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

PRESENT: EILEEN BRANSTEN PART 3

Justice

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DONALD J. TRUMP,

INDEX NO. 603097/08

Plaintiff

-against-

THE CARLYLE GROUP ET AL.,

MOTION DATE: February 24, 2010

MOTION SEQUENCE NO: 13

Defendants.

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The following papers, numbered 1 - 3, were read on this motion for leave to file an amended complaint.

	PAPERS NUMBERED
Order to Show Cause ...	1
Response	2
Reply	3

CROSS MOTION/ COUNTERCLAIM .....YES X NO

Motion sequence number 13 is decided in accordance with the accompanying memorandum decision.

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

Dated: March 29, 2010

EILEEN BRANSTEN, *J.S.C.*

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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DONALD J. TRUMP,

Plaintiff,

-against-

Index No.: 603097/08
Motion Date: 2/24/10
Motion Seq.
Nos.: 11, 12, 13, 14

THE CARLYLE GROUP, EXTELL DEVELOPMENT COMPANY, EXTELL RIVERSIDE L.L.C., CRP/EXTELL RIVERSIDE, L.P., GARY BARNETT, CRP RIVERSIDE G.P. L.L.C., CRP RIVERSIDE L.L.C., CARLYLE REALTY PARTNERS IV (CANADIAN) L.P., JOHN DOE 1, JOHN DOE 2 and HUDSON WATERFRONT ASSOCIATES, I THROUGH V, L.P.s,

Defendants.

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BRANSTEN, J.

Motion sequence numbers 11, 12, 13 and 14 are consolidated for disposition.

In motion sequence number 11, defendants Hudson Waterfront Associates I-V LPs ("Hudson Partnerships") move, pursuant to CPLR 3211 (a) (5) and (a) (7), to dismiss Plaintiff's Amended Complaint.

In motion sequence number 12, defendants The Carlyle Group, Extell Development Company, Extell Riverside L.L.C., CPR/Extell Riverside, L.P., Gary Barnett, CRP Riverside G.P. L.L.C., CRP Riverside L.L.C. and Carlyle Realty Partners IV (Canadian) L.P. (collectively, "C/E Defendants," and, with the Hudson Partnerships, "Collective Defendants"), move, pursuant to CPLR 3211 (a) (5) and (a) (7) and CPLR 3016 (b), to dismiss Plaintiff's Amended Complaint.

In motion sequence number 13, Plaintiff moves for leave to file a Second Amended Complaint.

In motion sequence number 14, the C/E Defendants move against Plaintiff for sanctions pursuant to 22 NYCRR § 130-1.1 and/or costs under CPLR 3025 (b).

The court addresses the instant motions in numerical order.

BACKGROUND

A. Procedural History

Plaintiff filed his first complaint ("Complaint") in this litigation on October 28, 2008. The matter was assigned to Justice Richard B. Lowe III, presiding judge of *Trump v. Cheng et al.*, Index No. 602877/2005 ("*Trump I*"), a case premised upon the same real estate transaction that underlies the causes of action as the case at bar.

The Collective Defendants moved to dismiss the Complaint in early May of 2009. Each defendant cited, in support of their motion, the preclusive effect of *Trump I* and pleading deficiencies in the Complaint.

On May 12, 2009, Plaintiff moved to recuse Justice Lowe. While stating that Plaintiff's claim was "unsupported and baseless," the Honorable Justice Lowe found, based upon Plaintiff's assertions, that Plaintiff "will question any actions taken by this court in the

instant matter." Justice Lowe therefore recused himself as an "exercise of caution" (Order dated May 14, 2009). This court was then assigned the matter.

Plaintiff responded to each defendant's motion to dismiss the Complaint on May 22, 2009. On June 23, 2009, the stipulated due date for the Collective Defendants' reply, the parties further stipulated to stay the proceedings pending a decision in *Trump I* by the Appellate Division, First Department, and to withdraw the pending motions to dismiss.

The parties then stipulated to extend the Collective Defendants' time to answer the Complaint until September 14, 2009. On that date, both the C/E Defendants and the Hudson Partnerships again moved to dismiss the Complaint, upon the same grounds as the parties' previous motions. Plaintiff requested, and was granted, additional time to respond to the defendants' motions.

Plaintiff responded to the defendants' motions on November 2, 2009. The Collective Defendants each replied on November 11, 2009, thus completing in full the nearly-completed earlier round of briefing the defendants' motions to dismiss the Complaint.

Three weeks after full submission of the Collective Defendants' motions to dismiss, on December 1, 2009, Plaintiff filed an amended complaint (the "Amended Complaint"). While counsel for the C/E Defendants objected to Plaintiff's new pleading in a letter to this court dated December 8, 2009, the Collective Defendants withdrew their respective motions to dismiss the Complaint by stipulation dated December 14, 2009.

Each defendant moved to dismiss the Amended Complaint on January 6, 2010. In support of their motions, the defendants again cited the preclusive effect of *Trump I* and deficiencies in Plaintiff's claims. Plaintiff responded on January 14, 2010.

Plaintiff moved to file a second amended complaint (the "Second Amended Complaint") on February 1, 2010, two days prior to the Collective Defendants' time to reply in support of their respective motions to dismiss the Amended Complaint. Plaintiff served its motion to file a Second Amended Complaint on February 3, 2010, the due date of the defendants' replies. The Collective Defendants each oppose the motion as futile and as comprised of defective pleadings.

The Collective Defendants each replied in support of their motions to dismiss the Amended Complaint on February 3, 2010.

