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

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Index Number : 109854/2008

SPITZ, SAUL

VS

POKOIK, GARY A/K/A GARY

Sequence Number : 006

PARTIAL SUMMARY JUDGMENT

INDEX NO. 109854/08

MOTION DATE 7/30/10

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to 54 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	1-22
Answering Affidavits -- Exhibits Notice of X-Motion	23-43
Replying Affidavits	44-54

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: August 12, 2010

JOAN M. KENNEY J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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ESTATE OF SAUL SPITZ and LEE POKOIK a/k/a/ LEON POKOIK,

Plaintiffs,

-against-

GARY POKOIK a/k/a GARY MICHAEL POKOIK a/k/a/ GARY M. POKOIK, et al.,

Defendants.

-and-

DAVIN POKOIK,

Additional Counterclaim Defendant.

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Index No.: 109854/08
DECISION, ORDER & JUDGMENT

JOAN M. KENNEY, J.:

For Plaintiffs:
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For Additional Counterclaim Defendant
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Papers considered in review of this motion and cross motion :

Papers	**Numbered**
Notice of Motion, Affidavit	1-2
Exhibits annexed to Motion A-S	3-22
Notice of Cross Motion, Affidavit	23-24
Exhibits annexed to Cross Motion A-O	25-40
Notice of Cross Motion, Affidavit	41-42
Exhibits annexed to Cross Motion A	43
Reply Papers, Affidavit with Exhibits A-H	44-54

Defendants seek and Order, pursuant to CPLR 3212 (e), granting partial summary judgment for: (1) a declaration that plaintiff, Lee

Pokoik a/k/a Leon Pokoik (Leon) breached his fiduciary duties; (2) a money judgment in the amount of $200,000; and (3) an Order dismissing Leon's affirmative defenses to the counterclaims.

Additional counterclaim defendant Davin Pokoik (Davin) cross-moves for an Oder, pursuant to CPLR 3212, dismissing defendants' counterclaims asserted as against him.

Plaintiff, Leon cross-moves for an Order, pursuant to CPLR 3212, dismissing the counterclaims asserted as against him.

BACKGROUND

The underlying action involves the management of four residential properties owned, in various proportions, by plaintiffs and defendants. The properties are: 242-44 East 77th Street; 234 East 82nd Street; 221 East 76th Street; and 521 East 82nd Street, all in Manhattan. For approximately 30 years, Leon had an ownership interest in the properties and managed the properties on behalf of all of the parties to this action.

In April, 2006, Leon ceded management of the properties to defendants Gary Pokoik (Gary), Jonathan Pokoik and J. Pokoik Realty, LLC in partial settlement of a dispute involving Leon's management of the properties. As part of the settlement, Leon reimbursed the various owners approximately $1.5 million, plus Gary's attorney's fees. After the settlement was reached, Leon and deceased plaintiff Saul Spitz (Spitz) sought an accounting for the subsequent management of the properties.

The instant action was commenced in July, 2008. The third counterclaim that is the subject of the instant motion alleges a breach of fiduciary duty by Leon against his co-tenants with respect to the sale of apartments 5A and 5B, 221 East 76th Street (the Apartment), by Leon to his son, Davin, at a price that defendants assert was $200,000 below market value.

The units were converted into cooperatives in 1983, and, by a co-tenancy agreement among the parties to this action, executed in 1985, Leon and Gary were designated as attorneys-in-fact for the co-tenant owners of the Apartment, plus the other properties indicated above, to manage the apartment for the benefit of all of the co-tenants. Motion, Ex. E. Although Leon and Gary, as the attorneys-in-fact for the properties, were given discretionary authority with respect to the lease and sale of the properties, pursuant to paragraph 7 of the co-tenancy agreement, none of the co-tenants could assign or transfer his or her interest in the unsold shares to anyone other than another co-tenant without the prior written approval of the other co-tenants. *Id.*

Apartments 5A and 5B were combined into one unit in a renovation that cost approximately $145,000.00 paid for by the co-tenants. On September 24, 2004, the Apartment was appraised at $610,000.00 by the financial institution financing Davin's purchase of the apartment. Motion, Ex. R.

In their reply papers, defendants have attached an affidavit

from Brian J Rogers (Rogers), a licensed real estate appraiser, dated July 26, 2010, in which Rogers states that, according to comparable sales at the time the Apartment was sold to Davin, the Apartment would have appraised at $600,000.00. The reply also contains an unsworn letter from Austin Schuster (Schuster), President, NYC Living Realty, dated August 28, 2009, stating that in the author's opinion, the Apartment would have sold, in September, 2004, for between $645,000.00 and $675,000.00. Reply, Ex. E. The price that Davin paid for the Apartment in December, 2004, was $410,000.00, with a mortgage note of $328,000.00. Defendants assert that the sale was effectuated against the best interests of the other co-tenants, was executed without their consent, and allege that Davin has recently placed the Apartment on the market with an asking price of over $800,000.00. Further, defendants point out that, in their replies to the counterclaims, both Leon and Davin state that the purchase of the Apartment was a "friendly family transaction" (Leon Reply, ¶ 36; Davin Reply, ¶ 21), which, defendants aver, evidence that the sale was not an arms-length transaction.

Leon's cross motion seeks to dismiss all of the counterclaims. The first counterclaim seeks the imposition of a constructive trust and an accounting for the difference between the future sales price of the Apartment, should it be sold, and the alleged appraised value of the Apartment. The second counterclaim seeks a permanent

injunction enjoining plaintiffs and Davin from distributing the proceeds from the alleged eventual sale of the Apartment to anyone but defendants.

Leon asserts that, pursuant to the settlement agreement referenced above, executed in 2006, two years after the sale of the Apartment, he and defendants mutually released each other from any and all claims arising out of their dispute with respect to the properties managed by Leon, which, according to Leon, settles the instant counterclaims. The pertinent provision of the settlement, paragraph 11, states:

> "Except for their respective obligations under this Agreement, GP [Gary, Gail Pokoik, and The Marion Pokoik Dick Revocable Trust] and LP [Leon] hereby mutually release each other from any and all claims, of whatever nature or description, arising out of or relating to their dispute regarding various disbursements from the accounts maintained for the respective Properties, including, without limitation, disbursements made to Lee Pokoik Realty, Alternative Plumber, LPGP, 470 Baywalk, Inc., 470 Baywalk Rest., Inc. d/b/a The Alligator, P&B Marina, Lions Farm, Pokoik Enterprises Inc. and Pokoik Racing Stables, Inc."

Cross Motion, Ex. B.

Defendants assert that all of the disbursements so mentioned were those made to Leon's personal companies and business ventures, and does not act as, nor was intended to be, a general release.

Leon also states that, according to the cooperative's offering plan, dated September 25, 2003, a little over one year prior to the sale in question, the asking price for the two units was a combined price of $450,000.00. Cross Motion, Ex. E. Leon says that the

asking price is not necessarily the selling price for any given piece of property. Leon also challenges the admissibility of the financing institution's appraisal, alleging that it is inadmissible because it does not qualify as a business record of defendants.

In addition, Leon contends that defendants knew that Davin was in the Apartment prior to the sale, and implicitly consented to his purchase of the Apartment. Leon makes this assertion based on the fact that Gail Pokoik (Gail) stated at her deposition that she learned that Davin was living in the Apartment before his wedding. Cross Motion, Ex. C. However, there is nothing to indicate that Gail knew that Davin was purchasing the Apartment, just that he was residing in the Apartment.

Leon's affirmative defenses to the counterclaim are:

A. Gross Laches

B. Release

C. Unclean Hands

D. Bad Faith-Equitable Estoppel

E. Waiver

F. Bad Faith-Coercion-Frivolous Counterclaims

G. No Liability Except in Gross Negligence or Act or Omission in Bad Faith

H. Claim Barred by Business Judgment Rule

In his cross motion, Davin states that he has no immediate plans to sell the Apartment, and that no wrongdoing has been

asserted as against him by defendants. However, the court notes that in his answer to the instant complaint, Leon stated that Davin has placed the Apartment on the market for an asking price above his purchase price. Motion, Ex. C.

Davin says that the counterclaims merely allege that he was the beneficiary of the "sweetheart deal" of the sale of the Apartment, but do not allege anything other than that he plans to sell the Apartment without distributing a proportionate share of any profit he may make to the former co-tenants.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of defendants' motion seeking a declaration that Leon breached his fiduciary obligations to defendants when he sold

the Apartment to his son without the co-tenants' written consent, is granted.

A confidential, fiduciary relationship exists between co-tenants, and no co-tenant may purchase or encumber the common property without the other co-tenants' consent. *Snyder v Puente De Brooklyn Realty Corp.*, 297 AD2d 432 (3d Dept 2002). Additionally, a power of attorney, as was given to Leon in the instant case, is "given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" (*Moglia v Moglia*, 144 AD2d 347, 348 [2d Dept 1988]), and also creates a fiduciary relationship between the attorney-in-fact and the principal (*id.*), in the instant case, between Leon and the defendants in this action.

> "[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interests of those owed a fiduciary duty. Included within this rule's broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person 'in such close relation [to the fiduciary] ... that possible advantage to such other person might ... consciously or unconsciously' influence the fiduciary's judgment [internal citations omitted]."

Birnbaum v Birnbaum, 73 NY2d 461, 466 (1989).

In the case at bar, Leon's sale of the Apartment to his son, admitted to be under circumstances of a friendly intra-family transaction, and allegedly at a price below the fair market value

of the Apartment, without the other co-tenants' consent, "violated the precept of undiluted trust at the core of his responsibilities as a fiduciary." *Id.*

Therefore, the court finds that Leon breached his fiduciary duty of unbiased loyalty to his co-tenants when he sold the Apartment to his son without the co-tenants' written consent.

That portion of defendants' motion seeking a judgment in the amount of $200,000, representing what they claim is the difference between the sales price and the fair market value of the Apartment at the time of the sale, is denied.

In support of their motion, defendants have provided three documents that allegedly support their position with respect to the value of the Apartment as of the date of the sale in 2004: (1) the appraisal of the financial institution that financed the purchase; (2) an unsworn letter from Schuster; and (3) an affidavit from Rogers.

Defendants claim that the appraisal from the financial institution is admissible as a business record, and, therefore, may be used to substantiate their claims as to the value of the Apartment in 2004. The court disagrees.

CPLR 4518 (a) states:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the

> regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter."

However, to be admissible, such document must be properly authenticated:

> "each participant in the chain producing the [business] record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception. Thus, ... the entrant must be under a business duty to record the event ... [internal quotation marks and citation omitted]."

Hochhauser v Electric Insurance Company, 46 AD3d 174, 180 (2d Dept 2007).

In the instant matter, if the appraisal were to be the business record of any entity, that entity would be the financial institution that allegedly generated it, not defendants. In order for defendants to rely on such a document in support of a summary judgment motion, the record must be accompanied by authenticating affidavits from the persons who made the record under a business duty to make such record. This is the kind of authentication defendants have failed to provide. Hence, the alleged appraisal made by the financial institution does not appear in the moving papers in admissible form, and, therefore, is insufficient to support defendants' proposition.

The unsworn letter from Schuster is, similarly, inadmissible and without probative weight.

The only document supporting defendants' valuation contention

in admissible form is the affidavit from Rogers; however, that affidavit was prepared six years after the event, and, whereas Rogers states that it was based on contemporaneous sales of similar apartments, this statement lacks supporting evidence. Furthermore, this affidavit appears for the first time in defendants' reply papers, and, therefore, may not be considered by the court. *Matter of Harleysville Insurance Company v Rosario,* 17 AD3d 677 (2d Dept 2005).

In addition, the documents provided by Leon regarding the building's evaluation of the market value of the units are similarly inadmissible without proper authentication.

As a consequence of the foregoing, material questions of fact exist regarding the fair market value of the Apartment at the time of the sale, which precludes granting summary judgment on this portion of defendants' motion.

The court grants that portion of defendants' motion dismissing Leon's affirmative defenses.

All of Leon's defenses to the counterclaims, with the exception of B, release, are pled in a conclusory manner without any factual allegations, and may be summarily dismissed as such. *Cohen Fashion Optical, Inc. v V & M Optical, Inc.,* 51 AD3d 619 (2d Dept 2008); *Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.,* 35 AD3d 317 (1st Dept 2006); *Teachers Insurance and Annuity Association v Tedeschi,* 3 AD3d 671 (3d Dept 2004); *Clifton County Road*

Associates v Vinciguerra, 195 AD2d 895 (3d Dept 1993).

However, even though Leon's defense of release has some support with the inclusion of the 2006 release, the release is insufficient as a matter of law to rebut defendants' allegations.

The counterclaims asserted against Leon sound in breach of fiduciary obligations, and a general release cannot relieve a fiduciary of his fiduciary obligations unless the persons to whom such duty is owed specifically agree to such release. *See Littman v Magee*, 54 AD3d 14 (1st Dept 2008); *H. W. Collections, Inc. v Kolber*, 256 AD2d 240 (1st Dept 1998); *Matter of Newhoff*, 107 AD2d 417 (2d Dept 1985). There is no indication in the release that defendants intended to release Leon from any breach of fiduciary obligations, and the release, as quoted by Leon, only releases him with respect to disbursements made to certain entities, and does not refer to the disbursements to defendants resulting from the sale of the Apartment. In addition, not all of the named defendants were parties to the release, and, consequently, even if the release were to be deemed a general release, it would not relieve Leon of his obligations to all of the defendants. Therefore, this defense to the counterclaims is also dismissed.

Davin's cross motion to dismiss the counterclaims asserted as against him, is denied.

> "Anyone who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby ... and [defendants] raise[] a triable issue of fact as to whether [Davin] directly

> participated in that breach and is therefore liable [internal quotation marks and citations omitted]."

Talansky v Schulman, 2 AD3d 355, 359-360 (1st Dept 2003).

> "Substantial assistance [to a breach of trust] occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur [internal quotation marks and citation omitted]."

Monaghan v Ford Motor Company, 71 AD3d 848, 850 (2d Dept 2010).

At present, the court has insufficient facts regarding Davin's knowledge and active participation in Leon's actions so as to be able to conclude that he is not liable to defendants.

Lastly, Leon's cross motion to dismiss the counterclaims asserted as against him is denied.

For the reasons stated above, the third counterclaim asserted as against Leon cannot be dismissed because the court has found it to be meritorious.

With respect to the first and second counterclaims, under certain circumstances, an allegedly injured party may seek a constructive trust (*Northbay Construction Co., Inc. v Bauco Construction Corp.*, 38 AD3d 737 [2d Dept 2007]) and/or a permanent injunction (*Sager Spuck Statewide Supply Co., Inc. v Meyer*, 273 AD2d 745 [3d Dept 2000]) for breach of a fiduciary duty. In the case at bar, the first and second counterclaims are inartfully worded, and the court cannot ascertain, with any degree of certainty, whether defendants are seeking these remedies only with respect to their alleged damages representing the difference

between the amount Davin paid for the Apartment and its fair market value at that time, or whether defendants are seeking the constructive trust and/or injunction on all of the proceeds of the presumed eventual sale of the Apartment, to which they would not be entitled if they receive the price differential from the 2004 sale, since they have failed to seek recision of that sale.

Since the court has concluded that Leon breached his fiduciary duties to defendants in the sale of the Apartment to his son, these remedies may be appropriate should it eventually be decided that the price Davin paid for the Apartment was below fair market value, and defendants have no other way of being compensated for that dollar difference except by means of a constructive trust or injunction with respect to the eventual distribution of any future sale of the property. As a consequence, these counterclaims cannot be dismissed at this time.

Based on the foregoing, it is hereby,

ORDERED that the portion of defendants' motion for partial summary judgment seeking a declaration that Leon Pokoik breached his fiduciary duty to them when he sold the subject apartment to his son, additional counterclaim defendant Davin Pokoik, is granted; and it is further

ADJUDGED and DECLARED that plaintiff Leon Pokoik breached his fiduciary duties when he sold the unsold shares attributable to the cooperative apartments at 221 East 76 Street, New York, New York,

and the sale of the unsold shares attributable to the cooperative apartments 5A and 5B without the consent and against the best interests of the co-tenants of the apartments when he sold the subject apartment to his son, additional counterclaim defendant Davin Pokoik; and it is further

ORDERED that the portion of defendants' motion for partial summary judgment seeking a monetary award in the amount of $200,000 is denied; and it is further

ORDERED that the portion of defendants' motion for partial summary judgment seeking to dismiss plaintiffs' affirmative defenses numbered A through H to defendants' counterclaims is granted and said affirmative defenses are dismissed; and it is further

ORDERED that plaintiff Leon Pokoik's cross motion for partial summary judgment dismissing the counterclaims asserted as against him, is denied; and it is further

ORDERED that additional counterclaim defendant Davin Pokoik's cross motion for summary judgment dismissing the counterclaims asserted as against him, is denied; and it is further

ORDERED that the parties proceed to their scheduled mediation on August 17, 2010.

Dated: August 12, 2010

ENTER:

Joan M. Kenney, J.S.C.