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

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 602873/2007
CURRIE, IAN J.
VS.
GLOVER, SIMON
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 602873/07
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

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, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 03 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/30/10

BARBARA R. KAPNICK J.S.C.
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

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IAN J. CURRIE,

Plaintiff,

- against -

SIMON GLOVER, SRIO FOUNDATION, CERES HOLDING GROUP LLC, CERES COMMODITIES GROUP LLC, ROLAND SANCHEZ and MARINA KHARITON,

Defendants.

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DECISION/ORDER
Index No. 602873/07
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

This action arises out of a Settlement Agreement in an earlier action in which plaintiff Ian J. Currie ("Currie") and certain of his affiliates were preliminarily enjoined from transferring the business of defendants Ceres Holding Group, LLC ("Ceres Holding") and Ceres Commodities Group LLC ("Ceres Commodities", and together with Ceres Holdings, "Ceres') to Monaco.

Pursuant to the Settlement Agreement dated March 2, 2007, defendants Simon Glover ("Glover") and SRIO Foundation ("SRIO") agreed to cause Ceres to pay Currie 55.754% of the book value of Ceres as of February 28, 2007, as determined by an independent audit, in exchange for Currie's relinquishing his entire interest in Ceres. Although the audit showed that Currie, who had received $200,000 in cash and approximately $539,000 in tax credits under the Settlement Agreement, was entitled to no further amounts,

Currie commenced this lawsuit, asserting causes of action for breach of contract, rescission/fraud, fraudulent conveyances, conversion and an accounting.

Defendants now move, pursuant to CPLR §§ 3212, for summary judgment dismissing the complaint.

Background

Currie, a commodities trader with over 25 years experience in the coffee and cocoa markets, is a citizen of the United Kingdom who resides in Monaco. Glover is also a citizen of the United Kingdom who has a residence in Connecticut. Currie helped found Ceres in 2003 to engage in commodities trading for coffee and cocoa. Glover joined Ceres shortly after its formation. Glover held his interests through SRIO, a Liechtenstein entity that he controlled and which invested $900,000 in Ceres. Dundee, Inc. ("Dundee"), a Delaware corporation controlled by Currie, was the 90% owner of Ceres Holding, a Delaware limited liability company, whose sole asset is 100% of Ceres Commodities. Defendant Roland Sanchez managed the day-to-day affairs of Ceres. Defendant Marina Khariton was Ceres' Chief Financial Officer.

Ceres had two bases of operation – one in New York City, led by Sanchez, and one in London, led by Currie. According to Currie,

in 2005, Glover embarked on a scheme to utilize Ceres' line of credit and other resources to make personal trades in commodities. Currie asserts that with the full knowledge of Sanchez and Khariton, Glover opened a new commodities trading account at Ceres' brokerage firm in late 2005, and began to incur large losses, all in the name of Ceres. Currie asserts that by the end of July 2006, Glover had wrongfully withdrawn at least $1.5 million from Ceres due to the personal trading losses.

In late 2006, Currie proposed that Ceres close its New York operations, and transfer all activities to a BVI company formed by Currie and based in Monaco, in order to save costs. Glover objected to such action and he and SRIO commenced an action in the Supreme Court, New York County entitled *SRIO v Ceres, et al.*, Index No. 116721/06 seeking to enjoin Currie from "transferring all or a significant portion of its assets to [the new BVI Company] without plaintiff's consent." After a hearing on the record on February 7, 2007, Judicial Hearing Officer ("JHO") Ira Gammerman issued a preliminary injunction enjoining Currie from transferring any of Ceres' assets outside of the United States.

