[* 1]

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

PRESENT: **HON.** JOAN A. MADDEN **PART** 11
Justice

Dow, Gary
Plaintiff,

- v -

SINGER, Baruch, et al.

Defendant.

INDEX NO.: 105584/06

MOTION DATE:

MOTION CAL. NO.

MOTION SEQ. NO. 016

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that the this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 13, 2011

_____
J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

GARY DON, LAWRENCE GERSTEIN and
NEW YORK DEVELOPERS COLLABORATIVE, LLC

Plaintiffs,

-against-

Index No. 105584/06

BARUCH SINGER, MARK JUNGER, MOSES ROSNER, HERALD SQUARE DEVELOPMENT LLC, ROSMA DEVELOPMENT LLC, and MNM INVESTORS GROUP INC.,

Defendants,

855 REALTY OWNERS, LLC and ISTAR FM LOANS, LLC,

Intervenor-Defendants.

----------X

MADDEN, J.:

This action arises out of a development project involving an assemblage of real property located at 855 Avenue of the Americas, New York, NY (the Property). Plaintiffs Gary Don (Don), Lawrence Gerstein (Gerstein), and the company they utilized for the project, New York Developers Collaborative, LLC (NYDC), allege that they formed a joint venture with defendants Mark Junger (Junger), Moses Rosner (Rosner), Rosma Development LLC (Rosma), MNM Investors Group LLC (MNM), Baruch Singer (Singer) and Herald Square Development LLC (HS Development) to develop the Property, pursuant to a letter agreement dated May 13, 2005.

Plaintiffs assert that they were wrongfully ousted from their role in the alleged joint venture when Junger, Rosner, Singer and HS Development "misappropriated and usurped" the opportunity to develop the Property by purchasing it for themselves on February 7, 2006 for

$117,500,000, and later selling it to intervenor defendant 855 Realty Owner LLC (855 Realty) on March 1, 2007 for $140,000,000. The complaint seeks money damages and the imposition of a constructive trust on the Property, alleging that plaintiffs were "wrongfully and unjustly" deprived of their right to own a percentage of the joint venture, and to recover a share of the $22,500,000 in gross profits that were earned on the transaction. On April 25, 2006, a Notice of Pendency was filed against the Property.

Motion Sequence Nos. 016 and 026 are consolidated for disposition. In Motion Sequence No. 016, intervenor defendant iStar FM Loans LLC (iStar) moves, pursuant to CPLR 3212, for an order granting it partial summary judgment dismissing the eleventh cause of action for constructive trust. iStar also moves, pursuant to CPLR 1018 and 1021, for an order granting the substitution of Cipe Realty Associates, LLC (Cipe) as intervenor defendant in place of iStar, and amending the caption accordingly.

Intervenor defendant 855 Realty cross-moves for dismissal of the eleventh cause of action. Defendants Singer and HS Development also cross-move for dismissal of the eleventh cause of action. Defendant Rosner submits a letter in which he joins the motion for partial summary judgment dismissing the constructive trust cause of action.

Plaintiffs cross-move for leave to file and serve answers to i Star's and 855 Realty's respective counterclaims.

In Motion Sequence No. 016, plaintiffs move for an order dismissing this action against intervenor-defendants 855 Realty and iStar, on the ground that they no longer have any interest in the Property. Plaintiffs also move for an order denying as moot iStar's motion and 855 Realty's cross motion for partial summary judgment on the eleventh cause of action.

With respect to Motion Sequence No. 024, the motion and cross-motions for partial summary judgment dismissing the eleventh cause of action are granted. Plaintiffs' cross motion and iStar's motion to substitute Cipe as intervenor defendant are denied as moot. With respect to Motion Sequence No. 026, plaintiffs' motion is granted to the limited extent of dismissing this action against 855 Realty and iStar, and denied in all other respects.

BACKGROUND

In early 2005, plaintiffs Don and Gerstein began gathering information about development possibilities for the Property (Complaint, ¶¶ 12-18). From the outset, plaintiffs intended to raise the approximately $162,000,000 in estimated costs to purchase and develop the Property by obtaining: (1) "capital contributions" of approximately $20,000,000 from "third party strategic partners who would enter into a joint venture relationship with Plaintiffs;" and (2) mortgage loans to cover the remaining "approximately eighty-seven and half (87.5%) of the total estimated costs," i.e., approximately $142,000,000 in loans (*id.*, ¶ 18). Plaintiffs expected that they would need to obtain up to $142,000,000 in mortgage loans to carry out the project because they lacked sufficient capital to cover the projected acquisition and development costs (*see id.*, *see also* Deposition of Gary Don [Aff. of David L. Birch, Exh C], at 43-44, 45-46).