The C/E Defendants brought their motion against Plaintiff for costs and/or sanctions on February 11, 2010. Briefing was completed prior to oral argument on that motion, the Collective Defendants' separate motions to dismiss and Plaintiff's motion to file a Second Amended Complaint on February 18, 2010.

Plaintiff filed a motion to recuse this court on February 23, 2010.

Plaintiff moved for sanctions against all defendants on February 25, 2005. The court summarily denied Plaintiff's motion on that same day.

Plaintiff withdrew his motion for recusal on March 1, 2010.

B. Factual Background

This action is premised upon actions surrounding the 2005 sale of parcels of land comprising the former Penn Central rail yards on the Hudson River waterfront, between West 59th Street and West 72nd Street in Manhattan ("Hudson River Property"). The Hudson Partnerships sold the Hudson River Property to the C/E Defendants.

i. Trump I

The court presumes the parties' familiarity with the facts of *Trump I*, including the claims and defenses asserted therein (*see Trump v Cheng*, 9 Misc 3d 1120[A] [Sup Ct, NY County 2005] [discussing the facts of the case]). *Trump I* was premised upon the same real estate sale that forms the underlying basis of the claims in the instant case. Without attempting to describe *Trump I* in its entirety, Plaintiff Trump alleged in *Trump I* that the Hudson River Property was sold at less than fair value. Trump alleged that defendants Henry Cheng and Vincent Lo had arranged, on behalf of themselves and the other defendants, a $17.5 million dollar payment to Fineview Resources, Ltd. (BVI) ("Fineview"). Trump argued that Fineview was controlled by the *Trump I* defendants and that the payment was in exchange for the *Trump I* defendants' sale of the Hudson River Property to the then-non-parties, the C/E Defendants, at less than the property's alleged true value.

In July of 2006 Justice Lowe held that Trump's claims were derivative and that his failure to make demand upon the defendants was not excused. Justice Lowe therefore

dismissed all but one of Plaintiff's claims. Judgment was entered on September 19, 2006. The Appellate Division, First Department affirmed the judgment dismissing the *Trump I* complaint in June 2009 (*Trump v Cheng*, 63 AD3d 623 [1st Dept 2009]). The Court of Appeals denied Trump's motion for leave to appeal on October 27, 2009 (*Trump v Cheng*, 13 NY3d 833 [2009]).

ii. *The Instant Case*

Plaintiff Trump, as in *Trump I*, asserts the Amended Complaint individually and derivatively on behalf of the Hudson Partnerships. Plaintiff owns a 30% interest in the Hudson Partnerships. Also as in *Trump I*, the same Hudson Partnerships are named defendants.[1]

Non-party Hudson Waterfront Corporations I-V ("Hudson Corporations") hold a 1% interest in the Hudson Partnerships. Plaintiff claims that the Hudson Corporations, including its board of directors, which is dominated by non-party Henry Cheng and non-party Vincent Lo, owed a fiduciary duty to Plaintiff. Plaintiff asserts that the Hudson Corporations, its board of directors, separately and with Cheng, Lo, its investors, and additional non-parties Hudson Westside Associates I-V L.P.s ("Hudson Westside"), all approved, acquiesced and/or participated in and failed to disclose the alleged misconduct described in the Amended Complaint. The parties are familiar with the Amended Complaint, and the court will only

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[1] Plaintiff appears to omit his claim against Hudson Waterfront Associates, L.P., asserting claims only on behalf of and against Hudson Waterfront Associates I through V, L.P.s.

address the facts stated therein as necessary. All non-parties accused in the Amended Complaint of wrongdoing were defendants in *Trump I*.

The Vornado Realty Trust now owns 70% interests in the Hudson Partnerships, having acquired all foreign investors' shares in the Hudson Corporations and Hudson Westside.

Plaintiff's Amended Complaint asserts no causes of action against the Hudson Partnerships or their alleged companion wrongdoers. Rather, the Hudson Partnerships are "named in the event that this action is found to be derivative" (Compl, ¶ 13).

Plaintiff asserts three causes of action against the C/E Defendants. The Amended Complaint states claims against those defendants for: (1) "conspiracy to commit fiduciary fraud;" (2) "the substantive wrong of committing fiduciary fraud;" and (3) "aiding and abetting a fiduciary fraud." Plaintiff admits that his three causes of actions may be derivative, and states that, upon such a finding, demand is excused and any benefit from this suit should inure to the Hudson Partnerships.

The Amended Complaint provides a tortured narrative to attempt to illustrate a duty to Plaintiff owed by the C/E Defendants. Plaintiff claims that either The Carlyle Group, L.P. or Extell Development Company acted in concert with the "fiduciaries to accomplish the fiduciary fraud when they made a $17.5 million secret payment" to Fineview (the "Fineview Payment") (Compl, ¶ 25). The Amended Complaint's fact section does not allege any specific actions or statements by the C/E Defendants. Plaintiff instead appears to rely upon the barest of allegations against the C/E Defendants in his asserted causes of action.

DEFENDANTS' MOTIONS TO DISMISS

Upon an examination of the claims of the Amended Complaint, the court finds that dismissal of the Amended Complaint in its entirety is required.

