[* 1]

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

PRESENT: Hon. CAROL EDMEAD Justice J.S.C. PART 35

Mitchell Maxwell & Jackson

-v-

US Realty and Investment etal.

INDEX NO. 600102/10

MOTION DATE 3/26/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	
Answering Affidavits - Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by the defendants U.S. Realty Management Company, LLC, Aetna Realty Company, Benjamin Braka and Christopher Sgambati, pursuant to CPLR §3013 and CPLR §3016 (b), dismissing the first cause of action by the plaintiff Mitchell, Maxwell & Jackson, Inc., for failure to plead fraudulent misrepresentation with particularity is denied; and it is further

ORDERED that the branch of the motion by the defendants U.S. Realty Management Company, LLC, Aetna Realty Company, Benjamin Braka and Christopher Sgambati, pursuant to CPLR §3211 (a)(7) dismissing the second cause of action for breach of fiduciary duty, fourth cause of action for unjust enrichment, and fifth cause of action for violation of Racketeer Influenced Corrupt Organization Act 18 US Code §1962 (c) and §1962 (d) is granted, and said causes of action are severed and dismissed; and it is further

ORDERED that the branch of the motion by the defendants U.S. Realty Management Company, LLC, Aetna Realty Company, Benjamin Braka and Christopher Sgambati, pursuant to CPLR §3211 (a)(10) dismissing plaintiff's complaint for failure to join an indispensable party is denied; and it is further

ORDERED that the branch of the motion by the defendant Safra National Bank, pursuant to CPLR §3211 (a)(7) dismissing plaintiff's third cause of action for fraud and fifth cause of action for violation of Racketeer Influenced Corrupt Organization Act 18 US Code §1962 (c) and §1962 (d) is granted, and said causes of action are severed and dismissed; and it is further

ORDERED that the branch of the motion by the defendant Safra National Bank, pursuant to CPLR §3211 (a)(7) dismissing the fourth cause of action for unjust enrichment is denied; and it is further

ORDERED that the branch of the motion by the defendant Safra National Bank, pursuant to CPLR §3211 (a)(10) dismissing plaintiff's complaint for failure to join an indispensable party is denied; and it is further

ORDERED that the cross-motion by plaintiff Mitchell, Maxwell & Jackson, Inc. pursuant to CPLR §3025 (b) for leave to amend the complaint joining Luiz Antonio Bull as a defendant in this action, is granted solely to assert a cause of action for fraud; and it is further

ORDERED that the cross-motion by plaintiff pursuant to CPLR §3025 (b) for leave to amend the complaint to assert a cause of action for violation of Racketeer Influenced Corrupt Organization Act 18 US Code §1962 (c) and §1962 (d) against defendant Luiz Antonio Bull is denied; and it is further

ORDERED that this action is stayed pending resolution of the arbitration between Northwest 5th and 45th Realty Corporation and plaintiff Mitchell, Maxwell & Jackson, Inc.; and it is further

ORDERED that the caption shall be amended as follows:

----------X

MITCHELL MAXWELL & JACKSON, INC.,

Plaintiff,

Index No. 600102/2010

-against-

US REALTY AND INVESTMENT COMPANY,
AETNA REALTY COMPANY,
SAFRA NATIONAL BANK OF NEW YORK,
BENJAMIN BRAKA, CHRISTOPHER SGAMBATI,
LUIZ ANTONIO BULL and JOHN and JANE DOE,

Defendants.

----------X

and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support Office (Room 158) shall amend the caption accordingly; and it is further

ORDERED that plaintiff shall serve the said amended complaint upon all parties within 30 days of this order; and it is further

ORDERED that defendants U.S. Realty Management Company, LLC and Aetna Realty Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED

JUL 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated 7/7/10

ENTER: CAROL EDMEAD, J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 3]

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

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MITCHELL MAXWELL & JACKSON, INC.,

Plaintiff,

Index No. 600102/2010

-against-

US REALTY AND INVESTMENT COMPANY, AETNA REALTY COMPANY, SAFRA NATIONAL BANK OF NEW YORK, BENJAMIN BRAKA, CHRISTOPHER SGAMBATI, and JOHN and JANE DOE,

Defendants.

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

MEMORANDUM DECISION

This is an action by a commercial tenant to recover damages for overcharged operating expenses by a building management company.

Defendants U.S. Realty Management Company, LLC[1] ("US Realty"), Aetna Realty Company ("Aetna"), Benjamin Braka ("Braka") and Christopher Sgambati ("Sgambati") (collectively, the "Management defendants") move pursuant to CPLR §3013, CPLR §3016 (b), CPLR §3211 (a)(7) and CPLR §3211 (a)(10) to dismiss the complaint by plaintiff Mitchell Maxwell & Jackson, Inc. ("plaintiff"). Also before the court is a motion by Safra National Bank ("Safra"), pursuant to CPLR §3211 (a)(7) and CPLR §3211 (a)(10), dismissing the causes of action asserted against it by plaintiff. Plaintiff cross-moves pursuant to CPLR §3025 (b) to amend the complaint to add Luiz Antonio Bull as a defendant in this action.

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[1] Defendants' motion indicates that the name "U.S. Realty and Investment Company", as it appears in the caption herein, is incorrect.

FACTUAL BACKGROUND

Plaintiff, a residential and commercial appraisal company, is a tenant-lessee of the ninth floor of 546 Fifth Avenue, New York, New York (the "premises" or the "building"). Northwest 5th and 45th Realty Corporation is the owner-lessor of the premises ("Northwest") and is not a named party to this action. US Realty is the managing agent of the subject property. Braka is a vice-president and Sgambati is an employee of Aetna, a subdivision of US Realty. Safra is another tenant-lessee of the premises.

