

Walsh v Endresen

2009 NY Slip Op 30888(U)

March 30, 2009

Supreme Court, New York County

Docket Number: 602096/08

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Index Number : 602096/2008

WALSH, DAVID G.

vs.

ENDRESEN, GAIL

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE 1/16/08

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 _____

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

It is hereby

ORDERED that the motion of defendants Jan R. Endresen, BLR Capital Corp. and the Endresen Family Trust ("defendants") for an Order dismissing portions of the original Complaint by plaintiffs David G. Walsh, as trustee of the Christopher Endresen Marital Trust and the Christopher Endresen Family Trust and as authorized agent of Chris L.L.C., and Chris L.L.C. ("plaintiffs"), pursuant to CPLR §§3016(b) and 3211(a)(1), (3) and (7), is denied, on the ground that defendants' motion is moot; and it is further

ORDERED that defendants' motion that the Court strike portions of plaintiffs' Amended Complaint, pursuant to CPLR §3024(b), is denied, and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 3/30/09

[Signature]
HON. CAROL EDMEAD S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
DAVID G. WALSH, as Trustee of the
CHRISTOPHER ENDRESEN MARITAL TRUST,
CHRISTOPHER ENDRESEN FAMILY TRUST
and as Authorized Agent of CHRIS L.L.C.
and CHRIS L.L.C.,

Index No. 602096/08

Plaintiffs,

-against-

DECISION/ORDER

JAN R. ENDRESEN, BLR CAPITAL CORP.,
and the ENDRESEN FAMILY TRUST,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiffs David G. Walsh ("Mr. Walsh"), as trustee of the Christopher Endresen Marital Trust ("Marital Trust") and the Christopher Endresen Family Trust ("Family Trust") and as authorized agent of Chris L.L.C., and Chris L.L.C. ("Chris, LLC") (collectively, "plaintiffs") seek to recover damages from defendants Jan R. Endresen ("Jan"), BLR Capital Corporation ("BLR") and the Family Trust (collectively, "defendants") for breach of contract. Plaintiffs also make a demand for an accounting.

Defendants now move for an order dismissing plaintiffs' first cause of action against defendant Gail R. Endresen ("Gail"), pursuant to CPLR §3211(a)(1) and (7); dismissing plaintiffs' first cause of action against Jan, pursuant to CPLR §3211(a)(1) and (7); dismissing the third and fourth causes of action (breach of trust and fraud), pursuant to CPLR §§3016(b) and

3211(a)(1), (3) and (7)¹.

*Factual Background*²

Mr. Walsh is a trustee of the Marital Trust and the Family Trust (collectively, "the Trusts"). Mr. Walsh also is the authorized agent of Chris, LLC, a Wisconsin limited liability company formed by Christopher Endresen ("Chris") on or about August 14, 1997. After Chris' death, the Marital Trust took over ownership of Chris, LLC. Chris' widow, Kay Endresen, and his son, Tyler Endresen (age 13), are the beneficiaries of the Trusts.

~~Jan is Chris' brother. Jan is the president and/or CEO of Aerotech World Trade Corporation ("AWTC"), Aerotech Realty, Inc. ("Realty"), and BLR. Jan's wife, Gail, also is a trustee of the Family Trust. Aerotech Holding Company, Inc. ("Holding") is an inactive corporation, organized on or about March 21, 1977 under and pursuant to the laws of the State of New York.~~

Jan and Chris are the children of Bergthor Endresen ("Bergthor") and Rosilla Endresen ("Rosilla"). (Bergthor, Rosilla and Chris are now deceased.) Bergthor established the family business, AWTC, and related entities, Holding and Realty. AWTC caters to commercial and military aircraft, including helicopters, providing primarily maintenance and mechanical service. Chris was a shareholder of AWTC and Realty (Amended Complaint, ¶¶ 11-12). AWTC issued approximately 300 Class A voting shares of AWTC ("AWTC Class A Shares") and 100 Class B

¹Defendants' motion responds to plaintiffs' original Complaint (motion Exh. 3), in which Gail is listed as a defendant and which contains five causes of action against defendants. Plaintiffs have since filed an Amended Complaint, in which the first cause of action against Gail has been removed and which contains only three causes of action against defendants (see Exh. 1 to the affirmation of attorney Melinda M. Dus in opposition to defendants' motion, "Dus aff.").

²Information is taken from plaintiffs' Amended Complaint (Dus aff. Exh. 1).

[*4]

non-voting shares of AWTC (“AWTC Class B Shares”). Jan is the majority shareholder of both classes of AWTC stock (Amended Complaint, ¶ 13).