I. STANDARD OF LAW

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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 within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal quotations and citations omitted]); *see also Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 496 [1st Dept 2006] citing *Robinson v Robinson*, 303 AD2d 235, 235 [1st Dept 2003])

II. THE HUDSON PARTNERSHIPS' MOTION TO DISMISS THE AMENDED COMPLAINT
(Motion Sequence No. 11)

The Hudson Partnerships move to dismiss the Amended Complaint on the grounds that Plaintiff's claims are barred by the doctrine of collateral estoppel and that Plaintiff's claims are derivative. The C/E Defendants join in and adopt the Hudson Partnerships' arguments for dismissal.

Plaintiff opposes the Collective Defendants' separate motions to dismiss with a response memorandum of law and an affirmation of counsel. While striving to provide Plaintiff all possible favorable inferences, the court is mindful that Plaintiff's counsel's affirmation is not an affidavit upon personal knowledge, that the attached newspaper articles are hearsay and that Plaintiff's statement of facts are argumentative and replete with supposition (*see Leon*, 84 NY2d 87-88; *see also Young v. Fleary*, 226 AD2d 454, 455 (2d Dept 1996] [finding newspaper article hearsay and therefore insufficient to defeat a motion for summary judgment]).

A. Delaware Law Applies

Because the Hudson Partnerships are Delaware entities, Delaware substantive law applies to Plaintiff's claims for breach of fiduciary duties, to the determination of whether Plaintiff's claims are derivative or individual and whether demand upon the Hudson

Partnerships was excused (New York Partnership Law § 121-901 ["the laws of the jurisdiction under which a foreign limited partnership is organized ... govern its organization and internal affairs and the liability of its limited partners"]; *see Trump v Cheng*, 9 Misc3d 1120(A), *4 [Sup Ct, New York County 2005]).

B. Trump's Claims are Derivative

In order to determine whether Plaintiff's claims are derivative or direct under Delaware law, the

> court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

Tooley v Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1039 [Del Supr 2004]). The "issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" (*id.* at 1033). The Delaware law standard for determining direct and derivative claims is the same for partnerships as for corporate cases (*see Litman v Prudential-Bache Props., Inc.*, 611 A2d 12, 15 [Del Chanc 1992]; *JFK Family Ltd. P'ship v Millbrae Natural Gas Dev. Fund 2005, L.P.*, 21 Misc 3d 1102[A], *13 [Sup Ct, Westchester County 2008]).

The court notes that all of Plaintiff's causes of action are overtly stated to be direct claims against only the C/E Defendants. Plaintiff reiterates this statement throughout the Amended Complaint. However, it is "the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint" (*In re Syncor Intern. Corp. Shareholders Litigation*, 857 A2d 994, 997 [Del Ch 2004]). It is the facts of the Amended Complaint that determine whether a direct claim exists (*id.*).

Despite his overt pleadings, however, Plaintiff considers that his claims are or may be derivative. The Amended Complaint has named the Hudson Partnerships as both defendant and derivative plaintiff and Plaintiff argues that demand upon Vornado (currently a 70% owner of the Hudson Partnerships) is excused. The court has examined the facts of the Amended Complaint and exhibits thereto, as well as Plaintiff's response to the Hudson Partnerships' motion to dismiss. The court finds that Plaintiff's claims are derivative and that demand is not excused.

Plaintiff's claims seek damages of $17.5 million dollars for the C/E Defendants alleged "fiduciary fraud" in paying Fineview $17.5 million dollars to "become [] the purchaser of the [Hudson River] property" (Compl, ¶ 24). Plaintiff fails to allege any individual harm caused to him by the Fineview Payment. Rather, assuming *in arguendo*, that the Fineview Payment was improper, any duty breached and any injury suffered as a result thereof would be to the Hudson Partnerships. Plaintiff fails to allege how any (unpleaded)

harm to him differs from harm to the Hudson Partnerships. Further, any recovery of the $17.5 million dollar payment would remit to and be for the benefit of the Hudson Partnerships. Plaintiff's claims are derivative (*Tooley*, 845 A.2d at 1039; *Green v. LocatePlus Holdings, Corp.*, 2009 WL 1478553, *1-2 [Del Ch 2009]).

B. Plaintiff Has Not Made Demand Upon Vornado and Demand is not Excused

Delaware law requires, as a condition precedent to a plaintiff bringing derivative suit against a partnership or corporation, that the plaintiff make a pre-suit demand upon the board of directors to prosecute the contemplated action (*see* Del Chanc. Ct. Rule 23.1; *Simon v Becherer*, 7 AD3d 66, 71-72 [1st Dept 2004]). Demand may be excused upon the plaintiff setting forth "*particularized factual allegations* sufficient to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment (Del Chanc. Ct. Rule 23.1 [emphasis in original]); 6 Del Code § 17-1001). Plaintiff has not made a pre-suit demand upon Vornado. Instead, the Amended Complaint attempts to plead that demand was excused (Compl, ¶¶ 60-67).

Plaintiff states that:

> 64. It is in Vornado's interest that no judgment for conspiracy to commit and the commission of fiduciary fraud be returned against the Carlyle/Extell Defendants.

> 65. If Plaintiff is successful in the present suit, that would evidence the fraudulent actions of the General Partner, its investors, its Board of Directors, Cheng, Lo, and substantially increase the likelihood of a lawsuit being brought against the General Partner, its investors, the Board of Directors, Cheng, and Lo.
>
> 66. Were such suit brought and judgment rendered against the General Partner, its investors, its Board of Directors, Cheng, and Lo, Vornado in the first instance would be required to pay any judgment.

(Compl, ¶¶ 64-66). For these reasons, Plaintiff alleges that "Vornado cannot be expected to exercise good faith business judgment, disinterestedness and independence in its decision as to whether to bring suit against the Carlyle/Extell Defendants" (Compl, ¶ 67).

