

**Vays v 139 Emerson Place, LLC**

2011 NY Slip Op 30164(U)

January 20, 2011

Supreme Court, New York County

Docket Number: 400833/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 400833/2008  
VAYS, FRED  
VS.  
139 EMERSON PLACE  
SEQUENCE NUMBER : 004  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1, 2</u>
<u>5</u>
<u>6</u>
<u>3, 4</u>

Cross-Motion:  Yes  No


Upon the foregoing papers, It is ordered that this motion *by plaintiff to*  
*amend the complaint & cross-motion for*  
*summary judgment are decided in*  
*accordance with the attached memorandum*  
*decision.*

**FILED**

JAN 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/25/11

  
JUDGE DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
FRED VAYS, individually and as a member of  
Sycamore Development Group, LLP and Emerson  
Place, LLC,

Plaintiff,

Index No.: 400833/08  
DECISION/ORDER

-against-

139 EMERSON PLACE, LLC, 970 KENT AVENUE  
ASSOCIATES, LLC, SYCAMORE DEVELOPMENT  
GROUP, LLC, GEORGE DELLAPA, individually and  
as managing member of Sycamore Development  
Group, LLC, ELISSA WINZELBERG, individually  
and as managing member of Sycamore Development  
Group, LLC, CPC OPPORTUNITIES FUND, LLC,  
CPC RESOURCES, INC., and SYCAMORE KENT  
GROUP, LLC,

Defendants.

Motion Seq. No.: 004

**FILED**

**JAN 25 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**HON. DORIS LING-COHAN, J.S.C.:**

In this commercial contract action, plaintiff moves for leave to file an amended complaint, while defendants oppose the motion, and cross-move for summary judgment to dismiss the original complaint (collectively, motion sequence number 004). For the following reasons, both the motion and the cross motion are granted in part and denied in part.

**BACKGROUND**

The court discussed the facts of this case at length in its February 19, 2010 decision that disposed of defendants' prior summary judgment motions (motion sequence numbers 001 and 002), and will not repeat them extensively here. It is relevant to this decision, however, to recall that plaintiff Fred Vays (Vays) is a New York-licensed contractor, and that defendants George Dellapa (Dellapa) and Elissa Winzelberg (Winzelberg) are, respectively, a New York-licensed

attorney and a New York-licensed architect. *See* Notice of Motion, Coven Affirmation, ¶ 8; Vays Affirmation, ¶¶ 1-15.

Plaintiff Vays and defendants Dellapa and Winzelberg are equal shareholders in corporate defendants 139 Emerson Place, LLC (Emerson) and Sycamore Development Group, LLC (Sycamore), both of which are New York limited liability corporations. *Id.*; Coven Affirmation, ¶¶ 10-13; Exhibit T. The three formed Emerson in 1999 to develop, own and operate a residential apartment building located at 139 Emerson Place in Kings County (the Emerson building). *Id.* They also formed Sycamore later that year to engage in other, future real estate development projects, and signed an operating agreement (the Sycamore operating agreement), pursuant to which the unanimous consent of all three members was required to authorize Sycamore's involvement in any such development project. *Id.*; Exhibit I.

The final cross-moving defendant herein, Sycamore Kent Group, LLC (Sycamore Kent), is a New York limited liability corporation that Dellapa formed in 2001, to pursue a development opportunity involving a residential apartment building located at 970 Kent Avenue in Kings County (the Kent building) that ultimately failed. *Id.*; Coven Affirmation ¶ 14. While pursuing that opportunity, however, Dellapa formed another limited liability corporation - former defendant 970 Kent Avenue Associates, LLC (Kent) - and attempted to use Sycamore to acquire an interest in the Kent building, and thereafter transfer that interest to Kent. *Id.*

Vays, who had no interest in pursuing the Kent project, objected, and commenced this action by filing a complaint that set forth causes of action for: 1) an accounting with respect to Emerson and Sycamore; 2) breach of contract (i.e., the Sycamore operating agreement); 3) a declaratory judgment; and 4) an accounting with respect to Kent. *Id.*; Vays Affirmation, ¶¶ 1-15;

[\* 4]  
Exhibit A. Defendants answered, and moved for summary judgment to dismiss that complaint (motion sequence numbers 001 and 002).

On February 19, 2010, this court issued a decision that preserved Vays's first cause of action for an account stated related to Emerson and Sycamore and second causes of action for breach of contract based upon the Sycamore operating agreement, dismissed his third and fourth causes of action, and severed and dismissed the complaint against all defendants other than Dellapa, Winzelberg, Emerson, Sycamore and Sycamore Kent. *Id.*; Exhibit D. The court's February 19, 2010 decision also ruled all of the Kent-related transactions void, and stated, in pertinent part, that:

“...because defendants' purported acquisition of an interest in the Kent building by Sycamore clearly contravened section 8.2 of the Sycamore operating agreement, that transaction was likewise void *ab initio*, as a matter of law. For the same reason, Sycamore's purported October 18, 2001 transfer of its interest in the Kent building to Sycamore Kent was also void *ab initio*.

However, despite a determination that the above transactions are void *ab initio*, summary judgment of dismissal is not warranted as to the second cause of action for breach of contract as to defendants Dellapa, Winzelberg, Emerson, Sycamore and Sycamore Kent. The Appellate Division, First Department, has specifically held that claims for breaches of an LLC's operating agreement are legally cognizable, even where the results of such a breach would be a void transaction. *Bischoff v Boar's Head Provisions Co., Inc.*, 38 AD3d 440 (1<sup>st</sup> Dept 2007); *see also Cesario v Absolute Plus Management, LLC*, 2007 WL 3165066 (Sup Ct, NY County 2007). As previously noted, Vays has presented evidence that adequately supports his breach of contract claim. Accordingly, the branch of defendants' motion that seeks dismissal of Vays's second cause of action is denied.

*Id.*; Exhibit D.

Vays now moves for leave to file an amended complaint that includes his two surviving

causes of action for 1) an accounting (with respect to Emerson and Sycamore); and 2) breach of contract (i.e., the Sycamore operating agreement); and would add new claims for: 3) a constructive trust; 4) restitution; 5) unjust enrichment; and 6) fraud (motion sequence number 004). Defendants oppose Vays's motion, and cross-move for summary judgment to dismiss his two remaining original causes of action.

## DISCUSSION

### Plaintiff's Motion

As previously noted, Vays makes the instant motion for leave to serve an amended complaint pursuant to CPLR 3025 (b). In its recent decisions construing that statute, the Appellate Division, First Department, has noted the currently prevailing rule that:

On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit ... [internal citations omitted].

*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1<sup>st</sup> Dept 2010). Here, Vays seeks to add four new causes of action to his two surviving claims for an accounting and for breach of contract; three of those claims sound in equity, and one of them sounds in fraud. The court will examine each of them in turn.

Vays's proposed third cause of action seeks to impose a constructive trust on defendants' interests in Emerson. *See* Notice of Motion, Exhibit A, ¶¶ 75-232. In *Simonds v Simonds* (45 NY2d 233, 241 [1978]), the Court of Appeals recognized that the "broad scope of the constructive trust doctrine" makes it difficult to promulgate an exact formula for the imposition of this equitable remedy, and quoted Judge Cardozo's statement that:

A constructive trust is the formula through which the conscience of equity finds

\* 6]

expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

The Court then identified four factors that are helpful in determining whether to impose a constructive trust, including the existence of: (1) a confidential or fiduciary relation; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment. *Id.* at 242, citing *Sharp v Kosmalski*, 40 NY2d 119, 121 (1976). Here, Vays asserts that Dellapa and Winzelberg stood in a fiduciary relationship to him by virtue of their joint membership/ownership of Emerson and Sycamore, and because Dellapa was the attorney for both entities. *See* Notice of Motion, Coven Affirmation, ¶¶ 39-40. With respect to the “promise” element, Vays refers to proposed revenue-sharing arrangements that he, Dellapa and Winzelberg discussed prior to the formation of Emerson. *Id.*, ¶¶ 41-51. Next, with respect to the element of a “transfer in reliance upon a promise,” Vays refers to Dellapa’s and Winzelberg’s improper attempt to involve Sycamore in the Kent transaction. *Id.*, ¶¶ 52-54. Finally, with respect to the element of “unjust enrichment,” Vays claims that Dellapa’s and Winzelberg’s actions amounted to “stealing a development opportunity from Sycamore and excluding” him from it. *Id.*, ¶¶ 55-56. Defendants’ opposition papers do not contest that they stood in a fiduciary relationship with Vays; however, they assert that none of the other three factors that are considered when finding there is a constructive trust are present here. After review, the court agrees.

Defendants first argue that the purported “promise” underlying Vays’s claim does not exist, and merely refers to the proposals for revenue sharing that he and defendants ultimately memorialized in the Emerson and Sycamore operating agreements. *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶¶ 19-29. A careful reading of the 157 paragraphs that comprise Vays’s

proposed third cause of action shows that defendants are correct. For example, paragraph 217 states that “Dellapa and Winzelberg promised and represented ... that development opportunities undertaken by [Sycamore] would be shared equally.” *See* Notice of Motion; Exhibit A, ¶ 217. However, the subject matter of that “promise and representation” is clearly governed by the terms of the Sycamore operating agreement. *Id.*; Exhibit I. Furthermore, in the paragraphs that precede this one, the same purported “promise” is referred to variously and indiscriminately as applying to both the profits that were realized from the development of the Emerson building, and/or to the profits that might be realized from any future development opportunities. *Id.*, ¶¶ 143-148, 213. However, the Emerson and Sycamore operating agreements both, respectively, contain sections that govern(ed) the disposition of any such profits. *See* Notice of Motion, Exhibits I, V. Thus, Vays’s proposed amended complaint does not identify an independent “promise” that might support the imposition of a constructive trust.

Defendants further argue that section 16.3 of the Emerson operating agreement specifically bars Vays from relying on the subject matter of that contract as a “promise,” since it states that:

This Agreement constitutes the complete and exclusive agreement among the members with respect to the subject matter herein, and supercedes all prior agreements and understandings.

*See* Notice of Cross Motion, Hirshowitz Affirmation, ¶ 21; Notice of Motion, Exhibit V, at 15.

In his opposition papers, Vays does not specifically address this argument, but refers to a memo from Dellapa to Winzelberg and himself, dated March 6, 2001, which includes a rider that recites that the parties “wish to formalize and clarify the terms” of the Emerson operating agreement.

*See* Notice of Motion, Exhibit W. Vays concludes that this language is evidence that “ownership

interests remained an open issue” with respect to that agreement. *See* Coven Reply Affirmation, ¶ 48. The court disagrees. After reviewing the balance of the March 6, 2001 memo, it is clear that, while the parties may have had a dispute over the calculation of the profits that each was to receive as a result of the Emerson project, there was no dispute that those calculations were to be performed pursuant to the terms of the Emerson operating agreement. Thus, the court rejects Vays’s contention that there was a subsequent negotiation (involving a promise to pay) that superceded that agreement. Therefore, the court concludes that Vays has failed to identify an independent “promise” to support his proposed claim for a constructive trust.

Regarding the element of “a transfer in reliance” on a promise, Vays’s proposed amended complaint states only that “plaintiff provided the partnership with two \$100,000.00 contributions ... to the Emerson project.” *See* Notice of Motion, Exhibit A, ¶ 105. Vays does not identify any other transfers between himself and defendants. However, the court has already determined that defendants did not make any promises to Vays with respect to the Emerson project apart from those that were set forth and adopted in the Emerson operating agreement. Thus, Vays has also failed to identify any transfers that he made to defendants in reliance upon said (non-existent) promises. Therefore, the court concludes that Vays has also failed to support the “transfer in reliance” element of his proposed claim for a constructive trust.

Finally, Vays alleges that defendants were “unjustly enriched” by their “transferring [Sycamore]’s equitable interest in the [Kent] property to [Sycamore Kent].” *See* Notice of Motion, Exhibit A, ¶ 230. Defendants argue that they were not unjustly enriched at Vays’s expense because the “Kent [project] was not a Sycamore project” to which Vays would have been entitled a share of the proceeds. *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶ 26.

From the submissions, it is clear that the Kent project had nothing to do with Emerson - the entity upon which Vays seeks to impose a constructive trust. Therefore, the court concludes that Vays has failed to establish the “unjust enrichment” element of his proposed claim for a constructive trust. Accordingly, because three of the four factors that the Court of Appeals identified in *Simonds v Simonds* as “helpful” in determining whether to impose a constructive trust are simply not present here, Vays’s motion to amend is denied with respect to his proposed new third cause of action.

Vays’s proposed fourth cause of action seeks equitable relief on the grounds of “restitution/unjust enrichment.” Vays specifically alleges that defendants have “received approximately \$1.1 million dollars for their involvement with the Kent” development project that they would not have received “but for their use of the good will of the Sycamore” name. See Notice of Motion, Exhibit A, ¶¶ 238-239. Vays also quotes the holding of the Appellate Division, First Department, in *Wiener v Lazard Freres & Co.* (241 AD2d 114, 119 [1<sup>st</sup> Dept 1998]) that:

A cause of action for unjust enrichment is stated where “plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor.” Where defendants have reaped such benefit, equity and good conscience require that they make restitution [internal citations omitted].

Defendants argue that Vays’s claim is barred by paragraph 8.8 of the Sycamore operating agreement, entitled “independent activities,” which states that:

The Members, notwithstanding the existence of this Agreement, may engage in other activities without having or incurring any obligation to offer any interest in such activities to this Company [i.e., Sycamore] or any of the other Members.

*Id.*; Exhibit I, at 11; Notice of Cross Motion Hirshowitz Affirmation, ¶ 32. Vays responds that

“the legal validity of the transaction is entirely irrelevant to the merit of the proposed claim.” *See* Coven Affirmation in Further Support, ¶ 40. The court agrees. In its February 19, 2010 decision, the court determined that defendants’ attempt to have Sycamore obtain an interest in the Kent building was void ab initio, and denied so much of defendants’ motion as sought to dismiss Vays’s breach of contract claim (which was based on the Kent transaction).

The court now further notes that section 8.7 of the Sycamore operating agreement, entitled “prohibited transactions,” states that:

No Member shall do any one of the following: (I) use the name of the Company ... or any trademark or trade name adopted by the Company, except in the course of the Company’s business.

*See* Notice of Motion Exhibit I, at 11. Further, Vays has presented documentary evidence, in the form of advertising and memoranda, in which defendants used Sycamore’s experience and expertise in their pitch to secure the Kent development project. *Id.*, Exhibits T, Y; Coven Affirmation in Further Support, Exhibit DD. Because section 8.7 of the Sycamore operating agreement clearly governs Vays’s proposed claim, defendants’ reliance on section 8.8 is misplaced, and the court rejects their argument that is derived from that section. As a result, Vays has adequately supported a claim that defendants breached section 8.7 of the Sycamore operating agreement, and also that they have unjustly enriched themselves thereby, within the holding of *Wiener v Lazard Freres & Co.*

Further, it has been held an appropriate exercise of a court’s discretion to permit the amendment of a complaint setting forth a breach of contract claim to add additional, and possibly inconsistent, claims that are pleaded on alternative, equitable grounds. *See e.g. Jeremy’s Ale House Also, Inc. v Joselyn Luchnick Irrevocable Trust*, 22 AD3d 6 (1<sup>st</sup> Dept 2005); *see also*

*Strauss v Di Cicco*, 64 AD2d 979 (2d Dept 1978). Here, the court elects to exercise its discretion in that regard for the reasons stated above. Therefore, Vays's motion to amend is granted with respect to his proposed new fourth cause of action for restitution/unjust enrichment.

Vays's proposed fifth cause of action also seeks equitable relief on the ground of unjust enrichment, specifically because "Dellapa and Winzelberg wrongfully secured a benefit of ownership interests in [Emerson]." See Notice of Motion, Exhibit A, ¶ 243. Vays initially argues that defendants obtained their interests in Emerson "not through valuable consideration, but through sleight of hand." *Id.*; Coven Affirmation, ¶ 60. Vays goes on to assert that "the details of the actions of [defendants] have been extensively outlined above"; however, he omits to mention that he had also earlier acknowledged that "he was bound by the [Emerson operating] agreement," and had "adhered to [its] provisions." *Id.*, ¶¶ 48-49, 66. Inasmuch as Vays has also admitted that his and defendants' joint development of the Emerson project through the vehicle of Emerson was "successful," it is difficult to see how defendants' receipt of benefits at the conclusion of the Emerson project was in any way improper. *Id.*, ¶ 13. As the Appellate Division, First Department, has recently observed, "[i]t is not sufficient that a defendant is enriched; rather, the enrichment must be unjust." *Dobroski v Bank of Am., N.A.*, 65 AD3d 882, 885 (1<sup>st</sup> Dept 2009), citing *McGrath v Hilding*, 41 NY2d 625, 629 (1977). Here, Vays's argument is directed to the sufficiency of the consideration underlying the Emerson operating agreement, and not to defendants' actions in connection with the Emerson project. In the absence of any credible allegation or evidence that defendants acted improperly with respect to the latter, Vays's arguments regarding the former are simply irrelevant. Therefore, the court rejects them and denies Vays's motion to amend with respect to his proposed new fifth cause of

action.

Finally, Vays's proposed new sixth cause of action alleges fraud, specifically that defendants concealed their intention to improperly use Sycamore to obtain an interest in the Kent building and then to transfer that interest to Sycamore Kent. *See* Notice of Motion, Exhibit A, ¶¶ 246-253. To state a claim for fraudulent concealment, a plaintiff must allege: 1) that the defendant had a duty to disclose certain material information but failed to do so; 2) that the defendant then made a material misrepresentation of fact; 3) that said misrepresentation was made intentionally in order to defraud or mislead; 4) that the plaintiff reasonably relied on said misrepresentation; and 5) that the plaintiff suffered damage as a result. *See IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 586 (1<sup>st</sup> Dept 2009), citing *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1<sup>st</sup> Dept 2003). Here, however, as a result of this court's February 19, 2010 decision that defendants' attempt to have Sycamore obtain an interest in the Kent building was void ab initio, Vays is foreclosed, as a matter of law, from establishing that he suffered any "damages" as a result of defendants' purported concealment of information. Therefore, Vays's proposed new sixth cause of action has no merit and the motion to amend is denied with respect that cause of action. Accordingly, Vays's motion is granted in part and denied in part.

#### Defendants' Cross Motion

As previously mentioned, defendants' cross motion seeks summary judgment dismissing Vays's first two original causes of action for an accounting and for breach of contract. When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New*

*York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1<sup>st</sup> Dept 2003). Here, after consideration, defendants' cross motion is granted in part and denied in part.

The first cause of action in Vays's original complaint seeks an accounting from Dellapa and Winzelberg with respect to both Emerson and Sycamore. In their motion, defendants first request summary judgment dismissing so much of that cause of action as pertains to Emerson. *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶¶ 30-42. Defendants cite the decision of the Appellate Division, First Department, in *Kaufman v Cohen* (307 AD2d 113, 124 [1<sup>st</sup> Dept 2003]) that "a court of equity will not intervene to vindicate a partner's right to an accounting in the absence of a showing that a demand for one was made and rejected by the partner in possession of the books, records, profits or other assets of the partnership." Defendants then argue that they served two responses agreeing to Vays's original demand to review Emerson's financial records, but that neither Vays, nor his attorney pursued the matter prior to commencing this action. *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶¶ 30-39. Defendants have presented copies of Vays's May 2007 demand letter, and their two June 2007 responsive letters to bear out this contention. *Id.*; Exhibits J, K. Defendants also argue that the bulk of Emerson's financial records have already been produced during the discovery phase of this action. *Id.*; Hirshowitz Affirmation, ¶¶ 40-42. Defendants have presented copies of Emerson's tax returns

(for the years 1999-2009), financial statements (for the years 2001-2007) and monthly managing agent reports (for the years 2000-2008) to bear out this contention. *Id.*, ¶ 40. Vays's opposition, argument consists solely of his attorney's contention that, although "defendants' ... belated[ly produced] ... records relating to the Emerson entity ... in bad faith," they "cannot now deny that [Emerson] and [Sycamore] are inextricably intertwined in a greater joint venture." *See* Coven Reply Affirmation, ¶¶ 101, 103. However, this argument is clearly meritless. In the first place, the holding of *Kaufman v Cohen* negates Vays's claim for an accounting with respect to Emerson, because Vays has admitted that defendants have already complied with, rather than rejected, his demand for such an accounting. In the second place, as has been discussed several times, the existence of the Emerson and Sycamore operating agreements belies any claim that the Emerson development project and the parties' other projects were part of a single joint venture; they were not. Finally, it is well settled that "an attorney's affirmation, ... is of no probative value in opposition to a motion for summary judgment." *Ramnarine v Memorial Ctr. for Cancer and Allied Diseases*, 281 AD2d 218, 219 (1<sup>st</sup> Dept 2001). Here, Vays has not submitted any affidavit of merits by someone with personal knowledge to counter defendants' argument that Vays is not entitled to an accounting with respect to Emerson. For the foregoing reasons, Vays is not entitled to such an accounting. Therefore, defendants' cross motion is granted with respect to Vays's first cause of action as it concerns Emerson.

Defendants also argue that Vays's first cause of action should be dismissed as regards to Sycamore on the grounds that it is barred by the statute of limitations. *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶¶ 43-47. Defendants assert that CPLR § 213 (1) imposes a six-year statute of limitations on claims for an accounting, that Sycamore transacted its last

business on February 22, 2001, and that this action was commenced on September 19, 2007, more than six years after this occurrence. *Id.* Vays responds that the doctrine of equitable estoppel precludes defendants from asserting the statute of limitations defense herein, because of the “affirmative wrongdoing” consisting of their “fraudulent concealment” of their attempt to involve Sycamore in the Kent transaction. *See* Coven Reply Affirmation, ¶¶ 90-92. Vays cites the Court of Appeals’ decision in *Zumpano v Quinn* (6 NY3d 666, 674 [2006]) for the proposition that the doctrine will apply where a plaintiff was induced by fraud, misrepresentation (upon which he reasonably relied) or deception to refrain from filing a timely action. Defendants reply that there is no basis for applying the doctrine here, however, because they did not engage in any wrongful concealment of information, and that “indeed, the 2001 contract and deed by which the Kent property was purchased, with Sycamore’s name contained on each, were contemporaneously recorded and were thus available for public inspection in 2001.” *See* Hirshowitz Reply Affirmation, ¶ 33. Both parties’ equitable arguments are without merit.

In its February 19, 2010 decision, the court observed that Dellapa attempted to make the legally void transfer of Sycamore’s purported interest in the Kent property to Sycamore Kent on October 18, 2001, and that Vays thereafter commenced this action on September 19, 2007. *See* Notice of Cross Motion, Exhibit A at 3. Since that disputed act of transfer (which the court stated was a violation of section 8.2 of the Sycamore operating agreement) was the gravamen of Vays’s complaint, Vays commenced this action one month before the expiration of the applicable six-year statute of limitations. Therefore, the court rejects defendants’ statute of limitations argument and denies their cross motion with respect to so much of Vays’s first cause of action as applies to Sycamore.

The next branch of defendants' cross motion seeks dismissal of Vays's second original cause of action for breach of contract (i.e., section 8.7 of the Sycamore operating agreement). Defendants first argue that this claim is barred by the governing six-year statute of limitations. *Id.*; Hirshowitz Affirmation, ¶¶ 11-16. Defendants assert that "the breach by which Sycamore became part of the Kent project occurred on July 3, 2001," i.e., the date on which Sycamore purportedly acquired its interest in the Kent property. However, as was discussed in the preceding paragraph, defendants also committed a breach on October 18, 2001, the date on which Dellapa purportedly transferred Sycamore's interest to Sycamore Kent. Section 8.2 of the Sycamore operating agreement clearly requires the unanimous consent of all three members to either "acquire or enter into any contract for the purchase of an interest in a project," or to "sell, exchange, convey, trade, surrender, release, abandon or otherwise dispose of ... the assets of the company." *See* Notice of Motion, Exhibit I, at 10. That Dellapa's attempts to use Sycamore to acquire and later transfer an interest in the Kent property were legally void does alter the facts that Dellapa did initiate both of those transactions, or that the later transaction occurred less than six years before the commencement of this action. Therefore, the court rejects defendants' argument.

Defendants next argue that Vays's second cause of action is also barred by the statute of limitations that applies to breach of fiduciary duty claims "if [that] cause of action were deemed to be one for breach of fiduciary duty." *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶¶ 17-20. Although Vays does not respond to this argument in his opposition papers, the court merely notes that his second cause of action is *not* one of breach of fiduciary duty, but is rather for breach of contract. Thus, the court deems defendants' argument to be irrelevant and rejects it.

Finally, defendants argue that Vays's breach of contract claim must fail because he has not established the element of damages. *Id.*, ¶¶ 21-29. It is true that the proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, performance, its breach, and resulting damages. *See e.g. Furia v. Furia*, 116 AD2d 694 (2<sup>nd</sup> Dept 1986); *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Defendants specifically contend that the disclosure had herein to date shows that, by mid 2001, Sycamore had no assets or property, and that Dellapa's and Winzelberg's only contributions to Sycamore were intangible, and consisted solely of the services that they rendered to Sycamore. *See* Notice of Cross Motion, Hirshowitz Affirmation, ¶ 25. Vays responds, however, that he had furnished Sycamore with both his "knowledge and his capital," and that Sycamore had developed certain "good will and reputation" that defendants traded on when they breached the Sycamore operating agreement, to his financial detriment. *See* Coven Affirmation in Opposition, ¶¶ 94-95. At this juncture, based upon the within submissions, there are factual issues with respect to the issue of damages, warranting that this case proceed to trial. In New York, generally the issue of the calculation of damages that flow from a breach is reserved to the jury, especially in the determination of good will. *See e.g. Najjar Indus. Inc. v City of New York*, 87 AD2d 329 (1<sup>st</sup> Dept 1982), *affd* 68 NY2d 913 (1986). Further, that amount of damages need not be certain in order for the element of damages to be established. *See id.* Accordingly, defendants' cross motion is granted in part and denied in part as discussed above.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3025, of plaintiff Fred Vays for leave to amend the complaint herein is granted, in part, to the extent that leave shall be granted to add the

fourth cause of action and to this extent the amended complaint in the form proposed as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed third, fifth and sixth causes of action and those causes of action are stricken; and it is further

ORDERED that the defendants shall answer the amended complaint within 20 days from the date of said service; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants George Dellapa, Elissa Winzelberg, Sycamore Development Group, LLC, Sycamore Kent Group, LLC, and 139 Emerson Place, LLC is granted solely to the extent that the first cause of action of the complaint is dismissed with respect to defendant 139 Emerson Place, LLC, but is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

*Defendants*

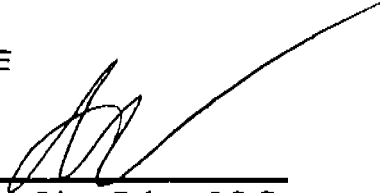
*AC*

**FILED**

**JAN 25 2011**

Dated: New York, New York  
January 20, 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
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Hon. Doris Ling-Cohan, J.S.C.