equity, LLC or any of its affiliates” (Dayan Aff., Ex. A [emphasis added]), and the amended complaint clearly alleges that Dayan conducts business through this entity. This agreement is signed by Witkoff individually, under the company name, “Witkoff Group (*and affiliates*),” and the amended complaint clearly alleges that Witkoff conducts business through this entity (*id.* [emphasis added]). The allegations of the pleading make clear that plaintiffs are seeking to hold Witkoff liable individually, and through the entities and affiliates through which he conducts business, that is, the Corporate Defendants in this action.

Moreover, defendants’ own capital calls are addressed to Dayan individually, and to “Bonjour” (Stomber Aff., Ex. 3), and the Operating Agreement for WG Charles Street LLC expressly authorized Witkoff to transfer an interest in this entity to “West 10th 303 LLC, an entity which is controlled, directly or indirectly, by Charles Dayan and/or Martin Dayan” (*id.*, Ex. 2).

In addition, at Witkoff’s deposition in the Broker Fee Action, Witkoff admitted that the Premises “was originally brought to [his] attention by the Bonjour people,” including, among others, Dayan (12/4/08 Rudofsky Aff., at 7). Witkoff testified that the property “was a reasonably good deal,” and that he said to people in his office, “Let’s buy it” (*id.* at 11). Witkoff

testified that “we offered \$60,000,000 for [the Premises]” (*id.* at 12). Witkoff admitted that his agreement with Bonjour was that they “were going to do [the transaction] together,” that “originally it was contemplated that they would put in 50 percent of the equity needed and we would put in 50 percent of the equity needed,” and that they would “collectively pay” any “closing costs associated with the deal ... [h]alf and half” (*id.* at 14, 15). Although Witkoff testified that Lehman Brothers approached him independently to sell him the Premises and that “this was [Lehman Brothers’] deal ... They got it and found it in their minds” (*id.* at 23, 28, 33), Witkoff admitted that he never discussed with “Dayan the possibility of bettering the \$85,000,000 offer” of Lehman Brothers (*id.* at 35). Witkoff also testified that he subsequently offered Dayan a “consolation prize” of “a minority position” in the investment, “with zero decision making” (*id.* at 39). At this stage of the litigation, Witkoff’s testimony is consistent with plaintiffs’ allegations concerning the existence of the joint venture between Dayan and Witkoff, that Dayan and Witkoff were the principals of the alleged joint venture, and that Witkoff used the Corporate Defendants to conduct the business of the alleged joint venture and the subsequent alleged misconduct that is at the heart of this lawsuit.

Plaintiffs’ sur-reply brief argues that, even if Dayan was not the contracting principal, he was, at a minimum, an agent representing Bonjour Equities LLC. Plaintiffs also argue that, alternatively, the proper parties can be joined. The court acknowledges defendants’ objection to plaintiffs’ sur-reply papers at the hearing held on these motions on January 12, 2009, arguing that issues of agency and joinder of parties are improperly raised for the first time in plaintiffs’ sur-reply papers. The court agrees. Plaintiffs never received the court’s permission to submit the sur-reply, and these arguments are not properly before the court (*Schultz v 400 Coop. Corp.*,

292 AD2d 16, 21 [1st Dept 2002] [“[t]he consideration of arguments advanced at a time when the opposing party has no opportunity to respond is a procedure that this Court condemned”).

However, Point I of plaintiffs’ cross reply merely reinforces arguments already raised in the parties’ earlier motion papers, and, therefore, defendants are not prejudiced by the court’s consideration of these arguments. For the reasons discussed above, at this stage of the litigation, the papers properly before the court are sufficient to withstand defendants’ motion to dismiss.

The parties also request sanctions, expenses and attorneys’ fees, under 22 NYCRR § 130-1.1. Defendants argue that this action is frivolous, and plaintiffs argue that defendants’ motion to dismiss is frivolous. While plaintiffs ultimately prevail on defendants’ motion to dismiss the amended complaint, none of the parties demonstrate frivolous conduct within the meaning of 22 NYCRR § 130-1.1. Therefore, the parties’ requests for sanctions, expenses and attorneys’ fees are denied.

Accordingly, it is hereby


ORDERED that the defendants’ motion to dismiss and for sanctions is denied; and it is further

ORDERED that plaintiffs’ cross motion for legal fees and expenses is denied; and it is further



ORDERED that defendants are directed to serve an answer to the amended complaint within 10 days after service of a copy of this order with notice of entry.

Dated: April 6, 2009

ENTER:

~~FRANK J. ...~~
J.S.C.

FILED
APR 08 2009
COUNTY CLERK'S OFFICE
NEW YORK