The statements in the Amended Complaint do not allege with "*particularity*" the reasons why a presuit demand on Vornado was not "likely to succeed" (*see* Del Chanc. Ct. Rule 23.1). Plaintiff merely alludes that "Vornado's interest" is contrary to judgment against the C/E Defendants. Plaintiff fails to state with specificity why Vornado would forego the possibility to recover any improperly made payment.

Reviewing Plaintiff's pleadings in full, Plaintiff's cited Exhibit D states, with specific regard to *Trump I*, that Vornado would "indemnify the Sellers for liabilities and expenses arising out of Mr. Trump's claim that the limited partnerships that Vornado Sub is acquiring did not sell the Rail Yards at a fair price . . . " (Compl, Ex D, p 3 of 6). While liability for indemnification could provide some semblance of a basis, though far from a finding, for an excused demand, no support for that liability is found here. Plaintiff expressly disclaims that

the matter at bar pertains to his previously alleged claims regarding the price of the Hudson River Property (Compl, ¶ 22). Exhibit D specifically applies to *Trump I* and states nothing about the current litigation, the C/E Defendants or the Fineview Payment. Plaintiff fails to explain how Vornado's possible indemnification for certain claims of *Trump I*, a closed case, would lead to current or future liability.

Plaintiff's conclusory allegations are insufficient "to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment" (*Trump v Cheng*, 63 AD3d 623, 624 [1st Dept 2009] citing *Simon*, 7 AD3d at 71-72).

The court finds that the Amended Complaint asserts three derivative causes of action. Plaintiff has not provided sufficient reasons for excuse of demand to withstand this motion to dismiss. The court therefore must dismiss the Amended Complaint.

C. Collateral Estoppel

The Hudson Partnerships, joined by the C/E Defendants, further argue that the claims in the Amended Complaint are barred by the doctrine of collateral estoppel. Due to the abundance of reasons supporting dismissal of the Amended Complaint on its merits, stated above and below, the court need not address the issue in full and makes no holding thereupon.

III. THE C/E DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT
(Motion Sequence No. 12)

Though the court has dismissed the complaint, additionally, and alternatively, the court will addresses the merits of the C/E Defendants' motion to dismiss the Amended Complaint.

The C/E Defendants argue that Plaintiff's claims must be dismissed for failure to state a cause of action pursuant to 3211 (a) (7) and for failure to state a claim for fraud with the particularity required by CPLR 3016 (b). Plaintiff opposes.

A. Plaintiff's Claims Against the C/E Defendants

New York law, differing from federal law,[2] does not recognize a claim for "fiduciary fraud." Thus, providing Plaintiff with every favorable inference on this motion to dismiss (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail]), the court examines Plaintiff's claims as either claims for fraud or breach of fiduciary duty.

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[2] *See* 11 U.S.C.A. § 523.

The extent of Plaintiff's general allegations against the C/E Defendants consist of the following:

> 25. Carlyle/Extell wilfully, intentionally, knowingly and wrongfully acted with the knowledge of the fiduciaries to accomplish the fiduciary fraud when they made a $17.5 million secret payment to a London Bank to the account of an off-shore company, Fineview Resources Limited (BVI), believed to be dominated and controlled by the fiduciaries, Cheng, and Lo, the General Partner, its investors and its Board of Directors, all without the knowledge of the Plaintiff [sic].
>
> 26. Upon information and belief, the Carlyle/Extell Defendants and Cheng, Lo, the General Partner, its investors, and its Board of Directors, by their willful, intentional, knowing, and wrongful misconduct, are joint tortfeasors, aiders and abettors and principals in the wrongdoing, and each is jointly and severally liable for the fraudulent misconduct described herein.
>
> 27. In or about 2009, the attorney for Extell, its related companies and Gary Barnett, stated that her clients were unaware of any services performed by Fineview Resources Limited (BVI), but were simply told how to pay the monies.
>
> 28. Upon information and belief, the Carlyle/Extell Defendants have admitted to the District Attorney, New York County their role in the described wrongful conduct.
>
> (Compl, ¶¶ 25-28).

Plaintiff's causes of action are addressed out of numerical order.

i. Plaintiff's Second Cause of Action Against the C/E Defendants for "the Substantive Wrong of Committing Fiduciary Fraud"

Plaintiff's second cause of action asserts that:

> 55. The substantive wrong of fiduciary fraud was committed when in November 2005 the Carlyle/Extell Defendants, to the knowledge of the fiduciaries, willfully, intentionally, knowingly, and wrongfully made the payment of the sum of $17.5 million as described above, this deliberately concealed from the Plaintiff.

(a) Breach of Fiduciary Duty

Plaintiff does not plead that the C/E Defendants, the purchasers of the Hudson River Properties and therefore the party opposite the Hudson Partnerships in the sale, owed him a fiduciary duty. Plaintiff does not plead any relationship existed between the C/E Defendants and Hudson Partnerships other than a conventional business relationship between sophisticated business entities. Absent special circumstances, a conventional business relationship does not create a fiduciary relationship. (*Feigen v Advance Cap. Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]; *see also AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 21-22 [2d Dept 2008] [stating that a special relationship creating a fiduciary relationship may arise when one party controls another party for the good of that other party). Plaintiff asserts no facts or special circumstances between Plaintiff and the C/E Defendants giving rise to a fiduciary relationship (*see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19-22 [2005]).