BLR, formed by Jan, also is in the business of servicing and maintaining aircraft, including, but not limited to, the sale, marketing and distribution of aircraft and helicopter parts.

Shortly after Chris’ diagnosis with cancer in 1997, Chris negotiated 1) the settlement of his share of Rosilla’s estate, which was still being administered; 2) an agreement whereby Chris gave Jan and/or his designee the option to purchase Chris’ AWTC and Realty shares; and 3) a ~~non-competition and consulting agreement on behalf of Chris and Chris, LLC for the benefit of~~ Jan and BLR (Amended Complaint, ¶15).

On or about May 16, 1997, Chris created the Christopher Endresen Revocable Trust (“the Trust”), which, upon his death, split into the Family Trust and the Marital Trust. The Trust is the ultimate holder of the payment obligations described below (Amended Complaint, ¶ 16).

On or about September 9, 1997, Chris, Chris, LLC, Jan and BLR, executed the Option Agreement (“Option Agreement,” Dus aff. Exh. A). The Option Agreement gives Jan or his designee the option to acquire Chris’ shares of AWTC and Realty stock. The Option Agreement also sets forth a non-competition and consulting agreement on behalf of BLR. The deadline to exercise the option was set as June 1, 1998 (Amended Complaint, ¶ 17).

On or about September 9, 1997, Chris, Jan and Starr & Co. executed an Escrow Agreement (“Escrow Agreement,” Dus aff. Exh. B). The shares subject to the Option Agreement were transferred to and held by the escrow agent; the shares were used as collateral for the underlying obligation (Amended Complaint, ¶ 18).

Chris delivered the certificates representing his AWTC shares and Realty shares

[* 5]

to the escrow agent. Upon the exercise of the Option Agreement, as set forth in the Escrow Agreement, the agent shall deliver the shares to the purchaser: "provided that, in each 12 month period from July 1 through July 30 of the payment schedule identified in Schedule 1.3 of the Option Agreement, Purchaser makes all payments due to Chris under such payment schedule during such period, Escrow Agent shall, on each anniversary date of this Agreement, release to Purchaser a pro rata portion of the AWTC shares" (Amended Complaint, ¶ 19).

On or about September 9, 1997, Chris entered into an agreement with Jan whereby Chris ~~agreed to exercise his power of appointment by and through his Will as to the shares held in trust~~ for his benefit, as set forth in the signed letter ("Power of Appointment," Dus aff. Exh. C), such that Jan could exercise the option to purchase these shares. Upon the failure of the power of appointment, if any, these shares would be used to fund the Christopher Endresen Children's Trust, which currently is unfunded (Amended Complaint, ¶ 20).

On or about June 17, 1998, after Chris' death, Kay (as the personal representative under Chris' Will), Mr. Walsh (as trustee of the Trust and authorized agent for Chris, LLC), Jan and BLR agreed to and executed an Amendment to Option Agreement ("Amended Option Agreement," Dus aff. Exh. D) (Amended Complaint, ¶ 21).

The Amended Option Agreement extended the option period to December 31, 1999 and modified the payment obligation in connection with the non-competition and consulting agreement. The payments due in exchange for the consulting agreement of Chris and/or Chris, LLC ended by agreement after Chris' death in exchange for increasing the amount that would be paid to the Trust in exchange for the non-competition agreement (Amended Complaint, ¶ 22).

On or about December 23, 1999, Jan and Gail, as trustee of the Family Trust, exercised

the option under the Amended Option Agreement and the Power of Appointment to acquire 49 AWTC Class A Shares, 50 AWTC Class B Shares, and 49 shares of Realty stock ("the Option Exercise Letter," Dus aff. Exh. E) (Amended Complaint, ¶ 23).

Jan, individually, exercised the option for the 49 AWTC Class A Shares and the 49 Realty shares (see the Amended Option Agreement). Gail exercised the option for the 50 AWTC Class B Shares as Jan's designee and as trustee of the Family Trust (*id.*) (Amended Complaint, ¶ 24). In exchange for the AWTC shares, Jan, Gail and the Family Trust agreed to pay Chris ~~\$225,000 as follows: \$40,000 as a down payment and \$185,000 spread over 96 monthly~~ installments (each in the amount of \$2,522.24), accruing 7% interest per annum (Amended Complaint, ¶ 25).

In exchange for the non-competition and consulting agreement, Jan and BLR had agreed to pay Chris and Chris, LLC \$20,000 as a down payment, plus \$145,750 spread over 96 monthly payments, accruing interest at 8% per annum, and \$46,250 spread over 96 monthly payments without interest. The first \$20,000 was received (Amended Complaint, ¶ 26).

