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SHORT FORM ORDER

INDEX No. 5297-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/13/11
ADJ. DATES 7/29/11
Mot. Seq. # 003 - Mot D
PC Scheduled: 10/28/11
CDISP Y____ N X

CHRISTOPHER ESPOSITO, Plaintiff, -against- JOHN C. TSUNIS, JOHN A. DANZI, HOME RUN HOTELS, LLC and LONG ISLAND HOTELS, LLC, Defendants.	PLUMMER & PLUMMER, LLP Attys. For Plaintiff 77 Arkay Dr. Hauppauge, NY 11788 MELTZER, LIPPE, GOLDSTEIN ET AL Attys. For Defs. Home Run & LI Hotels 190 Willis Ave. Mineola, NY 11501 RIVKIN, RADLER, LLP Attys. For Def. Danzi 926 RXR Plaza Uniondale, NY 11556 PINKS, ARBEIT & NEMETH, ESQS. Attys. For Def. Tsunis 140 Fell Ct. Hauppauge, NY 11788

Upon the following papers numbered 1 to 10 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5; 6-7 ; Replying Affidavits and supporting papers 8-10 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the defendant, John C. Tsunis, for an order dismissing the plaintiff's complaint to the extent that claims against this moving defendant are asserted, is considered under CPLR 3211(a) (1) and (7) and is granted only as to the Third Cause of Action which is dismissed, and its is further

ORDERED that a preliminary conference shall be held with respect to all remaining causes of action on **October 28, 2011**, at 9:30 a.m., in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

The plaintiff, as purchaser of a portion of the individual defendants' equity interests in defendant, Home Run Hotels, LLC, and as a member thereof, commenced this action to recover money damages from defendants, John C. Tsunis, John A. Danzi and Home Run Hotels, LLC (hereinafter "Home Run") under theories of contract and tort law. In addition, the plaintiff seeks the equitable remedy of an accounting from the individual defendants and defendant, Long Island Hotels, LLC (hereinafter "Long Island") as to profits they allegedly derived from competing hospitality group developments and other hospitality investments in which they had ownership interests since February 19, 2003. By the instant motion (#003), defendant, John C. Tsunis, seeks an order dismissing the five causes of action asserted against him by the plaintiff.

A review of the record adduced on this motion reveals the existence of the following facts. In 2002, defendants, Tsunis and Danzi formed Home Run Hotels, LLC, so as to engage in the commercial development of property in Central Islip as a hotel with affiliated services and to otherwise manage, operate, lease, sell or mortgage same for profit. On February 19, 2003, the plaintiff executed a Subscription Agreement by which he purchased a of 4% ownership interest in Home Run. The February 19, 2003 Subscription Agreement reads as follows:

> Chris Esposito, hereby subscribes to purchase four percent(4%) membership interest in Home Run Hotels, LLC, a duly formed New York State limited liability company with offices at c/o Long Island Hotels LLC at 801 Motor Parkway, Hauppauge, New York 11788.
>
> Said interest shall represent a 4% equity in the Home Run Hotels LLC project at Courthouse Derive and Carlton Avenue, Central Islip, new York and shall enjoy a guaranteed return of 6% and return of principal for five (5) years guaranteed by John C Tsunis and John A. Danzi.
>
> Subscription for said interest shall be made upon execution of this subscription agreement to held in escrow by Tsunis, Gasparis &I Dragotta, LLC, as attorneys, as escrow agent to be subsequently paid over to Home Run Hotels, LLC at which time certificates representing said equity interest shall be duly issued.

A written guaranty of the type contemplated by the Subscription Agreement had previously been executed by defendants, Tsunis and Danzi, on February 14, 2003. The written guaranty recites that the plaintiff Esposito was the purchaser of the equity interests of Tsunis and Danzi in two hotel development projects, including the one for which Home Run Hotels, LLC had been formed and that the guarantors were required by the contracts with Esposito to execute such guaranty and that they did so in order to induce Esposito to purchase equity interests in the LLCs. Therein, Tsunis and Danzi guaranteed, absolutely, irrevocably and unconditionally, "that Esposito shall receive a SIX (6%) percent annualized return on the . . . and [the] FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS

invested in Home Run Hotels LLC for the first FIVE (5) YEARS following Esposito's investment". . Tsunis and Danzi further guaranteed the return Esposito's principal investment for the first five years in the event Esposito wished to terminate his equity interest Home Run within the 54th and 60th months following his purchase of such interest. The terms of the guaranty prohibited modifications other than in writing and required that all notices, requests and demands be in writing. The five year term of the return of principal provision is alleged to have been extended by an Amended guaranty by Danzi and Tsunis.