Plaintiff has not stated a claim of breach of fiduciary duty (*see also Peacock v. Herald Square Loft Corp.*, 67 AD3d 442, 443 [2009] [dismissing plaintiff's claims for breach of fiduciary duty for failure to plead the claims with specificity required by CPLR 3016 [b]).[3]

(b) Fraud

To state a claim for fraud, Plaintiff must allege that "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]; *Iotex Communications, Inc. v Defries*, 1998 WL 914265, *6, 1998 Del Ch LEXIS 236, *18-19 [Del Ch 1998] [dismissing fraud claims when applying New York law, which court recognized as "decisively to the same effect" as Delaware law]); *cf. Bergold v. Anglin*, 1988 WL 25859, *2, 1988 Del LEXIS 64, *5-6 [Del 1988]. Upon making a claim for fraud, the heightened pleading requirements of the Delaware Chancery Court and CPLR 3016 apply, and the claimant must plead "the circumstances constituting the wrong . . . in detail" (CPLR 3016 [b]; Del Chanc Ct Rules, Rule 9[b]). Absence of any of these required elements mandates that this court find a failure to plead a prima facie case (*Global Minerals and Metals Corp. v Holme*, 35 A.D.3d 93, 98 [1st Dept 2006]; *see Hauspie v Stonington Partners, Inc.*, 945 A2d 584, 587 [Del 2008]).

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[3] New York and Delaware law are the same with regard to breach of fiduciary duty and aiding and abetting a breach of fiduciary duty (*see JFK Family Ltd. Partnership v. Millbrae Natural Gas Development Fund 2005 L.P.*, 21 Misc.3d 1102[A], *18 n 18 [Sup Ct, Westchester County 2008]).

Plaintiff's Amended Complaint pleads no material false representation by the C/E Defendants. Plaintiff thus does not, and is unable to, plead the remaining elements of a fraud claim: Plaintiff may not claim that the C/E Defendants intended to defraud Plaintiff with an affirmative representation; Plaintiff may not allege how he changed his position or otherwise relied upon any purported misrepresentations or omissions to his detriment; and Plaintiff may not claim that he has suffered resulting damage from the non-existent material misrepresentation. The Amended Complaint states only that the C/E Defendants made the Fineview Payments.

The court does not confuse the heightened pleading requirement of CPLR 3016 (b) with the standard needed to prove a claim for fraud (*Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 492 [2008]). "The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of" (*id.* at 491). Plaintiff's failure to allege *any* specific allegations of the elements of fraud by the C/E Defendants require that this court dismiss Plaintiff's second cause of action for failure to state a claim.

The court further notes that throughout Plaintiff's multiple complaints and various pleadings, the C/E Defendants' alleged $17.5 million dollar payment to Fineview is labeled "secret." However, the Hudson Partnerships' attorneys, in a November 2, 2005 "letter agreement constitut[ing] the joint instructions of the Sellers [and] the Purchasers" of the Hudson River Property directed the Commonwealth Land Title Insurance Company to

disburse funds in furtherance of the transaction (Affirmation of Richard H. Dolan [in support of the C/E Defendants' Motion to Dismiss], Ex B, p EX0636). The letter instructs the title insurance company to "[d]isburse the Funds in accordance with the terms of Exhibit N annexed hereto" (*id.*, Ex B, p EX0639 [emphasis in original). Exhibit N, titled "Funds Disbursement Statement," mandates that funds be disbursed "To Fineview Resources Limited (BVI); CRP/Extell Riverside L.P. - For a Finder's fee (pursuant to wire instructions on Schedule F): $16,500,000.00 (*id.*, Ex B, p EX0671). Plaintiff acknowledges that the Fineview Payment was $17.5 million dollars in total (*see* Compl, Statement of James F. Galvin, ¶¶ 31-36). The court finds that the knowledge and disclosure of the $17,500,000 payment to Fineview is sufficient to find that Plaintiff's claim that the Fineview Payment was "secret" is inherently incredible.

Plaintiff's second cause of action against the C/E Defendants for the substantive wrong of committing a fiduciary fraud is dismissed.

ii. Plaintiff's Third Cause of Action Against the C/E Defendants for "Aiding and Abetting a Fiduciary Fraud"

Plaintiff's third cause of action alleges that the C/E Defendants:

> 58. . . . willfully, intentionally, knowingly, and wrongfully aided and abetted the fiduciaries' breach of their duties owed to Plaintiff when the Carlyle/Extell Defendants provided the means by which the fiduciaries were able to breach their duties to Plaintiff, this deliberately concealed from Plaintiff.

Inherent in both an aiding and abetting claim for breach of fiduciary duty and for aiding and abetting fraud is the element of scienter. The court therefore addresses Plaintiff's claims for aiding and abetting a breach of fiduciary duty and aiding and abetting fraud together.

(a) Aiding and Abetting a Breach of Fiduciary Duty

A party asserting a claim for aiding and abetting a breach of fiduciary duty must establish: (1) a breach of fiduciary duty; (2) that the participant knowingly induced or participated in the breach; and (3) damages suffered as a result of the breach (*Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461, 464 [1st Dept 2007], *Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]); *In re Transkaryotic Therapies, Inc.*, 954 A2d 346, 370 [Del Ch2008]. A litigant "may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty" (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006). Rather, a litigant must allege with specificity that the participant "affirmatively assist[ed], help[ed] conceal or fail[ed] to act when required to do so, thereby enabling the breach to occur" (*Kaufman*, 307 AD2d at 126).

