

Poznanski v Wang

2009 NY Slip Op 32005(U)

August 25, 2009

Supreme Court, Nassau County

Docket Number: 018710/05

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ABRAHAM POZNANSKI, NORTHERN BAY
MANAGEMENT GROUP LLC, AFFINITY
REALTY ANALYSTS, LLC, ISLAND ASSET
MANAGEMENT, LLC,

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 018710/05

MOTION DATE: July 8, 2009
Motion Sequence #007

Plaintiffs,

-against-

CHARLES B. WANG, PLAINVIEW PROPERTIES,
LLC, ISLAND PROPERTIES, LLC, COMMANDER
TERMINALS HOLDINGS, LLC, MARINERS WALK,
LLC, LIGHTHOUSE DEVELOPMENT GROUP, LLC,
CENTRAL ISLAND PROPERTIES, LLC,
LIGHTHOUSE HOTEL DEVELOPMENT I LLC,
BUCKINGHAM VARIETY, LLC, SOUTH STREET
ENTERPRISES, LLC, OLD COUNTRY PROPERTIES,
LLC, MAXWELL AVENUE PROPERTIES, LLC,
ARKALION LTD., WALTER IMPERATORE and
THEODORE P. SASSO,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Rule19-A Statement in Opposition..... X
- Reply Affidavit.... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion [Seq. 007] by defendants, Charles B. Wang, Plainview Properties, LLC, Island Properties, LLC, Commander Terminals Holdings, LLC, Mariners Walk LLC, Lighthouse Development Group, LLC, Central Island Properties LLC, Buckingham Variety, LLC, South Street Enterprises, LLC, Old Country Properties, LLC, Maxwell Avenue Properties, LLC, Arkalion Ltd, Walter Imperatore and Theodore P. Sasso, pursuant to CPLR 3212(e), granting them partial summary judgment on the first, second, third, fifth, sixth, seventh and eighth causes of action in the Amended Verified Complaint is **granted**.

This is a companion action to that entitled **Commander Terminals Holdings LLC., et. al. v. Poznanski**, Index no. 17082/05.

Except where noted, the following facts are not in dispute, having been resolved by the parties' Rule 19-a Statements of Material Facts.

The Parties

A. Wang and Poznanski

Charles B. Wang ("Wang") and Abraham Poznanski ("Poznanski") have known each other for approximately 30 years. Wang was the founder and former Chairman and Chief Executive Officer of a publicly traded computer software company named Computer Associates International, Inc. ("CA") headquartered on Long Island, New York. From 1976 through 1979, Poznanski was a staff accountant at CA's then-outside accounting firm, assigned to CA's account. In 1979, Wang recruited Poznanski to work as an accountant at CA. By the early 1980s, Poznanski was the Chief Financial Officer of CA. In the mid-1980s, Poznanski moved to California to become President of a division of CA. In 1989, Poznanski left California to go into business in Florida with his father in law. This joint venture proved unsuccessful, and Poznanski was re-hired as a vice president of CA. Poznanski worked at CA until April, 1989. As of September 2005, Poznanski considered Wang a "mentor" and a "true friend."

B. Northern Bay Management Group, LLC

On March 29, 1999, Poznanski formed a limited liability company, Northern Bay Management Group, LLC ("Northern Bay"). Poznanski and his wife were the 100% owners of Northern Bay.

Northern Bay, acting through Poznanski, acquired for the companies (such as Island Properties, LLC affiliated with Wang — collectively, the “Wang Affiliates”), scores of parcels of real property located in Nassau County, New York. Northern Bay received brokerage commissions for these acquisitions and fees for managing the acquired properties. During its existence, Northern Bay had two sources of income. First, commissions and management fees from the Wang Affiliates for acquiring and managing properties owned by the Wang Affiliates. Second, up through January 2005, fees from an entity known as Island Asset Management, LLC (“IAM”) for administrative services provided to IAM.

C. Island Asset Management, LLC

In October 1999, while employed by the CA as Senior Vice President, Poznanski proposed to CA’s then-CEO, Sanjay Kumar (“Kumar”) that CA outsource the management of its real estate to a company Poznanski proposed to establish. On November 8, 1999, Poznanski formed IAM to manage CA’s real estate portfolio. During its existence, IAM was owned as follows:

- 65% by Poznanski
- 25% by Walter Imperatore (“Imperatore”)
- 10% by Jeff Szczapa (“Szczapa”), Poznanski’s nephew.

Beginning in or about November 1999 through January 2005, IAM managed CA’s real estate portfolio in consideration for fees from CA. During this period, Northern Bay provided certain administrative services to IAM in consideration for fees from IAM. In or about January 2005, CA elected to not continue the relationship between IAM and CA. IAM accordingly ceased to be an operating company, having lost its only client and sole source of income.