Pursuant to the Amended Option Agreement, the balance owed in connection with the consulting agreement at the time of the Amended Option Agreement (\$46,250, less payments made) was reduced to 83% of the amount due and added to the amount owed in connection with the non-competition agreement, for a total obligation of approximately \$170,325.04 that would be payable over 96 monthly installment payments (each in the amount of \$2,407.83) accruing interest at a rate of 8% (Amended Complaint, ¶ 27).

In exchange for the Realty stock, Jan had agreed to pay Chris \$63,000 spread over 96 monthly installments, accruing interest at a rate of 7% per annum (Amended Complaint, ¶ 28).

[* 7]

At the time of Chris' death, these payment obligations for the AWTC stock, the non-competition and consulting agreement, and the Realty stock funded the Marital Trust, which ultimately came to own Chris, LLC (Amended Complaint, ¶ 29).

After the exercise of the Amended Option Agreement, plaintiffs received the initial \$40,000 in connection with the AWTC shares, and defendants commenced paying the monthly installment payments. All monthly installment payments for the AWTC shares were made up to and through November 2001, according to schedule. As of November 1, 2001, the remaining principal was \$118,377.54, plus interest, at a rate of 7% per annum, calculated monthly. ~~Certain~~ payments were made after November 1, 2001 on a non-regular basis for the AWTC shares. On or about May 6, 2005, \$2,000 was paid; on or about June 22, 2005, \$62.71 was paid; and on or about August 15, 2005, \$47,500 was paid. These payments were applied against the then-accrued interest and the principal owed, bringing the payment obligation current through the July 2002 payment (Amended Complaint, ¶¶ 31-32).

As of August 1, 2008, the amount of principal owed in connection with the AWTC shares was \$100,234, and the accrued interest on the principal from August 2002 through August 1, 2008 was \$20,463.70. All monthly payments in connection with the non-competition and consulting agreement were made up to and through July 1, 2002. As of July 1, 2002, the principal balance owed by Jan and BLR in relation to the non-competition and consulting agreement was \$96,879.03, plus interest of approximately \$60,477.59, to date. No payments have been received after the July 2002 payment (Amended Complaint, ¶¶ 33-34).

All monthly payments in connection with the Realty shares were made up to and through July 1, 2002. As of July 1, 2002, the principal owed was \$40,312.60, plus interest, at a rate of

7% per annum, calculated monthly. On or about June 22, 2005, a payment in the amount of \$50,569.79 was made for the Realty shares that fully paid off all amounts due and owing in connection with the Realty shares. As a result, this obligation has been satisfied (Amended Complaint, ¶ 35).

Currently and as of August 1, 2002, the payment obligations for the AWTC shares and the non-competition and consulting agreement remain in arrears (Amended Complaint, ¶ 36).

*Plaintiffs' Complaint*³

Plaintiffs allege that at all times, Jan, individually and in his official capacity on behalf of AWTC, owed a duty to plaintiffs to act in good faith, with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances, as set forth in section 717 of New York Business Corporation Law. Starting in 2001, without the knowledge or consent of plaintiffs, and without any disclosure to the respective lenders as to the Amended Option Agreement or the installment payments still owed to plaintiffs, Jan used certain AWTC shares and/or assets as collateral to enter into mortgages in favor of various banks including, but not limited to, GE Capital (Amended Complaint, ¶¶ 37-38). Although properly demanded by plaintiffs in writing upon learning of the lien(s), Jan, individually and on behalf of AWTC, refused to disclose his or AWTC's creditors or financial condition (Amended Complaint, ¶ 39).

The Trust was and remains a shareholder of the AWTC Class A and B Shares to the extent that the shares served as collateral as set forth in the Escrow Agreement, only a pro-rata portion of shares were released in exchange for each twelve-month period of payments made, and the Power of Appointment executed by Chris is effective only if and to the extent that Jan

³Information taken from plaintiffs' Amended Complaint.

performed under the Option Agreement. As to all of the shares held by the Trust, Jan and AWTC had no right to encumber and/or pledge these shares. As to the assets of AWTC, Jan had no right to encumber these assets (Amended Complaint, ¶¶ 40-41).

Plaintiffs also allege that Jan conveyed his and AWTC's property and assets or otherwise entered into obligations using his and AWTC's property and assets as collateral (i) at the time when Jan knew or should have known that he and/or AWTC were insolvent or would be rendered insolvent by the transaction to the detriment of the business and/or plaintiffs, (ii) ~~without fair and adequate consideration to the detriment of the business and/or plaintiffs, or (iii)~~ when he knew the transaction would unreasonably reduce his or AWTC's capital and/or resources to the detriment of the business and plaintiffs (Amended Complaint, ¶ 42). At all times, Jan knew of his obligation to plaintiffs and that payments were due and owing to them. Jan acted with the intent to hinder or delay the payments owed to plaintiffs (Amended Complaint, ¶ 43).