(b) Aiding and Abetting Fraud

> "In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud. Actual knowledge of the fraud

> may be averred generally. Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated."

(Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co., 64 AD3d 472, 476 [1st Dept 2009] (internal quotations and citations omitted).

The Underlying Fraud/Breach of Fiduciary Duty

The court found, *supra*, that the C/E Defendants have not breached a fiduciary duty to Plaintiff. Assuming, *in arguendo* only, that another party or parties did commit a breach of fiduciary duty (the court here makes no such holding), Plaintiff has failed to properly plead that the C/E Defendants "knowingly induced or participated" therein.

Knowledge (Scienter)

Plaintiff claims that the C/E Defendants "willfully, intentionally, knowingly, and wrongfully" aided the "fiduciaries," and, thus, "provided the means by which the fiduciaries were able to breach their duties to Plaintiff" (Compl, ¶ 58). Plaintiff offers no support for his conclusory pleading. Plaintiff therefore fails to set forth facts from which scienter may be inferred (*Giant Group, Ltd. v Arthur Andersen, LLP.* 2 AD3d 189, 190 [1st Dept 2003]).

The Amended Complaint further fails to adequately plead that the C/E Defendants had actual or constructive knowledge of, or that the C/E Defendants substantially assisted, in any alleged breach of fiduciary duty or fraud (*Liberman v Worden*, 268 AD2d 337, 338 [1st Dept 2000]). A pleading for aiding and abetting liability must allege actual knowledge of the

underlying breach of duty (*Kaufman*, 307 AD2d at 125). While such knowledge may be stated generally, and this court, like the Appellate Division, is mindful of the "inherent difficulty in pleading a defendant's actual state of mind," unsupported allegations of knowledge are insufficient to state a claim for aiding and abetting liability (*id.* [dismissing claim for aiding and abetting a breach of fiduciary duty]). Plaintiff has made only a one-sentence claim that the C/E Defendants' "knowingly" aided the fiduciaries' alleged breach of duty and that an attorney for the C/E Defendants stated that her clients were unaware of the basis for the Fineview Payment. Plaintiff has pleaded no facts with sufficient particularity to support its claim(s). Plaintiff's allegations are insufficient as a matter of law to allow this court to find a cause of action for either aiding and abetting fraud or aiding and abetting a breach of fiduciary duty.

Substantial Assistance

Finally, in order to properly allege its claims, Plaintiff must detail the C/E Defendants' connection with the alleged fraud (*Sterling Nat. Bank v Ernst & Young, LLP.* 9 Misc 3d 1129[A], *7 [Sup Ct, NY County 2005] citing *Natl. Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]). Plaintiff must also show that any action by the C/E Defendants was the proximate cause of Plaintiff's alleged harm. Aider and abettor liability requires more than but-for causation; it requires that Plaintiff's injury be a direct and foreseeable result of the conduct in question (*see Kolbeck v LIT America, Inc.*, 939 F Supp 240, 249 [SD NY 1996]).

Plaintiff's cause of action centers on the Fineview Payment. Plaintiff inherently alleges it was harmed by Plaintiff's partners' failure to share the Fineview Payment. The court finds that the C/E Defendants' payment is sufficiently removed from Plaintiff's claimed harm to prevent this court from finding any foreseeable causation of Plaintiff's alleged injury by the Fineview Payment. The C/E Defendants bear no responsibility for subsequent actions upon the money involved in the Fineview payment.

The court further finds that, for the reasons stated above, Plaintiff has not sufficiently pleaded either a claim for aiding and abetting fraud or aiding and abetting a breach of fiduciary duty.

Plaintiff's third cause of action against the C/E Defendants for aiding and abetting a fiduciary fraud is dismissed.

iii. Plaintiff's First Cause of Action Against the C/E Defendants for "Conspiracy to Commit Fiduciary Fraud"

Plaintiff's first cause of action alleges that the C/E Defendants engaged in a "conspiracy to commit fiduciary fraud," stating:

> 51. In or about 2005, the Carlyle/Extell Defendants and the fiduciaries, the General Partners, its investors, its Board of Directors, Cheng, Lo, and Westside through the known conspirator, deliberately concealed the wrongdoing from Plaintiff and conspired and agreed by and between themselves to commit fiduciary fraud with the object being that set forth in Paragraph 24 above.

> 52. The overt act in the conspiracy was the wiring of $17.5 million to Fineview Resources Ltd. (BVI), which was concealed from the knowledge of the Plaintiff.
>
> Paragraph 24 of the Amended Complaint states:
>
> 24. There is fiduciary fraud when unknown to the Plaintiff, persons and entities enter into a conspiracy to pay, and thereafter pay monies to a fiduciary in order to become either the purchaser of the property or for and because of the fiduciary's status, even where they pay the proper price for the property.

The State of New York does not recognize an independent tort for conspiracy (*Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986] citing *Brackett v. Griswold*, 112 NY 454, 467 [1889]; *Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009]; *see also Lindsay v Lockwood*, 163 Misc 2d 228, 234, n 3 [Sup Ct, Monroe County 1994]). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of New York, Inc.*, 68 NY2d at 969). In order for a conspiracy to be actionable, Plaintiff must plead an agreement to do something that independently would constitute a tort (*Smukler v 12 Lofts Realty*, 156 AD2d 161, 163 [1st Dept 1989]).

The Amended Complaint does not sufficiently plead either a breach of fiduciary duty or a claim for fraud (*see supra*). The Amended Complaint therefore does not plead an independent tort, and thus fails to posit a claim for conspiracy (*see Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155-56 [4th Dept 2005] [summary judgment]).