D. Affinity Realty Consultants, LLC

On January 24, 2005, Poznanski formed a new company, Affinity Realty Consultants, LLC (“Affinity”).

E. The Wang Entities

The Wang Entities consist of Plainview Properties, LLC, Island Properties, Commander Terminals and Lighthouse.

Plainview Properties, LLC

In or about September 1991, Wang formed Plainview Properties, LLC (“Plainview Properties”) to acquire a 144-acre parcel of property in Plainview, New York from the County of Nassau. Wang contributed all of the capital of Plainview Properties.

Island Properties

On December 28, 1998, Wang and Kumar formed Island Properties, LLC (“Island Properties”) for the purpose of acquiring, for investment purposes, multiple parcels of real property in Oyster Bay, New York. No capital was contributed by Poznanski. From 1998 through in or about 2003, Island Properties acquired, through Northern Bay, approximately 80 parcels of property in Oyster Bay. In 2006, Wang acquired Kumar’s interest in Island Properties.

Commander Terminals

On August 17, 2000 and November 20, 2000, Wang and Kumar caused the formation of Commander Terminals, LLC and Commander Terminals Holdings, LLC (collectively, “Commander”), respectively, to acquire a fuel terminal in Oyster Bay, New York known as the Commander Fuel Terminal.

Lighthouse

Since 2003, Wang has been involved through his affiliate Lighthouse Development Group, LLC, with a proposal to redevelop the site of the Nassau Veterans Memorial Coliseum in Uniondale, New York (the “Coliseum Project”).

The Claims

- A. **Poznanski v. Wang**: First Cause of Action to Enforce Alleged Joint Venture Agreement.

In the First Cause of Action, Poznanski asserts there was an oral “joint venture agreement” between Poznanski and Wang whereby plaintiff Poznanski received a “ten percent equity interest” in the Wang Affiliates.

B. (i) **Poznanski v. Wang**: Second and Third Causes of Action to Enforce Management Agreement

(ii) **Commander v. Poznanski**: Seventh and Thirteenth Causes of Action to Void Management Agreements

In the Second and Third Causes of Action of the Poznanski Complaint, Northern Bay seeks to enforce written management agreements (“Management Agreement”) between Northern Bay and the following Wang Affiliates: Plainview Properties, Island Properties, Central Island Properties, Commander Terminals, Commander Terminal Holdings, Mariner’s Walk and Lighthouse Development Group.

In the Seventh and Thirteenth Causes of Action of the Commander Complaint, plaintiffs seek a declaration that the Management Agreements are void and unenforceable.

None of the Management Agreements has an execution date; rather, each has an “effective date” of January 1, 2004. Each of the Management Agreements purports to be for a term of five years. The Management Agreement with Lighthouse Development Group was never executed. Northern Bay provided services to the Wang Affiliates for years without written management agreements.

On August 27, 2004, Poznanski sent an e-mail to Wang’s business manager, Robert T. Bell (“Bell”) with the subject “NB-CBW Deal” proposing a “framework for restructuring Northern Bay.” Under Poznanski’s proposal, “Northern Bay will have a standard management agreement with each entity (client) for which it provides services.”

On September 14, 2004, Bell advised Poznanski orally and by e-mail that Wang had rejected Poznanski’s proposal.

On December 29, 2004, Poznanski sent an e-mail to Bell with the subject “NBM

Billing Status.” In the e-mail, Poznanski stated that Northern Bay had “implemented a new pricing structure for the services being provided by Northern Bay,” but made no mention of the Management Agreements.

Poznanski, who had been appointed by Wang as an officer of the Wang Affiliates, signed the Management Agreements as an officer of the Wang Affiliates (except the Management Agreement between Lighthouse Development Group and Northern Bay, which was never signed).

Although Poznanski was also the President and Chief Executive Officer of Northern Bay, he did not sign the Management Agreements on behalf of Northern Bay. Rather, he directed his nephew, Jeffrey Szczapa, to sign the Management Agreements as Vice President of Northern Bay. Szczapa had no authority to negotiate the terms of these agreements.

In or about August 2005, Wang was approached by a well-established Long Island based developer (“Developer”) of commercial real property about forming a joint venture for the Coliseum Project. On September 26, 2005, after a series of discussions between Wang and the Developer, a Memorandum of Understanding (“Coliseum MOU”) was executed for a joint venture agreement between Lighthouse and the Developer for the Coliseum Project.

