

Cohen v Cohen

2010 NY Slip Op 30838(U)

April 9, 2010

Supreme Court, Suffolk County

Docket Number: 40466-2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

PRESENT:

HON. EMILY PINES

J. S. C.

Index number: 40466-2008

Original Motion Dates: 07/14/09, 07/17/09, 09/25/09

Motion Submit Date: 03/24/2010

Motion Sequence No's.: 005, 006, 007, 008, 009, 010

Index number: 18376-2009

Original Motion Dates: 09/25/09

Motion Submit Date: 03/24/2010

Motion Sequence No's.: 001, 002

DAVID M. COHEN, et al,
Plaintiffs,

Rosenberg, Calica and Birney, LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530-3200

-against-

Bond, Schoeneck & Kling, PLLC
1399 Franklin Avenue, Suite 200
Garden City, New York 11530-1679

STANLEY COHEN, et al,
Defendants.

Certilman, Balin Adler & Hyman, LLP
1393 Veterans Memorial Highway, Suite 301S
Hauppauge, New York 11788

JANET COHEN KAPLAN, et al,
Plaintiffs,

Braken & Margolin, LLP
One Suffolk Square, Suite 300
1601 Veterans Memorial Highway
Islandia, New York 11740

-against-

Martin Cohen, PRO SE
90 Chestnut Lane
Woodbury, New York 11797

STANLEY COHEN, et al,
Defendants.

Court Appointed Referee
Brian T. Egan, Esq.
South Ocean Avenue
Patchogue, New York 11772

STANLEY COHEN,
Plaintiff,

-against-

JANET COHEN KAPLAN,
Defendant.

_____X

Far be it from the Court to take issue with the great Leo Tolstoy¹, however, a

¹"All happy families are alike; each unhappy family is unhappy in its own way", **Anna Kareninna**. Leo Tolstoy.

common element appears to exist with regard to disputes involving families with wealth - the manner of division of their assets.

In 1972, Stanley and Lorraine Cohen established a for-profit educational institution, known as the Five Towns College. Twenty years later, the same parties formed the Five Towns College Real Property Trust ("Trust"), naming the three Cohen children, David, Janet and Martin, as the settlors and beneficiaries thereof. The Trust acquired real property in Dix Hills with financing from the Suffolk County IDA, entered into a lease with the IDA, and thereafter entered into a Sublease Agreement with the College, with the approval and signature of the Trustees, and the beneficiaries. The original 1992 Sublease Agreement between the Trust and the College had a twenty year term and set forth a method for valuation of the real property should the College exercise its option (contained therein) to purchase the interest of the Trust in such property.

In 2001, Stanley Cohen, David Cohen (allegedly on behalf of the College) and the College signed an Amendment to the Sublease Agreement, making substantial changes to the valuation method for the land, to be paid by the College to the Trust, and extending the sublease for twenty years from the date of the amendment. Janet Cohen Kaplan avers that the Amendment was hidden from her until 2007.

From its initial establishment until 2002, Stanley and Lorraine Cohen were the sole shareholders of the College. In 2002, they formed the Stanley and Lorraine Cohen Limited Family Partnership ("Partnership or FLP") for the purpose of transferring shares of the College, Stanley Cohen owning a 49.5% limited partnership interest and a .6% general partnership interest, and Lorraine Cohen owning a 49.5% limited partnership interest and a .4% general partnership interest.

As part of an estate plan, Lorraine and Stanley Cohen gifted each of the Cohen children with a 6% interest in the FLP utilizing their one million dollar gift tax exemption and transferred an additional 5% in return for each child signing a \$267,267 promissory note payable to each parent. On the same date, each of the Cohen children

entered into an Assignment and Assumption Agreement with each of the Cohen parents, providing that each child would receive 11% of the net profits of the FLP. Since each child received two Assignment and Assumption Agreements, they were each to receive a total of 22% of the net profits of the FLP. The FLP gave the general partners broad discretion with regard to payments from the FLP in general and the parties are currently disputing whether the Assignment and Assumption Agreements acted, in essence, to modify the promissory notes.

Following the death of Lorraine Cohen in 2004, David Cohen and Janet Cohen Kaplan aver that Stanley Cohen used his position as President of the College to take an exorbitant salary and take moneys which should have been used both to pay the children under the Assignment and Assumption Agreements and by the College to make rent payments under the sublease and other financial obligations to the Trust.

In 2008, after acting to fire her from her position as General Counsel to the College, Janet Cohen Kaplan brought an accounting proceeding in Surrogate's Court regarding the Trust, which is still ongoing. Stanley Cohen then acted to remove Janet Cohen Kaplan as a partner of the FLP.

In November, 2008, David Cohen commenced an action in this Court against Stanley Cohen, seeking an accounting of the FLP, broad injunctive relief, removing Stanley Cohen from the FLP, and curtailing the powers of Stanley Cohen and the College except in the ordinary course of business. In May 2009, Janet Cohen Kaplan commenced an action against Stanley Cohen, the College, its Board of Trustees, Patricia Schmidt (Stanley Cohen's new wife) and Robert Sherman (Chief budget officer of the College) seeking both equitable and legal relief against all parties based on alleged wrongdoing, involving breach of fiduciary duties, and aiding and abetting the same.

As a result of prior motions returnable April 8, 2009, this Court, on May 11, 2009, appointed a Temporary Receiver to oversee an accounting proceeding relating to the FLP and issued a Preliminary Injunction, enjoining the transfer of Partnership stock along

with a conversion of the College to not for profit status. All other requests for preliminary injunctive relief were denied, in part due to the broad discretion granted Stanley Cohen in the FLP and Trust.

These motions have followed.