In their first cause of action, plaintiffs contend that Jan and the Family Trust breached the Amended Option Agreement in connection with AWTC shares. Plaintiffs allege that Jan and BLR agreed to and executed the Option Agreement and the Amended Option Agreement, which are binding and enforceable contracts duly supported by mutual consideration. Jan and Gail, as trustee, elected to exercise the option and purchase Chris' AWTC shares. Jan purchased the 49 AWTC Class A Shares held in trust for Chris, for which Chris executed a Power of Appointment; and Gail, as the designee of Jan and as trustee of the Family Trust, purchased the 50 AWTC Class B Shares. On July 19, 2002, Jan wrote and sent a handwritten letter to Mr. Walsh, as trustee of the Marital Trust, stating that "[w]e are experiencing difficulties here in the

business and I am therefore reducing my monthly payments to the [Trust]. I will keep you informed as to our progress" ("July 19, 2002 letter," Dus aff. Exh. F). After receiving the letter, plaintiffs engaged in written and telephone communications with the attorneys for Jan in an effort to have the payments resume (Amended Complaint, ¶ 47). No monthly installment payments as set forth in the Amended Option Agreement were made after July 2002. As of August 1, 2002, Jan and the Family Trust defaulted and breached the Amended Option Agreement in connection with the AWTC shares (Amended Complaint, ¶ 48). The breach was ~~without justification, and at all times, the payment obligation remained due and owing.~~ Plaintiffs seek a judgment against Jan and the Family Trust for approximately \$120,697.70, plus costs, disbursements and expenses, including reasonable attorneys' fees, incurred as a result of bringing this action.

In their second cause of action, plaintiffs contend that Jan and BLR breached the non-competition and consulting agreement of the Amended Option Agreement (see Amended Option Agreement, §2). Plaintiffs allege that Chris, Jan and BLR agreed to and executed a non-competition and consulting agreement, as amended, whereby Chris and Chris, LLC agreed not to compete with BLR in exchange for the payment of monies. The agreed-upon monthly payments owed to Chris, LLC were \$2,407.83 for a total of 96 payments in the aggregate amount of \$170,325.04 (Amended Complaint, ¶53). Jan and/or BLR ceased paying the monthly installment payments after July 1, 2002. As of August 2002, Jan and BLR defaulted and breached the non-competition and consulting agreement set forth in section 2 of the Amended Option Agreement. Therefore, plaintiffs seek a judgment against Jan and BLR, jointly and severally, for approximately \$157,356.62, plus costs, disbursements and expenses, including his

reasonable attorneys' fees.

In their third cause of action, plaintiffs make a demand for an accounting from AWTC, Realty, Holding, BLR, the Family Trust, Jan, Gail, Blair Endresen, Leigh Endresen and J. Reed Endresen. Plaintiffs allege that Jan controlled AWTC, Realty and BLR, and that Gail and/or Jan controlled the Family Trust. Plaintiffs further allege that Jan owned and/or controlled a majority of shares of AWTC, Realty and BLR, and he exercised pervasive if not exclusive control over the same (Amended Complaint, ¶ 58). Jan and the other defendants entered into a fiduciary ~~relationship vis-a-vis plaintiffs based on contract and as majority shareholders. Further, plaintiffs~~ entrusted defendants with certain shares of AWTC, as well as the value of the non-competition and consulting agreement as to Chris, LLC and Chris (Amended Complaint, ¶ 59).

Plaintiffs contend that Jan failed to observe corporate formalities; intermingled personal and business activities, assets and management; and engaged in self-dealing, waste and mismanagement in breach of his fiduciary duties vis-a-vis AWTC and plaintiffs, as shareholders and contract beneficiaries (Amended Complaint, ¶ 60). Plaintiffs allege that they properly demanded an accounting as well as access to and examination of the corporate books and records of AWTC, which Jan wrongfully refused (Amended Complaint, ¶ 61). Plaintiffs also contend that certain assets and/or opportunities were diverted, encumbered, sold, siphoned off and/or looted from AWTC for Jan's personal gain including, but not limited to, for the benefit of BLR, Gail, the Family Trust, and Jan's and Gail's three children, Blair, Leigh and J. Reed Endresen (Amended Complaint, ¶ 62). As a result of Jan's actions, plaintiffs suffered injury and harm, and are without adequate legal remedy.