On September 6, 2005, a few weeks prior to the execution of the Coliseum MOU, Poznanski presented Wang with a proposed one-page “real estate partnership” agreement (“Partnership Proposal”). The Partnership Proposal did not mention an existing partnership or joint venture agreement between Wang and Poznanski. Under the Partnership Proposal:

- (1) Poznanski and Wang would jointly own and manage Northern Bay;
- (2) Poznanski would receive an annual priority distribution of \$600,000 from Northern Bay;
- (3) Northern Bay would enter into management agreements with the Wang Affiliates and other entities for property management services, and
- (4) Northern Bay would receive:
 - (a) management fees of two percent of the managed assets

- (b) management fees of twenty percent of the appreciated value of the assets;
- (c) a project fee of fifteen percent of capital expenditures on manages [sic] projects; and
- (d) commissions for the sale, purchase, and lease of property.

The Partnership Proposal was virtually identical to the proposal made by Poznanski in August 2004 and rejected by Wang in September 2004. Wang did not accept the Partnership Proposal.

On September 26, 2005, the day the Coliseum MOU was executed, Poznanski, frustrated with Wang's refusal to enter into a partnership agreement, presented Wang with a letter containing an ultimatum demanding that Wang respond to the Partnership Proposal within twenty-four hours. Poznanski also inquired about his future role in the Coliseum Project and other projects. Wang rejected the ultimatum.

C. **Poznanski v. Wang**: Fifth, Sixth and Seventh Causes of Action for Breach of Restrictive Covenants, for Specific Performance of Restrictive Covenants, for Tortious Interference with Contract, and for Breach of Fiduciary Duty

In the Fifth Cause of Action, plaintiffs allege that Northern Bay and Affinity had employment agreements with their employees, that these agreements contained restrictive covenants, that Wang caused these employees to breach these agreements, including the restrictive covenants in the agreements, and that Wang thereby tortiously interfered with the business of Northern Bay and Affinity.

In the Sixth Cause of Action, plaintiffs allege that Imperatore and Sasso owed a fiduciary duty to Northern Bay and Affinity and that Sasso and Imperatore breached that fiduciary duty by disclosing (unspecified) confidential and proprietary information of Northern Bay.

In the Seventh Cause of Action of the Poznanski Complaint, Northern Bay and Affinity, as purported successors to IAM, allege that Sasso and Imperatore violated "the restrictive covenants." Imperatore did not sign an employment agreement with Northern Bay or Affinity. His employment agreement with IAM was not assigned to Affinity. Affinity is not a successor in interest to IAM, as IAM, formed on November 8, 1999, and Affinity,

formed on January 24, 2005, are separate companies.

D. **Poznanski v. Wang**: Eighth Cause of Action for Declaratory Judgment that Promissory Note and Mortgage are Unenforceable

The enforceability of the promissory note and mortgage executed and delivered by Abraham Poznanski and Evelyn Poznanski to Wang in December 2000 was determined by the Hon. Stephen A. Bucaria in a Short Form Order and Judgment dated April 21, 2008 [Index Number 013063/07, Mot. Seq. 002].

Plaintiffs offer additional statements of “undisputed” facts - those have neither been admitted nor denied by the defendants. Because there is no authority in Rule 19-a for such statements by the plaintiff, this Court will not consider plaintiffs’ claimed Statement of Uncontested Material Facts.

The Instant Motion

Upon the instant application, all defendants EXCEPT for Lighthouse Hotel Development I, LLC, move for partial summary judgment dismissing the plaintiffs’ first, second, third, fifth, sixth, seventh and eighth causes of action.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Sheppard-Mobley v. King*, 10 AD3d 70, 74, 2nd Dept., 2004, *aff’d. as mod.*, 4 NY3d 627 [2005], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 1986; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 1985). “Failure to make such **prima facie** showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Sheppard-Mobley v. King*, *supra* at 74; *Alvarez v. Prospect Hosp.*, *supra*; *Winegrad v. New York Univ. Med. Ctr.*, *supra*).

Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v. Prospect Hosp.*, *supra* at 324). The evidence presented by the opponent of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*see, Demishick v. Community Housing Management Corp.*, 34 AD3d 518, 521, 2nd Dept., 2006; *citing Secof v. Greens Condominium*, 158 AD2d 591, 2nd Dept., 1990).

For the sake of clarity, this Court will address each cause of action separately and in turn.