The plaintiff alleges that under the 6% annualized return on principal investment provisions of the February 19, 2003 Subscription Agreement , he was entitled to $150,000.00 from Home Run. The plaintiff further alleges that Home Run paid the plaintiff only the sum of $71,054.79, leaving a balance due in the amount of $78,945.21. The plaintiff claims that Tsunis and Dansi breached the terms of this guaranty because Home Run has not paid the full 6% return on the plaintiff's principal investment of $500,000.00 due for the first five years. The plaintiff further claims that defendant Tsunis breached the terms of an Amended Guaranty which gave the plaintiff a perpetual right to the return of his principal investment in Home Run. Tsunis is further charged with fraudulently inducing the plaintiff into withdrawing his November 27, 2007 written demand for a return of principal. According to the plaintiff Tsunis represented, among other things, that the five year term of February 14, 2007 written guaranty would be extended by Tsunis and Danzi. The plaintiff also claims that Tsunis is liable in tort for breaching fiduciary duties owing to the plaintiff and is obligated to provide an accounting of certain of the profits Tsunis derived from his alter ego, defendant, Long Island Hotels, LLC and other investments. In this regard, the plaintiff alleges that both of the LLC defendants are owned and controlled by defendants, Tsunis and Danzo and that such defendants operate Long Island as alter egos of themselves.

The claims asserted against defendant Tsunis, for which dismissal is sought on this motion pursuant to CPLR 3211(a)(1) and/or (a)(7), are set forth as the SECOND, THIRD, FOURTH, FIFTH and SIXTH Causes of Action in the plaintiff's complaint. For the reasons stated, the motion is granted to the extent that the THIRD Cause of Action, sounding in breach of an Amended Guaranty, is dismissed.

It is well established that a motion pursuant to CPLR 3211(a)(1) for dismissal of a claim based on documentary evidence is appropriately granted only where the documentary evidence submitted utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law *(see* ***Goshen v Mutual Life Ins. Co. of New York***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Mason v First Cent. Nat. Life Ins. Co. of New York***, 86 AD3d 854, 927 NY2d 694 [2d Dept 2011]). To be considered documentary for purposes of CPLR 3211(a)(1), the submissions must be unambiguous and of undisputed authenticity and consist of writings and documents other than letters, affidavits and deposition testimony (*see* ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v Doe***, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]).

In his THIRD Cause of Action, the plaintiff charges Tsunis with breaching an Amended Guaranty. Said Amended Guaranty allegedly extended the five year term for the return of principal that was set forth in the written guaranty of February 14, 2003 executed by Tusnis. However, defendant Tsunis established, by production of the written guaranty dated February 14, 2003, that the terms thereof precluded changes, modification and discharge thereof except by a writing signed by the party agaisnt

whom enforcement of the change, modification or discharge is sough (*see* Guaranty dated February 14, 2003 ¶ 3).

It is well-settled that a continuing guarantee with a no-oral-modification clause is not amenable to oral modification or termination as the statute of frauds bars oral modifications to a contract which expressly provides that modifications must be in writing (*see* General Obligations Law § 15-301; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***B. Reitman Blacktop, Inc. v Missirlian,*** 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]; ***Bank of New York v Kranis***, 189 AD2d 741, 592 NYS2d 67 [2d Dept 1993]). Since the plaintiff neither alleges nor relies upon the existence of a writing signed by defendant Tsunis that changed the terms of the written guaranty dated February 14, 2003, so as to extend the term thereof beyond the five year period stated therein, the plaintiff's THIRD Cause of Action is dismissed pursuant to CPLR 3211(a)(1).

The remaining portions of this motion are, however, denied. It is well settled law that when a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). In considering a motion to dismiss for legal insufficiency under CPLR 3211(a)(7), the court must afford the complaint a liberal construction after accepting the facts alleged therein to be true and determine only whether those facts fit within any cognizable legal theory (*see* ***Peery v United Capital Corp***., 84 AD3d 1201, 924 NYS2d 470 [2d Dept 2011]; ***Reiver v Burkhart, Wexler & Hirschberg, LLP***, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]; ***Goldin v Engineers Country Club***, 54 AD3d 658, 864 NYS2d 43 [2d Dept 2008]). If the court can determine that the plaintiff may be entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see* ***Symbol Tech. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc***., 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]).

It is equally well settled that "[W]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (***Rietschel v Maimonides Med. Ctr***., 83 AD3d at 810, 921 NYS2d 290 [2d Dept 2011]). The court is thus permitted, but not compelled, to consider evidentiary material submitted by a moving defendant, and where it does so, the criterion becomes whether the plaintiff has a cause of action, not whether he has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Bodden v Kean***, 86 AD3d 524, 927 NYS2d 137 [2d Dept 2011]). However, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action (*see* ***Sokol v Leader***, 74 AD3d 1180, *supra,* quoting, ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]). Absent a showing that a material fact as claimed by the plaintiff is not a fact at all and the absence of any dispute

with regard to it, a motion pursuant to CPLR 3211(a)(7) to dismiss for legal insufficiency must be denied (*see* ***Rietschel v. Maimonides Med. Ctr.***, 83 AD3d at 810, *supra*; ***Sokol v Leader***, 74 AD3d 1180, *supra*). Consideration as to whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; ***Khoury v Khoury***, 78 AD3d 903, 912 NYS2d 235 [2d Dept 2010]).

Defendant Tsunis contends that the FIFTH Cause of Action sounding in breach of fiduciary duties and the SIXTH Cause of Action for an accounting, both of which are cognizable only where a confidential or fiduciary relationship exists between the parties, fail to state claims for such relief (*see* ***AHA Sales, Inc. v Creative Bath Prods., Inc.***, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]). The court, however, rejects these contentions. The breach of fiduciary duties claim is based upon allegations of self-dealing on the part of Tsunis by his engagement in non-disclosed, competing real estate development projects by the use of monies belonging to Home Run and otherwise and other wrongful conduct. The plaintiff asserts that these tortious acts interdicted Home Run's ability to sustain profits and caused the plaintiff to sustain money damages.

Upon a liberal construction of the complaint and after accepting the facts alleged therein to be true, the court concludes that the complaint contains sufficient allegations of self dealing and other conduct which may constitute a breach of fiduciary duties (*see* ***Commander Terminals Holdings, LLC v Poznanski***, 84 AD3d 1005, 923 NYS2d 190 [2d Dept 2011]). Tsunis' additional claims that the FIFTH and SIXTH Causes of Action, to the extent they are dependent upon claims of fraud, are deficient under the pleading requirements of CPLR 3016 are similarly rejected (*see* ***Selechnik v Law Office of Howard R. Birnbach***, 82 AD3d 1077, 920 NYS2d 128 [2d Dept 2011]).

It is further contended by Tsunis that dismissal of the FIFTH and SIXTH Causes of Action is warranted because the plaintiff *has* no cognizable claims for breach of fiduciary duties. These contentions are premised upon claims that Tsunis did not breach any fiduciary duty owed to the plaintiff. In support thereof, Tsunis relies upon his own affidavit and certain provisions of the Operating Agreement of Home Run as amended, which purportedly permit Tsunis to engage in other real estate developments, even those in close proximity to the Central Islip site to which Home Run is dedicated. Tsunis claims that these provisions absolve him of customary fiduciary duties which would have prohibited his involvement in competing development projects.

The court finds however, that Tsunis' characterization of the relied upon terms of Home Run's Operating Agreement as amended, which purportedly contemplate and permit Tsunis' engagement in the activities complained of by the plaintiff, fail to establish that as a matter of law the plaintiff has no claims for damages or an accounting due to Tsunis' breach of fiduciary duties owing to the plaintiff. Since neither the Operating Agreement nor its amendment expressly absolve defendant Tsunis of or permit him to engage in the specific activities complained of by the plaintiff it is not clear that, as a matter of law, material facts as claimed by the plaintiff "are not facts at all" and that no significant dispute exists with regard thereto or that Tsunis has a legal defense thereto based upon the submitted documentary evidence (*see* ***Bodden v Kean***, 86 AD3d 524, *supra*; ***Mason v First Cent. Nat. Life Ins. Co. of New York***, 86 AD3d 854, *supra*). Tsunis' demands for dismissal of the FIFTH and SIXTH Causes of Action set forth in the complaint purusant to either CPLR 3211(a)(1) or (a)(7) are thus denied.

Likewise denied are those portions of Tsunis' motion wherein he seeks dismissal of the SECOND Cause of Action set forth in the plaintiff's complaint. Therein, Tsunis is charged with breach of the terms of the written guaranty dated February 14, 2003 wherein he guaranteed, absolutely, irrevocably and unconditionally "that Esposito shall receive a SIX (6%) percent annualized return on the . . . and [the] FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS invested in Home Run Hotels LLC for the first FIVE (5) YEARS following Esposito's investment". Tsunis' demands for dismissal of the plaintiff's claim of breach of the written guaranty are premised upon allegations that defendant Home Run did not default in any obligation to pay the full 6% return on the plaintiff's principal investment of $500,000.00 for the first five years as set forth in the Subscription Agreement offer to purchase that was accepted by the defendants. However, the court finds that Home Run's Operating Agreement as amended does not conclusively demonstrate that the plaintiff has no cause of action against Home Run for recovery of the remaining amounts due under the 6% annualized return on the plaintiff's principal investment of $500,000.00 for the first five years or that the terms of such Operating Agreement provide Tsunis with a legal defense to the plaintiff's claims for recovery of such outstanding monies. The issue regarding whether the Home Run is obligated to pay these outstanding amounts thus remains in dispute and is a factor which implicates a default on the part of Home Run. Since a default on the part of Home Run has not been established as being "not a fact at all," Tsunis *may* be liable under the terms of his written guaranty of Home Run's obligation to provide the plaintiff with the full 6% return on the plaintiff's principal investment of $500,000.00 for the first five years as set forth in the Subscription Agreement.

Tsunis' alternate claim for dismissal of the SECOND Cause of Action on the grounds that the plaintiff failed to issue a demand therefor, in accordance with the terms of the February 14, 2003 written guaranty, is equally unavailing. From the record adduced, it is apparent that the plaintiff received from Home Run periodic payments totaling $71,054.79 out of the $150,000.00 due as the 6% annualized return on the plaintiff's principal investment of $500,000.00 for some of the first five years and that Home Run failed to pay the remaining $78,945.21, for which the plaintiff seeks recovery in his SECOND Cause of Action from Tsunis under his written guaranty of such payments. After those periodic payments stopped, the plaintiff served a written demand for payment by a writing dated November 28, 2007. While defendant Tsunis assails the validity of that demand due to its purported recision, the plaintiff claims that any such recision was fraudulently induced by Tsunis. There is insufficient documentary or other evidence to establish that, as a matter of law, the plaintiff's November 28, 2007 written demand for payment of sums owing was effectively rescinded or otherwise did not constitute a demand of the type required by the notice provisions of the February 14, 2003 written guaranty of Tsunis. Under these circumstances, and in view of the early stages of the litigation in which this pre-answer motion to dismiss has been interposed, the court finds that Tsunis failed to demonstrate that the plaintiff *has* no cause of action for recovery of the remaining portions of the $150,000.00 return on his principal investment against Tsunis under the terms of his written guaranty. Tsunis' demands for dismissal of the SECOND Cause of Action set forth in the complaint pursuant to either CPLR 3211(a)(1) or (a)(7) is thus denied.

The remaining portions of this motion wherein Tsunis seeks dismissal of the plaintiff's FOURTH Cause of Action is also denied. By such cause of action, the plaintiff charges Tsunis with fraudulently inducing him into rescinding his November 28, 2007 demand for payment of all amounts due under the February 19, 2003 Subscription Agreement and under Tsunis' written guaranty of such

payments dated February 14, 2003. Tsunis claims that this cause of a action is legally insufficient in as much as it is premised upon the same allegations that give rise to the plaintiff's breach of contract claims. While it is well settled law that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been and that such duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract violated (*see* ***Clark-Fitzpatrick, Inc. v Long Island R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]), tort claim resting on allegations that a non-contractual independent duty was breached are not duplicative of contract claims and may subsist in an action that includes breach of contract claims (*see* ***Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.***, 64 AD3d 85, 878 NYS2d 97 [2d Dept 2009]); ***Luxonomy Cars v Citibank,*** 65 AD2d 549, 550, 408 NYS2d 951 [2d Dept 1978]). The court's focus is not on whether the tortious conduct is separate and distinct from the defendants' breach of contractual duties, for it has long been recognized that liability in tort may arise from and be inextricably intertwined with that conduct which also constitutes a breach of contractual obligations. Rather, the focus is on whether a non-contractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement (*see* ***Apple Records, Inc. v Capitol Records, Inc.***, 137 AD2d 50, 529 NYS2d 279 [1st Dept1988]; ***Rich v New York Cent. & Hudson River Railroad Co.***, 87 NY at 382 [1882]).

Here, the plaintiff charges Tsunis with fraudulent acts that purportedly induced the plaintiff into executing a writing by which may have retracted his demand for payment of, among other things, the return of his principal investment in Home Run within the five year period provided in the February 19, 2003 Subscription Agreement. These allegations implicate a breach of a duty independent of Tsunis' obligations under the written guaranty. The tort claim asserted by the plaintiff in his FOURTH Cause of Action is thus not a mere duplication of his breach of contract claim. Tsunis' demands for dismissal of the FOURTH Cause of Action is thus denied.

In view of the foregoing, the instant motion (#003) by defendant, John C. Tsunis, for dismissal of the claims asserted by the plaintiff is granted only to the extent that plaintiff's THIRD Cause of Action is dismissed pursuant to CPLR 3211(a)(1). Counsel for the parties are directed to appear for the preliminary conference scheduled above with respect to the other causes action asserted by the plaintiff against defendant Tsunis.

DATED: 9/6/11

THOMAS F. WHELAN, J.S.C.