At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of April, 2010.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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DAVID TRACEY,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 6456/07

BRIGHT CITY DEVELOPMENT, LLC, AIDA STODDARD, JOANNA FRANK, JAMES MOONEY, V.C. VITANZA SONS, LLC, AND FOX, CHARLES & KOWALEWSKI, LLP (IN ITS CAPACITY AS ESCROWEE),

(Action No. 1)

Defendants.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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V.C. VITANZA SONS, LLC,

Plaintiff,

- against -

Index No. 26772/09

AIDA STODDARD, JOANNA FRANK, BRIGHT CITY DEVELOPMENT, LLC, AND 111 3RD STREET, LLC,

(Action No. 2)[1]

Defendants.

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[1] Pursuant to the court's order, dated Feb. 16, 2010, V.C. Vitanza Sons, LLC was to file a stipulation of discontinuance of Action No. 2. It appears that no such stipulation has been filed with the court to date.

The following papers numbered 1 to 22 read on these motions:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3; 8-11; 18-19
Opposing Affidavits (Affirmations)	4-6; 12-13; 20-21
Reply Affidavits (Affirmations)	7; 14
Affidavit (Affirmation)	
Other Papers Memoranda of Law	15-17; 22

In these actions for breach of a partnership agreement, fraud, and unjust enrichment, the following motions are consolidated for disposition and, upon consolidation:

(1) The motion of defendant V.C. Vitanza Sons, LLC in Action No. 1 for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff David Tracey's sixth, seventh, ninth, twelfth, thirteenth, and fourteenth causes of action is granted.

(2) That branch of the motion of defendant Bright City Development, LLC in Action No. 1 for an order, pursuant to CPLR 3211 and/or 3212, is granted to the extent that all of plaintiff's causes of action, except for an accounting, are dismissed. Pursuant to Article 22 of the Judiciary Law, in accordance with the provisions of Part 122 of the Rules of the Chief Administrator of the Courts (NYCRR part 122), the matter is referred to a Judicial Hearing Officer in the Judicial Hearing Officer Part for a full accounting and for a hearing and report on the assets and liabilities of the partnership among Bright City Development, LLC, Aida Stoddard, Joanna Frank, and James Mooney relating to 103-119 3rd Street, Brooklyn, New York. The parties are directed, within fifteen days of the date of this decision and order, to

complete the JHO referral form and serve it, together with a copy of this decision and order with notice of entry, upon the JHO Clerk in the Motion Support Office. The date of the hearing will be fixed by the Clerk of the Part.

(3) That branch of the motion of defendants Aida Stoddard and Joanna Frank in Action No. 1 for an order, pursuant to CPLR 3211 and/or 3212 is denied, subject to renewal after discovery is completed and a note of issue is filed.

(4) The motion of defendants Bright City Development, LLC, Aida Stoddard, Joanna Frank, and 111 3rd Street, LLC in Action No. 2 for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint based on documentary evidence and for failure to state a cause of action is denied.

Facts and Allegations

The Relevant Parties

Plaintiff David Tracey is a real estate investor (the Investor). Defendant James Mooney is the Investor's professional acquaintance. Defendant V.C. Vitanza Sons, LLC (the Seller), a New York liability company, owned certain commercial real property located at 103-119 3rd Street in Brooklyn, New York (the property). Defendant Bright City Development, LLC, a New York limited liability company (the Developer), contracted with the Seller to purchase the property. Defendant Aida Stoddard (also known as Aida Saleh Stoddard) is a New York State licensed architect and one of the two members/owners of the

Developer. Defendant Joanna Frank (also known as Joanna Ruth Clipstone Frank) is the other member/owner of the Developer.

The Chronology of Events

May 2005: The Developer is formed as a limited liability company, with Stoddard and Frank (collectively, the Developer Members) as its only members and owners (LLC Operating Agreement, § 1.1).

May 2006: The Developer Members and Mr. Mooney approach the Investor with a proposal that they purchase the property and develop it as a residential and commercial condominium (the project) (Complaint, ¶ 15). The Developer Members and Mr. Mooney advise the Investor that a deposit is needed to secure their interest in the property, and request that the Investor, as the only individual involved with sufficient funds, contribute a total of $800,000 to be used exclusively to fund the purchase (¶¶ 19-20, 23-24). The Investor, as a condition for his immediate contribution of $400,000, requires that the other three individuals give him full and unfettered authority with regard to the property until the commencement of the actual development, or, if he does not wish to proceed with such purchase or development, that they reimburse him the full $800,000, and "additionally adequately compensate him for such risk investment" (¶ 25). Allegedly to induce the Investor to join the partnership, the other three individuals agree and accept his terms and conditions (¶ 27). On or about May 23, 2006, the Investor provides the requested $400,000 for the initial

deposit on the property. At that time, neither the Investor nor the Seller knew each other (Vitanza Aff., dated Jan. 29, 2010 [Vitanza Aff.], ¶ 7).