Currie alleges that in support of this claim, Glover represented that he and SRIO held, indirectly, 45% of the membership interests in Ceres, which interests were "worth

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approximately $1.3 million" (Complaint, ¶ 12). Currie further alleges that Sanchez submitted an affidavit dated November 27, 2006 in support of Glover's claim, in which he attested that "Ceres currently has approximately $3 million in equity" (*id.*). In addition he claims that Ceres' principal assets were "accounts receivables for cocoa and coffee, actually delivered [and] inventory of cocoa and coffee futures positions" (*id.*). However, Currie asserts that neither Sanchez nor Glover mentioned Glover's personal trading account or his large debt, which, by November 30, 2006, stood at approximately $1.5 million. Moreover, at the hearing before JHO Gammerman, both Glover and Sanchez repeated their assertions regarding Ceres' net worth of approximately $3 million, again without mention of Glover's withdrawal of at least $1.5 million as a result of his personal trading losses.

After JHO Gammerman issued the preliminary injunction, the parties engaged in settlement discussions, which resulted in the Settlement Agreement, which released the claims in the lawsuit, and separated Currie and Glover's interests in Ceres. The Settlement Agreement provides in paragraph 5 that:

> In full satisfaction of all interests the Major Shareholders [Currie and related persons] have in the Ceres entities, the Investors [Glover and SRIO] agreed to cause Ceres to pay Currie, or entities he controls,

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(i) US$200,000.00, which is to be received by March 21, 2007; and

(ii) An amount equal to Currie's equity ownership in Ceres as of February 28, 2007 as determined by an independent audit of the Ceres books by Bederson & Company ("Auditors"), and stated on Annex A, less (a) the US$200,000 as referenced in (i) above and (b) the Tax Refunds as referenced in Paragraph 6 below, plus $53,658 as stated in Paragraph 3 above.

Such payments are to be made to Currie, or entities he controls, within 14 business days of the conclusion of the audit by the Auditors (the "Payout Date").

Ceres also agreed to place $600,000 in a separate account to discharge certain contingent indemnity obligations, which if unpaid, would revert to Currie (Settlement Agreement, ¶ 8).

As indicated in the Settlement Agreement, the final amount due Currie was to be determined based on an audit by Bederson & Company ("Bederson"), Ceres' long-time accountants, subject to certain contractual provisions regarding value. Following the execution of the Settlement Agreement, Bederson began to audit Ceres' books and records. Trial balances prepared by Ceres and reviewed by Bederson revealed that the net equity as of February 28, 2007 was approximately $1,200,000, although an asset of approximately $1,100,000 was questioned as being uncollectible.

After conducting a preliminary audit, Bederson prepared a balance sheet which indicated that Ceres had only $121,813 in net assets as of February 28, 2007. Bederson, however, never finished the audit, and resigned in September of 2007.

Currie asserts that he never received a single payment beyond the initial payment of $200,000 in late March 2007. Currie then filed this action in August 2007. Thereafter, the audit of Ceres' net equity was completed by Hirsch Olebaum Bram Hanover & Lisker PC ("Hirsch Olebaum") and reflected a net equity of $1,167,516 as of February 28, 2007.

Discussion

Breach of Contract (First Cause of Action)

In his first cause of action for breach of contract, Currie asserts that SRIO and Ceres have "repudiated and breached the Settlement Agreement" because they "failed to pay plaintiff for his pro rata interest in Ceres' assets at February 28, 2007," and "[t]o avoid payment, they have obstructed the Bederson Firm's audit and diverted the assets of Ceres both before and after February 28, 2007" (Complaint, ¶ 26).

To establish a right to recover for breach of contract, a party must prove (1) the making and existence of a contract; (2)

performance of the contract by the injured party; (3) breach by the other party; and (4) damages. *Furia v Furia*, 116 AD2d 694 [2nd Dep't 1986]; *see also, Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303 (1st Dept 2004). Thus, one of the elements the plaintiff must prove in order to sustain a cause of action for breach of contract is damages (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 [1st Dept 1988]).