DAVID COHEN ET AL AGAINST STANLEY COHEN ET AL
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I. MOTION BY DEFENDANT STANLEY COHEN TO RENEW PLAINTIFF DAVID COHEN'S APRIL, 2009 MOTION TO RESTRAIN STANLEY COHEN FROM CONVERTING THE FIVE TOWNS COLLEGE EDUCATIONAL CORPORATION TO A NOT-FOR-PROFIT- CORPORATION

In its Decision and Order on such motion, this Court ruled on May 11, 2009, that the transfer of the stock of the Stanley and Lorraine Cohen Family Partnership ("Partnership") and conversion of then Five Towns College ("College") to not-for-profit status was preliminarily enjoined, based on the writing of Section 10.1 of the Partnership Agreement, until the Court had further opportunity to examine all documents to determine the intent of the parties. The Court set down and scheduled a hearing date for such purpose. Now, Defendant, Stanley Cohen moves, pursuant to CPLR § 2221 (e) to renew that motion, and upon renewal, for the Court to lift any injunctive relief, based upon Stanley Cohen's actions taken following the Court's initial ruling. The provision of the agreement that gave rise to the Court's May 2009 ruling provided that:

"The Partners agree that the stock in the Five Towns College shall be held by the Partnership until the earlier of (i) five (5) years after the succession of David Cohen as a General Partner or (ii) a period not to exceed eighteen (18) years. At the end of this time period, whichever shall occur first, the Partnership shall sell, donate or otherwise transfer the stock of the college, upon the condition that the college shall convert to non-profit status. In the event of a sale, the Partnership shall receive a payout of the sales

price over not less than a ten (10) year period of time and the Partners shall donate a portion of the proceeds of the sale back to the college so as to minimize their own income tax consequences. . . .”

On June 11, 2009, Stanley Cohen executed an amendment to the Partnership agreement providing that the sale of the Partnership stock and conversion of the College to not for profit status could occur “(a)t any time, in the sole discretion of Stanley Cohen”. Such Defendant now argues, as a result of this amendment, any bar to the immediate sale of Partnership stock and conversion of the College is now lifted and the Court should so rule.

Plaintiff, David Cohen and nominal Defendant, Janet Cohen Kaplan both oppose Stanley Cohen’s motion to renew and argue, in any case, that upon renewal, the motion to lift the Court’s current injunctive relief should be denied. They state, first, that the terms of the Partnership agreement prohibit such an amendment. Specifically, the Partnership Agreement states at Section 13 that:

“This agreement may be amended only with the unanimous consent of the Partners if the amendment would change their required contributions, their rights and interests in Partnership profits or losses, their rights on liquidation of the Partnership, payment of cash flow, income tax allocations, or the requisite vote needed to expel a member.”

The opponents of this motion argue that since the sole asset of the partnership is 100% of the stock in the College, permitting Stanley Cohen, by such amendment, to dispose of the sole asset, instead of waiting until after passage of the minimum time periods, clearly changes the partners rights and interests in Partnership profits and losses. They also argue that an initial further purported amendment of the Partnership Agreement, which altered the time period for the payment for the Partnership stock from a period of not less than ten (10) years to a period of less than ten (10) years clearly changed the rights of the Partners upon liquidation. However, Stanley Cohen set forth that the removal of the words “not” was merely a typographical error and he re executed

the amendment to remove such error on November 11, 2009. David Cohen and Janet Cohen Kaplan also argue that the purported amendment constitutes a breach of their father, Stanley Cohen's fiduciary duty to them as partners, pointing to his other actions in firing them from their positions with the college, his failure to distribute partnership assets, and his wrongful use of Partnership assets for his own personal gain.

II. MOTION BY DAVID COHEN TO RENEW AND/OR REARGUE HIS PRIOR MOTION OF APRIL 2009

In this motion, Plaintiff, David Cohen moves to renew and/or reargue his prior motion for broad preliminary injunctive relief of April, 2009, in which he sought to curb Stanley Cohen's powers with respect to 1) transferring Partnership stock; 2) sale of Trust property to the College; and 3) limiting Stanley Cohen's powers from taking any Partnership action outside the ordinary course of business.

David's Cohen's arguments with regard to the transfer of the Partnership stock are identical to those made in opposition to Stanley Cohen's motion to renew. That is, once the sole asset of the Partnership is alienated, there will be no losses or profits and, therefore, such an amendment clearly required unanimous vote of all partners including the Cohen children. With regard to the sale of the Trust property by the Trust to the College, David Cohen asserts that to allow the transfer to go forward will deprive the Trust of over \$13 million, since that party has wrongfully saddled the Trust with that amount in purported loans, which he admitted in a Surrogate's Court proceeding were "mistakes". Further, allegations of Stanley Cohen's continuous self-dealing, as a member of the College Board of Trustees and General Partner of the Partnership that owns the College stock must be curbed. According to David Cohen, Stanley Cohen has dissipated partnership assets by having the College pay for his extraordinary personal expenses; has, without authority, amended notes payable to the Cohen children by the College to make them payable to Stanley Cohen, and fired David Cohen and Janet Cohen Kaplan as College employees specifically due to these lawsuits. To the extent that David

Cohen's motion is one to renew, it is sought to reinstate him to his former position as his firing occurred after the Court's determination of the prior motion. In support of this motion, David Cohen cites his 22 years of service to the College as well as the fact that he had never received any adverse reviews during his employment and was terminated without cause, for the sole reason that he instituted this lawsuit.

Stanley Cohen opposes David Cohen's motion to renew and/or reargue as follows. With regard to the transfer of partnership stock, Stanley Cohen reiterates the arguments made in his own motion to renew. In addition, he asserts that read as a whole, the Partnership Agreement permits him to withdraw as partner and such would result in immediate divestiture of partnership stock. With regard to the other issues, Stanley Cohen states that David Cohen raised the issue of its opposition to the provisions of the Sublease Agreement and Stanley Cohen's purported breaches of his fiduciary duties in his original motion papers; was rejected by the Court's May 2009 determination; and raised nothing new. With regard to the firing of David Cohen, Stanley Cohen alleges that such must be asserted against the College.

The College answers, stating that to the extent that David Cohen's motion seeks to mandate his reinstatement, he was an at will employee and, therefore, cannot demonstrate a likelihood of success on the merits. With regard to an injunction against the College participating in the transfer of Partnership stock or the sale of Trust property under the Sublease Agreement, the College argues that those issues have been resolved by this Court's prior determination of May 2009 and the amendment of the Partnership Agreement by Stanley Cohen. The College argues, further, that David Cohen cannot obtain preliminary injunctive relief against it since it has no underlying cause of action for such against the College.

The College and David Cohen argue whether the College has the ability under the State regulations, to convert to a not for profit status, each citing counsel for State Department of Education as supporting their argument.

III. JANET COHEN KAPLAN MOVES TO RENEW AND OR REARGUE DAVID COHEN'S APRIL 2009 MOTIONS, ALTHOUGH SHE DID NOT PARTICIPATE IN SUCH MOTIONS ORIGINALLY, AS THE COURT'S DETERMINATION ADVERSELY AFFECTS HER

Janet Cohen Kaplan moves to renew and/or reargue David Cohen's original April 2009 motions for preliminary injunctive relief on the same grounds as David Cohen and, in addition based on the Court's misapprehension of certain material facts. She argues that the Court improperly stated that all of the settlors as well as Trustees agreed to the 2001 amendment to the Sublease Agreement which substantially changed the manner of valuing the Trust property for its sale to the College. In fact, neither Co-Trustee Lorraine signed it, although alive at the time, not did Janet Cohen Kaplan nor Martin Cohen. The change substantially lowered the value for sale and, therefore, constituted a breach of Stanley Cohen's fiduciary duty to the beneficiaries of the Trust. With regard to the statute of limitations argument raised by Stanley Cohen, Janet states the sublease agreement was either void ab initio or subject to the 2 years from discovery rule, as she only learned of it in 2007. Janet Cohen Kaplan asserts that she had no way of predicting that the Court would state that all the partners had agreed to the 2001 sublease amendment, since no allegation was made.

Stanley Cohen argues that having failed to support David Cohen's original motion, Janet Cohen Kaplan has lost the right to renew and/or reargue. He also asserts that the objections to the 2001 amendment to the sublease with the College are barred by the six year statute of limitations.

JANET COHEN KAPLAN ET AL AGAINST STANLEY COHEN, FIVE TOWNS COLLEGE, BOARD OF TRUSTEES OF FIVE TOWNS COLLEGE, PATRICIA SCHMIDT AND ROBERT SHERMAN - INDEX # 18376 - 2009

IV. MOTION BY STANLEY COHEN TO DISMISS JANET COHEN KAPLAN'S

COMPLAINT

Stanley Cohen moves to dismiss Janet Cohen Kaplan's ten causes of action relating to the Trust on the following grounds: 1) the alleged breaches of fiduciary duty are barred by the 6 year statute of limitations with regard to equitable relief and the 3 year statute of limitations with regard to damages claims. Thus, since the amendment of the sublease agreement occurred in 2001, it is protected from the Plaintiff's claims for equitable relief contained in her 9th and 19th causes of action and monetary claims contained in the 20th and 21st causes of action. 2) Stanley Cohen acted within the broad discretion afforded him in the Trust agreement in amending the sublease with the college and the Cohen children all acquiesced in the amendment. 3) Janet Cohen Kaplan, having chosen the Surrogate's Court to bring her proceeding regarding the Trust, must raise all her issues there.

Stanley Cohen argues that Janet Cohen Kaplan's 7 causes of action relating to the Family Limited Partnership must be dismissed as she lacks standing, having been expelled from the FLP. Thus, he argues: 1) that she may be expelled under the clear terms of the FLP; 2) that his motivation is irrelevant as Stanley Cohen has the right to expel Janet Cohen Kaplan with or without cause; 3) Janet Cohen Kaplan's causes of action are not private ones but those that must be brought derivatively on behalf of the partnership and, as she is no longer a partner, she may not do so. Stanley Cohen asserts that Janet Cohen Kaplan's 18th cause of action for intentional infliction of emotional distress must fail as it cannot meet the threshold set forth under case law. With regard to the 5th, 7th and 16th causes of action concerning the promissory notes, allegedly altered by Stanley Cohen and the College to remove Plaintiff as the beneficiary, Stanley Cohen argues that such is the exact cause of action in Janet Cohen Kaplan's third counterclaim in a different action and, therefore, must be dismissed. Stanley Cohen asserts that Jane Cohen Kaplan's third cause of action alleging breach of an oral agreement by Stanley Cohen to allow Janet Cohen Kaplan's promissory notes to be paid out of partnership profits cannot be read into the language of the notes themselves. The 6th cause of action for wrongful termination of Janet Cohen Kaplan should be dismissed as 1) she was an

at will employee, 2) such claim can only be asserted against the College, not Stanley Cohen; and 3) she has raised the same issue in her counterclaim in his action to enforce his promissory note. Stanley Cohen argues that Plaintiff's 11th cause of action taking issue with the College's sale of College property to Stanley Cohen must be dismissed because the Trust does not own the residence and, therefore, the sale can have no effect on the Trust. Finally, Stanley Cohen moves to dismiss the claims against Schmidt in the 5th and 13th causes of action, as Plaintiff has no standing to challenge the partnership's actions and the 7th, 16th and 17th causes of action alleging that Schmidt and Sherman conspired with Stanley Cohen to alter promissory notes (Sherman) and to deprive Janet Cohen Kaplan of her interests in the FLP as such causes of action are not recognized in New York.

V. MOTION BY COLLEGE DEFENDANTS TO DISMISS JANET COHEN KAPLAN'S COMPLAINT

The College argues that Janet Cohen Kaplan's 6th cause of action against the College for wrongful termination must be dismissed as Janet Cohen Kaplan was an at will employee and did not plead that she relied on the College's By-laws prior to accepting employment. The 7th, 9th, 10th and 16th causes of action against the College and its Board of Trustees must be dismissed as they sound in civil conspiracy. The 8th and 12th causes of action for breach of the sublease regarding the College's requirement to pay rent are allegedly not specific enough. The 14th and 15th causes of action must be dismissed as they are derivative causes of action on behalf of the FLP. And Janet Cohen Kaplan has been expelled from the FLP. In addition, those causes of action relating to the payment of Stanley Cohen, the payment of Patricia Schmidt's salary, the College's seeking to acquire property belonging to the Trust for below market value, are assertedly all barred by the Business Judgment Rule. The College argues that Janet Cohen Kaplan has failed to state a cause of action against the individual Board members (7th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 19th causes of action) since there is no evidence or even allegation that they ever acted in other than the College's interest. The College argues that the breach of contract and breach of fiduciary duty claims are also

time barred as the actions complained of occurred over 3 and/or over 6 years before the 2009 action was commenced by Janet Cohen Kaplan.

Janet Cohen Kaplan opposes both the College's and Stanley Cohen's motions to dismiss her 2009 complaint. With regard to the breach of fiduciary duty causes of action, she states that such have mostly occurred within the past 6 years and are not barred by a statute of limitations (i.e., failure to require College to pay rent, taking exorbitant salaries, changing promissory notes to make himself rather than the Cohen children the beneficiary). With regard to the 9th and 19th causes of action, against Stanley Cohen, Janet Cohen Kaplan argues they are not time barred because she only learned of the sublease amendment in 2007 and commenced her action within 2 years thereafter. In addition, Janet Cohen Kaplan asserts that the purported amendment by Stanley Cohen without Lorraine Cohen, who was alive in 2001, is ultra vires and makes the action void, thereby avoiding the statute of limitations issue. Janet Cone Kaplan states that the 8th, 11th and 12th causes of action against Stanley Cohen all relate to his facilitating the College in breaching the terms of its lease by not paying rent, and that the breach is continuing and therefore not barred. The Surrogate's Court action is not a bar, according to Janet Cohen Kaplan, as there are other parties named herein such as Schmidt and Sherman and also requests for declaratory relief and for damages between living parties, all outside Surrogate's Court jurisdiction.

With regard to her claims against Stanley Cohen for breach of his fiduciary duties, Janet Cohen Kaplan asserts she was wrongfully terminated from the FLP and can, therefore, bring the claims. Janet Cohen Kaplan asserts she has a claim for intentional infliction of emotional distress based on her father's actions. With regard to the promissory note claim, she sates that they are not duplicative of her counterclaims in other actions because she has named the members of the College Board of Trustees and its Chief Financial Officer, Robert Sherman, all absent from the other lawsuits where she has asserted similar counter claims and cross claims.

Janet Cohen Kaplan argues she is not barred by the parole evidence rule

concerning the claims that her promissory note to Stanley Cohen must be read in conjunction with the Assignment and Assumption Agreement which simultaneously entitled her and her siblings to 22% of the net profits of the FLP, which they never received. She argues that Stanley Cohen acted without authority when he fired her; that the College's sale of the President's (Stanley Cohen's) house to him, for below market value does adversely affect the Trust and that the causes of action against Patricia Schmidt and Robert Sherman are viable both as they seek declaratory relief affecting their rights and as aiding and abetting breach of their fiduciary duties.

With regard to the College's motion to dismiss, Janet Cohen Kaplan asserts : 1) she is entitled to her compensation on the termination cause of action, since the College never terminated her; 2) the 7th, 9th, 10th and 16th causes of action are not conspiracy but, rather, aiding and abetting breach of Stanley Cohen's fiduciary duties by the 2001 amendment, falsifying business records to show the Trust owed the College \$10 million; paying money to Stanley Cohen really owed the Janet Cohen Kaplan and her siblings; 3) the 8th and 12th causes of action seek to recover rent the College owes the Trust; and the 19th and 20th causes of action for the College's breaches, to the extent they are missing information, should be allowed to continue as it is all in Stanley Cohen's hands; 4) Janet Cohen Kaplan has standing to sue on behalf of the partnership for the same reasons as set forth in her opposition to Stanley Cohen's motion to dismiss; 5) the Business Judgement Rule does not apply to actions taken by the College in bad faith and in breach of its fiduciary duties; 6) Janet Cohen Kaplan should be allowed discovery before dismissal of claims against individual Board members; 7) her claims regarding the 2001 amendment are not time barred for the same reasons as set forth in her opposition to Stanley Cohen's motion; and 8) Janet Cohen Kaplan's claims for breach of contract and breach of fiduciary duty are not time barred as the College is subject to a 20 years lease which it is continuing to violate and many of the actions complained of occurred within either 6 or 3 years prior to her commencement of this action.

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VI. MOTION BY COLLEGE DEFENDANTS TO DISMISS JANET COHEN
KAPLAN'S CROSS CLAIMS AGAINST THEM

The College Defendants move to dismiss Janet Cohen Kaplan's cross-claims against them in this action on essentially the same grounds as set forth in their motion to dismiss her complaint against them in the Janet Cohen Kaplan action. Janet Cohen Kaplan opposes such motion on essentially the same grounds as set forth in her opposition to the College's motion to dismiss in her action.

DAVID COHEN ET AL AGAINST STANLEY COHEN ET AL, INDEX # 40466-2008
AND STANLEY COHEN AGAINST JANET COHEN KAPLAN, ET AL INDEX #
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VII. MOTION BY DEFENDANT STANLEY COHEN TO CONSOLIDATE THE
ABOVE ACTIONS AND FOR PARTIAL SUMMARY JUDGMENT BASED ON THE
COHEN CHILDREN'S FAILURE TO PAY PROMISSORY NOTES

Stanley Cohen moves to consolidate these two cases on the ground that they present the same factual and legal issues regarding the promissory notes made by Janet Cohen Kaplan, David Cohen and Martin Cohen payable to Stanley Cohen. He also moves for partial Summary Judgement on the claims on the notes based upon dicta in this Court's May, 2009 decision where it stated that the Cohen children had clearly defaulted on the repayment of the notes. Stanley Cohen argues that the children's interest in the FLP was financed with the three outstanding notes.

Janet Cohen Kaplan opposes the motion and states that at the time she and her two brothers executed the promissory notes, Stanley Cohen promised the children that he

would distribute partnership profits to them so that they would have funds to pay the same. The notes were assertedly a means to avoid payment of gift taxes, once Stanley and Lorraine Cohen gifted their children each with FLP interests up to the maximum gift limit of \$ 1 million. Assignment and Assumption Agreements signed the same date by all parties, required distribution of FLP profits to the Cohen children, which have never occurred. Janet Cohen Kaplan also asserts she poses other defenses to the action on the notes, which preclude summary judgment, including failure to receive notice of default and opportunity to cure, fraudulent inducement, that Stanley Cohen's actions in looting the FLP profits caused the default, that the Cohen children's counterclaims far exceed the amount due, and that Stanley Cohen lacks standing to sue on the note as it passed to the Trust upon Lorraine Cohen's death and she and her brothers are beneficiaries thereof.

David Cohen also opposes the partial summary judgment motion on the notes asserting that there exist material issues of fact regarding the validity and purpose of the promissory notes as well as the intent when they were made. He also avers that the notes were to be paid out of FLP distributions which have not been forthcoming.

Stanley Cohen's Reply demonstrates filings from the Surrogate's Court to show how he became the holder of the notes payable to Lorraine Cohen.

During oral argument of these seven motions, counsel for all parties present stipulated that the three cases pending before the Court: (David Cohen et al v Stanley Cohen et al, Index #40466-08), (Stanley Cohen v Janet Kaplan, Index # 34442-08) and (Janet Kaplan Cohen v Stanley Cohen and Five Towns College et al, Index # 18376-09) would be consolidated at this time for purposes of conducting joint discovery, with the issue of joint trial being deferred until discovery is complete.

MOTIONS TO RENEW/REARGUE

Pursuant to CPLR § 2221 (e), on a motion to renew, the movant must demonstrate,

as applicable to the case at bar: 1) that there are new facts not presented in the prior motion before the Court that would change the prior determination; and 2) that there exists a reasonable excuse for the movant's failure to present the new facts on the prior motion. **Angilillo v Town of Greenburgh**, 290 Ad 2d 12, 735 NYS 2d 66 (2d Dep't 2001). Where no valid explanation is given to the Court, the motion to renew will be denied. **Worrell v Parkway Estates, LLC**, 43 AD 3d 436, 840 NYS 2d 817 (2d Dep't 2007); **see, Halle v Fernandez**, 286 AD 2d 662, 730 NYS 2d 126 (2d Dep't 2001).

A motion to reargue, on the other hand, governed by CPLR § 2221 (d), must be based on a showing that the Court overlooked or misapprehended the facts or the law in its prior determination. **New York Cent. Mut Ins. Co. v Davalos**, 39 AD 3d 654, 835 NYS 2d 247 (2d Dep't 2007).

PRELIMINARY AND MANDATORY INJUNCTIONS

To establish entitlement to a preliminary injunction, enjoining certain actions pendente lite, the movant must demonstrate 1) a likelihood of success on the merits of its claim 2) irreparable harm in the absence of the relief sought; and 3) a balancing of the equities in the movant's favor. **Doe v Axelrod**, 73 NY 2d 748, 536 NYS 2d 44, 532 NE 2d 1272 (1988); **Grant Co v Sgroi**, 52 NY 2d 496, 438 NYS 2d 761, 420 NE 2d 953 (1981); **Matos v City of New York**, 21 AD 3d 936, 801 NYS 2d 610 (2d Dep't 2005). A request for mandatory injunctive relief, while requiring the same general showing, is used to compel the performance of an act and is considered a drastic remedy rarely granted by the Court. **Matos at 937, 611.**

MOTIONS TO DISMISS PURSUANT TO CPLR §§ 3211 (a) 1,4,7.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7), the Court must afford the pleading a liberal construction, accept all the allegations of the complaint as true, and provide the Plaintiff with every possible favorable inference. **AG**

Capital Funding Partners, L.P. v State St Bank & Trust Co, 5 NY 3d 582, 808 NYS 2d 573, 842 NE 2d 471 (2005); **Pekler v Health Insurance Plan of Greater New York**, 67 Ad 3d 758, 888 NYS 2d 196 (2d Dep't 2009). In making such determination, the Court, inter alia, should "(d)etermine only whether the facts, as alleged, fit within any cognizable legal theory". **Leon v Martinez**, 84 NY 2d 83, 614 NYS 2d 972, 638 NE 2d 511 (1994); **Micro Technology International Inc v Artech Information Systems LLC**, 62 AD 3d 764, 883 NYS 2d 710 (2d Dep't 2009). Dismissal based upon documentary evidence will only be granted in those instances where the documents presented establish a defense to the claims presented as a matter of law. **Leon v Martinez, supra**; **Leibowitz v Impressive Homes, Inc**, 43 AD 3d 1003, 843 NYS 2d 120 (2d Dep't 2007). A Court maintains broad discretion in determining a motion brought pursuant to CPLR § 3211 (a) (4) to dismiss an action, on the basis of another action pending, where there exists substantial identity of the parties and the causes of action in the disparate lawsuits. **See, Montalvo v Air Dock Systems**, 37 AD 3d 567, 830 NYS 2d 255 (2d Dep't 2007).

Breach of Fiduciary Duty/Statute of Limitations

"One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation" **Restatement Second of Torts § 874**. The members of a partnership owe each other a duty of loyalty and good faith and as a fiduciary, a partner must consider the welfare of other partners and refrain from acting for purely personal profit. **See, Gibbs v Breed, Abbott & Morgan**, 271 AD 2d 180, 710 NYS 2d 578 (1st Dep't 2000). Likewise, under New York common law, a trustee owes a fiduciary duty to protect the interests of the trust beneficiaries. **See, Heller v Miller**, 6 NY 3d 649, 816 NYS 2d 403, 849 NE 2d 262 (2006).

A six year statute of limitations applies to causes of action by partners and/or beneficiaries of a trust against partners and/or trustees for breach of fiduciary duty alleging misappropriation of partnership and/or trust assets, based on allegations of fraudulent misrepresentations and concealment, where the Plaintiff seeks both legal and

equitable relief. **CPLR § 213(1); Kaufman v Cohen**, 307 AD 2d 113, 760 NYS 2d 157 (1st Dep't 2003). Where such allegations are made, the cause of action must be commenced within six (6) years from the date of the alleged fraudulent act or two (2) years from the date the plaintiff discovered or reasonably could have discovered improper concealment, using due diligence. **Id** at 122. Thus, the discovery accrual rule does apply to fraud based breach of fiduciary duty claims. **See, Yatter v William Morris Agency**, 268 AD 2d 335, 702 NYS 2d 243 (2000).

Aiding and Abetting Breach of Fiduciary Duty

To state a cause of action for aiding and abetting breach of a fiduciary duty, the proponent must set forth 1) breach of a fiduciary duty owed to the Plaintiff; 2) that the Defendant knowingly induced or substantially assisted in the breach and 3) damages resulting from such conduct. **Kaufman v Cohen, supra**. In order to fulfill the requirement of “substantial assistance”, the Defendant must affirmatively assist or actively conceal, rather than merely fail to act. **Monaghan v Ford Motor Company**, 2010 WL 968108 (2d Dep't March 16, 2010). Moreover, constructive knowledge and/or mere assistance is insufficient to establish such a cause of action. **See, Kaufman, supra**. The statute of limitations is the same as that applied to claims for breach of fiduciary duty, where the allegations are fraud based and the Plaintiff seeks legal and equitable relief. **Id**.

Wrongful Discharge of At-Will Employees

Where employment is at will, an employee may be terminated at any time, for any reason, or for no reason at all. **See, Lobosco v New York Tel Co**, 96 NY 2d 312, 727 NYS 2d 383, 751 NE 2d 462 (2001). Indeed, there is no requirement under New York law that an at will employee be discharged in good faith. **See, Sabetay v Sterling Drug**, 69 NY 2d 329, 514 NYS 2d 209, 506 NE 2d 919 (1987). Although there may exist exceptions for whistle blowers and those who refuse to violate the

Lawyers Code of Professional Responsibility, there exists no recognized tort of wrongful discharge in New York based on a violation of the covenant of good faith and fair dealing. **See Lobosco, supra; Trakis v Manhattanville College**, 51 AD 3d 778, 859 NYS 2d 453 (2d Dep't 2008).

Intentional Infliction of Emotional Distress

To sustain this cause of action in New York, the proponent must demonstrate extreme and outrageous conduct by the Defendant causing the Plaintiff emotional harm. **See, Howell v New York Post Co.**, 81 NY 2d 115, 506 NYS 2d 350, 612 NE 2d 699 (1993). A Defendant's act in terminating the Plaintiff may not be used to form the basis of an intentional infliction of emotional distress cause of action, in order to circumvent the at-will employment rule in New York. **FAMA v American International Group, Inc.**, 306 AD 2d 310, 60 NYS 2d 534 (2d Dep't 2003).

Business Judgment Rule

The "Business Judgment Rule" essentially bars judicial inquiry into the actions of corporate directors taken in the exercise of honest judgment and in legitimate furtherance of corporate purposes. **NY Jur 2d, Business Relationships § 692**. There exists a presumption that the directors or members of a corporate Board have acted properly and in the corporate interest. **Id; see, Auerbach v Bennett**, 47 NY 2d 619, 419 NYS 2d 920, 393 NE 2d 994 (1979). As set forth by the Court of Appeals:

"(T)he business judgment doctrine . . . is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be business judgments (B)y definition the responsibility for business judgments must rest with the corporate director; their individual capabilities and experience particularly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud . . . The court must and properly should respect their determinations." **Id at**

629-631, 926-927. In bringing an action against individual members of a corporate board, the Plaintiff is required to plead with specificity independent tortious acts by each individual Defendant in order to overcome a public policy that supports the business judgment rule. **See, Martha v Child Care Association**, 45 NY 2d 913, 411 NYS 2d 219, 383 NE 2d 865 (1978); **Pelton v 77 Park Avenue Condominium**, 38 AD 3d 1, 825 NYS 2d 28 (1st Dep't 2006).

Declaratory Judgments

The general purpose of a declaratory judgment pursuant to CPLR § 3001 is to resolve disputed : “(j)ural relation either as to present or prospective obligations” **James v Alderton Dock Yards**, 256 NY 298, 176 NE 401 (1931); **See, Siegel, N Y Practice, § 436 at 739.** As described by Professor Siegel, the declaratory judgment is utilized to resolve a dispute where the claimant is unable to find among other common causes of action, one that will help bring the case to court. **Id.** at 742.

SUMMARY JUDGMENT

A party moving for Summary Judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Winegrad v New York University Medical Center**, 62 NY 2d 85, 487 NYS 2d 316 (1985); **Zuckerman v City of New York**, 49 NY 2d 557, 427 NYS 2d 595, 404 NE 2d 718 (1980). Yet, summary judgment is considered a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue; but, once a prima facie showing of entitlement has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. **State Bank of Albany v McAuliffe**, 97 AD 2d 607, 467 NYS 2d 944 (3d Dep't 1983). The role of the Court in deciding a motion for Summary Judgment “(i)s not to resolve issues of fact or to determine matters of credibility, but merely to determine

whether such issues exist.” **Dyckman v Barrett**, 187 AD 2d 553, 590 NYS 2d 224 (2d Dep’t 1992).

MOTIONS TO RENEW/REARGUE

In view of the significant arguments raised by the three movants, the Court grants Stanley Cohen’s motion to renew, Janet Cohen Kaplan’s motion to renew and/or reargue and David Cohen’s motion to renew and/or reargue David Cohen’s April 2009 motion for broad injunctive relief. With regard to Janet Cohen Kaplan’s reargument, the Court accepts her statement that she would have responded to David Cohen’s original motion if she thought the Court was going to provide that all three Cohen children agreed to the terms of the 2001 Sublease Agreement. Indeed, in reviewing the prior motion papers, although Stanley Cohen states that there was signed acquiescence to the Sublease, he was referring to the 1992 Sublease. While Stanley Cohen now states, in opposition to Janet Cohen Kaplan’s motion to reargue, that she did agree to the Amendment, Janet has raised a significant issue of fact. Thus, there exists a reasonable excuse for Janet Cohen Kaplan’s failure to address any issues concerning the 2001 Amendment.

Upon reargument, the Court finds that Janet Cohen Kaplan has raised an issue, which calls into question the validity of the 2001 Sublease Amendment, since, for the first time, the Court must now determine whether such amendment was made and concealed by Stanley Cohen from a beneficiary of the Trust and member of the FLP, in breach of Stanley Cohen’s fiduciary duties as general partner and Trustee. Moreover, if the Trust property is to be transferred ultimately under any scenario, to the Five Towns College, the method of valuation is now called into question. Accordingly, upon reargument, the Court agrees that a Preliminary Injunction is warranted to prohibit, pendente lite, any transfer of Trust property to the Five Towns College. It is the Court’s understanding, based on exhibits to the various papers submitted, that an Order is currently in effect in the Surrogate’s Court Trust Accounting Proceeding, signed by Surrogate Czygier, most recently dated May 28, 2008, prohibiting Stanley Cohen, “(h)is

agents, representatives, attorneys and employees . . . (from) distributing, disposing of, dissipating, encumbering or otherwise transferring any money or other property of . . . (the) Inter Vivos Trust, dated May 23, 1992, . . . until further order of . . . (that) court". If and when that stay is lifted and the accounting proceeding is completed, this Court will consider a letter application by any party to these proceedings to extend it if necessary.

With regard to other relief sought by Janet Cohen Kaplan, upon reargument and renewal, the Court, having already preliminarily enjoined transfer of partnership stock and having already appointed a Temporary Receiver to oversee an accounting of the partnership, finds no basis for further extending Preliminary Injunctive relief. Having extended its Preliminary Injunction as set forth above, the Court in response to David Cohen's motion, upon reargument, declines to otherwise alter its May 2009 determination except as set forth in response to Stanley Cohen's motion to renew. Upon renewal of David Cohen's motion, the Court declines to issue a mandatory injunction, directing the College to rehire David Cohen based on the law as applied to the facts herein. Like his sister, the Court has been informed, during oral argument, that David Cohen has filed an extensive lawsuit against his father alleging, inter alia, breach of the latter's fiduciary duties regarding the Trust and the Partnership.

Upon granting Stanley Cohen's motion to renew, the Court declines to lift its Preliminary Injunction, prohibiting sale of the Partnership stock and transfer of the College to not for profit status. Although Stanley Cohen purported to amend the Partnership Agreement after the Court's May 2009 decision, his amendment, to the extent that it moved forward in time the sale of the stock, had a potential effect on the partners profits and losses as set forth by David Cohen in his papers and, therefore, may have required a unanimous vote of the partners as set forth in the agreement.

STANLEY COHEN'S MOTION TO DISMISS

Janet Cohen Kaplan states a claim in her myriad causes of action against Stanley Cohen for his alleged breaches of his fiduciary duties as a Trustee and General Partner. Accepting her allegations as true, as the Court must on such motion, the first, second, third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth and seventeenth causes of action in her complaint allege that Stanley Cohen breached his duties of loyalty toward Janet Cohen Kaplan in entering into the Sublease Amendment without her consent, making false promises to the partners concerning the promissory notes, making an unauthorized party a partner, changing the payees on promissory notes, borrowing against a line of credit guaranteed by the Trust, and failing to collect rent owed the Trust. In addition, Janet Cohen Kaplan's 19th cause of action seeking declaration that the Sublease Amendment is void and her 20th cause of action against Stanley Cohen for breach of the Trust Agreement also state causes of action under the law as set forth.

With regard to the Statute of limitations, the Court finds that the allegations of breach of fiduciary duty, which seek equitable and monetary relief are subject to both the six year and 2 year from discovery statute of limitations. Thus, except to the extent that they specifically refer to acts taken, with Plaintiff's knowledge, more than six years from the date of filing of her complaint, they are not barred at this stage.

With regard to Plaintiff's standing, the Court accepts the statements of Janet Cohen Kaplan and David Cohen, during oral argument that Stanley Cohen has treated her as a partner on all tax returns filed to date and thus finds that she has standing both to bring claims for breach of fiduciary duty owed partners and derivative claims on behalf of the partnership against Stanley Cohen as set forth in the fourteenth cause of action. Having taken such position in an income tax return, Stanley Cohen is estopped from taking a different position in this litigation. **See, Mahoney-Buntzman v Buntzman**, 12 NY 3d 415, 881 NYS 2d 369, 909 NE 2d 62 (2009).

Janet Cohen Kaplan also states a cause of action for a declaratory judgment as set forth in her nineteenth cause of action, in which she seeks a declaration that the 2001

Sublease Amendment was void ab initio, as it lacked the consent of Lorraine Cohen.

The Court grants Stanley Cohen's motion to dismiss the sixth cause of action, which is based on wrongful termination, not recognized as set forth above as well as the cause of action for intentional infliction of emotional distress as set forth in the eighteenth cause of action since it appears to be an attempt to circumvent the at will employment rule. **See, FAVA v American International Group, supra.** The Court also grants Stanley Cohen's motion to dismiss the thirteenth cause of action, regarding Patricia Schmidt's allegedly improper appointment to the Board as barred by the business judgment rule as set forth above.

The 5th cause of action in Janet Cohen Kaplan's complaint states a cause of action against Patricia Schmidt for Declaratory relief concerning her eligibility for membership in the FLP and the 17th cause of action states a claim for aiding and abetting Stanley Cohen in breach of his fiduciary duty concerning the same issue. However, as the Court is not entertaining a cause of action against the College or its Board concerning Patricia Schmidt's membership on the Board, it is also dismissing Janet Cohen Kaplan's 13th cause of action against Patricia Schmidt.

COLLEGE AND BOARD OF TRUSTEES' MOTIONS TO DISMISS

Based on the law set forth above, the Court finds that Janet Cohen Kaplan's complaint states a cause of action against the Five Towns College and the Board of Trustees, as its governing body, for aiding and abetting Stanley Cohen to breach his fiduciary duties in his amendment of the sublease agreement (9th cause of action); in borrowing against a line of credit guaranteed by the Trust to pay Stanley Cohen \$2.3 million (10th cause of action); in selling Stanley Cohen college property below market value to the detriment of the Trust (11th cause of action); in changing promissory notes to be payable to Stanley Cohen as opposed to the Cohen children (7th and 16th cause of action). Those claims (the 7th and 16th causes of action) also state a cause of action

against the College's Chief Business Officer, Robert Sherman, for aiding and abetting Stanley Cohen in breach of his fiduciary duty concerning changing the payees on the promissory notes. For the same reasons as set forth above, the Court finds that Janet Cohen Kaplan states a cause of action derivatively on behalf of the partnership and the Trust against the College and its governing board (14th cause of action) to the extent that it sets forth specific acts such as changing the payee on promissory notes previously payable to the Cohen children and selling real property below its market value to Stanley Cohen, and failing to pay rent (8th and 12th causes of action). Those general allegations contained within the Fourteenth cause of action accusing the College of rubber stamping the actions of Stanley Cohen are barred by the business judgment rule.

Janet Cohen Kaplan also states a cause of action for a declaratory judgment with regard to the validity of the Sublease Amendment (19th cause of action). A declaration with regard to the validity of the Sublease Amendment will be necessary in order to determine how to proceed in the Partnership Accounting Proceeding in valuing the real property on which the College is located. The sixth cause of action against the College and its governing Board, for wrongful termination is dismissed as it is against Stanley Cohen.

Plaintiff's 13th cause of action, in which she seeks to declare that the College and its governing body violated its By-Laws in appointing Patricia Schmidt to its Board is dismissed against those parties since it fails to state a claim under the Business Judgment Rule as set forth above. In addition, none of the above causes of action nor the 15th cause of action in faulting the individual members of the Board for failing to monitor Stanley Cohen state a claim against the individual members of the Board of Trustees as no single allegation against any one of them as individuals has been made. **See Martha v Child Care Association, supra.**

With regard to Janet Cohen Kaplan's cross-claims against the College, they state a cause of action for aiding and abetting Stanley Cohen's breach of fiduciary duty with regard to the College's failure to pay rent (1st Cause of action), the allegedly improper

amendment of the Sublease Agreement (2d cause of action), the borrowing against a line of credit guaranteed by the Trust (4th cause of action), the changing of the payees on the promissory notes originally payable to the Cohen children (5)th cause of action), and the asserted manipulation of records to make Trust indebted for construction of dormitories (7th cause of action). The Eighth cross-claim states a derivative cause of action against the College only to the extent that it relates to the changing of the payees on the promissory notes and the sale of the President's home below market value. It is otherwise barred under the Business Judgment Rule. The third cross claim, also derivative in nature, and relating solely to compensation awarded Stanley Cohen, and the ninth cross claim, accusing the College of "negligence in performance of its duties" are both dismissed under the business judgment rule. Finally, the Third cross claim, sounding in wrongful termination, is dismissed for the same reasons as set forth above.

To the extent that the College has made arguments with regard to the statute of limitations such are resolved based on the Court's rulings above. All claims that the Court has otherwise upheld may proceed under either the six year or two years from discovery rule, unless and until further evidence is produced.

CPLR § 3211 (a) (4)

As both the Stanley Cohen and the College Defendants have moved, in the Janet Cohen Kaplan action, to dismiss Janet Cohen Kaplan's Complaint on the basis of other actions pending, this Court has reviewed the Counterclaims of Janet Cohen Kaplan in the Stanley Cohen action and the Cross-claims of Janet Cohen Kaplan in the David Cohen action. In one form or another, most of the Counterclaims and/or Cross-claims are, in fact, contained in the Janet Cohen Kaplan action. While she is correct that she names other parties, such as Patricia Schmidt and Robert Sherman, as well as the Board of Trustees as the governing body of the College only in her action, it makes sense to coordinate all of these claims into one action . In order to avoid more motion practice, the Court will reserve Decision on this issue until it has the opportunity to meet with

counsel and develop a rational manner of handling those of Janet Cohen Kaplan's claims which the Court has now upheld.

SUMMARY JUDGMENT

Applying the legal principles set forth above, Stanley Cohen has established prima facie entitlement to Summary Judgment on the notes, which set forth no conditions on their fact and which admittedly have not been paid. However, in opposition, both Janet Cohen Kaplan and David Cohen raise material issues of fact. While the notes themselves are clear, since the issuance of the notes and prior to the commencement of the various litigations herein, Stanley Cohen, in 2005 and 2006, caused the College to make distributions to the Cohen children, who then paid the net proceeds thereof to Stanley Cohen as payment on the Notes. Whether this established a pattern of conduct demonstrating that the notes were to be paid out of distributions to the Cohen children is an issue which is material and has not been resolved. Moreover, in response to the Summary Judgment motion, David Cohen and Janet Cohen Kaplan have averred that the Assignment and Assumption Agreement signed the same day as the promissory notes must be read in tandem, to demonstrate that sufficient distributions would be made to the Cohen children from the Partnership to enable them to make payments on the promissory notes. These issues will be resolved at trial. Therefore, Summary Judgment is denied.

Accordingly, David Cohen's motion to renew and reargue is granted and upon renewal and reargument, the Court grants the relief sought as set forth above and denies the remaining relief requested. Stanley Cohen's motion to renew is granted and upon renewal, his request for relief is denied. Janet Cohen Kaplan's motion to renew and reargue is granted and upon renewal and reargument her requests for relief are granted as set forth above and are otherwise denied. Defendants College and Board of Trustees' motion to dismiss Janet Cohen Kaplan's Complaint is granted to the extent set forth above and are otherwise denied. The Defendant College's motion to dismiss Janet Cohen Kaplan's cross claims is granted to the extent set forth above and otherwise denied. The motion of the individual Board members to dismiss the complaint against them is granted. Stanley Cohen's, Patricia Schmidt's and Robert Sherman's motions to dismiss Janet Cohen Kaplan's complaint against them is granted to the extent set forth

above and is otherwise denied.

This constitutes the **DECISION** and **ORDER** of the Court. Counsel are required to appear for a Discovery Conference on May 11, 2010 at 10:30 a.m.

Dated: April 9, 2010
Riverhead, New York



EMILY PINES
J. S. C.