Defendants' Motion⁴

First, defendants contend that documentary evidence demonstrates that Gail has no individual liability in this action. By its plain language, the Option Exercise Letter shows that Gail exercised the option solely in her trustee capacity and not as an individual (MOL, p. 5). To the extent that plaintiffs purport to sue Gail in a capacity other than trustee of the Family Trust, the Court should dismiss plaintiffs' first cause of action, defendants argue.

Second, defendants contend that the Option Exercise Letter demonstrates that plaintiffs ~~have no legal basis upon which to assert joint and several liability against Gail and Jan. The~~ Option Exercise Letter recites Gail's separate exercise of an option in her trustee capacity to purchase the AWTC Class B Shares and Jan's separate exercise of an option to purchase the AWTC Class A Shares. Accordingly, documentary evidence dispositively shows that plaintiffs' first and fourth causes of action are incapable of supporting a claim of "joint and several" liability against Gail and Jan (MOL, pp. 6-7).

Third, defendants contend that plaintiffs' cause of action against Jan for breach of fiduciary duty contains "multiple infirmities" that require the dismissal of the claim. Citing the original Complaint, defendants contest plaintiffs' contention that Jan caused AWTC to grant a collateral security interest in AWTC shares and caused an entity known as Realty to grant a security interest in its shares (original Complaint, ¶ 54). First, defendants argue, plaintiffs lack standing and are legally disabled from asserting a breach of trust claim involving the Realty shares that Jan acquired from Chris pursuant to the Option Agreement (MOL, p. 7). To assert a

⁴Defendants' motion responds to plaintiffs' original Complaint (motion Exh. 3) and comprises the affidavit of attorney Brandon Sall ("Sall aff.") and a Memorandum of Law ("MOL").

claim based on Realty shares, plaintiffs would have to show that when they commenced the action, they held an actionable interest in such shares, defendants argue (*id.*). However, plaintiffs admit that long before they commenced their action, they held no interest in Realty (*see* original Complaint, ¶ 35; MOL, p. 7-8). Accordingly, as a matter of law, Jan cannot be deemed to have a duty of trust to plaintiffs arising out of Realty shares that Chris sold to Jan, and plaintiffs lack standing to make any such claim. Second, citing CPLR §3016(b), defendants argue that plaintiffs failed to plead breach of trust with particularity. Third, citing ¶ 53 of the original Complaint, defendants argue that, contrary to the conclusory allegations advanced in plaintiffs' pleading, AWTC does not own and never has owned any AWTC shares. AWTC, therefore, could not have pledged shares it does not own, and plaintiffs' conclusory assertions offer no basis to support a breach of trust claim. Fourth, in support of their breach of trust claim, plaintiffs nakedly assert that Jan or AWTC encumbered AWTC shares in which plaintiffs claim an interest. The Court judicially may notice publicly recorded information showing that a predecessor-in-interest to Chase Bank perfected a security interest in AWTC assets prior to the date of the Option Agreement, defendants argue. Such a security interest did not encompass any shares of AWTC stock. Accordingly, plaintiffs failed to plead breach of trust based on a putative encumbrance of AWTC shares ostensibly owned by the company. Fifth, even if plaintiffs could plead that Jan violated a legally cognizable interest of plaintiffs in the AWTC shares that Chris sold pursuant to the Option Agreement, plaintiffs could not claim injury based on an assertion that such shares ostensibly decreased in value because of unspecified acts by Jan. A conclusory assertion that any decrease in the value of AWTC shares should be attributable to unspecified acts of Jan is insufficient to state a breach of trust claim. Sixth, defendants argue that plaintiffs'

breach of trust claim in all other respects lacks the particularity required under CPLR §3016(b) and may not be sustained based on the sweeping generalities advanced in plaintiffs' original Complaint (MOL, pp. 8-9).

Fourth, defendants contend that plaintiffs' cause of action against Jan and Gail for fraudulent conveyance is fatally deficient. Citing ¶¶ 72-77 of the original Complaint, defendants argue that plaintiffs failed to state a legally cognizable fraud claim against Gail. Second, notwithstanding plaintiffs' naked statement to the contrary, Gail never conveyed any asset of the Family Trust to anyone, and plaintiffs' conclusory assertion is insufficient to plead that Gail fraudulently conveyed anything. Third, the Realty shares that Jan acquired pursuant to the Option Agreement have been paid for in full and are not part of this case. Accordingly, plaintiffs have no legal basis upon which to assert a fraudulent conveyance claim against Jan relating to the Realty shares. Fourth, plaintiffs have failed to plead with particularity their claim that Jan caused AWTC property or assets to be conveyed outside the ordinary course of business. Fifth, plaintiffs otherwise have failed to plead fraudulent conveyance with the requisite particularity (MOL, pp. 9-10).

Plaintiffs' Opposition

Plaintiffs contend that all of the issues raised by defendants' motion have been addressed, cured and fully mooted by the Amended Complaint, with attached exhibits, filed by plaintiffs on December 10, 2008. The Amended Complaint also was served upon defendants on December 10, 2008. The Amended Complaint contains two counts for breach of contract (formerly Counts I and Counts II of the original Complaint) and one count for an accounting (formerly Count V of the original Complaint) (opp., pp. 2-3).

Plaintiffs point out that none of defendants' contentions concerns the underlying contractual obligations, or defendants' default in the duly owed payments pursuant to the agreements. Therefore, plaintiffs argue, it cannot be reasonably disputed that defendants entered into these obligations and failed to fully perform thereunder. Instead, defendants interpose arguments not directed to the heart of the claim in Count I, but instead focused on minor aspects, such as to whether Gail acted in an individual capacity, or whether the Family Trust and Jan can be held joint and severally liable. These arguments are not substantive, nor do they even remotely address the core allegation: breach of contract. Likewise, defendants' motion fails to address or discuss – in any manner whatsoever – Count II, the claim for breach of contract of the non-competition and consulting agreement, or Count V, the demand for accounting. At best, defendants' motion is a selected assault against portions of Counts I, III and IV (opp., pp. 8-9).

Plaintiffs chose to amend the Complaint and focus on their core allegations – defendants' breach – in the Amended Complaint. The Amended Complaint fully moots defendants' motion, as it removes any claim against Gail individually, or any reference to joint and several liability in the *ad damnum* clause of plaintiffs' original Complaint, which were defendants' concerns with Count I (see defendants' MOL, pp. 6-7). Count II of the Amended Complaint remains the same as it was in the original Complaint, against which defendants did not move. Count III of the Amended Complaint contains a demand for an accounting; again, the same as it was in the original Complaint⁵, against which defendants did not move. The Amended Complaint contains only these three counts. As the Amended Complaint fully moots defendants' motion, the Court should deny defendants' motion in its entirety, plaintiffs argue (opp, p. 9).

⁵Alleged as Count V in the original Complaint.

Plaintiffs further argue that an Amended Complaint supercedes and takes the place of any prior pleading. It is well established by caselaw that by filing an amended complaint, the amended complaint supercedes and takes the place of the prior pleading, plaintiffs contend. Upon plaintiff's filing of an Amended Complaint, defendants' motion was fully mooted (opp., p. 9-10).

Defendants' Reply

Defendants contend that plaintiffs' amended pleading fails to address several material ~~issues raised in defendants' motion. Accordingly, defendants' motion is not moot.~~

With respect to Gail, plaintiffs' Amended Complaint continues to refer to alleged actions of Gail in a capacity other than that as trustee of the Family Trust. Yet, documentary evidence shows that at no time has Gail acted in a capacity other than as trustee of the Family Trust (see the Option Exercise Letter; Amended Complaint, ¶ 25; original Complaint, ¶ 25). In their Amended Complaint, plaintiffs recite: "In exchange for the AWTC shares, Jan, *Gail*, and the Endresen Family Trust, agreed to pay Chris Two Hundred Twenty Five Thousand Dollars (\$225,000.00)" (*emphasis added*). It is scandalous and prejudicial for plaintiffs' filed pleading to allege that Gail did anything in her individual capacity, since documentary evidence shows that Gail never individually agreed to pay any money to plaintiffs. Defendants' moving papers demonstrate that Gail in her individual capacity is not a proper party to this action and that plaintiffs' papers should include no reference adverse to her. To the extent any such reference remains – as it does in plaintiffs' Amended Complaint – the reference is subject to dismissal, pursuant to CPLR §3024(b). Accordingly, defendants ask the Court to issue a decision and order dismissing the Amended Complaint and directing plaintiffs to serve a further amended pleading

that deletes any reference to Gail in her individual capacity (reply, ¶¶ 3-5).

Furthermore, plaintiffs failed to properly amend the Complaint to conform with the documentary evidence with respect to the first cause of action. The removal of Gail corrected one defect with this cause of action. However, the Amended Complaint seeks recovery from both Jan and the Family Trust for the entire sum alleged to be due for the AWTC shares. The Option Exercise Letter documents that Jan exercised the option with respect to the AWTC Class A Shares and Gail, as trustee, exercised the option with respect to the AWTC Class B Shares.

