

**Antebi v Thor Gallery at Warren Conner, LLC**

2012 NY Slip Op 33472(U)

April 4, 2012

Sup Ct, NY County

Docket Number: 600371/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 49

MARK ANTEBI,

Plaintiff,

-against-

THOR GALLERY AT WARREN CONNER, LLC, *et al.*,

Defendants.

INDEX NO. 600371/2010

MOTION DATE Nov. 15, 2011

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to dismiss action.

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss the complaint is decided in accordance with the accompanying decision and order.

Dated: April 4, 2012

*O. P. Sherwood*  
O. PETER SHERWOOD, 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 49**

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**MARK ANTEBI,**

**Plaintiff,**

**-against-**

**DECISION AND  
ORDER**

**Index No. 600371/2010**

**THOR GALLERY AT WARREN CONNER, LLC,  
THOR MM GALLERY AT WARREN CONNER, LLC,  
THOR GALLERY AT SOUTH DEKALB EQUITY, LLC,  
THOR MM GALLERY AT SOUTH DEKALB EQUITY,  
LLC, THOR EQUITIES, LLC, JOSEPH J. SITT SBT  
TRUST, JOSEPH J. SITT, THOR PROPERTIES, LLC,  
JOHN DOES 1-10, and ABC CORPORATIONS 1-10.**

**Defendants.**

-----X

**O. PETER SHERWOOD, J.:**

Defendants seek to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) this action commenced on November 16, 2009 by plaintiff Mark Antebi, ("Plaintiff"), in connection with his investment in two retail shopping centers owned by affiliates of Thor Equities LLC ("Thor"). Plaintiff alleges that in June 2003, he executed the Second Amended and Restated Operating Agreement for Thor South DeKalb Equity LLC ("Thor SDE") located in Atlanta, Georgia ("SDE Agreement"), and in respect of his \$500,000 investment, became a roughly 10% member of the entity. Similarly, in May 2003, Plaintiff executed the Amended and Restated Operating Agreement for Thor Gallery at Warren Conner, LLC ("Thor WC") located near Detroit, Michigan (the "WC Agreement")(together, "Operating Agreements"), and invested \$412,500, becoming approximately a 10% member. The two operating agreements are substantially identical and contain several provisions relevant to this action.

Under each operating agreement, the Manager of the Property was given broad authority and

discretion: “The Manager shall have the sole authority to manage the operations of the Company and shall have the authority on behalf of the Company to take any and all actions as the Manager shall deem reasonable or necessary to carry out the business of the Company.” Further, “The Manager shall not be liable to the Company or any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of the gross negligence or willful misconduct of such Manager.” (§4.7). Plaintiff also acknowledged that “THE MEMBERSHIP INTEREST IS VERY SPECULATIVE AND RISKY” (§3.7) and that the “Manager does not in any way guaranty the return of any Capital Contribution to a Member or a profit for the Members from the operations of the Company.” (§4.7). The operating agreements also stated that “[i]n considering its investment in the Company, such Member has not relied upon any representations made by, or other information (whether oral or written) furnished by or on behalf of, the Company, the Manager or any officer, employee, agent or Affiliate of such Persons, other than as set forth in this Agreement.” (§3.8.7).

Plaintiff sued eight named individuals and entities (as well as 20 unnamed “John Doe” individuals and entities) on the theory that they are all “one (1) person, without distinct personal and business boundaries and purposes, without distinct marketing materials, letterhead and bank account management, without unique ownership and control” (§ 36). Citing to various portions of the discussion and projections in a marketing investment summary, Plaintiff alleges that he was fraudulently induced to invest in Warren Connor as a result of “intentional, materially false representations” on which he claims to have relied. Similarly, citing to an investment summary for the Atlanta property, Plaintiff alleges that he was fraudulently induced to invest \$500,000 by a series of “intentional, materially false verbal representations.” Plaintiff also alleges that refinancing and

construction took place without prior notice to or approval from the members (§ 34.C, D); that either “\$4.3 Million is missing in the first 2 months of the SDE acquisition, or the other 53 investors did not really invest a cumulative total of \$11,516,000”; that defendants improperly paid themselves before investors out of refinancing proceeds on the two properties; that too much in tenant improvement reserves were established; that preferred returns could only be paid out of net operating income, not refinance proceeds; that there is a discrepancy between his membership interest as shown on the investor schedule and as reported on a K-1 for a particular year and that defendants concealed that millions of dollars are missing. Lastly, Plaintiff complains that he was given insufficient access to the companies’ books and records.