First Cause of Action: Breach of Joint Venture Agreement

In the first cause of action, plaintiff, Poznanski, claiming that he has no adequate remedy at law, seeks the imposition of a constructive trust upon each of the Ownership Entities and the Properties for his benefit to the extent of his ten percent undivided interest. Plaintiff seeks the imposition of a constructive trust based upon allegations that Wang breached his Joint Venture Agreement with Poznanski under which Poznanski was to be a beneficial owner of 10% of all of the Properties acquired by the Joint Venture. Plaintiff's claim is simple: he invested six years of effort in "successfully 'quarterbacking' the assemblage of a real estate empire consisting of dozens of separate properties having an aggregate value in excess of \$200 million;" and in return, he wanted (and still wants) to be a 10% beneficial owner in all of the real estate acquired in the name of the "Wang Entities" (*Plaintiffs' Memo of Law*, p. 2). This was the gist of the joint venture agreement according to Poznanski. As a result of the alleged breach of this agreement by Wang, plaintiff seeks injunctive relief (a constructive trust) and damages.

A joint venture is "an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge" (*Williams v. Forbes*, 175 AD2d 125, 126, 2nd Dept., 1991 [internal quotation marks omitted]). "The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise; and a provision for the sharing of profits and losses" (*Tilden of N.J. v. Regency Leasing Sys.*, 230 AD2d 784, 785-786, 2nd Dept., 1996 [internal quotation marks omitted]; see also *Gramercy Equities Corp. v. Dumont*, 72 NY2d 560, 565, 1988). An oral agreement may be sufficient to create a joint venture relationship, unless by its terms, the agreement cannot be performed within one year from making thereof (*Sugar Creek Stores, Inc. v. Pitts*, 198 AD2d 833, 4th Dept., 1993; citing *Rothfield v. Clinger*, 91 AD2d 939, 1983). The Statute of Frauds is generally inapplicable to such an agreement (61 NY Jur. 2d, Statute of Frauds, §33 at 77; see also *F.S. Intertrade Off. Prods. v. Babina*, 199 AD2d 95, 1st Dept., 1993; *Ackerman v. Landes*, 112 AD2d 1081, 2nd Dept., 1985). In fact, a purely oral joint venture to purchase and operate real property is fully enforceable (*Barash v. Estate of Sperlin*, 271 AD2d 558, 2nd Dept., 2000; *Mendelovitz v. Cohen*, 37 AD3d 670, 2nd Dept., 2007).

In this case, it is undisputed that the plaintiffs and the defendants did not draft or enter a written joint venture agreement. Plaintiffs, however, claim that Wang and Poznanski reached an oral joint venture agreement and that circumstantial evidence herein evidences the terms of this agreement. This Court disagrees. Plaintiffs have failed to come forth with evidence of each of the elements necessary to establish a joint venture.

As the parties seeking to enforce the terms of the alleged oral joint venture agreement with the Wang Defendants, plaintiffs bear the burden of demonstrating the existence, terms and validity of the agreement (*Paz v. Singer Co.*, 151 AD2d 234, 235, 1st Dept., 1989). The record herein does not support the finding of an oral joint venture agreement.

The test of a partnership or a joint venture is whether “the parties have so joined their property, interests, skills and risks that for the particular adventure, their respective contributions have become as one...” (*Steinbeck v. Gerosa*, 4 NY2d 302, 317, 1958). “[I]t is not ‘enough that two parties have agreed together to act in concert to achieve some stated economic objective.’” (*Id. quoting Hasday v. Barocas*, 10 Misc. 2d 22, 28-29 [Sup. Ct. New York 1952]).

In this case, Poznanski’s self serving assertion that he and Wang were partners in a joint venture is belied by his own words. In a letter to Wang dated September 26, 2005, Poznanski stated, in pertinent part, that “[n]early two years ago, I relayed to you that I *wanted* to be partners with you in our real estate ventures and hoped that we could clearly define how this *would* occur. Despite several attempts to discuss this you continued to put me off...Several additional attempts to engage you on this were deflected” (emphasis supplied) (*Motion*, Ex. G). That is, just weeks before the commencement of this action in October 2005, Poznanski acknowledged that no partnership or joint venture existed between them.

Further, the record confirms that Northern Bay was a vendor to Wang Affiliates, such that Poznanski’s company provided property acquisition and management services to Wang. Obviously, a vendor-vendee relationship does not indicate a joint venture between Poznanski and Wang. Poznanski’s argument that the fact that he left a higher-paying job at CA (founded by Wang) to earn less money in connection with Wang’s real estate ventures because of the “joint venture” with Wang, is entirely meritless and inaccurate. The undisputed facts are that before Poznanski left the employ of CA, he proposed to Sanjay Kumar, the then CEO of CA, that CA’s real estate operations be outsourced to a company that Poznanski proposed to establish and once this proposal was accepted, and as a result, Poznanski formed IAM to manage CA’s real estate portfolio providing for an annual salary of \$500,000 for Poznanski

from IAM alone. Based upon the foregoing, this Court finds that there was no oral agreement manifesting the intent of the parties to be associated as joint venturers. Thus, clearly, Poznanski did not leave his post at CA *as a result of* a “joint venture” with Wang.

In addition to not being able to demonstrate a joint agreement by and between the parties (*see e.g.*, *Hammond Oil Co. v. Standard Oil Co.*, 259 NY 312, 1932; *Di Vito v. Pokoik*, 150 AD2d 331, 332, 2nd Dept., 1989), plaintiffs have also failed to provide any admissible evidence that there was any agreement by and between the parties to share profits and losses. An essential element of a partnership or joint venture both under common law and statutory law is an agreement to share profits and losses (*Steinbeck v. Gerosa*, *supra* p.317). The use of the word “partnership” does not create a partnership unless there is an agreement to share profits and losses (*Ramirez v. Goldberg*, 82 AD2d 850, 851-852, 2nd Dept., 1981). Here, Poznanski acknowledges that the properties acquired by Wang were owned by the Wang Affiliates, and that he did not have any interest in these entities. He nevertheless alleges that he and Wang had an oral agreement that Poznanski would “retain an equity interest in the Properties and the entities which owned the Properties as well as share any losses on a proportionate basis” (*Poznanski Aff.*, ¶12-13). This bald assertion is entirely unsupported by the tax returns, or other documentation showing that Poznanski shared in the profits or losses from the Wang Entities. There is no evidence of payments made to or by Poznanski. That Poznanski was (admittedly) working in acquiring and managing the properties of the Wang Affiliates, does not make him a “sweat equity partner” (*Poznanski Aff.*, ¶¶13-14; *see also* *DeVito v. Pokoik*, 150 AD2d 331, 331-332, 2nd Dept., 1989; *Tanzi v. Vergopia*, 128 AD2d 769, 771-772, 2nd Dept., 1987). Plaintiffs, without qualification, have admitted to the following Rule 19-A Statement outlined above:

Northern Bay, acting through Poznanski, acquired, for the companies such as Island Properties, LLC affiliated with Wang (collectively, the “Wang Affiliates”), scores of parcels of real property located in Nassau County, New York. Northern Bay received brokerage commissions for these acquisition and fees for managing the acquired properties.

Thus, it is clear and undisputed that plaintiff was exchanging his work and “sweat” for cash in the form of real estate brokerage commission, which compensated Northern Bay for its work in acquiring properties and management fees. Simply, plaintiff, Poznanski, an individual who has no proprietary interest in a business, except to share the profits as compensation for services cannot be deemed a joint venturer (*DeVito v. Pokoik*, *supra* at 331; *cf.* *Ramirez v. Goldberg*, *supra*, p.852). Here, Poznanski concedes that he never

contributed any of the capital used to acquire the purported "\$200 million real estate portfolio" which indicates that there was no joint venture (*Brodsky v. Stadlen*, 138 AD2d 662, 2nd Dept., 1988).

Finally, plaintiffs' have also failed to show "a degree of joint proprietorship or control." Poznanski's unsupported assertion that he and Wang jointly controlled the Wang Affiliates, despite the fact that he did not have a membership interest in these affiliates, is belied by Poznanski's September 26, 2005 letter wherein he asks Wang *if* he could be a partner, and also in two 1999 memoranda to Wang and Kumar regarding the plans to acquire and develop the property in Oyster Bay, New York. In these two memoranda, Poznanski asks Wang and Kumar "to meet to review [the plans] and insure that I am heading on the right course" (*Defendants' Reply Aff.*, Ex. C) and later asks "to meet in order to confirm that I am going in the right direction" on the Oyster Bay project (*Id* at Ex. D). Thus, it is apparent that Poznanski was not exercising control over the Wang affiliates but rather was providing property acquisition and management services in consideration for fees paid for these services.

For these reasons, defendants' motion for summary judgment dismissing plaintiffs' first cause of action is **granted**.

Second and Third Causes of Action: Enforcement of the Management Agreements

In the second and third causes of action, Poznanski and Northern Bay seek to enforce the Management Agreements signed by Poznanski on behalf of certain of the Wang Affiliates. Plaintiffs claim that under the Management Agreements, Northern Bay was entitled to receive management fees from the Wang Entities through 2009. Plaintiffs additionally claim that the Management Agreements expressly provided that upon the sale or refinance of the subject Properties, Northern Bay would receive a 20% participation in the "upside."

The crux of defendants' motion for summary judgment seeking dismissal of plaintiffs' second and third causes of action is that these agreements are void and unenforceable on the grounds that Poznanski breached his fiduciary duty when he signed these agreements in favor of Northern Bay.

"In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly

caused by the defendant's misconduct" (*Kurtzman v. Bergston*, 40 AD3d 588, 590, 2nd Dept., 2007; citing *Ozelkan v Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d 877, 879, 2nd Dept., 2006). There can be no dispute that Poznanski, as a corporate officer of the Wang Affiliates, owed a fiduciary duty to the corporation and the principals (*Global Minerals & Metals Corp. v. Holme*, 35 AD3d 93, 98, 1st Dept., 2006). Poznanski, despite the fact that he was the President and CEO of Northern Bay, did not sign these agreements on behalf of Northern Bay; rather he executed the agreements on behalf of the Wang Affiliates. In the absence of any admissible evidence that Wang gave the requisite consent and had the knowledge of their execution, this Court finds that Poznanski breached his fiduciary duty to Wang and the Wang Affiliates when he executed the Management Agreements between certain of the Wang Affiliates and Northern Bay. The execution of these agreements benefited Poznanski personally, through his 99% ownership interest in Northern Bay, to the detriment of Wang and the Wang Affiliates. Specifically, these agreements increased Poznanski's compensation, gave Northern Bay a five year term, when previously, the relationship between the Wang Affiliates and Northern Bay was terminable at will, and purported to give Poznanski, through Northern Bay, an equity interest in the Wang Affiliates. "[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect * * * This is a sensitive and "inflexible" rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty * * *" (*Birnbaum v. Birnbaum*, 73 NY2d 461 [1989] [citations omitted]). "If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance" (*Guice v. Charles Schwab & Co.*, 89 NY2d 31, 45, 1996). Poznanski, at his oral examination before trial stated that he had a potential conflict of interest at the time he signed these agreements on behalf of the Charles Wang entities (*Poznanski Tr.*, pp. 491-93). Thus, Poznanski, was required to fully and completely inform the principal, i.e., Wang, of every fact material to the principal's interests, and the principal was required to consent freely in the presence of such knowledge (*Salm v. Feldstein*, 20 AD3d 469, 470, 2nd Dept., 2005).

In the absence of such exchange of information and consent, this Court finds that Poznanski breached his fiduciary duty to Wang and the Wang Affiliates and therefore the Management Agreements signed by Poznanski are void and unenforceable (*Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 AD2d 278, 1st Dept., 2002).

Poznanski's argument in opposition to defendants' motion, that he comported with his obligation of full disclosure when he sent an e-mail to Wang's business adviser, Robert

Bell, setting forth some of the terms of the Management Agreements and that Bell failed to object, and therefore, the Management Agreements are valid because the offer was accepted by conduct or acquiescence, is unavailing. Admittedly, the terms of the Management Agreements were not the same as those in Poznanski's emails of August 27, 2004 and December 29, 2004; accordingly, the purported "offer" in these e-mails differed materially from the Management Agreements signed by Poznanski. Thus, there could be no consent by silence (*Eustathopoulo v. Gillespie*, 218 AD 179, 186, 1st Dept., 1926). Moreover, Poznanski, in responding to defendants' Rule 19-A Statement of Material Facts, concedes that his proposal for the Management Agreements had been expressly rejected by Wang via e-mails sent on August 27, 2004 and on September 14, 2004 from Bell to Wang.

Accordingly, defendants' motion for summary judgment dismissal of plaintiffs' second and third causes of action seeking to enforce the management agreements is **granted** and the causes of action are **dismissed**.

Fifth, Sixth, and Seventh Causes of Action: Breach of Joint Venture Agreement

In the fifth, sixth and seventh causes of action, plaintiffs allege that Wang misappropriated the business of Northern Bay, Affinity and IAM, thereby tortiously interfering with the business of these entities, and that "many of the key employees (such as Imperatore and Ted Sasso)" breached employment agreements and misappropriated confidential customer information. Specifically, plaintiffs' fifth cause of action sounds in tortious interference with contractual relations; sixth cause of action is for an injunction enjoining Sasso and Imperatore from disclosing to Wang confidential and proprietary information belonging to Northern Bay; and seventh cause of action seeks specific performance against Sasso and Imperatore of the restrictive covenants. Poznanski argues that "Wang appropriated the entire business of Northern Bay and Affinity for his own benefit, taking all of the key employees of Northern Bay and Affinity and effectively continuing the business of Northern Bay and Affinity under" a new company. He also argues that Wang misappropriated the business of IAM and concludes that these alleged activities are actionable based upon two theories, namely, tortious interference with contract and unfair competition.