~~Therefore, predicated upon the evidence presented, Jan and the Family Trust cannot both be responsible for the sum alleged to be due.~~

Defendants also argue that the Amended Complaint makes improper reference to Realty in ¶ 35. In defendants' moving papers, defendants refer to plaintiffs' admission that they have been paid in full with respect to shares of Realty. Indeed, plaintiffs admit that they have no claim against Realty, and the admission carries forward into their amended pleading. Defendants' notice of motion seeks the dismissal of all pleaded allegations that are adverse to Realty. Although the Amended Complaint removes the causes of action plaintiffs purported to base upon Jan's option to purchase the Realty shares, plaintiffs continue to include adverse references regarding Realty in their Complaint, to the detriment of Jan. Such allegations concerning Realty, including the reference at ¶ 58 and the "wherefore" clause on page 15, should be stricken from the Amended Complaint, pursuant to CPLR §3024(b).

Defendants ask the Court either to dismiss the Amended Complaint or, in the interest of judicial economy, to direct plaintiffs to remove the references and thereby avoid the need for additional motion practice to correct the Complaint. As referenced above, the inclusion of such

allegations have no bearing on the action presently before this Court.

Analysis

Dismissal Based on Documentary Evidence and Failure to State a Cause of Action

Under CPLR 3211(a)(1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" based on documentary evidence [*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1, 784 N.Y.S.2d 63 [1st Dept 2004]]. The term "documentary evidence" referred to in CPLR 3211(a)(1) ~~"typically means judicial records such as judgments and orders or out-of-court documents such as~~ contracts, deeds, wills, and/or mortgages and includes "[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 (NY Ct Cl), 2003 NY Slip Op. 50590(U) citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20 and 7 Weinstein-Korn-Miller, NY Civil Practice, P 3211.06).

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause

of action, the court must accept factual allegations as true]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026) and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]).

However, in those circumstances where the bare legal conclusions and factual allegations ~~are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded~~ every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Here, defendants seek the partial dismissal of a complaint that has been superseded by an amended complaint filed on December 10, 2008. According to the First Department, after a complaint has been formally amended and served, the amended complaint becomes *the only complaint* in the case (*Branower & Son v Waldes*, 173 AD 676, 678 [1st Dept 1916] (*emphasis added*), *citing Penniman v Fuller & Warren Co.*, 133 NY 442, 444 [1892]; *Brooks Brothers v Tiffany*, 117 AD 470 [1st Dept 1907]; *Lewis v Pollack* 85 AD 577 [1 Dept. 1903]).

“Accordingly, the action herein must proceed as though the original pleading had never been served” (*Halmar Distributors, Inc. v Approved Mfg. Corp.*, 49 AD2d 841, 841 [1st Dept 1975]). Plaintiffs informed defendants of the contents of the Amended Complaint (opp., ¶¶ 4-6). However, defendants never withdrew their motion (*id.*, ¶ 7). Therefore, the Court must review defendants’ motion in light of plaintiffs’ Amended Complaint (*see Halmar Distributors, Inc. v Approved Mfg. Corp.*).

In reviewing defendants’ motion and plaintiffs’ Amended Complaint, the Court finds that ~~the arguments in defendants’ motion have been rendered academic. Therefore, defendants’~~ motion is moot (*see Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005], *citing Gay v Farella*, 5 AD3d 540, 541 [2^d Dept 2004] and *Titus v Titus*, 275 AD2d 409, 410 [2^d Dept 2000]).

First, defendants’ motion makes reference to causes of action against Gail that no longer exist (defendants’ MOL, pp. 4-10). Gail is no longer a defendant, and all causes of action against her have been removed (*see Amended Complaint*). Second, defendants’ motion refers to allegations and causes of action against Jan that no longer exist. The Amended Complaint contains no causes of action for breach of trust and fraudulent conveyance.

The only causes of action in the Amended Complaint are two counts of breach of contract against Jan, the Family Trust and BLR, and a demand for an accounting from AWTC, Realty, Holding, BLR, the Family Trust, Jan, Gail, Blair Endresen, Leigh Endresen and J. Reed Endresen. However, none of the arguments in defendants’ motion addresses plaintiffs’ allegations of breach of contract by Jan, the Family Trust and BLR, or plaintiffs’ demand for an

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accounting, which also were causes of action in the original Complaint⁶.