In his Rule 19-a Counterstatement in response to defendants' Statement of Material Facts Not in Dispute, Currie admits that he "received the sum of $200,000 specified in section 5 (i) of the Settlement Agreement" and that, prior to the execution of the Settlement Agreement, he or his predecessors in interest "received tax refund payments aggregating approximately $539,000". Under the Settlement Agreement, Currie was entitled to receive, in full satisfaction of his interest in Ceres, 55.754% of the audited book value of Ceres as of February 28, 2007, less $739,294 that he had already received in cash and as a tax credit. Thus, Currie would be entitled to receive additional funds only if the audited net worth of Ceres as of February 28, 2007 exceeded $1,326,325.79.

The record reveals that John Straccamore, a partner at Bederson who conducted the preliminary audit, testified that Ceres' net worth or "member's equity" as of February 28, 2007 was

$121,813. (Straccamore EBT, pp. 47-48). After Bederson resigned, Ceres hired Hirsch Olebaum, who certified Ceres' net worth to be $1,167,516. Given that the net equity of Ceres as of February 28, 2007 was less than $1,326,325.79 under either audit, and because Currie has already received $739,294, which is greater than 55.754% of Ceres' net worth as of February 28, 2007 under either audit, defendant contends that Currie is not entitled to any further payment under the Settlement Agreement. Therefore, Currie cannot allege that he sustained any contract damages, and his claim for breach of the Settlement Agreement must be dismissed.

In opposition, Currie argues that the "true value" of Ceres is a disputed matter and that the validity of the Hirsch Olebaum report is hotly contested. He refers to the fact that Glover and Sanchez testified on February 7, 2007 before JHO Gammerman that Ceres had a net worth of approximately $3,000,000, to support his claim for damages for the alleged breach of the Settlement Agreement.

However, the Settlement Agreement does not state that Currie is entitled to 55.754% of $3,000,000; rather, it provides that he is entitled to 55.754% of Ceres' net worth as of February 28, 2007. Currie's chosen auditors testified that Ceres' net worth was $121,813 at that time. After those auditors resigned, Ceres hired

another auditor who certified its net worth to be $1,167,516. In either case, Ceres' net worth on the relevant date was insufficient to warrant further payment to Currie under the Settlement Agreement.

Currie's position seeks to render paragraph 5(ii) of the Settlement Agreement meaningless, and thus "vitiates the principle that a contract should not be interpreted so as to render any clause meaningless." (*RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [1st Dept 2007], *citing Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 69 (1st Dep't 1999); *see also Two Guys from Harrison v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 (1984).

Accordingly, the first cause of action for breach of contract is dismissed.

Fraud (Second Cause of Action)

In his second cause of action for rescission/fraud, Currie asserts that:

> In order to induce plaintiff to enter into the Settlement Agreement, defendants Glover, SRIO Foundation, Sanchez, and Ceres misrepresented the assets of Ceres, through both their sworn statements and the implied representations in the Settlement Agreement. As defendants well knew, their statements regarding Ceres were false. By March 2, 2007, defendants were in

> the process of substantially depleting the assets of Ceres so that they could take for themselves the value of its business. Plaintiff reasonably relied upon defendants' representations regarding Ceres' financial condition and would not have agreed to the settlement if defendants had disclosed the extent of their diversion of its assets.

(Complaint, ¶ 28).

To properly plead a common-law fraud claim, a plaintiff must allege a misrepresentation of a material fact, falsity of the misrepresentation, scienter, plaintiff's reasonable reliance on the alleged misrepresentation, and injury resulting from the reliance (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]; *see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). The absence of any of these elements is fatal to a recovery on a claim for fraud (*Shea v Hambros PLC*, 244 AD2d 39 [1st Dept 1998]).

Defendants argue that plaintiff has failed to make out a claim for fraud as a matter of law because the Settlement Agreement contains no "implied representations." Paragraph 24 of the Agreement affirmatively states that "[t]his Agreement contains the complete settlement agreement of the parties." Defendants contend that such a provision makes the written document itself the "exclusive evidence of the parties' intent" (*Unisys Corp. v*

Hercules Inc., 224 AD2d 365, 368 [1st Dept 1996], *lv to app granted 88 NY2d 815 (1996), appeal withdrawn* 89 NY2d 1031 [1997]).

Moreover, defendants argue that under New York law, a cause of action seeking damages for fraud cannot be sustained where the only fraud charged relates to a breach of contract (*Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]).

Finally, defendants argue that Currie cannot satisfy the element of reasonable reliance, since the statements that Currie supposedly relied upon, and which were not referred to in the Settlement Agreement, were made at the preliminary injunction hearing in early February 2007 and were based on the financial statements of Ceres as of October 31, 2006, which showed that Ceres had equity of approximately $3 million. Defendants insist that Currie testified during his deposition that he was aware that Ceres was losing money since October 2006, partially as a result of Ceres' bank reducing its available credit, and, therefore, its equity declined. (Currie EBT, pp. 38-41; see also, Currie's testimony at the hearing on February 7, 2007, pp. 99-100).

Following the hearing before JHO Gammerman and the ruling on the preliminary injunction motion, Currie spent almost two weeks examining Ceres' books and records. Defendants argue that under

these circumstances, plaintiff cannot demonstrate reasonable reliance.

Plaintiff, however, argues that he has satisfied each of the required elements to prove fraud. Specifically, plaintiff asserts that he has produced evidence that defendants represented the net equity of Ceres to be approximately $3 million from October 2006 through February 2007 based on the sworn statements made in the prior litigation, and that this was entirely consistent with the way the business was run.

Plaintiff also points to the same portion of his deposition testimony relied upon by defendants to support his claim that he was aware in the summer of 2006 of lowered earnings by Ceres, but not of any losses in October 2006 through February 2007. In fact plaintiff asserts that at the February 7, 2007 hearing, defendants testified that no losses had occurred because Ceres' net assets remained at the same level as in October 2006 - namely, $3 million. Mr. Sanchez also testified that business operations were stable.

Plaintiff further disputes that he had full access to the books and records of Ceres; he claims he only saw what defendants showed him, which was very little. Specifically, in paragraph 21 of Mr. Currie's Affidavit sworn to on May 20, 2009, he states as follows:

> Defendants did not give me full access to Ceres' books and records during the settlement negotiations, or before. I reviewed statements for Ceres' bank accounts, and the physical book containing the contracts for Ceres' cocoa and coffee trades. I was not given any of Ceres' financial statements or records pertaining to the debt owed by Mr. Glover to Ceres. Before I signed the Settlement Agreement, I received a trial balance as of December 31, 2006, prepared by Ms. Khariton and sent to me on February 23, 2007 ... The trial balance did not identify that Mr. Glover owed Ceres a large sum of money, or that most of Ceres' equity was money owed by Mr. Glover. Instead, it contained one entry for "accounts receivable", which I now understand included the amount owed by Mr. Glover. The term "accounts receivable" is customarily used for customers that owed funds to Ceres based on commodities sales.

In reply, defendants argue that this allegation still does not establish that there was reasonable reliance on plaintiff's part because Currie was the controlling shareholder of Dundee, Inc. which was the owner of 90% of Ceres and thus had the absolute right to ask to review all the books and records of Ceres at any time. Relying on the Court of Appeals decision in *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 (1959), defendants assert that

> 'if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations (citations omitted).'

"Moreover, when the party to whom a representation is made has hints of its falsity", (*Global Mins. & Metals Corp. v Holme*, 35

AD3d 93, 100 [1st Dep't 2006]), as defendants argue that plaintiff did here based on the concerns expressed by Mr. Straccamore while he was conducting his audit on behalf of Bederson,

> a heightened degree of diligence is required of it (citation omitted). It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy. (Citation omitted). When a party fails to make further inquiry or insert appropriate language in the agreement for its protection, it has willingly assumed the business risk that the facts may not be as represented. (*Rodas v Manitaras*, 159 AD2d 341, 343 [1st Dep't 1990]).

Global Mins. & Metals v Holme, supra at 100.

However, "when a fiduciary in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make 'full disclosure' of all material facts (*Birnbaum v Birnbaum* [73 NY2d 461, 465])." *Blue Chip Emerald v Allied Partners*, 299 AD2d 278, 279 (1st Dep't 2002).

Moreover, "a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed [agreement]." *Blue Chip Emerald v Allied Partners, supra* at 280; *see also Littman v Magee*, 54 AD3d 14 (1st Dep't 2008).

"Absent such full disclosure, the transaction is voidable (*see Matter of Birnbaum v Birnbaum*, 117 AD2d 409, 416)." *Blue Chip Emerald v Allied Partners, supra* at 279-280; *see also Global Mins. & Metals Corp. v Holme, supra* at 98.

Although plaintiff owned a larger percentage of the business than defendant Glover, Mr. Currie was not involved in the business on a day-to-day basis; rather Mr. Sanchez managed the day-to-day affairs of Ceres and Ms. Khariton was the CFO and handled the financial books and records. Mr. Glover had superior knowledge because he had personally caused and incurred the trading losses of approximately $1.5 million.

Based on the papers submitted, this Court finds that there is an issue of fact as to whether, under the circumstances presented, plaintiff could reasonably have relied on defendants' misrepresentations, which precludes the granting of summary judgment to defendants on the second cause of action.[1]

Debtor and Creditor Law §§ 276 and 273 (Third and Four Causes of Action)

In his third cause of action, Currie asserts a claim under New York Debtor & Creditor Law ("DCL") § 276, alleging that defendants

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[1] The Court also disagrees with defendants' contention that if plaintiff prevails on his fraud claim there would be no resulting damages.

Glover and Sanchez "engaged in a series of transactions that rendered Ceres insolvent, with actual intent to defraud its present or future creditors, such as Currie." (Complaint, ¶ 32). In the fourth cause of action, plaintiff asserts a claim under DCL § 273, asserting that defendants Glover, Sanchez and Khariton "have engaged in conveyances and incurred obligations without fair consideration that have rendered Ceres insolvent". (Complaint, ¶ 36).

DCL Section 276 provides that

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

DCL Section 273 provides that

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Currie has failed to satisfy a threshold element of a claim under either section, i.e., he is not a creditor of Ceres, as he is not owed anything under the Settlement Agreement. DCL § 270 defines a "creditor" as "a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Currie's claim also fails because he fails to identify any "conveyance" made by, or to, any defendant. In opposition to the motion, Currie summarizes the entire basis for his claim under the DCL as follows:

> Here, plaintiff has presented evidence supporting the fact that defendants have rendered Ceres insolvent by their improper transfer of assets. This evidence includes Mr. Glover's improper accrual of debt to Ceres which he never planned on paying back, defendants' improper forgiveness of approximately $350,000 of such debt, and Ceres' suspicious and unaccounted losses and negative gross profit. This evidence is sufficient to support an inference that defendants caused Ceres to make such conveyances with actual intent to defraud and without receiving adequate consideration.

(Pl Mem., at 21).

Pursuant to DCL § 270, a "conveyance" includes "every payment of money, assignment, release, transfer, lease, mortgage or pledge of . . . property." Currie, however, fails to specify any such conveyance. Under DCL §§ 273 and 276, the remedy to which an alleged defrauded creditor is entitled pursuant to such sections "is limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance" (*Joslin v Lopez*, 309 AD2d 837, 839 [2d Dept 2003]). Thus, Currie's failure to identify the conveyance he seeks to set

aside is fatal to his claim, and the third and fourth causes of action are dismissed.

Conversion (Fifth Cause of Action)

In his fifth cause of action for conversion, Currie alleges that:

> 39. Pursuant to the Settlement Agreement, plaintiff was entitled to his percentage interest of the net assets of Ceres as of February 28, 2007. As set forth above, defendants Glover, SRIO Foundation, Sanchez and Khariton have converted, or aided and abetted the conversion of, those assets to their personal enrichment.
>
> 40. Accordingly, plaintiff is entitled to a judgment against defendants in an amount to be determined at trial, but believed to exceed $1.5 million

Defendants argue that this cause of action should be dismissed because the damages that Currie seeks are the very damages that he claims resulted from the alleged breach of the Settlement Agreement, and it is well settled law that "[a] cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]

"Conversion is the unauthorized exercise of dominion or control over specifically identified property (underlining

supplied) which interferes with the owner's rights (citations omitted)." (*Hoffman v Unterbeg*, 9 Ad3d 386, 388 (2nd Dep't 2004). Plaintiff argues that he has presented sufficient evidence that defendants have converted Ceres' assets in which plaintiff had an ownership interest.

Moreover, plaintiff disputes defendants' claim that his conversion claim is duplicative of his breach of contract claim. Specifically, plaintiff argues that his conversion claim is predicated on a duty independent of any created by the Settlement Agreement, in that he claims defendants converted assets in which plaintiff had an ownership interest, regardless of whether he entered into the Settlement Agreement.

However, as defendants set forth, plaintiff's failure to specifically identify any converted property is fatal to his conversion claim. *See, Wornow v Register.Com, Inc.*, 8 AD3d 59, 60 (1st Dep't 2004); *cf. Republic of Haiti v Duvalier*, 24 AD2d 379, 384-386.

Accordingly, the conversion claim is dismissed.

Accounting (Sixth Cause of Action)

In his sixth cause of action for an accounting, Currie asserts that he is "entitled to an accounting for all funds diverted from

Ceres by defendants Glover, Sanchez and Khariton, including to any entities or persons under their control" (Complaint, ¶ 42).

In order to be entitled to an accounting, a party must establish the existence of a fiduciary relationship (*Simons v Ross*, 309 AD2d 667, [1st Dept 2003].

Defendants argue that plaintiff is not entitled to an accounting because there is no basis for concluding that any defendant was a fiduciary of plaintiff's; rather plaintiff and certain defendants are *now* merely parties to a Settlement Agreement.

However, this Court has already found that there was a fiduciary relationship between the parties prior to the execution of the Settlement Agreement, and since this Court has also found that there are issues of fact as to plaintiff's cause of action for rescission/fraud, it would be premature to dismiss the accounting cause of action at this time.

Claims Against Defendant Marina Khariton

Finally, defendants argue that summary judgment should be awarded dismissing all claims against defendant Khariton because she was not a party to the Settlement Agreement, made no representations to Currie, was not involved in the settlement

negotiations and did not receive any of the assets allegedly diverted from Ceres.

However, plaintiff alleges that the evidence shows that defendant Khariton actively participated in defendants' alleged fraud against plaintiff by making false and misleading entries in Ceres' financial records.

Specifically, plaintiff cites to Ms. Khariton's deposition testimony where she testified that she recorded Mr. Glover's debt to Ceres as an asset and reclassified the balance owed by Glover to Ceres as a receivable, despite being aware that Mr. Glover and Mr. Currie were involved in litigation at the time regarding Ceres and that accounts receivable not likely to be collected should be designated as distributions. This led to misrepresentations on the trial balance sheet she prepared for Mr. Currie's review just days before he entered into the Settlement Agreement.

The evidence submitted by plaintiff on this motion raises an issue of fact as to Ms. Khariton's involvement in the fraud allegedly perpetrated on Mr. Currie. Accordingly, that portion of defendants' motion seeking to dismiss the second cause of action against defendant Marina Khariton is denied.

Counsel for all parties shall appear in IA Part 39, 60 Centre Street - Room 208 on August 31, 2010 at 10:30 a.m. to schedule a trial on plaintiff's second cause of action for rescission/fraud and sixth cause of action for an accounting.

This constitutes the decision and order of this Court.

Dated: July 30, 2010

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.