In April 2005, plaintiff were introduced to defendants Junger and Rosner regarding the proposed development project. Junger signed a "Confidentiality Memorandum" and a "Confidentiality and Non-Circumvent Agreement," prepared by plaintiffs, on behalf of himself and defendant Rosma, requiring that they keep confidential the opportunity to develop the site (Complaint, ¶¶ 20, 22-23).

Plaintiffs allege that, during a meeting held on May 13, 2005, plaintiffs Don and

Gerstein and defendants Junger and Rosner agreed to be partners, and enter into a joint venture relationship with regard to the development of the Property (*id.*, ¶ 29). Thereafter, Don, Gerstein, Junger and Rosner signed an agreement dated May 13, 2005, purporting to set forth an "outline of Joint Venture Structure" for the acquisition and development of the Property (the JV Agreement) (*id.*; *see* Birch Aff., Exh D). The JV Agreement was written on the letterhead of plaintiff NYDC, and addressed to Junger and Rosner in their capacity as representatives of their company, MNM (Junger, Rosner, Rosma and MNM are collectively referred to as the MNM defendants) (*see id.*).

The JV Agreement contained a number of terms. The Property was to be purchased by a limited liability company to be formed by the joint venture (*see id.*). MNM was to invest up to $20,000,000 in equity toward the estimated $162,000,000 in purchase and development costs for the Property, in return for an 88% ownership interest in the project (*see id.*). Plaintiff NYDC, which invested no capital in the project, was to receive a 12% ownership interest in the project, and a 40% share of any net profits in excess of $68,000,000 (*see id.*). Finally, both NYDC and MNM were prohibited from taking any action that would "circumvent the other" with respect to the project (*see id.*).

Plaintiffs allege that, after the JV Agreement was executed, Junger and Rosner informed plaintiffs that defendant Singer wanted to participate as a partner in the joint venture, and would be contributing the majority or all of the $20,000,000 in required equity for the project (Complaint, ¶¶ 36, 39, 47). Plaintiffs assert that, during an initial meeting with Singer, he was provided with a copy of the Confidentiality Memorandum and the JV Agreement, and verbally agreed to be bound by those documents (*id.*, ¶¶ 43-47). However, neither Singer nor his

company, defendant HS Development, ever signed the Confidentiality Memorandum or the JV Agreement, and Singer has testified that he never saw either of those documents prior to this litigation (Deposition of Baruch Singer [Birch Aff., Exh E], at 26-27; 31-32).

In the late spring/early summer of 2005, plaintiffs and Singer met with the then-owners of the Property (the Sellers) to discuss a potential purchase transaction (Don Dep., at 357-358). In May and June 2005, plaintiffs, MNM and Singer made offers to purchase the Property from the Sellers (*id.* at 359; 364-365). However, no agreement to purchase the Property was ever signed, and neither the plaintiffs nor any joint venture created pursuant to the JV Agreement ever entered into any such contract (Gerstein Dep., at 265-267; 414-415).

In July 2005, Singer determined that he was not interested in working with plaintiffs to acquire and develop the Property (*id.* at 372-377). Plaintiffs allege that, at this point, "[d]efendants embarked on a strategy to do whatever it took to oust Plaintiffs and take over the Project for themselves to the utter and wrongful exclusion of Plaintiffs" (Complaint, ¶ 82). Plaintiffs assert that, in mid-July 2005, Singer offered them $3,500,000 to withdraw any claim that they had an interest in the development project (Don Dep., at 374-375; 596). Singer's attorneys then forwarded a letter dated July 7, 2005 to the attorneys who had been representing plaintiffs in the negotiations with Sellers, informing them that there would be no further cooperation between the parties, and that plaintiffs "are not involved with the transaction at this time" (Complaint, ¶ 83; *see* Birch Aff., Exh H). According to Gerstein, the letter made it "evident that we were not working together any more," and upon reading the letter, Gerstein became "upset" because the prior collaboration between the parties was over (Gerstein Dep., at 372-377).

Pursuant to two contracts dated August 29, 2005 (*see* Birch Aff., Exh T), Singer eventually agreed to purchase the Property with Junger and Rosner through HS Development for $117,500,000 (Singer Dep., at 90-92). On February 7, 2006, HS Development closed on the purchase of the Property (Complaint, ¶ 96).

To finance the February 7, 2006 acquisition of the Property, HS Development obtained loans totaling $105,000,000 secured by multiple mortgages, including (1) a mortgage dated February 7, 2006 between HS Development, as mortgagor, and New York Community Bank, as mortgagee, in the amount of $76,375,000, and which was recorded on March 21, 2006 (*see* Birch Aff., Exh K); and (2) a mortgage dated March 3, 2006 between HS Development and Fortress Credit Corporation (Fortress) in the amount of $105,000,000, which consolidated the $76,375,000 New York Community Bank Mortgage with an additional $28,625,000 mortgage, also dated March 3, 2006, between HS Development and Fortress, which were both recorded on July 11, 2006 (*see id.*, Exh L).

On March 1, 2007, HS Development sold the Property to intervenor defendant 855 Realty for a total purchase price of $140,000,00 (*see* March 1, 2007 Deed [Birch Aff., Exh M]). It is conceded by plaintiffs that because HS Development purchased the Property for $117,500,000 and sold it for $140,000,000, the gross profit was $22,500,000 (*see* Aff. of Jeffrey Michaels, ¶ 6 [Birch Aff., Exh X]).

Like HS Development, 855 Realty procured mortgage loans totaling $105,300,000 to finance the March 1, 2007 acquisition of the Property. The loans were secured by multiple mortgages, including (1) a mortgage dated March 2, 2007 in the principal amount of $300,000 between 855 Realty and Fremont Investment & Loan (Fremont); and (2) a Consolidated,

Amended and Restated Mortgage and Fixture Filing, dated as of March 2, 2007 and recorded on March 12, 2007, between Fremont, as mortgagee, and 855 Realty as mortgagor (*see* Birch Aff., Exhs P and Q). These mortgages consolidated, amended and restated the various mortgages previously issued on the Property, including the $76,350,000 New York Community Bank mortgage and the $28,625,000 increase in secured obligations evidenced by the Fortress mortgage, for a total of $105,300,000 in consolidated mortgages. Fremont thus became the successor-in-interest and holder of the mortgages that were originally issued by HS Development to secure the Property on February 7, 2007.

By Assignment and Assumption of Notes, Mortgages and Other Loan Documents, dated June 29, 2007, Fremont assigned its consolidated mortgages to iStar (the iStar Assignment) (*see* Birch Aff., Exh R]). Thereafter, iStar assigned its interest in the mortgages to Cipe pursuant to an Assignment of Mortgage, dated July 1, 2010 (the Cipe Assignment) (*id.*, Exh S). By virtue of these assignments, Cipe is the current holder of the mortgages originally issued by HS Development to acquire the Property at issue.

On April 25, 2006, plaintiffs filed the eleven-count complaint herein, alleging that they were wrongfully ousted from their role in a joint venture to develop the Property. The first ten causes of action seek money damages, and are not the subject of this motion. The eleventh cause of action seeks to impose a constructive trust on the Property based on allegations that the MNM defendants, Singer and HS Development "misappropriated and usurped" the business opportunity provided by plaintiffs by purchasing the Property for themselves on February 7, 2006, and later flipping it at a profit to defendant 855 Realty on March 1, 2007 (*see* Complaint, ¶ 193). According to the complaint, these defendants "wrongfully and unjustly" deprived

plaintiffs of their purported right to a share of the joint venture's profits from the development of the Property (*id.*). Based solely on this claim, plaintiffs filed a Notice of Pendency simultaneously with the complaint, on April 25, 2006 (*see* Birch Aff., Exh B).

iStar contends that it did not learn of the existence of the Notice of Pendency until mid-2009, after the filing of the foreclosure action (Birch Aff., ¶ 30). After learning of the Notice of Pendency, iStar intervened in this matter on September 15, 2009, seeking to vacate the Notice of Pendency, or, in the alternative, to obtain a judgment that plaintiffs' constructive trust claim and Notice of Pendency cannot affect, and are inferior to, iStar's rights under the mortgages (*see id.*, Exh T). 855 Realty intervened in this matter on September 17, 2009.

Thereafter, on November 21, 2008, iStar filed an action entitled *iStar FM Loans LLC v 855 Realty Owner LLC, et al.* (Index No. 115753/2008, Ramos J., Sup Ct, NY County), to foreclose on the Property and an additional adjacent lot that was mortgaged to secure the $105,300,000 iStar loan, after 855 Realty defaulted on its obligation to repay the iStar loan at maturity (*see* Birch Aff., Exh U). On October 8, 2009, Justice Ramos granted summary judgment in iStar's favor, confirming the validity of the mortgages and ruling that iStar is entitled to foreclose on the Property, and referred the matter to a hearing before a referee to compute the outstanding amount of the mortgage debt (*see id.*, Exh V).

In a stipulation and order dated December 21, 2010, the foreclosure action was discontinued with prejudice, and a judgment of foreclosure and sale was vacated by the court. According to the stipulation and order, 855 Realty was deemed to have all the rights and title over the Property to same extent it possessed prior to the commencement of the foreclosure action.

On December 23, 2010, a deed transferring the Property from 855 Realty to Avenue of the Americas Development Company LLC (Ave of Americas) was filed with the Office of the New York City Register. On December 21, 2010, Ave of the Americas entered into a mortgage agreement with a new mortgagee, Manufacturers and Traders Trust Company (M&T Bank). On December 23, 2010, Cipe assigned its mortgage on the Property to M&T Bank.

ANALYSIS

Motion and Cross Motion for Summary Judgment (Motion Sequence No. 024)

"'[T]he 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 demonstrate the absence of any material issues of fact [citation omitted]'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]). The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, *cert denied* 434 US 969 [1977]; *Indig v Finkelstein*, 23 NY2d 728 [1968]).

As set forth below, movants have shown their entitlement to summary judgment as a matter of law by demonstrating that the constructive trust claim is baseless. In response, plaintiffs fail to come forward with evidentiary proof in admissible form to demonstrate the existence of material issues of fact upon which their claim rests (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *European Am. Bank & Trust Co. v Schirripa*, 108 AD2d 684 [1st

Dept 1985]). Accordingly, the motion and cross-motions for summary judgment are granted, and the eleventh cause of action for a constructive trust is dismissed.

Courts have consistently held that "the equitable remedy of a constructive trust may be imposed 'when property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest (citation omitted)'" (*Dean v Dillon*, 234 AD2d 256, 257 [2d Dept 1996], *lv dismissed* 89 NY2d 1029 [1997]; *see also Sharper v Harlem Teams for Self-Help, Inc.*, 257 AD2d 329 [1st Dept 1999] [holding that a constructive trust may be imposed where the holder of legal title would be unjustly enriched]). However, the imposition of a constructive trust is an extraordinary "'fraud-rectifying' remedy" designed to prevent unjust enrichment – not an independent cause of action (*Bankers Sec. Life Ins. Soc v. Shakerdge*, 49 NY2d 939, 940 [1980]), and requires proof by plaintiff that it is entitled to recover the property upon which the constructive trust is sought (*Israel v Chabra*, 12 NY3d 158 [2009]; *Simonds v Simonds*, 45 NY2d 233 [1978]; *Sharp v Kosmalski*, 40 NY2d 119 [1976]). In the absence of such proof, there is nothing "unjust" in the holding of that property by another, and no basis for equity to intercede (*Simonds v Simonds*, 45 NY2d 233, *supra*; *Steinberger v Steinberger*, 252 AD2d 578 [2d Dept 1998]).

Here, the eleventh cause of action for constructive trust fails because, as a matter of law, plaintiffs cannot establish the required elements of a constructive trust over the Property In addition, plaintiffs clearly have an adequate remedy at law.

In order to justify the imposition of a constructive trust, a plaintiff must establish: "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Consumers Union of U.S., Inc. v State of*

New York, 5 NY3d 327, 347, n 14 [2005]; *Sharp v Kosmalski*, 40 NY2d 119, *supra*; *Matter of Gupta*, 38 AD3d 445 [1st Dept 2007]).

First, plaintiffs have failed to establish the transfer element of a constructive trust claim. To prove a constructive trust claim, the plaintiff must demonstrate a promise and a transfer of title or property in which plaintiff had an interest in reliance on that promise (*Sharp v Kosmalski*, 40 NY2d 119, *supra*; *see e.g. Fodiman v Zoberg* (182 AD2d 493, 494 [1st Dept 1992] ["Here, although the pleading may have sufficiently alleged a confidential relationship and unjust enrichment, it failed to allege either a promise to convey or reconvey the property or an interest therein to defendant or a transfer in reliance on such promise"]). Thus, a constructive trust claim cannot be maintained by a party "who has no interest in the property prior to obtaining a promise that such an interest will be given to him" (*Matter of Wells*, 36 AD2d 471, 474 [4th Dept 1971]; *affd* 29 NY2d 931 [1972]).

Accordingly, where the plaintiff is only a potential purchaser who never held an ownership interest in the subject property, he is not entitled to the imposition of a constructive trust on such property as a matter of law (*Kaufman v Torkan*, 51 AD3d 977, 980 [2d Dept 2008] ["under these circumstances, Kaufman would not be entitled to the imposition of a constructive trust since, as only a potential buyer, he had not interest in the subject property at the time he allegedly received Torkan's promise"]; *Pfeiffer v Jacobwitz*, 29 AD3d 661, 662 [2d Dept 2006] [holding that plaintiff failed to state a claim for constructive trust because "he did not allege facts which would indicate ... that the plaintiff was in possession of property which he transferred in reliance on a promise of the defendants"]; *Mance v Mance*, 128 AD2d 448, 448 [1st Dept], *appeal dismissed in part, denied in part* 70 NY2d 668 [1987] [reversing lower court and granting

defense motion for summary judgment dismissing constructive trust claim because "plaintiff possessed no prior interest in the company which he relinquished in reliance on the alleged promise"]).

Kaufman v Torkan (51 AD3d 977, *supra*) is directly on point. There, like here, the plaintiff filed breach of fiduciary duty claims, and sought the imposition of a constructive trust alleging that his partners in a joint venture to acquire certain properties improperly acquired one of the properties for themselves, and excluded him from the transaction. The court granted summary judgment dismissing the constructive trust claim and cancelling the notice of pendency because, even if it were assumed that a joint venture to acquire the property had been established, the plaintiff "would not be entitled to the imposition of a constructive trust since, as only a potential buyer, he had no interest in the subject property" during the time period at issue (*id.* at 980).

Here, as in the foregoing cases, there was no "transfer" of an interest in property by plaintiffs, or even by the joint venture between NYDC and MNM alleged in the complaint. The deposition testimony of both Don and Gerstein confirms that neither plaintiffs nor any joint venture in which they had any interest ever held an ownership interest in, or had any contract to acquire, the property (Don Dep., at 347-352 [testifying that the purchase agreement prepared by plaintiffs "wasn't signed"]; Gerstein Dep., at 265-267 [testifying that "we never had a contract to be put in and this was never executed so we never had to put a contract in here"]). Indeed, Gerstein testified that he knew Singer bought the Property (*id.*; Gerstein Dep., at 405-406). While HS Development ultimately entered into two contracts to purchase the Property, it is undisputed that plaintiffs were not members of that entity. Accordingly, plaintiffs cannot satisfy

the "transfer" element of a constructive claim as a matter of law.

In opposition to the motions, plaintiffs do not deny that there was no "transfer" of an interest in property by plaintiffs, and that they never had any ownership interest in or contract to purchase the Property. However, plaintiffs cite *Mendel v Hewitt* (161 AD2d 849, 850 [3d Dept 1990]) for the proposition that "the concept of transfer can extend to instances where 'funds, time and effort are contributed in reliance on a promise to share in the result'" (Pl Opp., ¶ 81). This argument fails because, at most, it would establish that they had an interest in the profits of the joint venture, but not in the Property.

In addition, plaintiffs cannot establish the existence of the "confidential relationship" element of a constructive trust claim. Plaintiffs assert that they have established the "confidential relationship" element because "the evidence produced so far shows unmistakably that Plaintiffs approached all of the Singer defendants with their proprietary business opportunity on a strictly confidential and discrete basis" (Pl Opp., ¶ 66). That argument is irrelevant, however, because neither iStar nor Cipe, nor any of the predecessor bank herein, are alleged to have had a confidential relationship with plaintiffs upon which to justify the imposition of a constructive trust claim against them.

Plaintiffs also contend that they have established that iStar has been unjustly enriched because "the Business Opportunity created and developed by Plaintiffs was stolen by the Singer Defendants through guile and trickery" (Pl Opp., ¶ 87). However, it is clear that plaintiffs have failed to establish unjust enrichment in this case:

> [P]laintiff has failed to show that any of the four criteria for imposing a constructive trust are present and operative against Dollar upon the evidence presented in this case. Simply stated,

> Dollar was not unjustly enriched; it gave value for the mortgages it now holds. While plaintiff may ultimately be able to impose a constructive trust against STA and the Halloran interests, it has no viable cause of action against Dollar upon that theory

(*Groh v Halloran*, 86 AD2D 35, 38-39 [1st Dept, *appeal withdrawn* 57 NY2d 675 [1982] [internal citation omitted]). Here, like the mortgagee in *Groh*, Cipe, iStar and their predecessor mortgagees gave value for the mortgages at issue, and therefore, were not unjustly enriched as a matter of law.

The constructive trust claim must also be dismissed because plaintiffs have an adequate remedy at law. It is well-established under New York law that "equity will not entertain jurisdiction where there is an adequate remedy at law" (*Boyle v Kelley*, 42 NY2d 88, 91 [1977]). With respect to constructive trusts, New York courts have held that "[a]s an equitable remedy, a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate" (*Bertoni v Catucci*, 117 AD2d 892, 895 [3d Dept 1986]; *see e.g. Evans v Winston & Strawn*, 303 AD2d 331, 333 [1st Dept 2003] ["Plaintiffs' claim for a constructive trust was properly dismissed since plaintiffs do not claim that [defendant] is unable to repay plaintiffs' capital contributions, and it does not otherwise appear that the legal remedy of damages will be inadequate"]).

Plaintiffs admit that, while the alleged purpose of the joint venture was to acquire real property, plaintiffs' interest in the joint venture is "deemed to be personalty" (10/28/10 Aff. of Jeffrey E. Michels, Esq.), which is compensable in money damages. Indeed, the gravamen of the complaint is plaintiffs' assertion that they were wrongfully ousted from their role in a joint venture to develop the Property. Plaintiffs claim that they are entitled to file a Notice of

Pendency for the sole purpose of protecting their share of profits from the alleged joint venture. Even assuming that this claim has merit, plaintiffs have no basis for asserting a constructive trust claim because they have an adequate remedy at law against the MNM defendants, Singer and HS Development pursuant to the first ten causes of action asserted in the complaint, for which they seek "monetary damages against Defendants, both jointly and severally, for (i) Future Lost Profits in the approximate amount of $13,500,000, (ii) Future Lost Profits of 40% of Total Actual Net Profits realized above the Projected Net Profits for the commercial and residential complex; (iii) Future Lost Developer's Fee in the approximate amount of $2,500,000 ... and (iv) Punitive Damages in the amount of $10,000,000" (Complaint, at 1-2).

In opposition to the motion, plaintiffs assert that they do not have an adequate remedy at law because they have always sought "to acquire and develop the Property" and, from the outset of this case, sought the imposition of a constructive trust (Pl Opp., ¶¶ 89-90). This argument, however, fails to address the adequacy of money damages as a remedy (*see e.g. 11 Duke St., Ltd. v Ryman*, 280 AD2d 429, 429 [1st Dept 2001] [adequacy of remedy at law is not determined by "any inherent physical uniqueness of the property but instead in the uncertainty of valuing it"]). Here, the very purpose of the alleged joint venture was to acquire property and sell it for a profit.

Accordingly, with respect to Motion Sequence No. 016, the motion and the cross motions for summary judgment dismissing the constructive trust cause of action are granted. As such, plaintiffs' cross motion for leave to file and serve answers to iStar's and 855 Realty's respective counterclaims is denied as moot, as this court specifically ordered, in decisions and orders dated September 15, 2009 and September 17, 2009, that 855 Realty's and iStar's motions

to intervene be granted with respect only to the eleventh cause of action. iStar's motion to substitute Cipe as intervenor defendant in place of iStar is also denied as moot.

With respect to Motion Sequence No. 026, as the constructive trust cause of action is being dismissed, and as 855 Realty and iStar no longer have an interest in the Property, plaintiffs' motion to dismiss this action against iStar and 855 Realty is granted. Plaintiffs' additional request for an order denying as moot iStar's motion and 855 Realty's cross motion for partial summary judgment on the eleventh cause of action is denied.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of intervenor defendant iStar FM Loans, LLC, and the cross motions of intervenor defendant 855 Realty Owners LLC and defendants Baruch Singer and Herald Square Development LLC to dismiss the eleventh cause of action (Motion Sequence No. 016) are granted, and the eleventh cause of action of the complaint is dismissed; and it is further

ORDERED that iStar FM Loans, LLC's motion for an order granting the substitution of Cipe Realty Associates, LLC as intervenor defendant in place of iStar is denied as moot; and it is further

ORDERED that plaintiffs' cross motion for leave to file and serve answers to the counterclaims of intervenor defendants iStar FM Loan LLC and 855 Realty Owners, LLC is denied as moot; and it is further

ORDERED that plaintiffs' motion for an order dismissing this action against iStar

FM Loans, LLC and 855 Realty Owners LLC (Motion Sequence No. 026) is granted, and the remainder of the motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 13, 2011

ENTER:

J.S.C.