"In order to succeed on a cause of action to recover damages for tortious interference with contract, the plaintiff must establish ... the existence of a valid contract between it and a third party, and that the defendant intentionally procured the third party's breach of that contract without justification" (*Dome Property Mgt, Inc. v. Barbaria*, 47 AD3d 870, 2nd

Dept., 2008 [citations omitted]; Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413, 424, 1996). In the case of a contract terminable at will, there can be no liability for tortious interference unless the means employed to induce the breach were wrongful (Baron Assoc. P.C. v. RSKCO, 16 AD3d 362, 2nd Dept., 2005).

Notably with respect to IAM, it cannot be overlooked that plaintiffs, in response to defendants' Rule 19-A Statement of Material Facts, admit that IAM ceased operations in or about January 2005, i.e., many months before October 2005 when the alleged misappropriation took place. Specifically, plaintiffs admitted that: "[i]n or about January 2005, [CA] elected to not continue the relationship between IAM and CA...IAM accordingly ceased to be an operating company, having lost its only client and sole source of income..." (Rule 19-A Stmt., ¶13). Accordingly, Poznanski's present assertion that Wang misappropriated IAM's business ten months after it lost its only customer and ceased operations is obviously frivolous. This also explains why the plaintiffs, in support of their tortious interference with contract claim, do not allege that the employees of IAM were hired. Moreover, none of the contracts were with Affinity; most of them were with IAM, not Northern Bay. Specifically, the only contract with a term of employment was a contract between IAM and Sasso, yet IAM was out of business in October 2005.

Turning to the merits of plaintiffs' tortious interference with contract claim, plaintiffs have not established that there was a contract between Northern Bay and Affinity and any employees for a fixed term of employment. In fact, the contracts themselves expressly state that the employees were "at will" employees. As such, the hiring of these employees could only be actionable if plaintiffs established dishonest means or a scheme to produce damages. In the absence of this showing, plaintiffs' tortious interference with contract claim is **dismissed**.

As to plaintiffs' unfair competition claim, New York recognizes seven bases for a claim of unfair competition. They are: (1) monopoly; (2) restraint of trade; (3) trade secrets; (4) trademark or trade name infringement, (5) palming off; (6) misappropriation; and (7) false labeling or advertising (2 NY PJI3d 3:58, at 525 [2007]). Plaintiffs argue that Wang engaged in "unfair competition" by terminating the vendor/vendee relationship between the Wang Affiliates and Northern Bay and Affinity, establishing a company to service these affiliates, and hiring employees of Northern Bay and Affinity for this servicing company. Specifically, plaintiffs, relying upon a 1974 Court of Appeals case, Duane Jones Co. v. Burke, 306 NY2d 172, state that "the wholesale and deliberate 'pirating' of Northern Bay's

business by Wang presents a textbook case of wrongful misappropriation and unfair competition” (*Plaintiffs’ Memo of Law in Opp.*, p. 15). Reliance on Duane Jones, however, is ineffective.

In Duane Jones, the Court of Appeals considered a claim that Burke, an officer of a third party company, had conspired with a disloyal employee to destroy the plaintiff’s business. There the defendants appropriated overnight upwards of 50% of the business of their previous employer, and 90% of its skilled employees as well as a majority of the entire working force. While Duane Jones did not establish any fixed standards for measuring the breach of duty by an employee which would be sufficient to invoke a legal remedy, the Court found, after close analysis of its particular facts, that the jury was justified in concluding that defendants’ conduct “fell below the standard required by the law of one acting as an agent or employee of another” (Duane Jones v. Burke, *supra* at 187); that defendants had ‘while employees of the corporation, determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves through destruction of plaintiff’s business, in violation of the fiduciary duties of good faith and fair dealing imposed on defendants by their close relationship with plaintiff corporation’ (*Id.* at 189). In Duane Jones, the defendants were officers and employees. In this case, however, there is no allegation or proof that Wang was employed by, or had a fiduciary duty to, Northern Bay or Affinity. To the extent that plaintiffs argue that Wang “aided and abetted” a breach of fiduciary duty by Northern Bay and Affinity employees, such argument is unavailing for there is no proof on this record of any wrongful conduct by the employees. The fact that these at-will employees left the employ of Northern Bay or Affinity is not a breach of their fiduciary duties to Northern Bay or Affinity (Headquarters Buick-Nissan, Inc. v. Michael Oldsmobile, 149 AD2d 302, 303-304, 1st Dept. 1989). Moreover, plaintiffs present no proof of a deliberate plan to paralyze and seize a business to divert customers. In fact, plaintiffs had no viable business with IAM having shut down operations in January 2005 (when it lost its only customer, CA) and with Northern Bay and Affinity losing their only customers, the Wang Affiliates.

To the extent that plaintiffs rest their unfair competition claims upon the misappropriation of confidential information, there is no competent evidence in the record to suggest that such a misappropriation occurred (*see e.g.*, Chemfab Corp. v. Integrated Liner Tech., 263 AD2d 788, 790, 3rd Dept., 1999). While ordinarily the determination of whether business information is entitled to protection as “confidential” and “proprietary” is an issue of fact (Suburban Graphic Supply Corp v. Nagle, 5 AD3d 663, 2nd Dept., 2004), in this case, plaintiffs fail to present any evidence (or even allege) that Wang or the Wang

Affiliates misappropriated any information concerning IAM or Northern Bay. Nor do they offer any evidence that they diverted to themselves the business of IAM's only (and former) client, CA, or the business of Northern Bay that was other than that of the Wang Associates. In fact, the Wang Affiliates were the only clients of Northern Bay. As to Affinity, while Poznanski asserts that "Affinity was working on dozens of potential real estate transactions with third parties and had developed listings of potential other customers and sources of third party business transactions" which information, Poznanski argues, was misappropriated by Wang, there is no documentation of any kind or any evidence whatsoever to support the misappropriation claim. Moreover, there has been no showing that this alleged "information" was confidential to the plaintiffs, was kept in secret and had been disseminated to third parties in the first place (*Downtown Women's Center, Inc. v. Carron*, 237 AD2d 209, 1st Dept., 1997; *Amana Express Int'l, Inc. v. Pier-Air Int'l, Ltd.*, 211 AD2d 606, 2nd Dept., 1995). In light of the foregoing, plaintiffs' misappropriation claims are **dismissed**.

Finally, plaintiffs' claims that defendants, Imperatore and Sasso, violated their restrictive covenants are also **dismissed**. Poznanski argues that Wang wrongfully solicited employees of Northern Bay, who, Poznanski claims, were parties to written employment agreements with restrictive covenants barring them from working for a competitor for a period of one year from using purportedly confidential information of Northern Bay. A plain and simple reading of these written employment agreements however confirms that all of these employment agreements are with IAM, not Northern Bay or Affinity. There is no evidence on this record that Sasso, Imperatore or anyone else had an employment agreement with Northern Bay or Affinity. Insofar as plaintiffs argue that "Affinity and Northern Bay were 'successors in interest' to IAM and are therefore entitled to succeed to the contractual rights of IAM" (Poznanski affidavit at 55), this argument conflicts with plaintiffs' admission that "Affinity is not a successor in interest to IAM" (Rule 19-A Stmt., ¶42) as well as with the prior order of this Court wherein this Court stated, as follows:

With respect to the employment agreements and purported restrictive covenants, the defendants Imperatore and Sasso are correct in asserting that they did not contract with Affinity or Norther, only IAM, and without any document that concretely makes those entities successor or assigns to IAM, the plaintiff have not sustained their burden of a clear right on the facts and the law. (Short Form Order, Index No. 18710/05, Feb. 14, 2006).

Accordingly, plaintiffs' claims predicated upon defendants' alleged breach of their restrictive covenants are also **dismissed**.

POZNANSKI, et al v WANG, et al

Index no. 018710/05

Eighth Cause of Action: Declaratory Judgment

In their eighth cause of action, plaintiffs seek a judicial declaration that plaintiff Poznanski and non-party Evelyn Poznanski have no current obligations under the Notes or the Purchase Money Note or otherwise for the repayment of any monies to Wang; and an Order directing the delivery of a satisfaction of the Mortgage to Poznanski and Evelyn Poznanski; and a preliminary and permanent injunction prohibiting Wang from taking any steps to record or enforce the Mortgage or to enforce the Notes or the Purchase Money Note.

Insofar as this cause of action has been previously resolved by this Court in a Short Form Order and Judgment dated April 21, 2008 in the case captioned Wang v. Poznanski, Index No. 013063/07 (Mot. Seq. 002) (*see also*, Rule 19-A Statement, ¶43), the doctrine of collateral estoppel bars this action herein (*Benedictine Hosp. v. Gelsing*, 47 AD3d 1184, 3rd Dept., 2008).

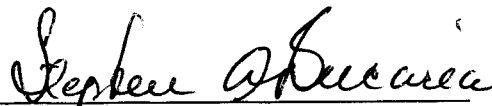
Accordingly, defendants' motion, pursuant to CPLR 3212(e), granting them partial summary judgment on the first, second, third, fifth, sixth, seventh and eighth causes of action in the Amended Verified Complaint is **granted** and said claims are herewith **dismissed**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

This shall constitute the decision and order of this Court.

Dated AUG 25 2009


XXX J.S.C.

ENTERED

AUG 27 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**