The court further notes that Plaintiff's cause of action for conspiracy repeats the factual basis of the Amended Complaint's causes of action for "fiduciary fraud" and "aiding and abetting fiduciary fraud" (fraud and breach of fiduciary duty). Plaintiff's claims are therefore duplicative thereof and must be dismissed (*Kew Gardens Hills Apartment Owners, Inc. v Horing Welikson & Rosen, P.C.*, 35 AD3d 383, 386 [2nd Dept 2006]; *American Baptist Churches of Metro. N.Y. v Galloway*, 271 AD2d 92, 101 [1st Dept 2000]).

Plaintiff's first cause of action against the C/E Defendants for conspiracy to commit fiduciary fraud is dismissed.

B. Plaintiff has not Alleged any Cause of Action Against Gary Barnett

The C/E Defendants argue that Plaintiff has failed to allege any cause of action against Defendant Gary Barnett. Because the court has dismissed all causes of action against the C/E Defendants, which include defendant Barnett, this part of the C/E Defendants' motion to dismiss is moot.

For the reasons stated above, the C/E Defendants' motion to dismiss is granted. For these reasons and for the reasons stated in Section II, *supra*, the Amended Complaint is dismissed in its entirety, with prejudice.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT
(Motion Sequence Number 13)

In motion sequence number 13, Plaintiff moves for leave to file a Second Amended Complaint. While Plaintiff's proposed Second Amended Complaint purports to remove the Hudson Partnerships, the pleading continues to name those parties as "nominal defendants." Plaintiff's Second Amended Complaint further seeks to refine Plaintiff's causes of actions as direct, rather than derivative, claims. The facts in the second amended complaint remain "essentially as they were" (Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Leave to File and Serve a Propose [sic] Second Amended Complaint ["Plaintiff's Motion Seq No 14 Reply"], p 1; *see* Tr 2/24/2010.

Generally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party and where the amendment is not patently lacking in merit (CPLR 3025 [b]; *Millard v Alliance Laundry Systems, LLC*, 20 AD3d 866, 868 [4th Dept 2005 [internal citations omitted]). However, the court will view plaintiff's application in light of the history of the case, and the party seeking amendment has the burden of establishing the merit of the proposed amendment (*Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]; *see Monteiro v R.D. Werner Co.*, 301 AD2d 636, 637 [2d Dept 2003] ["movant must make some evidentiary showing that the proposed amendment has merit, and a proposed amendment that is plainly lacking in merit will not be permitted"). "[T]he motion must be supported by an affidavit of merits and evidentiary proof that could be considered

upon a motion for summary judgment. Specious amendments should not be allowed" (*Nab-Tern Constructors v City of New York (Yankee Stadium)*, 123 AD2d 571, 572-73 [1st Dept 1986]; *see also* (*Morgan v Prospect Park Assocs. Holdings, L.P.*, 251 AD2d 306, 306 [2d Dept 1998])).

The decision whether to grant leave to amend a complaint is committed to the sound discretion of the court (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see also* CPLR 3025 [b]).

The Collective Defendants assert that Plaintiff's claims in his proposed Second Amended Complaint are defective for the same reasons as Plaintiff's claims in his Amended Complaint. They contend that Plaintiff's motion to amend should therefore be denied as futile (*see Kaye v. Trump*, 58 AD3d 579, 580 (1st Dept 2009). The court agrees.

A. Plaintiff's Proposed Second Amended Complaint Is Without Merit

Plaintiff's restyling of his claims in the proposed Second Amended Complaint, as summarized by the C/E Defendants, "adds no new claims, no new parties, and no new material allegations. Rather, it rearranges the allegations of the amended complaint without enhancing them" (Memorandum of Law of the [C/E Defendants] in Opposition to Motion to File Second Amended Complaint, and in Support of Cross-Motion for Sanctions and Costs, p 3). While Plaintiff attempts to levy, and make much of, a (hearsay) New York

Times article as justification for "refining" his complaint, Plaintiff has neither provided any valid reason why the article cures the infirmities of the Amended Complaint or why the article adds material facts. The court notes that the newspaper article predates the Amended Complaint by over two months. The court further notes that Plaintiff's Second Amended Complaint is not verified under CPLR § 3020.

As Plaintiff's counsel admits, the facts of the new pleading remain the same and certain causes of action and parties were dropped by this motion, rather than a simple agreement between the parties, merely because it seemed "the more formal way to do it" (Tr 2/18/10, 55:24). Nothing has been added to the proposed new pleading to remove the infirmities fatal to the Amended Complaint. Plaintiff's claims in the proposed new pleading therefore suffers from the same infirmities.

In addition, Plaintiff has not submitted a proper affidavit of merit with his motion to amend (*Glatt v Mariner Partners*, 66 AD3d 440, 441 [1 Dept 2009] [dismissing motion to amend for failure to submit an affidavit of merit]). Plaintiff's attorney's affirmation, which merely introduces New York Times articles that were available well prior to Plaintiff's filing of his Amended Complaint and attempts to contend that the proposed pleading will cause no prejudice, is insufficient (*Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 404-05 [1st Dept 2006]).

B. Plaintiff's Proposed Second Amended Complaint Would Cause Prejudice

Further, Plaintiff's claim that the Second Amended Complaint will "cause no undue prejudice to the defendants, since a letter was sent on February 1, 2010 notifying them that we intended to seek leave to file and serve a Second Amended Complaint" (Affirmation of Jay Goldberg, Feb 2, 2010, ¶ 2) fails to show that prejudice will not result from allowing the Second Amended Complaint. Plaintiff does not provide the claimed letter in his moving or reply papers, nor state how the letter was sent. The court notes, however, that Plaintiff's letter was allegedly sent two weeks after Plaintiff submitted his response to the each defendants' motion to dismiss and only two days before each defendants' deadline to reply. Plaintiff served its motion to amend on the same day the Collective Defendants' replies to their respective motions to dismiss were due. The court notes that forcing the C/E Defendants to again move to dismiss a Second Amended Complaint on claims that are materially and factually the same as stated, and found wanting, in the Amended Complaint is prejudicial.

The court further notes that placing the Hudson Partnerships as "nominal defendants" effectively posits those defendants in the same position as the C/E Defendants. Should the court allow the Second Amended Complaint, the Hudson Partnerships may be forced to either respond, move to dismiss or move to remove their name from the case caption. The court finds that forcing such action upon the Hudson Partnerships, combined with nullifying the defendants' current motion to dismiss, prejudices the Hudson Partnerships.

Plaintiff has not met his burden to establish any merit to the proposed Second Amended Complaint (*Lambert*, 218 AD2d at 621). Even allowing that the Amended Complaint has theoretically dropped its derivative causes of action, Plaintiff's claims differ in no material way than those denied in section III, *supra*. Further, to allow Plaintiff to file the proposed Second Amended Complaint will prejudice each defendant. Plaintiff's motion to file a Second Amended Complaint is denied (*Edenwald Contr. Co.*, 60 NY2d at 959).

THE C/E DEFENDANTS MOTION FOR COSTS AND/OR SANCTIONS
(Motion Sequence No. 14)

In motion sequence number 14, the C/E Defendants move against Plaintiff for costs under CPLR 3025 (b) and/or sanctions under 22 NYCRR § 130-1.1. The C/E Defendants contend that Plaintiff's proposed Second Amended Complaint contains no new claims, parties or substantive facts and that Plaintiff's motion for leave to file the Second Amended Complaint evidences a pattern of conduct undertaken primarily to delay or prolong this litigation.

The C/E Defendants base their motion upon the sequence of facts in this litigation described above, with particular regard to Plaintiff's service of multiple complaints. The C/E Defendants contend that they have completed three full rounds of motion to dismiss briefing; that Plaintiff's repeated new pleadings have rendered the defendants' first two rounds of briefing useless; and that Plaintiff now baselessly seeks to waste another round of briefing.

The C/E Defendants argue that the proposed Second Amended Complaint merely restates and reorders the claims of the Amended Complaint. The C/E Defendants contend that Plaintiff's actions have and continue to needlessly drive up litigation costs and that Plaintiff merely uses the parties' prior motions to dismiss as blueprints to attempt to remedy its pleadings.

22 NYCRR 130-1.1(a) authorizes the court to award any party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Conduct is deemed frivolous if, among other things, "it is completely without merit in law" or "asserts material factual statements that are false." In determining whether conduct is frivolous, courts must consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Plaintiff has repeatedly stymied the Collective Defendants' efforts to put forth motions to dismiss. The court is mindful of, and unimpressed with, both the timing of Plaintiff's amended pleadings and Plaintiff's counsel's attacks upon, rather than towards the arguments of, opposing counsel. However, the court narrowly finds that Plaintiff's submissions were not "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" and are therefore not sanctionable under 22 NYCRR 130-1.1. Nor do Plaintiff's pleadings give rise to the imposition of costs under CPLR 3025(b).

Rather, counsel has, however inartfully, acted as a zealous advocate for his client upon what facts are believed known to him. Unfortunately for Plaintiff, those facts do not give rise to any claimed or inferred cause of action.

This court reminds counsels that while costs or sanctions are not here deemed warranted, "[t]here comes a point when a court can no longer permit counsel to engage in frivolous conduct" at others' expense, and upon reaching that point, the court will not hesitate to impose costs and/or sanctions (*Gassab v. R.T.R.L.L.C.*, 22 Misc.3d 1140[A], * 4 (Sup Ct, NY County 2009] [Bransten, J], *affd* 2010 WL 273750 [1st Dept 2010]). Plaintiff has here narrowly avoided the imposition of costs or sanctions. Continued prosecution of claims without basis and attacks upon persons will place Plaintiff beyond this point.

The C/E Defendants' motion for costs and/or sanctions is denied.

(Order on Following Page)

Accordingly, it is

ORDERED that defendants Hudson Waterfront Associates I-V LPs' motion (sequence no. 11) to dismiss Plaintiff's Amended Complaint is granted, and it is further.

ORDERED that the C/E Defendants' (The Carlyle Group, Extell Development Company, Extell Riverside L.L.C., CPR/Extell Riverside, L.P., Gary Barnett, CRP Riverside G.P. L.L.C., CRP Riverside L.L.C. and Carlyle Realty Partners IV (Canadian) L.P.) motion (sequence no. 12) to dismiss Plaintiff's Amended Complaint is granted, and it is further

ORDERED that Plaintiff Donald J. Trump's motion (sequence no. 13) for leave to file a Second Amended Complaint is denied with prejudice, and it is further

ORDERED that the C/E Defendants' motion (sequence no. 14) against Plaintiff for sanctions pursuant to 22 NYCRR § 130-1.1 and/or costs under CPLR 3025 (b) is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 29, 2010

ENTER:

Hon. Eileen Bransten, J.S.C.