Defendants argue in reply that their motion survives because the Amended Complaint still makes references to Gail (reply, ¶¶ 3-5). Defendants also argue that ¶ 35 of the Amended Complaint still makes improper references to Realty (reply, ¶ 6). Further, defendants take issue with the fact that the Amended Complaint seeks recovery from Jan and the Family Trust for the entire sum alleged to be due for the AWTC shares (reply, ¶ 5). The Option Exercise Letter makes clear that Jan exercised the option for the AWTC Class A Shares (Option Exercise Letter, p. 2, ¶ 1), while Gail, in her capacity as trustee of the Family Trust, exercised the option for the AWTC Class B Shares (*id.*, ¶ 2). Therefore, defendants argue, both Jan and the Family Trust cannot be held responsible for the outstanding amount due on the AWTC shares.

The Court does not find defendants' arguments persuasive. The references to Gail or Realty in the Amended Complaint do not serve to impose liability upon those parties. The Amended Complaint neither makes any allegations against Gail nor accuses her of any wrongdoing. Further, the Amended Complaint makes clear that plaintiffs have been paid in full as to the Realty shares (Amended Complaint, ¶ 35); thus, Realty is not accused of any wrongdoing. Regarding the sum owed for the AWTC shares, the Amended Complaint alleges that "as of August 1, 2002, Jan and the Family Trust defaulted and breached the Option Agreement, as amended, in connection with the AWTC shares" (Amended Complaint, ¶ 48). To the extent that the Amended Complaint now alleges that the Family Trust, through its agent, Gail, has not paid for the shares, as agreed in the Option Exercise Letter, then the Family Trust's liability for the outstanding amount due is at issue. Accordingly, the Court also denies the branch

⁶The first, second and fifth causes of action in the original Complaint.

of defendants' motion to remove references to Gail or Realty in plaintiffs' Amended Complaint.

Motion to Correct Pleadings

According to CPLR §3024(b), a party “may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” The Court in *Dong Wook Park v Michael Parke Dori Group, Inc.*, 2006 WL 1982595, 4 [2006]) explains the meaning of “scandalous” or “prejudicial”:

In order to strike portions of a pleading, the allegations must be scandalous or prejudicial and not merely unnecessary or irrelevant. Material is scandalous if it is both immaterial and reproachful or capable of producing harm without justification. Material is prejudicial when it impairs a substantial right of a party or causes harm to the party and is not necessary to the party's pleading.
(*id.*) (citations omitted)

See also Walker v Sheldon, 12 AD2d 456, *appeal granted* 12 AD2d 740, *affirmed* 10 NY2d 401 [1st Dept 1960] [“Those allegations in action for fraud and deceit which were clearly irrelevant and would unduly prejudice defendants if permitted to remain in pleading would be stricken on motion”]; *see also, Reichbach v Reichbach*, 1957, 3 AD2d 725, *affirmed* 4 NY2d 824 [2d Dept 1957] [“If the allegations have no bearing on such damages as could properly be awarded, those allegations might well be prejudicial to the appellants if spread before a jury” (*id.*)].

Here, defendants argue that the references to Gail and Realty in the Amended Complaint are adverse to Gail (reply, ¶ 4) and Jan (reply, ¶ 6). However, defendants have not demonstrated that these references are “clearly irrelevant” or would “unduly prejudice” Gail and Jan. Further, as discussed above, the Amended Complaint contains no allegations against Gail. It also contains no unsubstantiated allegations against Jan and the Family Trust. Accordingly, defendants' request that the Court strike all references to Gail and Realty in the Amended Complaint is denied.

Conclusion

Based on the foregoing, it is hereby

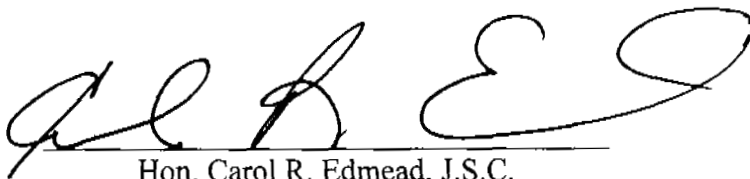
ORDERED that the motion of defendants Jan R. Endresen, BLR Capital Corp. and the Endresen Family Trust (“defendants”) for an Order dismissing portions of the original Complaint by plaintiffs David G. Walsh, as trustee of the Christopher Endresen Marital Trust and the Christopher Endresen Family Trust and as authorized agent of Chris L.L.C., and Chris L.L.C. (“plaintiffs”), pursuant to CPLR §§3016(b) and 3211(a)(1), (3) and (7), is denied, on the ground that defendants’ motion is moot, and it is further

ORDERED that defendants’ motion that the Court strike portions of plaintiffs’ Amended Complaint, pursuant to CPLR §3024(b), is denied, and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: March 30, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK