

Blue Ridge Farms, Inc. v Kontogiannis

2010 NY Slip Op 33814(U)

June 30, 2010

Sup Ct, Kings County

Docket Number: 23246/08

Judge: David I. Schmidt

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At Part COM-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of June, 2010.

P R E S E N T:

HON. DAVID I. SCHMIDT

Justice.

-----X

BLUE RIDGE FARMS, INC., ET AL.,

Plaintiffs,

- against -

Index No. 23246/08

THOMAS KONTOGIANNIS, ET AL.,

Defendants.

-----X

The following papers numbered 1 to 24 read on these motions:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-3 8,9 13,14 19,20 22,23</u>
Opposing Affidavits (Affirmations)_____	<u>4 10 15,16 21 24</u>
Reply Affidavits (Affirmations)_____	<u>5-7 11,12 17,18</u>
_____ Affidavit (Affirmation)_____	_____

Upon the foregoing papers, the motion by defendants Gersten Savage LLP, Robert S. Wolf and David E. Danovitch (collectively, Gersten Savage) for an order, pursuant to CPLR 3211(a) (1) and (7), dismissing the amended cross claims of defendant June Siegel,

individually and as representative of the Estate of Seymour Siegel (June Siegel),¹ the motion by plaintiffs for, among other things, leave to enter a default judgment against defendants Annette Apergis, Chloe Kontogiannis, Georgia Kontogiannis, Lisa Dipinto, Andrew Themis, Chloe Foods S.A., Anperg Inc., BRF Acquisition LLC, Cross Island Plaza Inc., Edgewater Development Inc., Parkview Financial Center Inc. and Plaza Real Estate Holdings Inc. (collectively, the Apergis Defendants), the motion by the Apergis Defendants for an order, pursuant to CPLR 3211, dismissing the cross claims asserted against them by June Siegel, the motion by June Siegel for an order granting summary judgment on her counterclaims against Blue Ridge and the motion by the Apergis Defendants for leave to renew and reargue their prior motion for an order dismissing the amended complaint are consolidated for disposition herein and, upon consolidation:

1. the motion by Gersten Savage is granted;
2. the motion by plaintiffs is granted only to the extent of granting partial summary judgment in their favor with respect to the first cause of action and directing the Apergis Defendants to serve an answer to the amended complaint;

¹By letter of April 15, 2010, plaintiffs' attorneys advised this court that plaintiffs and Gersten Savage had reached a settlement agreement and, therefore, plaintiffs' cross motion for partial summary judgment against Gersten Savage and that branch of Gersten Savage's motion for an order dismissing plaintiffs' amended complaint should be deemed withdrawn.

3. the dismissal motion by the Apergis Defendants is denied;
4. the motion by June Siegel is granted; and
5. the motion by the Apergis Defendants for leave to renew and reargue is denied.

In this action for legal, equitable and declaratory relief, plaintiffs allege, among other things, that in early 2004 defendant Thomas Kontogiannis (Kontogiannis) proposed to invest in Blue Ridge, a family-owned business, and that he made certain misrepresentations to Blue Ridge for the ultimate purpose of converting the property of Blue Ridge for his personal benefit. On March 17, 2004, plaintiffs and Kontogiannis entered into a Stock Sale Agreement (the Agreement) pursuant to which Blue Ridge was to purchase June Siegel's 94% interest in the corporation for \$4,000,000 and, thereafter, Kontogiannis would receive 6% of Blue Ridge's shares directly from the corporation for \$5,000,000, the end result of which would be that he would have a 50% stake in the corporation because the remaining shareholders, Richard Siegel and Jeffrey Siegel, each had 3%. Plaintiffs further allege that, notwithstanding his failure to make a payment of \$1,000,000 required by the Agreement, Kontogiannis installed his own management personnel at Blue Ridge and usurped control of its operations. Subsequently, Kontogiannis allegedly informed plaintiffs that he would not pay the \$1,000,000 unless they agreed to give him a 100% ownership interest in a warehousing facility which the corporation owned in Illinois (the Chicago property) and its manufacturing facility in Brooklyn (the Brooklyn property). Since plaintiffs were facing the

threat of foreclosure by a bank as a result of Kontogiannis' reluctance to pay the \$1,000,000 which he was obliged to pay, they acceded to Kontogiannis' demands. Subsequently, defendants obtained financing of \$15,000,000 from Marathon Structured Finance LLP, secured by a mortgage on the Brooklyn property. All the while, Kontogiannis still allegedly refused to make any payment due for Blue Ridge's shares or to arrange the financing which he promised. Plaintiffs further allege that Kontogiannis thereafter looted the assets of Blue Ridge or otherwise transferred them to various entities which he controlled, including Chloe Foods Corp. (Chloe), a corporation of which Richard Siegel and Jeffrey Siegel were supposed to become shareholders. Plaintiffs additionally allege that the various defendants subsequently looted the assets of Chloe. As a result of the multitude of misdeeds alleged against Kontogiannis, his relatives and the business entities he allegedly controls, plaintiffs seek declaratory relief with respect to the parties' rights and interests, an accounting, money damages and the appointment of a receiver.

Following service of plaintiffs' amended complaint, June Siegel successfully prosecuted an arbitration claim against Kontogiannis. By order dated September 10, 2009, this court confirmed the arbitration award and a judgment was entered in favor of June Siegel and against Kontogiannis in the amount of \$8,246,819.46. Shortly thereafter, June Siegel served an amended answer, counterclaims and cross claims for the expressed purpose of "hold[ing] [responsible] those third parties, including Kontogiannis' family members and

attorneys who facilitated or participated in the divestiture of [June Siegel's] assets or who equitably or legally hold or held such assets.”

In seeking leave to renew and reargue their prior dismissal motion, the Apergis Defendants assert that their request for relief is based upon the arbitration award which was rendered after this court's prior order of November 10, 2009. According to the Apergis Defendants, by virtue of the award, which denied rescission of the Stock Sale Agreement, this court's holding that it was not prepared to determine whether Kontogiannis validly acquired any interest in Blue Ridge and, consequently, whether Jeffery Siegel and Richard Siegel had standing to pursue the sixth through eighth causes of action has been “undermined.” The Apergis Defendants further argue that the sixth through eighth causes of action (which concern the Brooklyn and Chicago properties) fail to plead valid claims for unjust enrichment because such claims arise out of a contract (the Stock Sale Agreement). Moreover, with respect to the second through fourth causes of action, the Apergis Defendants maintain that, pursuant to the terms of settlement agreements which they executed in June 2005, Jeffrey Siegel and Richard Siegel relinquished all their interest in Blue Ridge and, therefore, they do not have standing to sue in the name of Blue Ridge on those causes of action. In addition, since Jeffrey Siegel and Richard Siegel were to receive a 10% interest in Chloe, the Apergis Defendants suggest that the second through fourth causes of action should be stayed because Chloe is in bankruptcy. The Apergis Defendants also request an extension of time in which to serve an answer if their motion is denied.

In opposition to the renewal motion, plaintiffs argue that they have standing to sue in the name of Blue Ridge because Kontogiannis does not own any shares in Blue Ridge. Plaintiffs further argue that, in any event, the Apergis Defendants cannot assert such a defense because it is personal to Kontogiannis. Plaintiffs also assert that, as President and Chief Executive Officer of Blue Ridge, Jeffrey Siegel has the authority to institute this action in the name of Blue Ridge. Since defendants allegedly breached the “settlement agreements” upon which they rely by failing to transfer any shares of Chloe stock to Jeffrey Siegel or Richard Siegel, plaintiffs contend that those documents cannot absolve the Apergis Defendants from liability or support said defendants’ contention that plaintiffs relinquished their claims against them. With respect to their unjust enrichment claim, plaintiffs maintain that the Apergis Defendants (and, in particular, Georgia Kontogiannis and Annette Kontogiannis), received benefits—the Brooklyn and Chicago properties—to which plaintiffs are legally entitled.

In reply, the Apergis Defendants repeat their position that the renewal motion is based primarily upon the arbitration award which states that the award is “in full settlement of all claims submitted to this arbitration” and that “[a]ll claims and counterclaims not expressly herein granted are hereby denied.”

In plaintiffs’ second, third and fourth causes of action, they allege on behalf of Blue Ridge that Kontogiannis and his relatives, in their capacity as officers and directors of Blue Ridge, breached their fiduciary duty to the corporation and, with the assistance of various

defendants (including the Apergis Defendants) stripped Blue Ridge of its assets. In the sixth, seventh and eighth causes of action, plaintiffs allege that, in reliance upon promises made by Kontogiannis in the Stock Sale Agreement, Blue Ridge transferred two parcels of real property to entities which Kontogiannis controls and, thereafter, several of the Apergis Defendants borrowed money against the properties, thus diminishing their value. In its order of November 10, 2009, which denied that branch of the prior motion by the Apergis Defendants which sought dismissal of the above six causes of action, this court indicated that it was not prepared to find, at the pleading stage, that Kontogiannis had validly acquired a 50% interest in Blue Ridge and that Jeffrey Siegel did not have standing to pursue claims on Blue Ridge's behalf (i.e. the second third and fourth causes of action). Because the court found that the alleged unjust enrichment by the Apergis Defendants did not arise out of the Stock Sale Agreement, it also declined to dismiss the sixth, seventh and eighth causes of action. In seeking renewal and reargument, the Apergis Defendants assert that:

1. the arbitrators' denial of a claim for rescission of the Stock Sale Agreement undermines this court's prior order since it establishes that Kontogiannis validly acquired an interest in Blue Ridge, thus depriving plaintiffs of standing to sue on behalf of Blue Ridge on the second through fourth causes of action and

2. the sixth through eighth causes of action concerning the real property in Brooklyn and Chicago fail to plead a valid claim for unjust enrichment.

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law” (*Foley v Roche*, 68 AD2d 558, 567-568 [1979]). A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and set forth a reasonable justification for the failure to present such facts on the prior motion (see CPLR 2221 [e] [2], [3]; *Nelson v Allstate Ins. Co.*, 73 AD3d 929 [2010]). The Apergis Defendants assert that, following this court’s prior order, June Siegel proceeded with arbitration of her claims against Kontogiannis and Blue Ridge and the arbitrators’ award constitutes “new facts” which would change the court’s determination denying dismissal of the second through fourth causes of action. According to the Apergis Defendants, the arbitrators denied the claim for rescission of the Stock Sale Agreement by which Kontogiannis became an owner of 50% of the shares of Blue Ridge and, therefore, plaintiffs do not have standing to pursue those causes of action.

According to the award, the arbitrators were asked to consider June Siegel’s claim for rescission of the Agreement on the ground that it was procured through fraud. Although June Siegel suggested in a March 9, 2005 “Demand for Arbitration” that “claimants” were seeking relief on behalf of Blue Ridge (i.e., money damages, an award of legal fees and an order directing the reconveyance of assets fraudulently transferred), there was no demand by Blue Ridge for a rescission of the Stock Sale Agreement and, in fact, by letter of November 7,

2008 to the American Arbitration Association, Gersten Savage, Kontogiannis' attorneys, argued that neither the Agreement nor the law gave June Siegel the right to seek damages on behalf of Blue Ridge. This court concurs with the opinion previously advanced by Kontogiannis' counsel and sees no indication in the arbitration award that, in denying such relief to June Siegel, Blue Ridge's claims against Kontogiannis (and, consequently, her claims against the Apergis Defendants) were precluded. Accordingly, to the extent that the Apergis Defendants seek leave to renew their prior motion, such relief is denied. With respect to plaintiffs' cause of action relating to unjust enrichment, the Apergis Defendants contend that the existence of the Stock Sale Agreement governs the subject matter of plaintiffs' sixth through eighth causes of action, thus precluding that claim (*see, e.g., Feigen v Advance Capital Management Corp.*, 150 AD2d 281, 283 [1989]), and that this court overlooked or misapprehended the relevant facts or applicable law in refusing to dismiss it. However, although the alleged misdeeds of Kontogiannis and the Apergis Defendants involved the same parcels of real property and the Stock Sale Agreement referred to various obligations of Kontogiannis regarding those properties, the action of the Apergis Defendants in, among other things, borrowing money against the properties so as to become unjustly enriched was not referable to the Agreement and did not arise out of the Agreement so as to bar a claim for unjust enrichment. Accordingly, that branch of the Apergis Defendants' motion which seeks leave to reargue is likewise denied.

In their motion, plaintiffs explain that the Apergis Defendants have not served an answer to the amended complaint, notwithstanding a stipulation between the parties which provided that the time to respond to the amended complaint had been extended to March 30, 2009. Instead, according to plaintiffs, the Apergis Defendants have served a “frivolous” motion seeking leave to renew and reargue. Therefore, plaintiffs seek leave to enter a default judgment against the Apergis Defendants. With respect to Kontogiannis, plaintiffs point out that, in their first cause of action, they seek a declaratory judgment concerning Blue Ridge’s right to cancel six shares of common stock issued to Kontogiannis (constituting 50% of its issued shares) on the ground that he failed to pay the agreed-upon price of \$5,000,000 for them. Plaintiffs assert that Kontogiannis’ failure to pay is established by his admissions, as well as the award rendered in the arbitration proceeding commenced by June Siegel.

In opposition to plaintiffs’ motion, Kontogiannis asserts that the arbitration panel denied all claims made by June Siegel against Blue Ridge, as well as all claims against him that were not expressly granted in the award, including the claim for rescission of the Stock Sale Agreement by which he became an owner of 50% of the shares of Blue Ridge. He argues, therefore, that plaintiffs are precluded from pursuing claims, such as the first cause of action, that were allegedly denied in the arbitration proceeding.

In two reply affirmations, plaintiffs chastise the Apergis Defendants for a “calculated, willful and intentional” failure to serve an answer, even as said defendants have had the time to serve a motion to dismiss and a motion to renew, as well as a notice of appeal. Plaintiffs

suggest that this court allow entry of a default judgment unless the Apergis Defendants serve an answer within 10 days from the date of the court's order. Insofar as Kontogiannis is concerned, plaintiffs point out that the arbitration panel specifically found that he breached the terms of the Stock Sale Agreement by divesting Blue Ridge of its assets and they add that Kontogiannis has conceded that there is no evidence that he made any payment to Blue Ridge for its shares.

In a stipulation dated March 3, 2009, the Apergis Defendants were given until March 30, 2009 to serve an answer and until April 6, 2009 to respond to plaintiffs' Interrogatories and Requests for Production. Rather than doing so, the Apergis Defendants moved to dismiss plaintiffs' amended complaint. By order dated November 10, 2009, the motion was granted in part and denied in part. After service of a copy of the order with notice of entry, the Apergis Defendants were given until January 14, 2010 to serve an answer and responses to plaintiffs' discovery demands. Instead, on or about January 14, 2010, the Apergis Defendants moved for leave to renew and reargue their prior dismissal motion. Since the Apergis Defendants have actively litigated this matter and their renewal motion included a request for an extension of time in which to serve an answer, that branch of plaintiffs' motion which seeks leave to enter a default judgment against the Apergis Defendants is denied. Nevertheless, since the Apergis Defendants' request for leave to renew and reargue has been denied, an answer and a response to the discovery demands are now due. Accordingly, the Apergis Defendants are directed to serve an answer to the amended complaint within 20 days

after service of a copy of this order with notice of entry. They shall respond to plaintiffs' Interrogatories and Requests for Production within 20 days thereafter.

In their first cause of action, plaintiffs seek a judgment declaring that Blue Ridge is entitled to cancel the shares of Kontogiannis in the corporation on the ground that the agreed upon consideration of \$5,000,000 has not been paid. Plaintiffs also seek a declaration of the rights and interests of others, such as June Siegel and Chloe with respect to ownership of shares of the corporation. In their instant motion, plaintiffs move for partial summary judgment as against Kontogiannis alone. Although June Siegel indicated in a "Statement of Readiness" to the arbitration panel that she sought rescission of the Stock Sale Agreement on the ground that it was procured through fraud and the panel declined to grant such relief, contrary to Kontogiannis' contention, the arbitrators did not consider Blue Ridge's claims against Kontogiannis, nor did they resolve the issue of whether he paid any sums due to Blue Ridge under the agreement; rather, they determined that Kontogiannis breached the agreement, vis-a-vis June Siegel, because he fraudulently divested assets of Blue Ridge, thus rendering it insolvent and unable to pay her. Therefore, plaintiffs are not precluded by the arbitration award from pursuing the first cause of action against Kontogiannis. Based upon the contents of plaintiffs' verified amended complaint and Kontogiannis' admission (in discovery responses) that he had no documents which would evidence payment to Blue Ridge for its shares, that branch of the motion by plaintiffs which seeks partial summary judgment against Kontogiannis with respect to the first cause of action is granted.

In its motion, Gersten Savage characterizes the cross claims of June Siegel as an improper attempt to hold them responsible for the acts of their client, Kontogiannis. According to Gersten Savage, in early 2005 it represented Kontogiannis and his corporate affiliates in enforcing security interests which they had in Blue Ridge and in obtaining control of Blue Ridge's assets when Blue Ridge defaulted on its obligations. Gersten Savage points out that it did not represent Kontogiannis at the time he executed the Stock Sale Agreement in March 2004, nor did it draft a Security Agreement executed by Richard Siegel which granted 3301 Atlantic Avenue Corp. (Atlantic), one of Kontogiannis' entities, a security interest in all of Blue Ridge's assets.³

In paragraph "16" of her cross claims, June Siegel lists 29 instances of how Gersten Savage allegedly committed wrongful conduct which gave rise to her claims, including its preparation of a Security Agreement, Secured Note and Notice of Default and its filing of a UCC-1 financing statement, "all the ordinary things a lawyer does when representing a client." Gersten Savage's contentions regarding June Siegel's cross claims against it may be summarized, as follows:

**Conspiracy to Defraud
(Sixth Cross Claim)**

Gersten Savage maintains that there is no substantive tort of conspiracy under New York Law and that there are no allegations of any knowingly false statements made by it with an intent to deceive June Siegel.

³Although the Security Agreement is dated May 21, 2004, June Siegel claims it was signed in November 2004 and back-dated, but there is no allegation that Gersten Savage participated in its alleged back-dating.

**Aiding and Abetting a Breach of Fiduciary Duty
(Eighth Cross Claim)**

Because the mere existence of a contract (in this case, between Kontogiannis and June Siegel) does not create a fiduciary duty, Gersten Savage contends that there can be no viable claim of aiding and abetting a breach of a non-existing duty.

**Legal Malpractice (Seventh Cross Claim)
Breach of Fiduciary Duty (Ninth Cross Claim)**

Gersten Savage points out that it never represented June Siegel or owed her any legal duty and, therefore, the seventh and ninth cross claims are without merit. To the extent that June Siegel alleges that there was privity between her and Gersten Savage, Gersten Savage asserts that she has not alleged that she relied upon its conduct. Moreover, Gersten Savage contends that June Siegel does not have standing to pursue a claim of legal malpractice or breach of fiduciary duty as a shareholder of Blue Ridge because she sold her shares as part of the transaction at issue and that, even if she did not do so, no individual shareholder has a cause of action to recover damages for wrongs against the corporation.

Tortious Interference with Contract (Tenth Cross Claim)

Gersten Savage notes that June Siegel has not alleged that a particular contract would not have been breached "but for" its conduct; rather, she conclusorily alleges that Gersten Savage "negligently or intentionally impaired, hindered or defeated [her] contractual

rights...by conducting and facilitating transfer of title and assets from [Blue Ridge] to the Kontogiannis defendants" and then facilitating the further transfer or encumbrance of said assets in transfers with Amerivon, which Gersten Savage represented.

Judiciary Law Section 487 Violation (Eleventh Cross Claim)

Judiciary Law § 487 permits an aggrieved party to recover treble damages in a civil action against an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive any party in the course of a pending judicial proceeding. Since a review of the alleged acts by Gersten Savage demonstrate that such acts did not occur in the course of a judicial proceeding, Gersten Savage argues that the cross claim should be dismissed. Gersten Savage further argues that June Siegel has not alleged, as required, that its actions were intended to deceive her.

Constructive Trust and Declaratory Relief Based on Unjust Enrichment (Twelfth and Thirteenth Cross Claims)

Because there was no confidential or fiduciary relationship between Gersten Savage and June Siegel, it contends that a claim based upon a constructive trust is not viable. Moreover, Gersten Savage asserts that it could not have been unjustly enriched at June Siegel's expense because it merely accepted payment of its legal fees from its client from funds that were not hers or in which she had an interest.

Debtor and Creditor Law § 276-a (Fifth Cross Claim)

In what it calls the "crux" of June Siegel's cross claims, Gersten Savage accuses June Siegel of attempting to "leap frog" her arbitration award against Kontogiannis, which briefly mentions the fraudulent conveyance of Blue Ridge's assets, to assert claims against Gersten Savage. Gersten Savage points out that it was not a party to the arbitration and that June Siegel, a creditor, does not have a remedy for money damages arising out of an alleged fraudulent conveyance against a third-party, such as Gersten Savage, which was not a transferee or beneficiary of the assets conveyed.

In opposition to Gersten Savage's motion, June Siegel suggests that the court should not only deny the motion, but "search the record" and grant summary judgment in her favor. Given the arbitration award which was recently rendered, she argues that arbitration panel specifically found that Kontogiannis was guilty of fraud and that he effectuated that fraud by transfers to third parties "knowingly performed or facilitated by Gersten Savage." According to June Siegel, Gersten Savage ignores the deposition testimony of Kontogiannis in which he detailed "the fake and fraudulent UCC foreclosure that was orchestrated and conducted by Gersten Savage and his disregard of restrictions in a settlement agreement which undid his prior divestitures with the aid and assistance of Gersten Savage." Moreover, she contends that Gersten Savage, with knowledge of Kontogiannis' violation of the settlement agreement, allegedly assisted Chloe in obtaining a series of loans secured by the assets wrongfully acquired from Blue Ridge. Although June Siegel and Gersten Savage may

not have had a direct attorney-client relationship, she further asserts that there was "near privity" because Gersten Savage represented Blue Ridge, a corporation in which she was a shareholder.

In reply, Gersten Savage points out that June Siegel has ignored its showing that the fifth, sixth, eleventh, twelfth and thirteenth cross claims fail to state a claim and it maintains that her "feeble attempt at salvaging the remainder of her cross claims is wholly insufficient."

There is no remedy for money damages under the Debtor and Creditor law against a party, such as Gersten Savage, that was neither the transferee nor the beneficiary of the assets which were alleged to have been fraudulently conveyed (*see Gallant v Kanterman*, 198 AD2d 76, 80 [1993]). Accordingly, the fifth cross claim is dismissed. Moreover, since there are no factual allegations alleging that Gersten Savage made any fraudulent representations to June Siegel or allegations of fact from which it could be inferred that it had agreed or entered into an understanding with Kontogiannis to cooperate in any fraudulent scheme against June Siegel, the sixth cross claim must likewise be dismissed. (*see Abrahami v UPC Constr. Co., Inc.*, 176 AD2d 180 [1991]). As June Siegel failed to plead any facts that meet the fraud requirements of Judiciary Law § 487, her eleventh cross claim is dismissed. (*see Michalic by Nakovics v Klat*, 128 AD2d 505, 506 [1987]). Since there was no confidential or fiduciary relationship between June Siegel and Gersten Savage, her twelfth cross claim for imposition of a constructive trust is without merit (*see Pereira v Glicker*, 61 AD3d 948, 949 [2009]). Further, June Siegel's thirteenth cross claim sounding in unjust enrichment is

not viable, given that, in accepting legal fees, Gersten Savage was not enriched at June Siegel's expense (see *Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2004]).

Under New York law, an attorney is not liable to a person other than his or her client for the negligent performance of legal work (see *Nat'l. Westminster Bank USA v Weksel*, 124 AD2d 144, 146 [1987]). Although June Siegel asserts that there was "near priority" between her and Gersten Savage because she was a shareholder of Blue Ridge and because Gersten Savage represented her in claims made by creditors, her contentions are unavailing. As a shareholder of Blue Ridge, she had no individual cause of action to recover for a wrong against Blue Ridge even if she had lost the value of her investment (see *Davis v Magavern*, 237 AD2d 902 [1997]). Further, the actions brought by creditors against Blue Ridge, in which she was likewise named as a defendant, are unrelated to the issues in this action. Therefore, the seventh cross claim is dismissed. Moreover, since the ninth cross claim for breach of fiduciary duty is premised on the same facts as the legal malpractice cause of action, it is redundant and should also be dismissed. (see *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]).

Although there may have been a contract between Kontogiannis and June Siegel regarding, among other things, her shares in Blue Ridge, the existence of the agreement, by itself, did not create a fiduciary duty from Kontogiannis to her (see *WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2001]). Because there was no fiduciary duty from Kontogiannis

to June Siegel, there can be no claim for aiding and abetting a breach of a non-existent duty and, therefore, the eighth cross claim must be dismissed.

With respect to the tenth cross claim for tortious interference with contract, June Siegel alleges that the Amerivon transaction---a debt and equity investment into Chloe---interfered with her settlement agreement with Kontogiannis and that Gersten Savage intentionally or negligently impaired her contractual rights by facilitating the transaction which involved the transfer of assets from Blue Ridge to several defendants herein. Not only did June Siegel not plead that the settlement agreement with Kontogiannis would not have been breached but for the alleged conduct of Gersten Savage. (*see Washington Ave. Associates, Inc. v Euclid Equipment, Inc.*, 229 AD2d 486, 487 [1996]), but there is also no allegation that the alleged wrongful conduct was motivated solely by an intent to injure her (*see Carl v Cohen*, 55 AD3d 478, 479 [2008]). Consequently, the tenth cross claim is likewise dismissed.

In their dismissal motion, the Apergis Defendants point out that June Siegel's cross claims against them are based upon the arbitration award and her contention that they participated in the divestiture of Blue Ridge's assets. According to the Apergis Defendants, all of the cross claims are, in fact, barred by the arbitration award because the award did not grant any of June Siegel's claims, including one for rescission of the Stock Sale Agreement, against Blue Ridge. Since the arbitrators denied her claims for rescission and for an order directing the reconveyance of Blue Ridge assets fraudulently conveyed by Kontogiannis and

those acting under his control, the Apergis Defendants contend that June Siegel's cross claims must be dismissed. The Apergis Defendants note that the arbitration award provided that it was "in full settlement of all claims submitted to this arbitration" and that "[a]ll claims and counterclaims not expressly herein granted are hereby denied." They add that, since Chloe, the alleged transferee of Blue Ridge's assets, is in bankruptcy, June Siegel's claims regarding the alleged fraudulent conveyance of Blue Ridge assets must be stayed.

In opposition, June Siegel asserts that, pursuant to an order of this court dated March 25, 2009, her claims against Kontogiannis were dismissed in exchange for his acceptance of the jurisdiction of the American Arbitration Association. Therefore, the arbitration panel's jurisdiction was limited to the issues between Kontogiannis and June Siegel and, for that reason, its findings of fact make no mention of her claims against Blue Ridge. Because the panel awarded June Siegel a judgment against Kontogiannis based upon his fraudulent transfer of Blue Ridge's assets, she argues that she may pursue cross claims against the Apergis Defendants on the basis of her derivative judgment against Kontogiannis.

In her motion, June Siegel seeks summary judgment on her first counterclaim against Blue Ridge. In that counterclaim, it is alleged that she is entitled to damages as a result of Blue Ridge's breach of contract, the amount of said damages being \$8,246,819.46, the sum found due to her in the arbitration. June Siegel's remaining six counterclaims are based upon the Debtor and Creditor Law and seek the cancellation of various conveyances, the appointment of a receiver and money damages. Given the arbitration award in her favor and

plaintiffs' admissions of her allegations in their reply, June Siegel argues that a money judgment should be entered against Blue Ridge on the first counterclaim, that a judgment as to liability should be entered with respect to the remaining counterclaims and that the issue of damages regarding the latter six counterclaims should be severed and continued "as the same involve the other remaining parties to this action."

In "opposition" to the motion, plaintiffs (who include two of June Siegel's children) do not dispute her claim that Blue Ridge breached the terms of the Stock Sale Agreement; rather, they take the position that the damages to which she is entitled is limited to the obligations which Blue Ridge undertook---to pay \$4,000,000 for the redeemed shares and \$500,000 to Seymour Siegel to serve as its Chairman for five years---not the sum awarded against Kontogiannis, \$8,246,819.46. With respect to the second through seventh counterclaims, plaintiffs point out that Blue Ridge is merely a nominal defendant that was required to be named pursuant to the Debtor and Creditor Law, with the actual liability for violation of the relevant provisions resting with Kontogiannis and the defendants acting under his direction. Therefore, plaintiffs suggest that the court abstain from ruling on the counterclaims (which are also cross claims against the other defendants) until it considers a motion involving the other defendants.

In her reply papers, which also include opposition to the cross motion by the Apergis Defendants, June Siegel characterizes their arguments as "wanting and without merit" because the arbitration panel did not consider her claims against Blue Ridge. Therefore,

according to June Siegel, the Apergis Defendants are incorrect when they assert that the arbitrators denied affirmative relief against Blue Ridge. June Siegel adds that, in any event, the Apergis Defendants have no standing to affirmatively assert collateral estoppel as a defense since they were not parties to the arbitration agreement or the arbitration proceeding.

The drastic remedy of summary judgment should be granted only if there are no material issues of fact (*see Dykeman v Heht*, 52 AD3d 767,769 [2008]). In this case, June Siegel asserts that, by virtue of the arbitration award, the issues of whether Kontogiannis breached the Stock Sale Agreement, whether his breach caused Blue Ridge to be unable to perform its obligations to her and whether he fraudulently transferred Blue Ridge's assets have been resolved in her favor. Blue Ridge was named as a party to the arbitration proceeding and it had a full and fair opportunity to litigate the issues determined in the proceeding. (see, e.g., *Clemens v Apple*, 65 NY2d 746 [1985]). In "opposition" to June Siegel's motion, Blue Ridge indicates that it "does not dispute [her] claim" that Blue Ridge breached the terms of the agreement. Accordingly, that branch of the motion which seeks summary judgment in her favor with respect to the first counterclaim is granted, albeit in the sum of \$4,500,000, the amount of Blue Ridge's liability pursuant to the Agreement. Moreover, with respect to the second through seventh counterclaims insofar as they are asserted against Blue Ridge, summary judgment is likewise granted in her favor, the issue of damages being held in abeyance pending resolution of those claims against the cross claim defendants.

Contrary to the contention of the Apergis Defendants, the arbitration award did not preclude relief against them. Not only were they not parties to the arbitration proceeding, but the proceeding took place pursuant to arbitration provisions in an agreement between Blue Ridge, June Siegel and Kontogiannis. Under the circumstances, therefore, the pre-answer dismissal motion by the Apergis Defendants is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT