

<b>Philips Intl. Inv., LLC v Pektor</b>
2012 NY Slip Op 33493(U)
May 21, 2012
Sup Ct, New York County
Docket Number: 651526/2011
Judge: Eileen Bransten
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 651526/2011  
 PHILIPS INTERNATIONAL  
 vs  
 PEKTOR, LOUIS  
 Sequence Number : 001  
 DISMISS ACTION

PART 3

INDEX NO. 651526/2011  
 MOTION DATE 2/16/2011  
 MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss the complaint

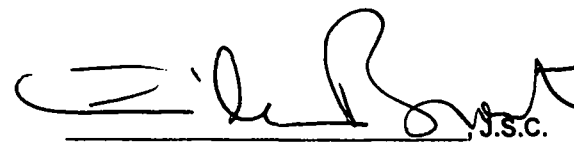
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is

**IS DECIDED**  
**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 5-21-12

  
 \_\_\_\_\_ J.S.C.

**EILEEN BRANSTEN**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X

PHILIPS INTERNATIONAL INVESTMENTS, LLC,  
  
Plaintiff,

Index No. 651526/2011  
Motion Date: 12/16/2011  
Motion Seq. No.: 001

-against-

LOUIS PEKTOR, LISA PEKTOR, CAPITAL TRUST, INC., 3174 AIRPORT ROAD, LP, 3773 CORPORATE PKY, LP, 3701 CORPORATE PKY, LP, 7562 PENN DRIVE, LP, 7355 WILLIAM AVE, LP, 7277 WILLIAM AVE, LP, 947 MARCON BLVD, LP, 964 MARCON BLVD, LP, 954 MARCON BLVD, LP, 944 MARCON BLVD, LP, 764 ROBLE ROAD, LP, 2196 AVE C, LP, 2041 AVE C, 754 ROBLE ROAD, LP, 2202 HANGAR PLACE, LP, 2201 HANGAR PLACE, LP, 1640, 1650 1660 VALLEY CENTER PKY, LP, 1605 VALLEY CENTER PKY, LP, 1560 VALLEY CENTER PKY, LP, 1550 VALLEY CENTER PKY, LP, 1530 VALLEY CENTER PKY, LP, 1525 VALLEY CENTER PKY, LP, 1510 VALLEY CENTER PKY, LP, 1455 VALLEY CENTER PKY, LP, 1495 VALLEY CENTER PKY, LP, 83, 85, 87, 89 S COMMERCE WAY, LP, 57 S COMMERCE WAY, LP,

Defendants.

-----X

BRANSTEN, J.

Defendants Louis Pektor and Lisa Pektor (collectively, the “Pektors”), Capital Trust, Inc. (“Capital Trust”) and all twenty-six Limited Partnership defendants (the “Partnership Defendants”) move to dismiss the complaint. Plaintiff Philips International Investments, LLC (“Philips”) opposes.

## **I. Background**

In early 2010, Philips and the Pektors formed a joint venture (the “Joint Venture”) “with the purpose of purchasing, planning, and managing a portfolio of thirty-three commercial and industrial properties in Pennsylvania’s Lehigh Valley region” (the “Properties”). Pektor Affidavit in Support of Motion to Dismiss (“Pektor Aff.”), Ex. A (“Compl.”), ¶ 36.

On April 13, 2010, the Joint Venture contracted with Liberty Property Limited Partnership (“Liberty”) to purchase the Properties for \$131,500,000 (the “Sales Contract” or the “Purchase”). Compl., ¶ 39. The Joint Venture formed six limited partnerships to hold title for the Properties (the “Limited Partnerships”). *Id.*

On May 21, 2010, Philips and the Pektors executed a letter agreement memorializing the Joint Venture (the “Joint Venture Agreement”). *Id.* at ¶ 37. The Joint Venture Agreement provided that Philips and the Pektors would each receive fifty percent of the profits generated by the Properties. *Id.* at ¶ 38. Philips also agreed to pay for and conduct all due diligence related to the purchase (the “Due Diligence”). *Id.* The Joint venture was to repay Philips’ due diligence costs with a 10% annualized preferred return prior to the distribution of the Joint Venture’s profits. *Id.* Philips incurred \$572,647.69 of due diligence costs. *Id.* at ¶ 42.

While conducting the Due Diligence, Philips “discovered a problem” with respect to one of the Properties then under lease by T-Mobile USA (the “T-Mobile Property”) which, Philips alleges, made the Purchase “not economically viable.” *Id.* at ¶ 43. Philips does not specify when it discovered the alleged problem with the T-Mobile Property or specify what the problem was.

On July 8, 2010, Philips filed for bankruptcy on behalf of the Limited Partnerships. Pektor Aff., Ex. F. Philips does not mention the bankruptcy proceeding in the complaint or otherwise explain why it initiated the bankruptcy proceedings. The Pektors claim that they did not consent to the bankruptcy filing. They assert that they believed that the filing was made in bad faith. Pektor Aff., ¶ 9. The Pektors did not sign any of the papers submitted in the bankruptcy proceeding. *Id.* at ¶ 10. Following the bankruptcy proceeding, Philips “agreed to having the Joint Venture exercise its termination rights under the Sales Contract.” Compl., ¶ 44.

Philips claims to have held extensive discussions with the Pektors regarding how to move forward with the Purchase in light of the Limited Partnerships’ bankruptcy and the problems with the T-Mobile property. *Id.* at ¶ 44. Phillips alleges that they considered the possibilities of bringing a lawsuit against Liberty or renegotiating the Purchase to exclude the T-Mobile Property. *Id.* Philips asserts that it relied on these discussions with the Pektors when it agreed to terminate the Sales Contract. *Id.*

Philips alleges that, while discussing the future of the Joint Venture and the Purchase with Philips, the Pektors were secretly negotiating with Capital Trust to purchase the Properties independently of the Joint Venture. Compl., ¶ 45. Philips argues that the Pektors induced Philips to terminate the Sales Contract so that they could purchase the Property without Philips. *Id.* at ¶ 47. Philips claims that the Pektors did so in order to keep the benefit of the Philips's expenditures for Due Diligence and other costs of negotiating the Purchase as well as all of the profits that would be generated by the Properties. *Id.*

Finally, Philips claims that on April 6, 2011, the Pektors, acting on behalf of themselves and Capital Trust, formed the Partnership Defendants. Allegedly, the Pektors, acting as agents for Capital Trust, then purchased the Properties from Liberty through the Partnership Defendants. *Id.* at ¶ 49.

Philips brought the instant action on June 2, 2011. Philips asserts causes of action for breach of fiduciary duty, breach of contract, fraud and unjust enrichment against the Pektors. Philips asserts causes of action for vicarious liability and unjust enrichment against the Partnership Defendants. Finally, Philips asserts causes of action for joint and several liability, vicarious liability, aiding and abetting fraud and tortious interference with contract against Capital Trust.

## II. Standard of Law:

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party’s pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

“Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Id.*

On a motion to dismiss pursuant to CPLR 3211 (a)(7), “the sole criterion is whether the pleading states a cause of action, and if from [the pleading’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). The “pleadings must be liberally construed and the facts alleged accepted as true.” *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1st Dep’t 1998).

While the court may consider affidavits submitted by a defendant in support of a motion to dismiss under CPLR 3211, those affidavits “will seldom if ever warrant the relief [defendant] seeks unless too the affidavits establish conclusively that plaintiff has no cause of action.” *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976).

### III. Analysis

#### A. Claims against the Pektors

##### 1. Breach of Fiduciary Duty

Philips claims that the Pektors owed it a fiduciary duty as a participant in the Joint Venture. Philips argues that the Pektors breached that duty by misappropriating the Joint Venture's business opportunity. Defendants claim that the Joint Venture had ceased to exist before the Pektors began discussing the possible purchase of the Properties with Capital Trust.

“A joint-venture agreement is generally defined as a special combination of two or more persons wherein some specific venture profit is jointly sought without any actual partnership or corporate designation.” *Natuzzi v. Rabady*, 177 A.D.2d 620, 620 (2d Dep't 1991) (internal citations omitted).<sup>1</sup>

The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses.

*Richbell Info. Servs. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 298 (1st Dep't 2003).

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<sup>1</sup> The parties suggest in footnotes to their briefs that Pennsylvania law may apply in this case. Defendant's Memo, p. 9, n. 2; Plaintiff's Memo, p. 5, n. 3. The parties do not brief the issue, nor do they provide sufficient facts for the court to conduct a choice of law analysis. Instead, the parties claim that the laws of both states as applied in this case are substantially similar. Defendant's Memo, p. 9, n. 2; Plaintiff's Memo, p. 5, n. 3. For the purposes of the instant motion, the court will apply New York law.

**a. Plaintiffs Sufficiently Allege Joint Venture Existed at  
Time of Claimed Breach of Fiduciary Duty**

Participants in a joint venture owe one another a fiduciary duty for the duration of the joint venture. *Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 279 (1st Dep't 2002); *see also NOW Productions, Inc. v. Ernest Tidyman Productions, Inc.*, 73 A.D.2d 168, 171 (1st Dep't 1980). “[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity . . . requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.” *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) (internal citations omitted).

A joint venture ends when the transaction for which the joint venture was formed is complete or when “one party makes evident its intent to no longer be associated with the other joint venturer.” *Madison Hudson Assoc., LLC v. Neumann*, 8 Misc. 3d 1025A, 1025A (Sup. Ct. N.Y. Co. 2005).

The Pektors do not claim that they did not owe Philips a fiduciary duty. They assert that such duty ended either when Philips unilaterally filed for bankruptcy without the Pektors’ approval or when Philips terminated the Sales Contract.

Philips claims that neither the bankruptcy filing nor the termination of the Sales Contract ended the Joint Venture. Philips alleges that the Pektors knew of and consented to

the bankruptcy filing. Philips further alleges that the Pektors induced it to terminate the Sales Contract by promising to collaborate with them either in bringing suit against Liberty or in negotiating a new sales contract.

Whether the Pektors consented to the bankruptcy filing, discussed finding alternative options for purchasing the Properties or intended to terminate the Joint Venture are all questions of fact inappropriate for determination on a motion to dismiss. At this early stage of the litigation, the court makes all inferences in favor of Philips and accept all allegations in the Complaint as true. *Leon*, 84 N.Y.2d at 88. The court must therefore deny Defendants' motion to dismiss Philips's claim for breach of fiduciary duty

Furthermore, Defendants do not provide documentary evidence that unequivocally establishes their assertion that Philips terminated the Joint Venture. In support of their argument, Defendants provide only a February 9, 2011 e-mail in which Michael Pilevsky, managing director of Philips, congratulates the Pektors on "secur[ing] a contract to purchase the Lehigh portfolio from Liberty." Pektor Aff., Ex. L, p. 1. The complaint does not clarify whether the e-mail was sent before or after the Pektors allegedly reached out to Capital Trust to begin negotiating the purchase of the Properties. Making all inferences in Philips's favor, the court must conclude that the e-mail was sent after the Pektors began discussions with Capital Trust. *Leon*, 84 N.Y.2d at 88. Consequently, the e-mail does not conclusively refute

Philips's claim that the Joint Venture and the fiduciary duty between Philips and the Pektors still existed when the Pektors contacted Capital Trust.

**b. Missappropriation of a Business Opportunity**

Defendants alternatively argue that, even if the Joint Venture was not terminated, the Pektors did not breach their duty to Philips by misappropriating a business opportunity of the Joint Venture.

A participant in a joint venture "cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the [joint venture]." *Alexander & Alexander v. Fritzen*, 147 A.D.2d 241, 246 (1st Dep't 1989). A business opportunity is an asset of the joint venture if the joint venture "has an interest or tangible expectancy in the opportunity. An interest or tangible expectancy has been explained as something much less tenable than ownership but . . . more certain than a desire or a hope." *Id.* at 247-48. A business opportunity is also an asset of the joint venture if the "opportunity is the same as or is necessary for or essential to, the line of business of the [joint venture]." *Id.*

Philips claims that the Properties purchased by the Partnership Defendants were among the properties that the Joint Venture had sought to acquire. The Joint Venture was formed solely for the purpose of buying the Properties. The opportunity to purchase the Properties was therefore essential to the line of business of the Joint Venture, and the Joint

Venture had an interest or tangible expectancy in the Properties. *Alexander & Alexander*, 147 A.D.2d at 247-48.

Accepting all of Philips's allegations as true, as the court must on a motion to dismiss, Philips has adequately alleged a claim for breach of fiduciary duty against the Pektors. Defendants' motion to dismiss Philips's cause of action for breach of fiduciary duty against the Pektors is therefore denied.

## **2. Breach of Contract**

Philips claims that the Pektors breached the Joint Venture Agreement "by purchasing the Viable Lehigh Valley Property independently of Philips." Compl. ¶¶ 64-65. Defendants assert that the Pektors could not have breached the Joint Venture Agreement because Philips terminated the Joint Venture Agreement before the Pektors contacted Capital Trust.

As explained above, construing all of Philips's allegations as true and making all inferences in Philips's favor, issues of fact exist as to if and when the Joint Venture ended. Philips has adequately alleged all of the elements of a breach of contract claim, and Defendants have not conclusively established that the Joint Venture had ended before the Pektors allegedly began negotiations with Capital Trust to purchase the Properties. Defendant's motion to dismiss Philips's claim for breach of contract against the Pektors is thus denied.

### 3. Fraud

Philips claims that the Pektors fraudulently induced Philips to terminate the Sales Contract. Philips alleges that the Pektors falsely promised continue working with Philips to either bring legal action against Liberty or negotiate a new sales contract if Philips agreed to terminate the Sales Contract. Philips claims that it terminated the sales contract in reliance upon the Pektors' alleged misrepresentations.

Defendants argue that Philips's allegations are impermissibly vague and duplicative of Philips's breach of contract claim. Defendants further assert that Philips has not shown that it reasonably relied on the Pektors' alleged misrepresentations or omissions when deciding to terminate the Sales Contract. Defendants claim that Philips terminated the Sales Contract because, as Philips states in the Complaint, the purchase of the Properties "was not economically viable" in light of the problems with the T-Mobile Property. Compl., ¶ 43.

To adequately plead a cause of action for fraud, a plaintiff "must allege the elements of representation of a material existing fact, falsity, scienter, justifiable reliance and damages. . . . [E]ach of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail." *Bramex Assocs., Inc. v. CBI Agencies, Ltd*, 149 A.D.2d 383, 384 (1st Dep't 1989); *see also Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43 (1999) ("To make

out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury.”). “Moreover, where allegations of fraud are based on information and belief, the source of such information must be revealed.” *DDJ Mgmt., LLC v. Rhone Group L.L.C.*, 78 A.D.3d 442, 443 (1st Dep’t 2010).

All of the allegations contained in Philips’s claim for fraud against the Pektors are “based upon information and belief.” Compl., ¶¶ 45-49, 57. Philips gives no indication of the source of this information. Philips’s fraud allegations are therefore too vague to withstand the heightened pleading requirement of CPLR § 3016(b). *DDJ Mgt., LLC*, 78 A.D.3d at 443.

Furthermore, Philips does not show that it reasonably relied on the Pektors’ alleged misrepresentations in terminating the Sales Contract. Philips states in the complaint that the Purchase had become “economically not viable” due to the problems with the T-Mobile Property. Compl., ¶ 43. This allegation undermines Philips’s assertion that it “agreed to have the Joint Venture exercise its termination rights under the Sales Contract in reliance on discussions with the Pektors.” *Id.* at ¶ 56.

Philips did not plead its claim for fraud with sufficient detail under CPLR § 3016(b). *DDJ Mgt., LLC*, 78 A.D.3d at 443. Nor did Philips sufficiently allege reasonable reliance. *Bramex Assocs., Inc.*, 149 A.D.2d at 384. Defendants’ motion to dismiss Philips’s claim against the Pektors for fraud is therefore granted.

#### 4. Unjust Enrichment

Philips alleges that the Pektors were unjustly enriched when they used the Due Diligence obtained in a fiduciary capacity to misappropriate a business opportunity of the Joint Venture. Compl., ¶ 85. Defendants argue that no confidentiality agreement existed between the parties, and that the Pektors were under no obligation to return the Due Diligence to Philips when the Joint Venture ended.

To state a claim for unjust enrichment, “[a] plaintiff must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.” *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (internal citations omitted).

Defendants argue that a party may not recover costs incurred in preparation for a failed transaction under a theory of unjust enrichment. Defendants point to two cases in support of this argument: *J.E. Capital, Inc. v. Karp Family Assocs.*, 285 A.D.2d 361 (1st Dep’t 2001) and *Chaterjee Fund Mgmt., L.P. v. Dimensional Media Assocs.*, 260 A.D.2d 159 (1st Dep’t 1999). Neither case supports Defendants’ argument.

In *J.E. Capital*, the court rejected the plaintiff’s unjust enrichment claim against a third-party purchaser of a property. *J.E. Capital, Inc.*, 285 A.D.2d at 361. Much like in this case, the plaintiff claimed that it conducted due diligence in anticipation of purchasing the

property and, when the purchase fell through, the defendant used the plaintiff's due diligence materials for its own benefit. The court found, however, that the plaintiff had not actually conducted any due diligence. Unlike in this case, the seller had provided due diligence materials for the property to both the plaintiff and the defendant. The plaintiff did not confer a benefit upon the defendant. The plaintiff, therefore, failed to establish its claim for unjust enrichment. *Id.*

In *Chaterjee*, the court dismissed plaintiff's claim to recover expenses incurred in negotiating the purchase of a property. *Chaterjee Fund Mgmt.*, 260 A.D.2d at 159. Unlike here, the defendant in that case was the seller. While the plaintiff had incurred due diligence costs in preparation for the sale, the defendant did not benefit from the plaintiff's expenditure. The court consequently dismissed the plaintiff's claim for unjust enrichment, holding that "unjust enrichment is not an appropriate remedy for recovery of the expenses of a failed negotiation." *Id.* at 160.

In this case, unlike in *J.E. Capital* and *Chatterjee*, Philips has alleged all of the elements of a cause of action for unjust enrichment. Philips claims that it expended over half a million dollars on due diligence for the benefit of the Joint Venture. Philips further claims that the Pektors wrongfully used the Due Diligence to negotiate a better deal for themselves with Capital Trust before the Joint Venture ended. Philips has adequately alleged that the

Pektors received a benefit at Philips's expense, and that it would be inequitable to permit the Pektors to retain the benefit of the Due Diligence materials. These allegations are sufficient to state a claim for unjust enrichment. *Mandarin Trading Ltd.*, 16 N.Y.3d at 182. Defendants' motion to dismiss Philips's claim against the Pektors for unjust enrichment is therefore denied.

## **B. Claims Against the Partnership Defendants**

### **1. Unjust Enrichment**

Philips alleges that the Partnership Defendants were unjustly enriched because they purchased the Properties "with the benefit of the due diligence analysis and legal work already performed and paid for by Philips." Compl. ¶ 76.

In opposition, Defendants raise the same arguments refuting the claim against the Partnership Defendants as they did in opposing Philips's unjust enrichment claim against the Pektors.

As explained above, the Plaintiffs have adequately alleged that the Partnership Defendants were enriched at Philips's expense, and that it would be unjust to permit the Partnership Defendants to retain the benefit conferred upon them. *Mandarin Trading Ltd.*, 16 N.Y.3d at 182. Defendants' motion to dismiss Philips's unjust enrichment claim against the Partnership Defendants is thus denied.

## 2. Veil Piercing

Philips claims that the Pektors formed the Partnership Defendants solely for the purpose of usurping the Joint Venture's business opportunity. Philips further claims that the Pektors "exercise complete dominion and control over the Partnership Defendants." Compl., ¶ 69. Consequently, Philips argues, "the Partnership Defendants are liable for the acts of the Pektors." *Id.* at ¶ 72. Defendants argue that Philips has failed to allege any facts that show the Pektors exercise control over the Partnership Defendants.

Philips does not allege that the Pektors have a partnership interest in any of the Partnership Defendants. Philips merely claims that, "upon information and belief, the Pektors are legal owners of the Partnership Defendants." *Id.* at ¶ 70. Alternatively, Philips claims that the Pektors "exert such control over the Partnership Defendants that they constitute equitable owners under New York law." *Id.* at ¶ 71.

It is unclear how the Pektors could be the "owners," equitable or otherwise, of partnerships in which they hold no partnership interest. Philips has alleged no facts that show how or when the Pektors exercised dominion or control over the Partnership Defendants. Philips has not provided, nor has this court located, case law supporting Philips's position.

"Although on a motion to dismiss plaintiff[']s] allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal

conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Philips’s allegations are conclusory and insufficient to state a veil-piercing claim. *Id.* Defendants’ motion to dismiss Philips’s veil-piercing claim against the Partnership Defendants is granted.

### **C. Claims against Capital Trust**

Plaintiffs assert claims for joint and several liability, vicarious liability, aiding and abetting fraud and tortious interference with contract against Capital Trust. Defendants argue that Capital Trust is not a proper Defendant to this action as a matter of law because it was not a party to the purchase of the Properties.

Kevin M. Wachter (“Wachter”), vice president of Capital Trust, stated that he met with the Pektors regarding the purchase of the Properties. Affidavit of Kevin M. Wachter in Support of Motion to Dismiss (“Wachter Aff.”), p. 2. Wachter further admitted that he “negotiated the purchase of 32 Lehigh Valley properties from Liberty on behalf of a private equity fund affiliated with Capital Trust” and that he “executed the Agreement of Sale and Purchase” for the Properties. *Id.* Although Capital Trust may not directly own the Properties, Capital Trust was involved with the purchase through its agent Wachter. Furthermore, Philips’s claims against Capital Trust do not necessitate a showing that Capital Trust is the legal owner of the Properties. The court will, therefore, address Philips’s causes of action against Capital Trust.

### **1. Joint and Several Liability**

Philips claims that the Pektors and Capital Trust formed an “investment partnership” for the purpose of purchasing the Properties. Compl., ¶ 86. Philips further alleges that, because the Pektors and Capital Trust were partners or joint venturers, Capital Trust is jointly and severally liable for Philips’s damages. *Id.* at ¶¶ 89-90.

Defendants contend that the Pektors and Capital Trust are not and have never been partners or joint venturers in any capacity. Furthermore, Defendants argue, Capital Trust was not a party to the purchase of the Properties, and, therefore, the Pektors and Capital Trust could not have been partners in the purchase. Defendant’s Memo., p. 20; *see also* Defendant’s Reply Memo., p. 10.

Philips points to Wachtler’s affidavit in support of its claim. Philips states that:

Defendants’ argument []seems to ignore the ‘evidence’ that Defendants themselves put before the Court. Specifically, in the Wachtler Affidavit, wherein Kevin Wachtler . . . states that he was ‘contacted by a broker about a potential acquisition of properties in LeHigh Valley, Pennsylvania, from [Liberty] . . . [The Pektors] were working with the broker to find a viable capital source for the purchase.’

Nothing in this statement demonstrates that the Pektors and Capital Trust were partners.

Philips sets forth no facts to support its allegation that the Pektors and Capital Trust were partners or joint venturers either in the complaint or in its motion papers. Philips provides nothing more than its claim “upon information and belief that the Pektors formed an

investment Partnership [with] Capital Trust.” This conclusory allegation is not a sufficient basis for a claim of joint and several liability. *Godfrey*, 13 N.Y.3d at 373. Defendants’ motion to dismiss Philips’s claim for joint and several liability is granted.

## 2. Vicarious Liability

Alternatively, Philips argues, if Capital Trust and the Pektors were not partners or joint venturers, then the Pektors were agents of Capital Trust. Compl., ¶ 92. Philips asserts that Capital Trust is, therefore, vicariously liable for any damages the Pektors caused to Philips. *Id.* at ¶ 96. Defendants contend that Philips has pleaded no facts showing that the Pektors acted as Capital Trust’s agents.

“A principal-agent relationship may be established by evidence of the consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act.” *5015 Art Fin. Ptnrs, LLC v. Christie’s, Inc.*, 58 A.D.3d 469, 471 (1st Dep’t 2009) (internal citations omitted).

Philips alleges that:

upon information and belief, the Pektors were acting as agents for Capital Trust, investing in commercial and industrial property on Capital Trust’s behalf. Upon information and belief, the Pektors’ breach of loyalty and fraud were within the scope of the Pektors’ duties as agent for Capital Trust and were within the Pektors’ scope of authority.

Compl., ¶¶ 92-93.

Philips again offers no facts or evidence in support of its claims. Philips's allegations consist solely of legal conclusions based "upon information and belief" and are insufficient to state a claim for vicarious liability. *Godfrey*, 13 N.Y.3d at 373. Defendants' motion to dismiss Philips's claim for vicarious liability is, therefore, granted.

### **3. Aiding and Abetting Fraud**

Philips next claims that Captial Trust aided and abetted the fraud allegedly carried out by the Pektors. To plead a claim for aiding and abetting fraud, "the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009). Because Philips did not adequately establish its cause of action for fraud, Philips cannot state a valid claim for aiding and abetting such fraud. *Id.*; *supra* § III(A)(3). Defendants' motion to dismiss Philips's claim for aiding and abetting fraud is granted.

### **4. Tortious Interference with Contract**

Philips asserts that Capital Trust tortiously interfered with the Joint Venture Agreement. Defendants argue that Philips, not the Pektors, breached the Joint Venture Agreement when it "unilaterally rejected the Purchase Agreement." Defendants' Memo, p. 22. Alternatively, Defendants contend that, even if Philips did not breach the Joint Venture Agreement, Philips alleges no facts showing that Capital Trust intentionally induced the Pektors to breach the Joint Venture Agreement.

To state a cause of action for tortious interference with a contract, a plaintiff must allege “the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). The plaintiff must also allege that the contract would not have been breached “but for” the defendant’s interference. *Washington Ave. Assocs., Inc. v. Euclid Equip., Inc.*, 229 A.D.2d 486, 487 (2d Dep’t 1996).

“Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation.” *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep’t 2006). “[V]ague and conclusory” allegations are insufficient to support a claim for tortious interference with a contract. *Washington Ave. Assocs.*, 229 A.D.2d at 487.

Philips’s claim for tortious interference with contract consists solely of legal conclusions based “upon information and belief.” Compl., ¶¶ 105-107. Furthermore, Philips does not allege that the Pektors would not have breached the Joint Venture Agreement but for Capital Trust’s interference. *Washington Ave. Assocs., Inc.*, 229 A.D.2d at 487. Philips has therefore not sufficiently alleged a claim for tortious interference with contract, and Defendants’ motion to dismiss Philips’s claim is dismissed.

**IV. Conclusion**

For the reasons set forth above, it is hereby

Ordered that Defendants' motion to dismiss is granted to the extent that Plaintiff's second, fourth, seventh, eighth, ninth and tenth causes of action are dismissed; and it is further

Ordered that plaintiff is granted leave to serve an amended complaint so as to replead the second, fourth, seventh, eighth, ninth and tenth causes of action within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

Ordered that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the defendants shall serve an answer to the complaint within 20 days after Plaintiff's time to serve and file an amended complaint has expired; and it is further

Ordered that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on June 12, 2012, at 10am.

Dated: New York, New York  
May 21 2012

ENTER:



Hon. Eileen Bransten, J.