The Amended Complaint lists nine causes of action arising out of the investments as follows: (1) breach of fiduciary duty, (2) breach of contract, (3) declaratory judgment, (4) breach of implied covenant of good faith and fair dealing, (5) fraud, (6) unjust enrichment and constructive trust, (7) negligence, (8) failure to give access to the books and records of Thor WC in violation of 6 Del. C. §18-305, and (9) failure to give access to the Books and Records of Thor SDE in violation of 6 Del. C. §18-305.

Defendants move under both CPLR 3211(a)(1) and CPLR 3211(a)(7) to dismiss the complaint in its entirety. Defendants assert that all claims are barred by the statute of limitations, that the amended complaint fails to state a cause of action and that Plaintiff’s claims are defeated by documentary evidence.

### ***DISCUSSION***

Because Thor SDE and Thor WC are Delaware limited liability corporations and the Operating Agreements provide that they “shall be construed ... and enforced in accordance with, and

governed by, the laws of the State of Delaware applicable to contracts to be performed entirely within the State without giving effect to the principles of conflicts of law,” Delaware law governs the substantive issues in this case. Procedural issues are governed by New York law (*see Sokol v Ventures Educ. Sys. Corp.*, No 602856/2002, 2005 WL 3249447\*5 [Sup Ct NY Co, June 27, 2005]).

#### **A. Statute of Limitations**

Application of the statute of limitations is considered procedural in New York (*see Tanges v Heidelberg N. Am.*, 93 NY2d 48, 53-54 [1999]). Absent a choice of law clause that expressly incorporates the limitations period of another jurisdiction, New York periods will be applied in a civil action in this State (*see Portfolio Recovery Assoc. LLC v King*, 14 NY3d 410, 416 [2010]).

New York’s statute of limitations applies here.

CPLR 203 (g) states in pertinent part:

Where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided.

The original complaint was filed on November 16, 2009. The Amended Complaint was filed on or about January 18, 2011.<sup>1</sup> Plaintiff subscribed to the Operating Agreements in May and June 2003.

Plaintiff asserts that the claims are not time-barred because Plaintiff had no reason to know of any impropriety until he demanded access to company books in the summer of 2009 and was refused. Plaintiff further asserts that only after being granted limited discovery in this case did he learn that more than \$18 million had been misappropriated by Defendants. Based on these arguments, Plaintiff claims that his fraudulent inducement cause of action is not time-barred because

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<sup>1</sup>The original complaint is verified, the amended complaint is not.

the claim, which “must be commenced within six years from the date of the fraudulent act or two years from the date the party discovered, or could, with due diligence, have discovered it” (*Kaufman v Cohen*, 307 AD2d 113, 122-23 [1<sup>st</sup> Dept 2003]), was brought within the two-year extension period.

A fraudulent inducement claim accrues upon contract execution (*see In re Ply Gem of Laurel, Inc v Lee*, 91 AD2d 513 [1<sup>st</sup> Dept 1982]). Plaintiff claims that defendants had represented to Plaintiff that he “would continue to receive a 7% preferred return on his investment through June, 2006.” Payments of any kind ceased in February 2005 (¶16.B). The contracts were signed in May and June 2003. The claim is time-barred because it was not filed until November 2009, more than six (6) years later. Further, plaintiff could have reasonably known about the fraud by early 2005 when the 7% preferred returns ceased, a date which is beyond the two year extension period. The fraudulent inducement claim must be dismissed.<sup>2</sup>

Plaintiff’s first cause of action for breach of fiduciary duty seeks money damages only. The claim is governed by a three year limitation period (*see Cartingford Ctr. Point Assoc. v MR Realty Assoc. LP*, 4 AD3d 179, 179-80 [1<sup>st</sup> Dept 2004] [applying a three year limitations period where the complaint primarily sought damages]). Assuming, without deciding, that the breach of fiduciary duty claim alleged for the first time in plaintiff’s unverified amended complaint relates back to the date of the original complaint, this cause of action must be dismissed because the actionable claims all pre-date November 16, 2006, which is three years prior to the date the original complaint was filed.<sup>3</sup>

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<sup>2</sup>The amended complaint does not set forth a separate cause of action alleging fraudulent inducement. The complaint alleges facts plaintiff claims induced him to invest. For purposes of the motion, the court will treat the amended complaint as including such a cause of action.

<sup>3</sup>Plaintiff’s claims that a six year limitations period should apply because the breach of fiduciary duty claim involves allegations of fraud (*see Kaufman v Cohen*, 307 AD2d 113, 122-23

A six year statute of limitations applies to the breach of contract declaratory judgment and unjust enrichment claims. Where the contract requires continuing performance over a period of time, each successive breach begins the statute of limitations running anew (*Bulova Watch Co v Celotex Corp.*, 46 NY2d 606 [1979]). Accordingly, Plaintiff's breach of contract claim, which contains a number of continuing performance claims that are alleged to be in violation of the written Operating Agreements, including obligations (1) to pay Plaintiff net cash flow from operations, net refinancing proceeds, net sales proceeds, and preferred return, (2) to distribute any excess held in the tenant improvement reserve, (3) to act as a fiduciary for the benefit of the Plaintiff, (4) to act in a commercially reasonable and good faith fashion, and (5) to provide access to books and records to Plaintiff, all involve discrete acts that are well within the limitations period. Plaintiff cannot recover for acts outside the six year limitations period, or, in the case of discrete acts that could not have been discovered with reasonable diligence, within that period, within the two year extension period. The breach of contract claim may not be dismissed in its entirety pursuant to CPLR 3211. For the same reason and to the same extent, the unjust enrichment and declaratory judgment causes of action survive defendants' statute of limitations defense.

At oral argument Plaintiff conceded that the seventh cause of action for negligence which has a three year limitations period should be dismissed. This claim is not subject to the two year extension provision of CPLR 203 (g)(see *Playford v Phelps Mem. Hosp. Ctr.*, 254 AD2d 471, 472-3 [2d Dept 1998]). Plaintiff has not alleged any post-November 2006 acts of negligence. This cause of action shall be dismissed.

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[1<sup>st</sup> Dept 2003]; *Unibell Anesthesia, PC v Guardian Life Ins. Co. of Amer.*, 239 AD2d 249 [1<sup>st</sup> Dept 1997]). As discussed, *infra*, the amended complaint fails to state a cause of action for fraud.

### **B. Application of CPLR 3211(a)(7) or 3211(a)(1)**

Regarding plaintiff's breach of contract claim, defendant asserts that this claim should be dismissed for lack of particularity. Although most of the allegations in the complaint allege actions taken that were well within the broad discretion accorded defendants under the terms of the Operating Agreements and Delaware law, Plaintiff has alleged facts sufficient to give notice of the breaches (*see, e.g.* Complaint ¶¶ 31, 34, 38). The second cause of action for breach of contract cannot be dismissed at this stage of the case.

In the third cause of action for declaratory relief, Plaintiff seeks a judgment declaring all of the named individual and institutional defendants "in fact are (1) person and that each is acting as the alter ego for the others and that all such Defendants are liable for any and all of the wrongs that each may have committed against Plaintiff" (Compl. ¶53). A party seeking to impose liability in the manner Plaintiff seeks here must demonstrate that the owners of the corporation exercised complete domination over it in the transaction at issue and, in so doing, abused the privilege of doing business in the corporate form, thereby perpetuating a wrong that resulted in injury to plaintiff (*see Wallace ex re. Cencom Cable Income Partners, Inc. v Wood* 752 A2d 1175, 1183-84 [1999]). Plaintiff has not alleged facts demonstrating that Thor WC and/or Thor MM Gallery at Warren Conner, LLC ("Thor MMWC") exercised any control over Thor SDE and/or Thor MM Gallery at South Dekalb Equity ("Thor MMSDE") or that Joseph J. Sitt SBT Trust ("Trust") dominated any of the above referenced entities. Further, standing alone, an allegation that an individual or entity exercised complete domination over Thor SDE and Thor WC in their dealings with Plaintiff is not sufficient to support exercise of the court's equity powers to lift the corporate veil (*see Mason v Network of Wilmington, Inc.*, 2005 WL 1653954\* 4 [Del Ch. July 1, 2005]). Plaintiff must also establish that

the owners, through their dominance, abused the privilege of doing business in the corporate form (*Wallace*, 752 A2d at 83-84). In this regard, factors to be considered include a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets and use of corporate funds for personal use (*see Harco Nat. Ins. Co. v Green Farms, Inc.*, 1989 WL 110537\* 1041 [Del. Ch. Sept. 19, 1989]). If plaintiff fails to allege all the material elements of each cause of action, the cause of action must be dismissed (*see id.*). In this case, the Amended Complaint does not assert that either Thor or Sitt acted other than as managing members of Thor SDE and Thor WC, that they failed to respect the separate corporate identities of Thor SDE and Thor WC, that they treated the corporate assets of Thor SDE and Thor WC as their own, or that Thor SDE and Thor WC were undercapitalized. The third cause of action for declaratory judgment must be dismissed.

In support of the fourth cause of action for breach of the implied covenant of good faith and fair dealing, Plaintiff asserts that defendants breached their obligation to provide truthful information, timely and accurate accounting and payment of monies (*see Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss*, p. 22). The Operating Agreements expressly cover these subjects and therefore cannot serve as a basis for a separate cause of action for breach of the implied covenant of good faith and fair dealing (*see Fisk Ventures LLC v Segal*, 2008 WL 1961156\*10 [Del Ch May 7, 2008]). The fourth cause of action must be dismissed.

The fifth cause of action for fraud must be dismissed. Paragraph 34 of the complaint, identified by Plaintiff as satisfying the particularity standard CPLR 3016(b) requires, fails (1) to allege statements made by defendant that are misleading, (2) to identify a duty to disclose alleged withheld information, (3) to allege detrimental reliance, and (4) to allege injury resulting from any actionable misrepresentation. The claim that defendants entered into contracts with themselves or

affiliates without the knowledge or approval of Plaintiff fails to allege that defendants misstated any facts or that defendants were under any obligation to disclose those transactions. In any event, under the terms of the Operating Agreements, defendants are identified as responsible for management of the companies and no approvals of Plaintiff are required. Matters relating to how the financial affairs of the company were to be conducted, including the size of reserve funds and the timing of refinances are all subjects within the discretionary authority of management under the terms of the Operating Agreements.

Because the relationship of the parties in this case is governed by contract, the sixth cause of action alleging unjust enrichment and constructive trust must be dismissed (*see Nemec v Shrader*, 991 A2d 1120, 1130 [Del 2010]). Plaintiff's attempt to plead around the contract by naming individuals or entities who are not parties to the agreement must also fail (*see Kuroda v SPJS Holdings, LLC*, 971 A2d 872, 891 [Del Ch 2009])["unjust enrichment cannot be used to circumvent basic contract principles [recognizing] that a person not a party to a contract cannot be held liable to it. Thus, [plaintiff] cannot use a claim for unjust enrichment to extend the obligations of a contract to [defendants] who are not parties to the contract.")].

Defendants argue that the Delaware Court of Chancery is the exclusive forum for statutory books and records claims (*see* 6 Del Ch §18-305). Plaintiff does not dispute the claim. Instead, Plaintiff maintains that books and records are subject to discovery in courts of law in civil cases (*see Petition of B&F Towing & Salvage Co., Inc.*, 551 A2d 45 [1<sup>st</sup> Dept 1988]). In fact, Justice Yates to whom this case was previously assigned, already declared that Plaintiff shall have access to the books and records. The eighth and ninth causes of action for access to books and records will be dismissed. Whether particular books and records plaintiff seeks must be produced will be decided in the ordinary course of discovery.

Accordingly, it is hereby

**ORDERED** that the motion to dismiss the amended complaint is GRANTED to the extent that the first, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action are hereby DISMISSED; and it is further

**ORDERED** that the Amended Complaint is hereby DISMISSED as against Joseph J. Sitt SBT Trust, Joseph J. Sitt, John Does 1-10 and ABC Corporations 1-10, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

**ORDERED** that the action is severed and the second cause of action only shall be continued against Thor Gallery at Warren Conner, LLC; Thor MM Gallery at Warren Conner, LLC; Thor Gallery at South DeKalb Equity, LLC; Thor MM Gallery at South DeKalb Equity, LLC; Thor Equities, LLC; and Thor Properties, LLC only; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and all future papers filed with the Court bear the amended caption as follows:

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49**

-----X

**MARK ANTEBI,**

**Plaintiff,**

**Index No. 600371/2010**

**-against-**

**THOR GALLERY AT WARREN CONNER, LLC,  
THOR MM GALLERY AT WARREN CONNER, LLC,  
THOR GALLERY AT SOUTH DEKALB EQUITY, LLC,  
THOR MM GALLERY AT SOUTH DEKALB EQUITY, LLC,  
THOR EQUITIES, LLC, and THOR PROPERTIES, LLC,**

**Defendants.**

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and it is further


**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

**ORDERED** that the remaining defendants shall serve and file their answer within twenty (20) days of service of this decision and order with notice of entry; and it is further

**ORDERED** that counsel shall appear for a preliminary conference on Wednesday, May 23, 2012 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

**DATED: April 4, 2012**

ENTER,  
  
O. PETER SHERWOOD  
J.S.C.

**APR 04 2012**