June 2006: The purchase agreement for the property is signed by the Seller and the Developer (Contract of Sale – Office, Commercial and Multi-Family Residential Premises, dated June 1, 2006). As is relevant to this case, the purchase price is $7,900,000, payable as follows: $395,000 (or 5% of the purchase price) upon execution of the agreement to be held in escrow, $395,000 (or another 5% of the purchase price) upon the Seller providing the Developer with a sixty-day notice of closing, and the balance of $7,110,000 at closing (Sch. C). Subject to certain exceptions, the closing is to take place sixty days after the Seller notifies the Developer of its desire to close (Sch. G, ¶ 2). A purchaser under the contract includes any permitted assignee (¶ 18.01). The Seller intends to utilize a tax-deferred like-kind exchange under IRC § 1031, whereby it will purchase from a third party another parcel of real estate at which it will continue to conduct its business (Sch. G, ¶ 25). As is typical for real estate transactions, the purchase agreement provides that it represents the entire understanding between the parties and may not be modified except by an instrument signed by the party against whom the enforcement is sought, and then only to the extent set forth in such instrument (¶ 18.02). Upon the execution of the purchase agreement, the Developer pays $395,000 to the Seller's attorneys (Complaint, ¶ 28).

August 2006: The Developer Members form 111 3rd Street LLC (the LLC) to represent their interests in their partnership with the Investor and Mr. Mooney (Complaint,

¶ 30), and to take title to the property (Third Amended Answer, ¶ 106). The Investor alleges that he has a majority interest in this partnership (Complaint, ¶ 31). According to the Investor. they memorialize the terms of their partnership agreement (¶ 32), although he has provided the court with no signed document or other evidence supporting his position. The Developer alleges that no written operating agreement for the LLC has ever been finalized (Stoddard Aff., dated Nov. 30, 2009 [Stoddard Aff.], ¶ 35).

Thereafter, the purchase agreement is amended, the due date for the second installment of the down payment is set for September 12, 2006, and the closing date is set for November 15, 2006 (Amendment to Contract of Sale, dated Aug. 21, 2006, ¶¶ 1-2). Further, the down payment escrow provisions of the original contract are deleted, and the first installment of the down payment is released from the escrow to the Seller (¶ 7).

September 2006: The Investor wires an additional $400,000 to the Developer (Complaint ¶ 28), which pays $395,000 to the Seller's attorneys. However, in accordance with the first amendment to the purchase agreement, the down payment is immediately released to the Seller, which uses it as operating capital and as a deposit on the replacement property (Tracey Aff., dated Feb. 8, 2010 [Tracey Aff.], ¶ 22). Allegedly, the Investor is unaware that the entire down payment has been released to the Seller, as his understanding has been that the down payment is to be escrowed until closing (*id.* at ¶ 21; Complaint, ¶ 29).

At the end of September 2006, the Investor withdraws from his partnership with the Developer, its Members, and Mr. Mooney (Complaint, ¶¶ 39, 41). He recounts various

reasons for his withdrawal. First, while he was having an emergency surgery in August 2006, the Developer and its Members engaged in direct negotiations with the Bank of Scotland, NYC in contravention of their earlier agreement not to do so without the Investor's express permission and in defiance of his authority to control the pre-development activities of the partnership (¶¶ 35-36). Second, he was not provided with the final terms for the purchase of the property, a complete copy of the purchase agreement, or any proof that the down payment totaling $790,000 is being held in escrow (¶ 37). Third, he was threatened to be replaced with other investors (¶ 38). Finally and crucially, he cannot get back his $800,000 (¶ 44). In his letter of September 21st announcing his withdrawal, the Investor leaves the terms of his departure open to negotiation.

October 2006: The Seller enters into a contract of sale to purchase a replacement property (Third Amended Answer, ¶ 28). Closing for the replacement property is scheduled for November 15, 2006, the same day as the closing for the subject property (¶ 31).

November 2006: The Developer advises the Seller that it will not be able to close on November 15, 2006 (Third Amended Answer, ¶ 32). In response to the Seller's insistence, the Developer offers to arrange for a bridge loan and asks the Seller to seek an adjournment of the closing on the replacement property to January 2007 (¶¶ 33-34). The Seller succeeds in having it extended to February 1, 2007, on the condition that the Seller pay principal and interest due on the first mortgage on the replacement property for December 2006 and January 2007 (¶ 35). The Seller, in turn, agrees to accept the Developer's offer to arrange

for a bridge loan; *provided* that the Developer agrees to reimburse Seller for the aforementioned mortgage payments, and pay all costs and interest associated with the bridge loan, until the closing on the property (¶ 36). The Developer accepts this arrangement, and a closing of the bridge financing is held on November 30, 2006, when the Seller borrows $2,800,000 from a third party, Wexford/HPC Mortgage Fund, L.P., for a term of three months (the bridge loan) (¶ 37). The bridge loan note is secured by a first mortgage on the subject property (*id.*). The payment of the note is personally guaranteed by the Developer Members (*id.*). At the closing of the bridge loan, the Developer pays the costs and interest on the bridge loan through February 2007 (*id.*). At the closing of the bridge loan, the Developer and its Members direct that their portion of the bridge loan proceeds be transmitted to the LLC (¶ 107). The Developer and its Members receive, either directly or indirectly through, the LLC a portion of the bridge loan proceeds of $1,146,668.50, which, according to the Seller, is intended: (1) as a partial return of the down payment in the sum of $780,000, thereby reducing it from $790,000 to $10,000; (2) in payment of the costs of carrying the bridge loan and the Seller's costs incurred by the delay in closing the purchase of the replacement property (Vitanza Aff., ¶ 9); and (3) a reserve for payment of $366,677.50 toward the bridge loan once the closing of the subject property occurs (Second Amendment to Contract of Sale, dated Feb. 16, 2007, ¶ 5). At the direction of the Developer and its Members, $898,616.67 of the $1,146,668.50 received and credited to them from the proceeds of the bridge loan is deposited in a bank account of the LLC (Third Amended Answer,

¶ 114). Thereafter, $433,846 of the $898,616.67 is paid over by the LLC to the Developer, which, in turn, pays it over to or for the benefit of the Developer Members for their personal use, and $86,394.51 of the $898,616.67 is paid over by the LLC to Joanne Frank's father (¶ 115, 117).

Also in November 2006, the Developer responds to the Investor's withdrawal from the partnership. In a letter of November 29th, the Developer advises the Investor that for the time being, he will not receive any return on his investment:

> "[F]unds received to date, in the amount of $800,000, were applied to predevelopment costs per the terms of the development plan.
>
> We embarked on this project together with the understanding that we had made a mutual commitment to completing our roles, Bright City as Developer, and David Tracey as Equity partner. Because you have chosen to renege on your commitment, we were forced to seek alternative sources of equity within a very limited time period. As a result, the expected profit margin for the project has been reduced considerably.
>
> We will proceed in cooperation toward the successful completion of this project . . . We will, at our discretion, consider a fair distribution of any profit produced at the end of the project.
>
> Alternatively, we will consider any qualified replacement you wish to propose for your position according to the terms outlined above."

January 2007: The Developer and its Members offer for sale their rights with respect to the property, alleging that such was necessary in order to meet their obligations under the purchase agreement (Complaint, ¶¶ 45, 47).

February 2007: The Seller serves the Developer with a "time of the essence" letter demanding that the closing take place on February 23, 2007 (Complaint, ¶ 49). At approximately the same time, the Investor is advised that a funding source has emerged, that such source requires, as a condition, that it be accorded a majority interest, and that upon completion of the project, the equity interests of the new investor will be satisfied before any return to the Investor, Developer, and Developer Members (Complaint, ¶ 50). Claiming that he was deprived of any further information regarding this funding source or the ultimate effect its role in the project would have on his interests, the Investor refuses to join with the others in consenting to its terms and conditions, and once again demands, without success, to review the partnership's books and records (¶¶ 53-54).

In the same month, the Developer and the Seller further amend the purchase agreement (Second Amendment to Contract of Sale, dated Feb. 16, 2007). Paragraph 2 of the Second Amendment provides, in relevant part, that:

> "Except as otherwise provided for in this contract, the closing of title pursuant to this contract ('Closing') shall take place on February 23, 2007, at 9:00 a.m., TIME BEING OF THE ESSENCE . . ."

Paragraph 5 of the Second Amendment provides that:

> "At the Closing of Title, Purchaser shall pay down the [Bridge] Loan by the amount of $366,677.50, said amount being the funds advanced by Seller to Purchaser and secured by the mortgage against the Premises. Upon paying down the Loan by the amount of $366,677.50, and providing verification of same from the lender, Purchaser shall have satisfied its indebtedness

> to Seller in the amount of $366,677.50, which was in excess of the Purchase Price."

On the same day, the Developer assigns the purchase agreement to Third & Bond Partners, LLC.

February 22, 2007: The Investor commences the instant action by filing a summons and complaint the day before the scheduled closing date, seeking monetary damages, an accounting, a declaratory judgment, and injunctive relief. The Investor simultaneously files a notice of pendency against the property, causing Third & Bond Partners, LLC to abandon the deal. As a result of the failure to close on the subject property, the Seller has no funds with which to close on the replacement property and ultimately forfeits its down payment of $350,000 on the replacement property (Third Amended Answer, ¶¶ 57, 60).

February 23, 2007: The Developer Members and the Seller meet to address the Investor's lawsuit and the parties' resulting inability to close (Third Amended Answer, ¶ 55). The Developer indicates that it has hired an attorney who is preparing a motion to have the notice of pendency vacated (¶ 56).

March 1, 2007: The bridge loan matures. Precluded from refinancing because of the notice of pendency, the Seller defaults on the bridge loan (Third Amended Answer, ¶¶ 61-62). The Seller is forced to extend the bridge loan to June 1, 2007, at a cost of $151,478.34, which the Developer refuses to pay (¶ 63).

April 17, 2007: By a stipulated order, the court vacates the notice of pendency upon deposit of the proceeds of the assignment of the purchase agreement by the Developer with the Investor's attorneys.

May 11, 2007: The Developer assigns the purchase agreement to Hudson Residential Services, Inc. (the Assignee) for consideration of $610,000 (Contract Purchase Agreement, ¶ 2). In that agreement, the Assignee covenants that it "has reviewed the Contract and, except any obligation to repay the loan as provided in Paragraph 5 of the Second Amendment to the Contract and any other amount due Vitanza or any affiliate of Vitanza from Bright City or any affiliate of Bright City not expressly set forth in the Contract, agrees to assume the obligations of the purchaser under the Contract from and after the date of the assignment" (¶ 4.b).

May 14, 2007: The Assignee and the Seller amend the purchase agreement to reduce the purchase price to $7,500,000 from $7,775,000 to satisfy the Seller's environmental remediation obligations under the purchase agreement (Agreement to Amend Contract of Sale, ¶ 2.b). In the amendment, the Seller reserves its rights to proceed against the Developer, post-closing, as follows (¶ 2.a):

> "Seller consents to the assignment of the Contract to Purchaser; provided, however, Seller reserves, without liability to Purchaser . . ., any and all rights and claims that Seller has or may have against Assignor or any affiliate or member of Assignor, including, but not limited to, the repayment of the amount provided for in Paragraph 5 of the Second Amendment to the Contract and any other amounts not expressly set forth in the Contract, which rights shall survive the Closing, the delivery

> of the deed by Seller, and the acceptance thereof by Purchaser, and the paying off or the paying down of the loan as referred to in Paragraph 5 of the Second Amendment to the Contract."

May 31, 2007: The Assignee purchases the property from the Seller.[2] Neither the Developer nor either of its Members attend the closing (Stoddard Aff., ¶ 54). The Developer and its Members fail to pay down the bridge loan by $366,677.50, to pay all the costs of carrying the bridge loan for the months of March, April and May 2007, and to pay the costs incurred by the Seller by reason of the delay in the acquisition of the replacement property (Third Amended Answer, ¶ 120).

The Procedural History

Following the sale of the property, the parties' efforts have been devoted to the pending litigation. By decision and order, dated April 21, 2008, this court granted the Seller leave to serve its second amended answer (*see Tracey v Bright City Dev., LLC*, 19 Misc 3d 1127 [A], 2008 WL 1903529, 2008 NY Slip Op 50915 [U] [Sup Ct, Kings County 2008]). On October 20, 2009, the Seller commenced Action No. 2 against the Developer, its Members, and the LLC. By short-form order, dated February 16, 2010, this court granted the Seller leave in Action No. 1 to serve a third amended answer that incorporated the allegations of its complaint in Action No. 2, deemed the motion of the Developer and its Members to dismiss Action No. 2 to apply to the new cross claims brought by the Seller in its third

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[2] The sale of the property has rendered moot the Investor's twelfth (declaratory judgment), thirteenth (another declaratory judgment), and fourteenth (injunction) causes of action against the Seller, the Developer, and the Developer Members.

amended answer, and directed the Seller to submit a stipulation of discontinuance of Action No. 2 without prejudice or costs. By short-form order, dated March 5, 2010, the court (Miller, J.) directed that the Developer produce certain records of disbursements past June 30, 2007 and extended the deadline for the filing of a note of issue to June 30, 2010.

Analysis

1. The Investor's Claims Against the Seller

The Investor's theory of recovery against the Seller is that the Seller conspired with the Developer Members "to use [his] money to sign a contract of sale which in turn was used by both parties to secure a bridge loan of 2.8 million dollars from which both parties profited" (Tracey Aff., ¶ 36). The Investor blames the Seller for using his $800,000 investment to purchase the replacement property without holding the money in escrow as understood (Complaint, ¶ 55). The Investor's claims against the Seller sound in conversion (the sixth cause of action), unjust enrichment (the seventh cause of action), and aiding and abetting of a breach of fiduciary duty owed to the Investor by the Developer, its Members, and Mr. Mooney (the ninth cause of action). As part of its motion for leave to serve the third amended answer, the Seller seeks dismissal of all of the Investor's claims against it.

(a)

To state a claim for conversion, a plaintiff must allege "legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights"

(*Whitman Realty Group., Inc. v Galano*, 41 AD3d 590, 592 [2d Dept 2007]). "Tangible personal property or specific money must be involved" (*Fiorenti v Central Emergency Physicians, PLLC*, 305 AD2d 453, 455 [2d Dept 2003]).

The Investor's claim for conversion against the Seller is dismissed for three reasons. First, the Seller received the initial down payment of $395,000 from a common fund consisting of money separately contributed by the Investor ($400,000) and the Developer ($100,000) (Stoddard Aff., ¶ 25); the Seller also received the subsequent down payment from the same common fund consisting of additional money separately contributed by the Investor ($400,000) and the Developer ($50,000) (*id.*); therefore, the Investor's funds are not sufficiently identifiable for the purposes of establishing a conversion claim. Second, there is no "unauthorized dominion" over the Investor's funds because, in accordance with the First Amendment to the purchase agreement, the Seller was permitted to use the down payment before closing. Third, and equally important, the Seller refunded $780,000 of the $790,000 down payment to the Developer before closing. Accordingly, the Investor has failed to allege the requisite elements of a conversion claim against the Seller.

(b)

"The term 'unjust enrichment' does not signify a single well-defined cause of action" (22A NY Jur 2d, Contracts § 523). "Rather, such an action is for restitution or based upon quasi-contract" (*Matter of Estate of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997]). The elements of a restitution claim in quasi-contract are that the defendant has received a benefit

or was enriched at the plaintiff's expense under circumstances that would make it unjust and against equity and good conscience for the defendant to retain what is sought to be recovered (*see Anesthesia Assocs. of Mount Kisco, LLP v Northern*, 59 AD3d 481 [2d Dept 2009]).

Here, the Seller was not unjustly enriched at the Investor's expense. The Investor's payments were for the deposit on the property to be acquired by the partnership in which the Investor was a member at that time. Following the Investor's withdrawal from the partnership, the Seller obtained a bridge loan and returned the deposit to the Developer. The Developer's subsequent failure to settle its account with the Investor cannot be attributed to the Seller. Thus, the Investor's claim for unjust enrichment against the Seller is also dismissed.

(c)

A claim for aiding and abetting of a breach of fiduciary duty has three elements: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that [the] plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Regarding the second element of knowing participation, "there must be an allegation that such defendant had actual knowledge of the breach of duty" (*id.*). The Investor's allegation of the Seller's purported knowledge of the Developer's breach is extremely sparse and wholly conclusory, consisting of this single statement: "I believe that Defendants Stoddard and Frank in their roles as members of BCD [the Developer] conspired with Defendant Vitanza to use my

money to sign a contract of sale which in turn was used by both parties to secure a bridge loan of 2.8 million dollars from which both parties profited" (Tracey Aff., ¶ 36). Apart from this allegation, there are no facts in the complaint from which it could be inferred that the Seller had actual knowledge that the Developer and its Members were misusing the Investor's funds. Instead, just the opposite was true. The Seller did not know of the existence of the Investor, who was not a party to the purchase agreement or a member of the Developer. Thus, there is no basis for the imposition of aider and abettor liability on the Seller.

2. The Investor's Claims Against the Developer

The Investor contends that a "partnership [has been] . . . formed among Plaintiff, Stoddard, Frank, Mooney, and ostensibly Bright City," that he "clearly retained a majority interest in the partnership," and that he is entitled to examine the partnership books and to obtain information relating to the partnership and his interest in the partnership (Complaint, ¶¶ 30-31, 133-134, 141-142). The Investor's claims against the Developer and its Members sound in fraud, negligence, breach of fiduciary duty, breach of an implied covenant of good faith and fair dealing, waste, conversion, unjust enrichment, deceptive acts and practices under General Business Law §§ 349 and 350, aiding and abetting the violation of a fiduciary duty, restriction and denial of access to books and records, and refusal to render information on demand.

In general, one partner may not sue another at law for damages relating to the affairs of partnership unless there has been a full accounting, prior settlement or adjustment of the partnership affairs (*see 1056 Sherman Ave. Assocs. v Guyco Constr. Corp.*, 261 AD2d 519, 520 [2d Dept 1999]; *see also Goodwin v MAC Resources Inc.*, 149 AD2d 666, 667 [2d Dept 1989] [an accounting is necessary before a partner can proceed against other partners in an action at law]).

The Investor's complaint in its tenth and eleventh causes of action states a valid claim for an accounting against the Developer and its Members (Complaint, ¶¶ 137, 144). Essentially, this claim is to recover the Investor's interest in what remains after his capital has been employed in and subjected to the risks of the investment, and, at most, all he is entitled to recover is the balance, if any, that will be found due upon an accounting (*see Conroy v Cadillac Fairview Shopping Center Props. (Maryland), Inc.*, 143 AD2d 726, 726-727 [2d Dept 1988] [where the complaint sufficiently pleaded a prior demand for and refusal of an accounting by alleging a demand for and refusal of true and full information about the financial affairs of the partnership, the defendants' motion to dismiss the complaint was properly denied]). Accordingly, the Investor's claims against the Developer may not be maintained at this time, except for those portions of the tenth and eleventh causes of action which seek an accounting.

Rather than specifically respond to this point, however, the Investor contends that the Developer's motion should be denied in its entirety as premature because discovery is

incomplete, in that the financial records of the Developer and the LLC are yet to be produced, the Investor's deposition is yet to be completed, and Mr. Mooney's deposition is yet to be taken (Investor's Memorandum of Law, at 14-16). All the same, the outstanding discovery cannot change the Investor's status as a partner in the partnership with the Developer and others. Nor can it change the Investor's basic legal theory against the Developer which sounds in an accounting (*see Duche v Star Recycling*, 261 AD2d 503, 504 [2d Dept 1999] ["The plaintiffs failed to submit any evidence sufficient to raise a triable issue of fact that the defendants were not immune from suit under (a particular legal theory), and the plaintiffs' mere hope that somehow they will uncover evidence that will prove their case provides no basis pursuant to CPLR 3212 (f) for postponing summary disposition"]).

The Investor further argues that material issues of fact preclude dismissal of every cause of action pleaded in his complaint (Investor's Memorandum of Law, at 19-21). While there may be issues of fact as to the Developer's ancillary legal theories (*e.g.*, negligence, breach of a fiduciary duty, and breach of an implied covenant of good faith and fair dealing), "the general rule that partners may not sue each other at law on any claim relating to the partnership unless there has been an accounting and a 'balance struck' or a promise to pay" remains unaffected (*see Silverman v Caplin*, 150 AD2d 673, 674 [2d Dept 1989], *appeal dismissed* 74 NY2d 793 [1989]). Not only there has been no accounting in this case, but also there has been no "balance struck" or a promise to pay. Although exceptions to the general rule have been recognized where the wrong alleged involves a partnership transaction which

can be determined without an examination of the partnership accounts (*see Simons v Doyle*, 262 AD2d 236, 237 [1st Dept 1999]), or where no complex accounting is required or only one transaction is involved which is fully closed but unadjusted (*see Giblin v Anesthesiology Assocs.*, 171 AD2d 839, 840 [2d Dept 1991]), these exceptions do not apply here, where resolution of the Investor's claims will involve examination of the partnership books and records covering a period of at least two years (*see Wiesenthal v Wiesenthal*, 40 AD3d 1078, 1080 [2d Dept 2007]). Therefore, the court dismisses the portion of the Investor's complaint which seeks to enter judgment against the Developer (*see Schiavone Const. Co. v Impresit-Girola-Lodigiani, Inc.*, 1992 WL 88178, *5-6 [SD NY 1992]), except for those portions of the tenth and eleventh causes of action which seek an accounting (*see Gaentner v Benkovich*, 18 AD3d 424, 427 [2d Dept 2005]). On a final note, the court observes that the dispute over the financial aspects of the transaction, including the need to inspect the books and records of the partnership, precludes the grant of summary judgment to the Developer on the accounting cause of action (*see Simons*, 262 AD2d at 237 ["the resolution of . . . claims for damages arising out of the sale of property subject to the parties' partnership agreement requires inspection of the records and expenses of the partnership"]).

3. The Seller's Cross Claims Against the Developer

(a)

The Seller's theory of liability against the Developer is that the Developer and the Investor entered into a plan and scheme to defraud the Seller, and to cause it to agree to

accept a sum substantially lower than the agreed-upon sales price (Third Amended Answer, ¶ 69). As alleged, part of such plan and scheme was to have the Investor file a notice of pendency against the property to give the Developer an excuse to refuse to close title on February 23, 2007 (¶ 70). These allegations furnish the basis for the Seller's second counterclaim (malicious prosecution), third counterclaim (abuse of process), second cross claim against the Developer (breach of contract), third cross claim against the Developer Members (unjust enrichment), fourth cross claim against the Developer and its Members (breach of implied covenant of good faith and fair dealing), and fifth cross claim against the Developer and its Members (misrepresentation).

In opposition, the Developer, in the opening and reply affidavits of Ms. Stoddard, has set forth a factual scenario that is in sharp contrast to that which the Seller has alleged. Moreover, the Developer has failed to eliminate all material issues of fact, and thus the denial of that branch of its motion which is for summary judgment is warranted (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

(b)

Turning to the branch of the Developer's motion for dismissal of the Seller's claims pursuant to CPLR 3211 (a) (1) and (a) (7), the doctrine of merger upon the closing of title does not preclude the Seller from asserting claims against the Developer. In paragraph 2.a of the amendment to the purchase agreement between the Seller and the Assignee, the Seller expressly has reserved its post-closing rights against the Developer. One of these rights is to pursue the Developer for its express undertaking to pay $366,677.50 in accordance with

Paragraph 5 of the Second Amendment. While the Developer contends that such obligation did not extend past the February 23, 2007 "time of the essence" closing date, the plain language of the Second Amendment is to the contrary. Paragraph 5 of the Second Amendment requires payment of this sum at the "Closing," and Paragraph 2 of the Second Amendment defines "Closing" as "the closing of title pursuant to this contract" without tying it to a particular date. Although the closing of title could have occurred on February 23, 2007, that was not the only permissible date for closing to occur pursuant to Paragraph 2 of the Second Amendment. In fact, "the closing of title pursuant to this contract" occurred on May 31, 2007, as a result of the parties' adjournment of the closing because of the intervening notice of pendency. Thus, there was a clear intent that the Developer's obligations under Paragraph 5 of the Second Amendment would survive the delivery of the deed (*see H.B. Singer, LLC v Thor Realty, LLC*, 57 AD3d 613, 614 [2d Dept 2008]).

Likewise, a dismissal of the Seller's claims against the Developer on the ground of the Statute of Frauds is unwarranted. The Second Amendment and the subsequent, May 14, 2007 amendment to the purchase agreement constitute the requisite writings establishing the Seller's claims against the Developer in the amount of $366,677.50. The documents annexed to the Developer's papers support, rather than refute, the Seller's allegations that the

Developer failed to pay $366,677.50 toward the bridge loan at closing of the subject property.[3]

(c)

The Seller's fraud claim against the Developer is not duplicative of his breach of contract claim, nor is it based merely on future expectation of the Developer's performance under the purchase agreement (*see Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 488 [2d Dept 2004]). "[A] cause of action for fraud will not arise if the alleged fraud restates the facts of the breach of contract claim; a fraud claim must be based on some additional representation, omission, or conduct, other than the contract itself, which was fraudulent when performed" (*Gotham Boxing Inc. v Finkel*, 18 Misc 3d 1114 [A], 2008 WL 104155, *10, 2008 NY Slip Op 50020 [U] [Sup Ct, New York County 2008]).

The Seller's fraud claim (the sixth cross claim in the Third Amended Answer in Action No. 1 and the first cause of action in the complaint in Action No. 2) is based on the bridge loan, rather than on the purchase agreement. In particular, the Seller alleges that at the closing of the bridge loan on November 30, 2006, the Developer and its Members directed that their portion of the bridge loan proceeds be transmitted to the LLC (Third Amended Answer, ¶ 107). According to the Seller, the Developer and its Members represented to the Seller that such proceeds would be used to repay certain costs associated

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[3] Contrary to the Developer's contention, the Second Amendment did not fail for lack of consideration because the February 23rd closing did not take place. Among other things, the Second Amendment canceled a note and mortgage which the Seller had executed and delivered with respect to the initial down payment (Second Amendment, ¶ 4).

with the subject property, the costs of carrying the bridge loan, and the Seller's costs incurred by reason of the delay in the acquisition of the replacement property, that the Seller relied upon these representations so made, but that all these representations were false and known to them to be false at the time such representations were made to the Seller, and such representations were made with intent to defraud the Seller (¶¶ 108-110). According to Seller, the Developer and its Members misappropriated $519,240.51 of the $1,146,668.50 given or credited to them from the proceeds of the bridge loan (Vitanza Aff., ¶ 20). At the direction of the Developer and its Members, $898,616.67 of the $1,146,668.50 received and credited to them from the proceeds of the bridge loan was deposited in a bank account of the LLC on December 1, 2006 (Third Amended Answer, ¶ 114). Thereafter, $433,846 of the $898,616.67 was paid over by the LLC to the Developer, which, in turn, paid it over to or for the benefit of the Developer Members for their personal use (¶¶ 115, 117), and $86,394.51 of the $898,616.67 was paid over by the LLC to Joanne Frank's father for his personal benefit (¶ 115). The Seller alleges that had it known that the Developer and the Developer Members did not intend to utilize $519,240.51 ($433,846 + $86,394.51) of the $1,146,668.50 given or credited to them from the proceeds of the bridge loan for the specified purposes, the Seller would not have borrowed $2,800,000 under the bridge loan and would not have given them $1,146,668.50, but would have declared the Developer to be in default under the purchase agreement and would have retained the entire down payment of $790,000 as liquidated damages, as well as avoided the costs of the bridge loan (¶ 118). The Seller asserts that by virtue of the foregoing it was defrauded and that the Developer Members were

unjustly enriched (¶¶ 121, 124). Viewed in the light most favorable to the Seller as the non-moving party, and according it the benefit of every possible favorable inference, the facts as alleged meet the adequacy and the particularity standards of CPLR 3211 (a) (7) and CPLR 3016 (b) (*see Pludelman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 493-494 [2008]).

(d)

The Seller's claim against the Developer for unjust enrichment is not duplicative of its breach of contract claim under the purchase agreement because such claim relates to the bridge loan. "As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept 2009] [internal quotation marks omitted]). Here, however, the bridge loan was a transaction separate from the purchase agreement (*see Elbroji v 22 East 54th St. Rest. Corp.*, 67 AD3d 957, 957 [2d Dept 2009] ["where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract, and will not be required to elect his or her remedies"] [internal quotation marks omitted]).

4. The Investor's Claims and the Seller's Cross Claims Against the Developer Members

Both the Investor and the Seller assert claims against the Developer Members for personal liability. One of the primary and legitimate purposes of incorporating is to limit or eliminate the personal liability of corporate principals. "Nevertheless, equity will intervene

to 'pierce the corporate veil' and permit the assertion of claims against the individuals who control the corporation, in order to avoid fraud or injustice" (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344 [2d Dept 2006]). To hold the individual members of the corporation liable by piercing the corporate veil – a doctrine also applicable to limited liability companies (*see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]) – a third party must show that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [party] which resulted in [the party's] injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016-1017 [2d Dept 2007]). A decision to pierce the corporate veil is a fact-driven inquiry that is "particularly unsuited for resolution on summary judgment" (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]).

At this juncture, it is premature for the court to determine whether the Investor and the Seller have established a sufficient basis for piercing the corporate veil under these general rules. First, the Developer and its Members are subject to an outstanding order of discovery compelling them to produce certain records of disbursements past June 30, 2007. Once produced, the records will, among other things, either confirm or deny the Developer Members' position that since the commencement of this litigation, the Developer has spent

far in excess of $300,000 in attorneys' fees to vacate the Investor's notice of pendency, to assign its rights under the purchase agreement, to defend the claims of the Investor and cross claims of the Seller, and to prosecute its counterclaims (Stoddard Aff., ¶ 58).

Second, as pointed out by the Investor, it appears that the Developer and its Members have not fully complied with a prior discovery order, dated December 21, 2009 (Investor's Memorandum of Law, at 13-14) (*see Giarguaro S.p.A. v Amko Intl. Trading, Inc.*, 300 AD2d 349, 350 [2d Dept 2002] ["Under the circumstances of this case, the plaintiffs are entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil, particularly since the defendant('s) document production was deficient. (Defendant) should not receive a benefit by having the complaint dismissed insofar as asserted against him for lack of evidence based upon his failure to comply with written discovery demands"]).

Finally and crucially, the Investor and the Seller allege that the Developer Members used their dominion and control over the Developer and the LLC to commit a fraud or wrong against the Investor and the Seller. Specifically, they allege that $519,240.51 in bridge loan proceeds were paid to the LLC, then to the Developer, and then from the Developer into the pockets, or for the benefit, of the Developer Members or their families (*see 107 Realty Corp. v National Petroleum U.S.A., Ltd.*, 181 AD2d 817, 818 [2d Dept 1992] [finding that where plaintiff alleged that defendants were "actually doing business of the corporate defendants in their individual capacities, shuttling their personal funds in and out of the corporations without regard to formality and to suit their convenience . . . so as to completely dominate

and control the corporate defendants," allegations for piercing the corporate veil were sufficiently alleged to survive a motion to dismiss] [internal quotation marks omitted]; *Sequa Corp. v Christopher*, 176 AD2d 498, 498 [1st Dept 1991] [a complaint which seeks to pierce the corporate veil should be upheld unless it can be said that it "is totally devoid of solid non-conclusory allegations"]). Accordingly, that branch of the Developer Members' motion to dismiss and/or for summary judgment is denied without prejudice to renewal after discovery is completed and a note of issue is filed (*see* CPLR 3211 [d], CPLR 3212 [f]; *Giarguaro*, 300 AD2d at 350).

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. MARK I. PARTNOW J.S.C.