On or about March 25, 2009, plaintiff requested an audit of certain disputed common area charges and/or operational expenses and discovered that the subject charges apparently included certain expenses for bank security services of Safra (complaint, ¶31). Plaintiff's attempts to obtain an explanation of the charges from the building management were unsuccessful.

In December 2009, pursuant to an arbitration agreement between plaintiff and Northwest, plaintiff commenced an arbitration proceeding against Northwest for the overcharged operational fees. On or about March 18, 2010, plaintiff started this court action.

Complaint

In the first cause of action (against all defendants except Safra) for misrepresentation, plaintiff alleges that the Management defendants knowingly made false representations to plaintiff by including in the monthly rent invoices operational expenses incurred solely by Safra, with intent to deceive plaintiff, who, justifiably relying on such representations, paid the invoices, and as a result of which, plaintiff suffered damages in the amount at least $100,000 (id., ¶33-43).

As for the second cause of action (against all defendants except Safra) for breach of

fiduciary duty, plaintiff alleges that the Management defendants "collectively entered into a fiduciary relationship with plaintiff by virtue of acting as the managing agent" of the premises, and "breached its fiduciary duty to plaintiff by acting adversely to the interest of plaintiff and for the benefit of Safra."

In the third cause of action (against Safra and John and Jane Doe) for fraud, plaintiff alleges that Safra and John and Jane Doe "knowingly accepted monthly checks" paid by plaintiff as operational expenses, and used the subject funds to pay for Safra's private bank security services; that Safra and John and Jane Doe had reasonable knowledge of such a "scheme" of fraudulent conduct, as a result of which, plaintiff suffered damages.

In the fourth cause of action (against all defendants) for unjust enrichment, plaintiff alleges that Safra has been unjustly enriched by improperly accepting and retaining payments from U.S. Realty and other named defendants.

In the fifth cause of action (against all defendants) for violation of Racketeer Influenced Corrupt Organization Act 18 USC §1962 ("RICO"), plaintiff alleges that defendants violated 18 USC §1962 (c) by "continuously direct[ing] the in house accounting department located in Egg Harbor, New Jersey[2] to misallocat[e] monthly Operational Expenses away from defendant Safra [. . .] [t]hereby allocating additional and fraudulent charges to other tenants at 546 Fifth Avenue" (complaint, ¶ 62) and thus, "defendant Safra acquired additional funding for its building and personal expenses." Further, defendants committed conspiracy pursuant to 18 USC §1962 (d). Plaintiff seeks at least $100,000 in compensatory damages and at least $300,000 in punitive

[2]The rent invoices which included the charges for operational expenses, were apparently generated by Aetna's accounting department located in Egg Harbor, New Jersey (complaint, ¶19).

damages, preliminary and permanent injunction enjoining defendants from misallocating operational expenses to plaintiff, and attorney's fees.

The Management Defendants' Motion

The Management defendants (or, alternatively, "defendants") move to dismiss on several grounds: for failure to plead the fraudulent misrepresentation and RICO claims with particularity, for failure to state a cause of action, and for failure to join an indispensable party.

Defendants argue that plaintiff's claim for fraudulent misrepresentations lacks the particularity as required by CPLR §3016 (b) and, what is alleged as "fraudulent misrepresentation," is a mere "billing error." Thus, they argue, because the claim is vague, ambiguous and speculative, it should be dismissed.

Further, defendants assert that there is no fiduciary relationship between the defendants as a building managing agent and plaintiff as a tenant-lessee, and the parties neither by their conduct, nor by an agreement, indicated that they intended to create fiduciary relationship.

Next, defendants argue that the unjust enrichment claim has not been stated because plaintiff did not allege that the Management defendants were enriched.

Defendants further assert that plaintiff failed to state a civil RICO claim pursuant to 18 USC §1962 (c) because the complaint contains no allegations of (1) a requisite pattern of racketeering; (2) the existence of an enterprise among the defendants; (3) particularized facts as to each individual defendant, or (4) some nexus to the interstate commerce, as all the alleged acts took place in New York. And, plaintiff's claim under 18 USC §1962 (d) likewise fails inasmuch as it alleges the conspiracy to violate 18 USC §1962 (c), and plaintiff's claim under that section is deficient.

Finally, defendants argue, the complaint should be dismissed for failure to join Northwest, the landlord, as an indispensable party, since this is a dispute between plaintiff and its landlord, who allegedly, through its managing agent, misappropriated the money improperly charged to plaintiff as the operating expenses.

Safra's Motion to Dismiss

Safra moves pursuant to CPLR §3211 (a)(7) dismissing the causes of action for fraud, unjust enrichment and violation of RICO and, pursuant to CPLR §3211 (a)(10) dismissing the complaint for failure to join an indispensable party (the landlord).[3]

Safra argues that plaintiff has not pled facts sufficient to sustain his claim for fraud, because the complaint has no allegations that Safra made any false representations to plaintiff, or the circumstances thereof (time, place or who made them); that plaintiff cannot state his claim for unjust enrichment since it has not asserted any facts as to how Safra benefitted from the payments; and that plaintiff is attempting to transform this "landlord-tenant dispute" into a criminal conspiracy claim under RICO. Plaintiff has not alleged Safra's participation in a criminal enterprise in an interstate commerce, or a pattern of criminal acts, or that Safra knowingly entered into an agreement with the other defendants to commit at least two predicate acts.

Further, Safra argues that Northwest is a necessary party to this action because, if Northwest is not joined, Safra and the remaining defendants could not be awarded complete relief, *i.e.*, "they will be unable to mitigate with Northwest any damages the Court may award";

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[3] In support, Safra submits an Affidavit of Luiz Antonio Bull (who appears to be a Chief Operating Officer of Safra and also, a director of Northwest), the main thrust of which is that Safra has no legal affiliation with Northwest and has not collected any fees from Northwest to pay for the bank private security services. The motion is also supported by an Affirmation of Barry Fischer.

Northwest's interests would be "inequitable affected" since "it will be unable to defend itself against plaintiff's claims as to the collection of the allegedly overcharged amounts for the operational expenses," and, if plaintiff prevails in the arbitration, it would be precluded from litigating its claims against the defendants in this action under the principle of collateral estoppel.

However, argues Safra, because plaintiff has made an election of remedies by previously commencing an arbitration against Northwest, joinder is not possible now, and thus, this litigation should be dismissed, or, in the alternative, stayed pending conclusion of the arbitration.

Plaintiff's Opposition and Cross-Motion

Plaintiff opposes both the Management defendants' and Safra's motions[4], arguing that the Management defendants "knowingly made misrepresentations of operational expenses both in person, during the audit, and through the phone, written and email communications," including on June 15, 2009, when the Management defendants presented plaintiff with the invoice for operational costs without itemizing the charges. Plaintiff relies on the invoice for "bank security services," electricity and insurance for 2008, as evidence of fraud by Safra,[5] asserting that discovery in this litigation will yield additional evidence with respect to the overcharges in operational expenses for the years 2005, 2006, 2007 and 2009; and, that, in the alternative, the court should grant plaintiff a leave to amend its complaint to plead fraud with greater specificity.

Further, plaintiff argues that the Management defendants breached their "fiduciary duty of loyalty to protect the interests of [plaintiff] as a tenant "against the adverse interests of the other

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[4] In support, plaintiff submits an Affirmation of its counsel Nicole M. Noonan and an Affidavit of Steven M. Knobel ("Knobel"), the president of plaintiff.

[5] The court notes that attached to Knobel Affidavit are a copy of the invoice, an email and a signature page of the Lease agreement between plaintiff and Northwest.

tenants" (*id.*, at 8). Plaintiff further contends that Safra bank was unjustly enriched as it "reaped the benefit" by using plaintiff's operational costs payments for its own private expenses, and that its RICO claim is sufficiently plead and is more clearly stated in the RICO statement attached to the Complaint.[6]

Further, plaintiff contends that Northwest is not a necessary party to this action because it was merely a vehicle, used by the named defendants "to maintain their scheme," but, even if deemed a necessary party, failure to join Northwest should be excused [based on the five factors enumerated in CPLR §1001 (b)[7]], because, in the event of the dismissal for nonjoinder, plaintiff will have no other effective remedy. Alternatively, plaintiff has no objections against either joining Northwest as a defendant, or the defendants impleading Northwest or Northwest intervening in the present action.

Plaintiff further asserts that it had commenced the arbitration proceeding against Northwest to preserve its rights under the lease agreement containing a 60-day limitation clause regarding the operational expenses disputes and because of the Management defendants continuous delay in providing plaintiff with operational costs statements (plaintiff's opposition, at p.6). Plaintiff further notes that, under the existing lease agreement, "the election remedy is plaintiff [sic.] exclusive remedy against Northwest [. . .] for the Operational Expense

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[6] The court notes that plaintiff has not attached the RICO statement to its motion.

[7] Plaintiff appears to be citing CPLR § 1001(b) which sets forth five factors for a court's determination of whether the necessary party's absence may be excused: (1) whether the petitioner has another remedy if the action is dismissed for non-joinder; (2) the prejudice to defendant or non-joined party; (3) whether the prejudice may be avoided; (4) the feasibility of a protective provision and (5) whether an effective judgment may be rendered in the absence of the non-joined party.

Statements" (*id.*)[8]

In its cross-motion, plaintiff moves to amend its complaint to include Luiz Antonio Bull ("Bull") as a defendant in this action, based on Bull's alleged personal involvement, as a Chief Operating Officer of Safra bank and also a director of Northwest, in authorizing the overbilling of plaintiff (plaintiff's amended complaint, ¶¶ 17-18; cross-motion, at p. 11). Plaintiff supports its cross-motion with an Affidavit by Bull (Safra's motion) and an Affidavit of Steven Knobel, president of plaintiff,[9] stating that Safra paid for its security services with the money charged as "operational expenses" to plaintiff and other tenants of the premises. Plaintiff also offers one of the biweekly invoices, dated September 15, 2008, from Anthony Paul Goetz Inc. (who appears to be a security services consultant) to Safra bank, showing charges for bank security related services. The invoice contains handwritten notes, stating "[illegible] from Northwest $2658.67" and a signature of Bull (exhibit B to Steve Knobel Affidavit), and a copy of email communications between Bull and Safra's human resources employees with respect to authorizing a payment of $12,500 to the bank security consultant, and containing handwritten notes with respect to allocation of the funds: "GL[D] . . . = [$]4166.25" and "[illegible] from Northwest = $8,333.75" (exhibit C to Knobel Affidavit). Finally, plaintiff asserts that no party will be prejudiced as a result of his joinder since it will not change the theory of the case and no discovery has taken place.

In their reply, the Management defendants reiterate that plaintiff's fraudulent

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[8] Since plaintiff has not attached the subject lease agreement to its papers, it is unclear to the court what plaintiff's "exclusive remedy" is.

[9] Plaintiff attaches as exhibit A, a copy of the signature page of the lease agreement (undated) between Northwest and plaintiff, signed by Bull as a director of Northwest.

misrepresentation claim lacks specificity and that the unjust enrichment and RICO claims are deficient.

Safra also opposes plaintiff's cross-motion to amend the complaint arguing that, the proposed complaint does not state fraud and RICO claims either against Bull or Safra since there are no allegations that Bull knowingly made false misrepresentations to plaintiff . . . or that plaintiff relied on such misrepresentation," or that Bull or Safra were directly involved in the allocation of the operational expenses or facilitating payments between Safra and Northwest.

Safra further argues that the proposed complaint does not state a claim for unjust enrichment against Safra. The allegation that Safra "received monies under circumstances where is was [sic] unjust for defendant to retain said monies" (proposed complaint, ¶63), does not satisfy the "particularity" pleading requirements of CPLR §3013, and ignores that it is Northwest, and not Safra, who received the payments for operational expenses.

Finally, Safra contends that the liability of defendants in this action cannot be determined unless Northwest is also joined as a defendant because Northwest, as a landlord, authorized the collection of the operational expenses at issue; that CPLR §1001(b) is inapplicable because Northwest is subject to the court's jurisdiction, and that, as evidenced by the plaintiff's Demand for Arbitration, the nature of the dispute and the relief sought in both the present action, and the arbitration, are "substantively identical."[10] And, if Northwest is not joined, there is a risk of inconsistent decisions, or, if plaintiff succeeds in both the arbitration and the litigation, it may recover twice.

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[10] The Demand for Arbitration dated December 10, 2009, states as the nature of the dispute "Landlord Tenant dispute regarding the escalation of fees" and the amount of the claim as $75,000, plus punitive damages and costs. The complaint in the instant action states a request for at least $100,000 in compensatory damages and at least $300,000 in punitive damages.

DISCUSSION

THE MANAGEMENT DEFENDANTS' MOTION

Misrepresentation: CPLR §3013 and CPLR §3016 (b)[11]

The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v Dreyer and Traub*, 219 AD2d 321, 643 NYS2d 33 [1st Dept 1996]). While CPLR §3013 provides for particularity of pleadings in general, CPLR §3016 (b) requires specificity when pleading, among others, a cause of action for misrepresentation.[12]

However, the purpose of the CPLR §3016 (b) "particularity" requirement is to give [defendant] adequate notice of the claim (see *Foley v D'Agostino*, 21 AD2d 60, 64, 248 NYS2d 121 [1st Dept 1964]). Indeed, the Court of Appeals has specifically noted that "this provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in

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[11] The first cause of action is for "misrepresentation," however, plaintiff frames it as a fraudulent misrepresentation; thus, the court will analyze it as such.

[12] CPLR §3013 states:

> Particularity of statements generally. Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

CPLR Rule 3016 (b) provides:

> (b) Fraud or Mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail.

detail the circumstances constituting a fraud" (*Lanzi v Brooks*, 43 NY2d 778, 402 NYS2d 384 [1977] [citation omitted]). "[T]he requirement of section 3016(b) that the complaint must sufficiently detail the allegedly fraudulent conduct, should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 367, 837 NYS2d 10 [1st Dept 2007]).

Thus, "taken in the light most favorable to the nonmoving party, and according that party the benefit of every possible favorable inference, we determine only whether the facts as alleged are cognizable within the claim asserted to section 3016(b)'s satisfaction (*Pludeman*; see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414, 729 NYS2d 425 [2001]). And, where as here, the concrete facts "are peculiarly within the knowledge of the party charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings" (*Jered Contr. Corp. v New York City Transit Authority*, 22 NY2d 187, 194, 292 NYS2d 98 [1968]); see *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 285-286, 519 NYS2d 804 [1987]; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97-98, 753 NYS2d 493 [1st Dept 2003]; see also Siegel, 2003 Supp. Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3016:3, 2008 Pocket Part, at 17 [Misrepresenters have not been known to keep elaborate diaries of their fraud for the use of the defrauded in court]).

"A complaint should not be dismissed on a pleading motion, so long as, when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists" (*Eiseman Levine Lehraupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 2008 WL 7514501 [NY

Sup Ct, New York County 2008]; citing *Rosen v Raum*, 164 AD2d 809, 811 [1st Dept 1990], *citing R.H. Sandbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989] [internal citation omitted]).

In applying the above standards, plaintiff, however inartfully, stated a cause of action for fraudulent misrepresentation against the Management defendants.

In *Greenstone/Fontana Corp. v Feldstein*, the court denied a motion to dismiss fraud claims, premised upon the alleged falsification of the billing records sent by the defendants advertising agencies to the plaintiff's automobile dealerships, thereby deceiving the plaintiff and resulting in plaintiff being overbilled *(Greenstone/Fontana Corp. v Feldstein*, 20 Misc 3d 1118, 867 NYS2d 16 [Sup Ct, Nassau County 2008], *citing Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007] [fraud claim based on padded bills survives 3211 motion]).

Similarly here, the complaint alleges that the Management defendants made "false misrepresentations" by presenting plaintiff with falsified bills under the guise of the otherwise valid building operational expenses, resulting in plaintiff's overpayments in the course of approximately five years. Furthermore, plaintiff's allegations coupled with the factual circumstances are sufficiently specific to make out a claim that the rent invoices by the Management defendants for the relevant time periods were knowingly false. Indeed, based on the allegations in the complaint, defendants cannot seriously contend that they lack the requisite notice to determine which statements/expenses are at issue as the complaint provides the details regarding the nature of the misrepresentations (falsely inflated charges for operational expenses), the parties involved (the management company and its affiliate), the identities of the individual defendants, and the time frame (at least from 2003 to 2008).

Further, defendants' argument that plaintiff has not alleged specific details of each individual defendant's conduct, is unavailing and unsupported by the case law. New York courts "have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery. Lest we willfully ignore the obvious--or the strong suspicion of a fraud--we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*Pludeman v Northern Leasing Systems, Inc.*, at 493; *see Jered Contracting Corp. v New York City Transit Auth.*; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 735 NYS2d 479 [2001]; *see also Board of Mgrs. of 411 E. 53rd St. Condominium v Dylan Carpet*, 182 AD2d 551, 552, 582 NYS2d 1022 [1st Dept 1992]).

Thus, here, the very nature of the alleged falsifications (monthly overcharges under the guise of the otherwise valid operational expenses) by the Management defendants, gives rise to the reasonable inference – rebuttable though it may later prove to be– that the [Management] defendants' officers, as individuals and in the key positions they held, knew of and/or were involved in the fraud (*see Pludeman*; *Houbigant; see also Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182, 641 NYS2d 1006 [NY Sup Ct, New York County 1996], *order aff'd without opinion,* 240 AD2d 253, 659 NYS2d 734 [1st Dept 1997][a concealment of fact one has an obligation to disclose, with the intent to defraud, has same legal effect as an affirmative misrepresentation]). Thus, based on these allegations, the finder of facts could reasonably infer the requisite knowledge or participation by the individual defendants.

Further, the allegations that the defendants knew of plaintiff's obligation under the lease to pay the rent invoices and that plaintiff relied upon those invoices to comply with its

obligations as a lessee, are sufficient to adequately plead intent and reasonable reliance by plaintiff. As the *Jered* Court recognized with respect to fraud, sometimes the surrounding circumstances are "peculiarly within the knowledge of the party against whom the [claim] is being asserted" (*Jered,* 22 NY2d at 194).

Therefore, taking the facts in the light most favorable to plaintiff, and according plaintiff the benefit of every possible favorable inference, the court finds that, at this stage of the proceedings, the allegations are sufficiently pled to sustain a fraudulent misrepresentation claim against the Management defendants.

Breach of Fiduciary Duty: CPLR §3211 (a)(7)

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). "Affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims" (*Eiseman, citing R.H. Sandbar*, 148 AD2d at 318).

To maintain a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty between the parties and a breach of that duty by the defendant (*Thermal Imaging, Inc. v Sandgrain Sec., Inc.*, 158 F Supp2d 335 [SDNY 2001]). Under New York law, a fiduciary

relationship arises "when one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*Eurycleia Partners LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 [2009]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). Put differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158, 866 NYS2d 578 [2008] [internal quotation marks and citation omitted]). Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry (*id.*)

Generally, where parties have entered into a contract, courts look to that agreement "to discover [. . .] the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency" (20 Misc 3d 1134, 872 NYS2d 690 [NY Sup Ct Kings County 2008], *citing Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 160 [1993]). "If the parties [. . .] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*id.*).

The Appellate Division, First Department, held that "[a] fiduciary relationship does not exist between parties engaged in an arm's-length business transaction [. . .] which is normally the situation between a landlord and tenant" (*Sehera Food Services Inc. v Empire State Bldg. Co. L.L.C.*, --- NYS2d ----, 2010 WL 2302365, 2010 NY Slip Op 04935 [1st Dept 2010]; *Andejo Corp. v South Street Seaport Ltd. Partnership*, 40 AD3d 407, 836 NYS2d 571 [1st Dept 2007] [No fiduciary duty existed between owners of seaport and tenants to support breach of fiduciary duty claim related to leases, where owners were not signatories to leases between their subsidiary and tenants]; *Dembick v 220 Central Park South, LLC*, 33 AD3d 491 [1st Dept 2006]).

Here, the court finds no fiduciary relationship between plaintiff and the Management defendants in the absence of allegations that either a contract exists, or that plaintiff "placed a higher trust or confidence" in the defendants. Plaintiff's conclusory allegations that the building managing defendants "collectively entered into a fiduciary relationship with plaintiff" and breached it "by acting adversely to the interest of plaintiff and for the benefit of Safra thereby causing damages to plaintiff," are insufficient to sustain a cause of action for breach of fiduciary duty.[13] Thus, this cause of action against the Management defendants is dismissed.

Unjust Enrichment

In order state a claim of unjust enrichment, a plaintiff must allege that he or she "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]). The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 884 NYS2d 47 [1st 2009]; *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007] [citation and internal quotation marks omitted]; *see also Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 405 [1st Dept 2008]; *Korff v Corbett,* 18 AD3d 248, 251 [1st Dept 2005], *quoting Wiener v Lazard Freres & Co.,* 241 AD2d 114, 119 [1st Dept 1998]; *Nakamura v Fujii et al., supra*).

Based on the alleged facts, the court has difficulty concluding that the Management defendants have received any benefit, let alone unjust enrichment (*Ruha v Guior*, 277 AD2d 116,

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[13] The court also notes that this cause of action is not pleaded with "particularity" required by CPLR §3016 (b).

717 NYS2d 35 [1st Dept 2000]). The allegation that the Management defendants conferred a benefit on Safra by collecting the operational fees thereby defraying Safra's bank security costs, is insufficient to state a cause of action for unjust enrichment against the Management defendants. Thus, this cause of action is dismissed.

RICO Claim

The court finds that plaintiff failed to properly plead civil RICO violations pursuant to 18 USC §1962 (c)[14] and 18 USC §1962 (d).

To state a civil RICO claim, plaintiff must plead a conduct of an enterprise involved in the interstate commerce through a pattern of racketeering activity (*Simpson Elec. Corp. v Leucadia, Inc.*, 72 NY2d 450, 534 NYS2d 152 [1988]; *DC Media Capital, LLC v Sivan*, 2009 WL 1030808, 2009 NYSlip Op 30650 [U] [NY Sup Ct 2009] (Trial Order), *citing Podraza v Carriero*, 212 AD2d 331, 335 (4th Dept 1995) (*quoting Sedima v Imrex Co.*, 473 US 479, 496 [1985]); see 18 USC §1962 [c]). Civil RICO claims are subject to heightened pleading requirements (*CFJ Assoc. of N.Y. v Hanson Indus.*, 274 AD2d 892, 896, 711 NYS2d 232 [3d Dept 2000]; *Besicorp Ltd. v Kahn*, 290 AD2d 147, 151, 736 NYS2d 708, *lv denied* 98 NY2d 601, 744 NYS2d 761 [2d Dept 2002]).

Racketeering activity includes the commission of specified state-law crimes, conduct indictable under various provisions within Title 18 of the United States Code, including mail and wire fraud, and certain other federal offenses (18 USC §1961(1); *see H.J. Inc. v Northwestern*

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[14] 18 USC § 1962 (c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in [. . .] interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

18 USC § 1962 (d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

Bell Tel. Co., 492 US 229, 232 [1989]). In order to prove a pattern, at least two related predicate acts must be shown (18 USC § 1961(5); *see also GICC Capital Corp. v Technology Fin. Group*, 67 F3d 463, 465[2d Cir 1995]).

Here, plaintiff's factual allegations, while sufficient to support its fraud and misrepresentation claims, do not give rise to a RICO claim (*see, CFJ Assoc. of N.Y. v Hanson Indus.*, 274 AD2d 892, 896, 711 NYS2d 232 [3d Dept 2000]; *United Knitwear Co., Inc. v North Sea Ins. Co.*, 203 AD2d 358, 612 NYS2d 596 [2d Dept 1994]). Plaintiff alleges that defendants "continuously directed the in-house accounting department in Egg Harbor, New Jersey to produce the rent invoices with fraudulent charges for operational expenses" (complaint, ¶62). These allegations are insufficient to state a "pattern" of racketeering activity, or any of the enumerated in the statute "predicate acts." Moreover, lack of particularity in asserting this claim is fatal.

Accordingly, since plaintiff has failed to sufficiently plead two or more predicate acts under RICO, the cause of action based on 18 USC § 1962 (c) is dismissed. And, since the remaining cause of action under 18 USC § 1962 (d) is premised upon a conspiracy to have committed the predicate acts discussed above, this cause of action must also fail. Thus, the civil RICO claim against the Management defendants is dismissed.

Indispensable Party: CPLR §3211 (a)(10)

CPLR §1001(a) provides that indispensable parties are "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action . . ." Courts deem "indispensable" "the parties who must be joined lest the action be dismissed" (*Saratoga County Chamber of*

Commerce, Inc. v Pataki, 100 NY2d 801, 819, 766 NYS2d 654, 665 [2003]). Thus, the movant must demonstrate that a party's joinder is "necessary to accord full relief to the parties presently joined," or that the absent party will be "inequitably affected by any judgment that may result in this action" (*CBS Corp. v Dumsday,* 268 AD2d 350, 353 [1st Dept 2000]; *TK Marketing, Ltd. v National Ben. Life Ins. Co.*, 160 AD2d 665, 666 [1st Dept 1990]; *Eclair Advisor Ltd. v Jindo America, Inc.*, 39 AD3d 240, 244-245 [1st Dept 2007]).

Here, the Management defendants failed to demonstrate that Northwest's joinder is necessary to accord full relief to the parties presently joined, or that, if not joined, Northwest will be inequitably affected by any judgment that may result in this action (CPLR §1001[a]). Northwest is the landlord of the premises operated by the Management defendants. If plaintiff is successful in recovering damages against the Management defendants for fraudulent misrepresentation, plaintiff would have a meaningful judgment even though it might not bind Northwest, who is not a party to this litigation. The Management defendants cannot avoid litigating plaintiff's claim merely by pointing to Northwest as a mastermind in "pocket[ing] [the] windfall operating expenses [. . .] at plaintiff's expense" (motion, at p. 20).

And, even if Northwest were deemed a necessary party and thus, could be joined, being subject to this court's personal jurisdiction, that plaintiff previously started an arbitration proceeding against Northwest, does not make Northwest an "indispensable party" warranting dismissal of the action.

SAFRA'S MOTION

Safra moves to dismiss plaintiff's complaint pursuant to CPLR §3211 (a)(7) for failure to state a cause of action for fraud, unjust enrichment and violation of RICO and, pursuant to CPLR

§3211 (a)(10), for failure to join an indispensable party.

Fraud

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Eurycleia Partners LP v Seward & Kissel, LLP,* 12 NY3d 553, 559, 883 NYS2d 147, 150 [2009], *quoting Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, *supra*, at 492; *Ross v Louise Wise Servs. Inc.*, 8 NY3d 478, 488, 836 NYS2d 509 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421, 646 NYS2d 76[1996]).

Although the court is mindful that plaintiff need not produce absolute proof of fraud (*Eurycleia*, at 559), under the facts of this case, the allegations in the complaint, coupled with the surrounding circumstances, do not give rise to a reasonable inference that Safra committed fraud (*id.* [Although there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action]).

The complaint is devoid of any allegations that Safra made false representations to plaintiff. Nor there are any factual assertions from which this conclusion can be drawn. The allegations that Safra "accept[ed] monthly checks collected by the [Management defendants] from plaintiff" and that Safra's Chief Operating Officer Luiz Bull "oversaw and approved payments [to] Safra" made by Northwest, even if true, do not establish any of the elements of this claim. Further, an allegation that "Bull was personally involved in fraudulent misrepresentation in his capacity as a Chief Operating Officer of Safra," is insufficient to state that Safra made a material misrepresentation of a fact to plaintiff. Furthermore, any discovery yielding additional evidence with respect to the overcharges in operational expenses for the years 2005, 2006, 2007

and 2009 cannot overcome the absence of any material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance. And, as plaintiff failed to allege any facts concerning these latter elements of fraud, leave to amend the complaint to assert additional facts is unwarranted. Thus, the fraud claim against Safra is dismissed.

Unjust Enrichment

As explained above, a cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another (*Mandarin Trading Ltd. v Wildenstein*, *supra*; *Sperry v Crompton Corp.*, *supra*). Furthermore, "[i]t does not matter whether the benefit is directly or indirectly conveyed" (*Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117-118, 559 NYS2d 704, *lv denied* 77 NY2d 803, 568 NYS2d 15, *citing Blue Cross of Cent. N.Y. v Wheeler,* 93 AD2d 995, 461 NYS2d 624 [4th Dept 1983]). "A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied or where he is saved an expense or loss" (*id.*)

Here, it is alleged that the excessive operational fees collected from plaintiff, helped defray the costs of the Safra bank security services, thereby saving Safra an expense of maintaining the bank's safety and possibly some personal expenses.

Furthermore, even though Safra's conduct may not have been fraudulent as it relates to plaintiff, "unjust enrichment does not require the performance of any wrongful act by the one enriched" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]). Thus, even assuming that Safra's principals, which are allegedly also Northwest principals, "never accepted any checks collected

by the other named defendants, or authorized the allocation of payments from the funds related to the operational costs of Northwest,[15] plaintiff stated its grounds for unjust enrichment. And, since at this point, plaintiff need only allege the necessary elements of the claim, and not provide evidentiary support, the court finds the unjust enrichment claim against Safra adequately pleaded.

RICO Claim

The allegations of violations of 18 USC §1962 (c) and 18 USC §1962 (d) are insufficient to give rise to a RICO claim against Safra since plaintiff has not adequately pleaded facts of a conduct of an enterprise through a pattern of racketeering activity across state lines. Plaintiff's allegations that Safra "received more favorable treatment by the landlord and managing agent than did plaintiff," fail to state any of the elements of a RICO claim. Thus, this portion of the motion is granted.

Indispensable Party

CPLR §3211 (a)(10)

Stay of Arbitration

Safra moves to dismiss the complaint for failure to join Northwest as an indispensable party, and in the alternative, to stay this action pending the arbitration. As the court earlier determined, Northwest is not an indispensable party, and, as explained above, a previously commenced arbitration proceeding against Northwest, does not warrant a dismissal of the present litigation.

Applying the same principles as discussed above, the issue in both proceedings is the same (overbilling of the operational costs) and, the same individuals allegedly own and control

[15] See Affidavit of Luiz Antonio Bull.

both Northwest and Safra, rendering Safra closely related to Northwest (see *NAMA Holdings, LLC v Greenberg Traurig, LLP, supra*; *Pacer /Cats/CCS v MovieFone, Inc., supra*).

Further, pursuant to CPLR §2201, "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just" *(Hope's Windows v Albro Metal Products Corp.*, 93 AD2d 711 [1st Dept 1983], appeal dismissed, 93 AD2d 711 [1st Dept 1983]). New York courts have stayed litigation proceedings that included parties who were not signatories to the subject arbitration agreement where the nonsigning party was closely related to the signatories and was alleged to have engaged in substantially the same improper conduct (*NAMA Holdings, LLC v Greenberg Traurig, LLP*, 62 AD3d 578, 880 NYS2d 34 [1st Dept 2009]; *Pacer /Cats/CCS v MovieFone, Inc.*, 226 AD2d 127, 640 NYS2d 55 [1st Dept 1996]).

In addition, the First Department has recognized that the prospect of a later collateral estoppel due to a judgment in another pending action is a valid ground for ordering a stay pursuant to CPLR § 2201 (*Belopolsky v Renew Data Corp.*, 41 AD3d 322, 322-23 [1st Dept 2007] [even though there was no complete identity of parties, there were overlapping issues and common questions of law and fact, and the determination of the prior action may dispose of or limit issues which are involved in the subsequent action]; *Schneider v Lazard Freres & Co.*, 159 AD2d 291, 293-94 [1st Dept 1990]).

Here, the issues in this litigation (inflated operational expenses fees), while framed slightly differently, are identical to the issues raised in the arbitration ("escalation of fees"). In addition, if plaintiff prevails in the arbitration, the determination of plaintiff's damages by the arbitration panel may dispose of or limit the issues of the operational costs, involved in the present action.

Furthermore, such a stay will promote judicial economy by avoiding inconsistent or duplicitous results and permitting the arbitration panel to resolve the common issues before the parties and the court commit additional time and resources to the resolution of this matter (Zodkevitch v Feibush, 17 Misc 3d 1106, 2007 NYSlip Op 51856 [U], *10 [Sup Ct, New York County 2007]; *see also Schneider v Lazard Freres, supra*, at 295 [It makes little sense to go full steam ahead with an action when the plaintiff stands to be made whole in another action, and this is so even when the other action is against a different defendant]). Furthermore, if plaintiff prevails in the arbitration, it may be precluded to litigate its claims against Safra in this action under the principle of collateral estoppel (*Schneider v Lazard Freres & Co., supra; Belopolsky v Renew Data Corp., supra*). Therefore, this branch of Safra's motion is denied and this action is stayed pending resolution of the arbitration between plaintiff and Northwest.

PLAINTIFF'S CROSS-MOTION TO AMEND

Plaintiff moves pursuant to CPLR §3025 (b) to amend the complaint to add Luiz Bull as a defendant, alleging fraudulent misrepresentation (fraud) and RICO violation. In the memorandum in support of the cross-motion, plaintiff also states that Bull was "personally involved in breach of fiduciary duty" (cross-motion, at p.10), however, plaintiff has not named Bull in this cause of action in the proposed amended complaint.

Leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party *(Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). The movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage*

Corp. v H.K.L. Realty Corp. at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]).

The opposing party must demonstrate that the facts alleged and relied upon in the moving papers are "obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr,* at 371).

When a party seeks not only to amend the pleadings, but also to assert claims against persons sought to be joined as additional parties in the action (CPLR §1003), the court may also consider the prejudice to the other defendants and the extent of the delay in moving to add the new parties and the reasons therefor (*Haughton v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 305 AD2d 214 [1st Dept 2003]; *Konrad v 136 East 64th Street Corp.*, 246 AD2d 324 [1st Dept 1998]).

Fraud

Applying the above discussed principles, the court finds that the allegations in the proposed complaint, coupled with the surrounding circumstances, give rise to a reasonable inference that Bull committed fraud. Plaintiff's factual assertions that Bull, as a Chief Operating Officer of Safra and also, as a director of Northwest (proposed amended complaint, ¶¶ 17-18), controlled the financial affairs of said entities and authorized the overcharges presented to plaintiff as the building maintenance charges, and paid for by plaintiff, are sufficient to state a cause of action for fraud against Bull.

Moreover, contrary to Safra's contention, plaintiff's allegations are amplified by evidence

showing that Bull had direct involvement in the allocation of the operational expenses: an invoice with handwritten notes and a signature by Bull, identical to that on the signature page of the lease agreement between plaintiff and Northwest, and a copy of emails showing that Bull authorized the use of the Northwest funds for the bank security services reimbursements (exhibit C to Knobel Affidavit). The affidavits offered by Safra have failed "to overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment."

Therefore, since the alleged claim for fraud against Bull has merit, and in the absence of demonstrated prejudice or surprise to the defendants (*Eighth Ave. Garage Corp.*), the cross-motion to amend the complaint to assert this claim against Bull is granted.

RICO Claim

The court finds the allegations that Bull was involved in facilitating payments between Northwest and Safra bank insufficient to plead a "conduct of an enterprise through a pattern of racketeering activity across state lines" (*see Besicorp Ltd. v Kahn*; *CFJ Assoc. of N.Y. v Hanson Indus.*, *supra*). Thus, the cross-motion to amend the complaint to assert a RICO claim against Bull is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the branch of the motion by the defendants U.S. Realty Management Company, LLC, Aetna Realty Company, Benjamin Braka and Christopher Sgambati, pursuant to CPLR §3013 and CPLR §3016 (b), dismissing the first cause of action by the plaintiff Mitchell, Maxwell & Jackson, Inc., for failure to plead fraudulent misrepresentation with particularity is

denied; and it is further

ORDERED that the branch of the motion by the defendants U.S. Realty Management Company, LLC, Aetna Realty Company, Benjamin Braka and Christopher Sgambati, pursuant to CPLR §3211 (a)(7) dismissing the second cause of action for breach of fiduciary duty, fourth cause of action for unjust enrichment, and fifth cause of action for violation of Racketeer Influenced Corrupt Organization Act 18 US Code §1962 (c) and §1962 (d) is granted, and said causes of action are severed and dismissed; and it is further

ORDERED that the branch of the motion by the defendants U.S. Realty Management Company, LLC, Aetna Realty Company, Benjamin Braka and Christopher Sgambati, pursuant to CPLR §3211 (a)(10) dismissing plaintiff's complaint for failure to join an indispensable party is denied; and it is further

ORDERED that the branch of the motion by the defendant Safra National Bank, pursuant to CPLR §3211 (a)(7) dismissing plaintiff's third cause of action for fraud and fifth cause of action for violation of Racketeer Influenced Corrupt Organization Act 18 US Code §1962 (c) and §1962 (d) is granted, and said causes of action are severed and dismissed; and it is further

ORDERED that the branch of the motion by the defendant Safra National Bank, pursuant to CPLR §3211 (a)(7) dismissing the fourth cause of action for unjust enrichment is denied; and it is further

ORDERED that the branch of the motion by the defendant Safra National Bank, pursuant to CPLR §3211 (a)(10) dismissing plaintiff's complaint for failure to join an indispensable party is denied; and it is further

ORDERED that the cross-motion by plaintiff Mitchell, Maxwell & Jackson, Inc.

pursuant to CPLR §3025 (b) for leave to amend the complaint joining Luiz Antonio Bull as a defendant in this action, is granted solely to assert a cause of action for fraud; and it is further

ORDERED that the cross-motion by plaintiff pursuant to CPLR §3025 (b) for leave to amend the complaint to assert a cause of action for violation of Racketeer Influenced Corrupt Organization Act 18 US Code §1962 (c) and §1962 (d) against defendant Luiz Antonio Bull is denied; and it is further

ORDERED that this action is stayed pending resolution of the arbitration between Northwest 5th and 45th Realty Corporation and plaintiff Mitchell, Maxwell & Jackson, Inc.; and it is further

ORDERED that the caption shall be amended as follows:

----------X
MITCHELL MAXWELL & JACKSON, INC.,

Plaintiff,

Index No. 600102/2010

-against-

US REALTY AND INVESTMENT COMPANY,
AETNA REALTY COMPANY,
SAFRA NATIONAL BANK OF NEW YORK,
BENJAMIN BRAKA, CHRISTOPHER SGAMBATI,
LUIZ ANTONIO BULL and JOHN and JANE DOE,

Defendants.
----------X

and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support Office (Room 158) shall amend the caption accordingly; and it is further

ORDERED that plaintiff shall serve the said amended complaint upon all parties within

30 days of this order; and it is further

ORDERED that defendants U.S. Realty Management Company, LLC and Aetna Realty Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: July 7, 2010

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

HON. CAROL EDMEAD