SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS Justice PART 53

Index Number : 601224/2007
RONI LLC
vs.
ARFA, RACHEL L.
SEQUENCE NUMBER : 019
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

is decided in accordance with accompanying memorandum decision and order.

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

Dated: 6/27/2013

_____, J.S.C.
CHARLES E. RAMOS

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: COMMERCIAL DIVISION

----------X

RONI LLC, ESHEL PROPERTIES, LLC, GILI HOLDINGS, LLC, and KRR INVESTMENTS, LLC, Assignees, and A.G. DOR INVESTMENTS, LLC, BANAGA LLC, MORDECHAI GOLDENBERG, ELORY LLC, ELUNGER, INC., HOD INTERNATIONAL EQUITIES LLC, JOSSIFOFF LLC, KALINA & SONS LLC, KARSH N DYAZ LLC, LYDGAT, LLC, MAZELDIK LLC, RISING STAR, LLC, ROKCOM LLC, S.I. DAR LLC, SBGR LLC, SINTRA REAL-ESTATE LLC, TAMR LLC, TATIVA FINANCE LTD., WASTED DREAMS, LLC, YALLI, LLC, YORAM BAUMANN, LLC, ELI UNGER, JEOSHUA DOT, EREZ ZENOV, NIR KRIEL, EYAL SCHIFF, OVED SASON, AZARIA JOSSIFOFF, URI KALINA, ZVI KARSH, RON BAHAT, YEHUDA KEREN, JACOB PERRY, SHALOM PAPIR, RAFI RACHMAN, AMOS LASKER, ELI MOR, YORAM DAR, SHLOMO MASHIACH, EYTAN STIBBE, RON GUTTMAN, PNINA GOLDBERG, SHUKI WEISS, ILAN CALIC, and YORAM BAUMANN, as Assignors,

Plaintiffs,

-against-

Index No.
601224/07

RACHEL L. ARFA, ALEXANDER SHPIGEL, GADI ZAMIR, LAWRENCE A. MANDELKER, in his Official capacity as Court-Appointed Temporary Receiver, pursuant CPLR Art. 64 of HARLEM HOLDINGS, LLC, HARLEM ACQUISITION LLC, AMERICAN ELITE PROPERTIES, INC., MINTZ LEVIN COHEN FERRIS GLOVSKY & POPEO, P.C., JEFFREY A. MOERDLER, EDWARD LUKASHOK, AUBREY REALTY CO., AUBREY REALTY, LLC, 42ND STREET REALTY, LLC, TAMMAZ REALTY, LLC, AND ELUL ACQUISITION, LLC,

Defendants.

----------X

Charles E. Ramos, J.S.C.:

In motion sequence 019, the plaintiffs Roni LLC, Eshel Properties, LLC, Gili Holdings, LLC, KRR Investments, LLC, Assignees, and A.G. Dor Investments, LLC, Banaga LLC, Mordechai Goldenberg, Elory LLC, Elunger Inc., Hod International Equities,

LLC, Jossifoff, LLC, Kalina & Sons LLC, Karsh N Dyaz LLC, Lydgat, LLC, Mazeldik LLC, Rising Star, LLC, Rokcom, LLC, S.I. Dar LLC, SBGR LLC, Sintra Real-Estate LLC, Tamr LLC, Tativa Finance LTD., Wasted Dreams, LLC, Yalli, LLC, Yoram Baumann, LLC, Eli Unger, Jeoshua Dor, Erez Zenov, Nir Kriel, Eyal Schiff, Oved Sason, Azaria Jossifoff, Uri Kalina, Zvi Karsh, Ron Bahat, Yehuda Keren, Jacob Perry, Shalom Papir, Rafi Rachman, Amos Lasker, Eli Mor, Yoram Dar, Shlomo Mashiach, Eytan Stibbe, Ron Guttman, Pnina Goldberg, Shuki Weiss, Ilan Calic, and Yoram Baumann (collectively, the "Plaintiffs") move pursuant to CPLR 3212 for partial summary judgment on their second cause of action for breach of fiduciary duty and their fourth cause of action for constructive fraud against Rachel L. Arfa "Arfa", Alexander Shpigel "Shpigel", and American Elite Properties ("AEP", with Arfa and Shpigel, the "Promoters").[1]

Additionally, the Promoters move pursuant to CPLR 3212 for summary judgment dismissing all causes of action asserted against them in the Second Amended Complaint (the "Complaint") and granting their counterclaim for contribution against the plaintiffs/counterclaim defendants Eli Mor ("Mor") and Jacob Perry ("Perry").

---

[1] Gadi Zamir ("Zamir"), a former defendant, has settled with the Plaintiffs and is no longer a party to this action.

Background

For a full recitation of the factual background in this action, see the decision and order entered April 17, 2009 ("Roni I").

This action arises out of seven real estate transactions organized by the Promoters (the "Transactions") between mid-2002 to early 2005. The Plaintiffs are all investors in the Transactions. The goal of the Transactions was to purchase certain residential buildings in upper Manhattan (the "Properties"), and renovate, manage, and ultimately sell or refinance the Properties for a profit.

The Transactions were structured through seven limited liability companies ("LLCs") that were formed to manage the Properties and hold the Plaintiffs' membership interests (the "Property LLCs").

The Promoters disclosed to the Plaintiffs the fees that would be associated with the Transaction, including an acquisition fee (the "Acquisition Fees"), management fees, and fees based on the profit generated upon a sale of one of the Properties (the "Upside Fee"). These fees were disclosed by Shpigel in presentations to the Plaintiffs or in written promotional materials (the "Set Ups").

However, in late 2005, due to growing discord between Arfa

and Shpigel and Zamir, Zamir revealed to the Plaintiffs that AEP was receiving commissions from the sellers of the Properties and mortgage rebates from the mortgage brokers in connection with the Transactions (the "Commissions") that were not disclosed. Upon receiving the Commissions, AEP subsequently distributed the funds to Arfa, Shpigel, and Zamir.

The Promoters do not dispute that they negotiated and received the Commissions, which totaled $4,273,225 (Pl. 19-a, ¶ 40; Def. 19-a ¶ 40). Rather, the Promoters maintain that the Commissions were properly disclosed in the Set Ups.

After this revelation, the Plaintiffs commenced this action asserting causes of action for an accounting, breach of fiduciary duty, malpractice, fraud, and constructive fraud. Subsequently, the Promoters moved to dismiss the Complaint.

In *Roni I*, this Court denied the Promoters' motion to dismiss the complaint on the basis that the Plaintiffs sufficiently pled their causes of action for breach of fiduciary duty and constructive fraud.

On June 3, 2010, the Appellate Division, First Department unanimously affirmed *Roni I*, but granted the Promoters leave to appeal to the Court of Appeals on the issue of LLC pre-formation fiduciary liability (*Roni LLC v Arfa*, 74 AD3d 442 [1st Dept 2010], *affd* 18 NY3d 846, hereafter "*Roni II*"). In rendering its opinion in *Roni II*, the court found that the "[P]laintiffs'

allegations that the [Promoters] planned the business venture, organized the LLCs, and solicited [P]laintiffs to invest in them are sufficient to establish a fiduciary relationship" and held that an "organizer of a limited liability company is a fiduciary to the investors it solicits to become members" (*id.* at 444).

On December 20, 2011, the Court of Appeals affirmed *Roni II*, and answered the certified question in the affirmative finding that the Complaint sufficiently pled a fiduciary relationship between the Promoters and the Plaintiffs (*Roni LLC v Arfa*, 18 NY3d 846, 849 [2011], hereafter "Roni III").[2] The court in *Roni III* based its opinion on the allegations that the Promoters represented that "they had particular experience and expertise" and "assumed a position of trust and confidence" with the Plaintiffs, who were "overseas investors who had little or limited knowledge of New York real estate or United States laws, customs or business practices with respect to real estate or investments" (*id.*).

The question now presented before this Court on summary judgment is whether the Promoters owed a fiduciary duty to the Plaintiffs, and if so, did the Promoters' purported disclosures of the Commissions in the Set Ups satisfied their fiduciary obligations.

---

[2] The certified question was "[w]as the order of [the First Department], which affirmed the order of [the] Supreme Court, properly made?" (Appellate Brief, 2011 WL 7452127 [NY], 8).

Discussion

The Plaintiffs move for partial summary judgment arguing that the Promoters breached their fiduciary duty by failing to disclose the Commissions.

A motion for summary judgment requires that the movant sufficiently establish the cause of action or defense to warrant judgment as a matter of law. In the summary judgment context, the Court only determines if there are genuine triable issues of fact (*S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

The Plaintiffs argue that pursuant to *Roni II* and *Roni III*, the Promoters clearly owed the Plaintiffs a fiduciary duty to disclose the Commissions based on the Promoters' status as the promoter of the Property LLCs and their position of superior experience and expertise. Thus, summary judgment is appropriate because it is undisputed that the Promoters never disclosed the Commissions.

The Promoters correctly point out that *Roni II* and *Roni III* applied the motion to dismiss standard and only held that a fiduciary relationship was sufficiently pled. However, the Promoters misinterpret *Roni III* in arguing that the Court of Appeals expressly rejected the theory that a organizer of an LLC owes fiduciary duties to the investors they solicit.

Rather, the Court of Appeals found that the totality of the

allegations pled sufficiently established a fiduciary relationship, and declined to disturb the First Department's ruling that the [Promoters'] status as organizers of the LLCs, standing alone, was sufficient to establish a fiduciary relationship at the pleading stage.

As a result, *Roni II and Roni III* each articulate a distinct standard upon which for the Plaintiffs may establish that the Promoters owed them a fiduciary duty, either as promoters of the Property LLCs (*Roni II*) or as a result of their superior experience and expertise (*Roni III*).

The Plaintiffs argue that the Promoters were clearly the promoters of the Property LLCs because they were responsible for organizing the business venture, creating the transaction documents, soliciting investors, and negotiating and ultimately purchasing the Properties that were the subject of the Transactions.

A promoter plans the business venture, organizes the LLCs, and solicits investors to invest (*Roni II* at 444). It is well established that the promoter is "treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith" (*Dickerman v N. Trust Co.*, 176 US 181, 204 [1900]). "The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent" (*id.* at 205). "His acts are scrutinized carefully, and he is

precluded from taking a secret advantage of the other stockholders" (*id.*).

The Promoters argue that they did not exercise the control and dominance, which typically gives rise to a fiduciary relationship. However, *under Roni II*, their status as promoters, standing alone, is sufficient to create a fiduciary relationship (*See also Weadick v Herlihy*, 16 AD3d 223, 224 [1st Dept 2005]["jural fiduciary relationships, unlike informal confidential ones, do not depend on dominance and related factors"]).

Furthermore, "[t]he fiduciary duty includes the obligation to disclose fully any interests of the promoter that might affect the company and its members, including profits the promoter makes from organizing the company" (*Roni II*).

AEP

AEP, in the capacity of the real estate broker and property manager for the Transactions, was the initial recipient of the Commissions. As a broker, it clearly owed a fiduciary duty to the Plaintiffs and was obligated to act in the P]laintiffs' best interest (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]). AEP is wholly owned and controlled by Arfa (Van Der Tuin, Ex. B, ¶ 13).

Shpigel

Shpigel undeniably held the status of promoter as confirmed

by his testimony that his "primary role" in the investment was "to solicit potential investors regarding the possibility of buying rent stabilized apartment buildings in the Harlem area..." and "[f]or all relevant time periods, I spent substantial time in Israel, promoting the concept of investing in Harlem real estate (Shpigel Aff., ¶¶ 5, 6).

Shpigel argues that the Plaintiffs were sophisticated investors, but as stated above, his status as a promoter of the Property LLCs is sufficient to impose a fiduciary obligation. The level of sophistication of the Plaintiffs has no bearing Shpigel's status as a promoter or his mandatory duty to disclose the Commissions. Even if Shpigel did not initially solicit some of the investors, the fact that the investors were ultimately referred to him is sufficient to confer upon him the status of promoter.

Arfa

Arfa previously testified that she and Shpigel "were responsible for cultivating investors and raising capital from them to acquire the properties" (Van Der Tuin, Ex. E, ¶ 23).

In contrast, Arfa now testifies that she only spoke to the investors after their investments were made and disputes her status as a promoter (Def. Opp., Ex. B, 55:6-24). In support of this argument, she references deposition testimony from various Plaintiffs.

However, almost all of the testimony referenced by Arfa fails to support her assertions that "she had no involvement whatsoever in soliciting, identifying, or selling property to investors" (Arfa Opp., p. 13). The excerpted deposition testimony either makes no mention of Arfa at all in the questions or answers, or the substance of the testimony is not probative as to Arfa's role or conduct (Arfa Aff., Exs. C, D, E, F, G, H, J, M, N, O, P, R, W, X).

In fact, some of the testimony referenced by Arfa contradicts her own assertions regarding her allegedly *de minimus* role. Zvi Karsh testified that:

> "I think that [Shpigel] spoke more about the numbers, in other words, what the price would be, how much of a mortgage we would get, what would be our level of investments as investors, but I cannot say [Arfa] did not participate in that. [Arfa] was at the meeting and she was involved and she was active" (*id.*, Ex. U, 45:8-18).

Furthermore, Shpigel's testimony that Arfa initially provided cursory assistance at his request," and that she "had no role in deciding the [purchase] price," but that she began working full-time and "created a spreadsheet for analyzing properties for potential acquisition..." and profitability later on suggest that she was involved in the Transactions before (Shpigel Aff., ¶ 10).

In contrast, various Plaintiffs have testified that Arfa held a significant role in organizing the Transactions.

Eytan Stibbe testified that "Alex and Rachel would describe every meeting a lot of information about real estate...[Arfa] was the business leader, lawyer, promoter, everything" (Van Der Tuin Aff., Ex. QQ, 31:17-33:11).

Amos Lasker testified that "[Arfa] explained to me at length the subject of refinancing and she gave an evaluation of the likelihood of the refinancing of this project...I understood that [Arfa's] the one who concentrated the whole subject of negotiations, be they business wise, commercial and legal and refinancing" (*id.*, Ex. RR, 63:14-65:10).

Zvi Karsh testified that "I do recall that [Arfa] was supposed to shepherd this -- oversee it on our behalf as investors (*id.*, Ex. YY, 42:9-43:20).

Ephraim Kriel testified that "When I met [Arfa] it was either with [Shpigel] or it was her alone at [Shpigel's] initiative..." (*id.*, Ex. HHH, 21:22-25).

Eyal Schiff testified that "I understood that the people who are coordinating this is [Shpigel], who's [Shpigel] and [Arfa]..." (*id.*, Ex. III, 81:9-21).

Furthermore, Arfa's former attorneys who assisted with the Transactions also contradict Arfa's testimony that she had a limited role. Edward Lukashok testified that "[w]ell, my client in practical terms was [Zamir and Arfa]...So [Zamir and Arfa] were basically the people that I would deal with, but the entity

that ended up as the purchaser were the LLCs" (*id.*, Ex. AA, 49:3-15).

Moreover, Jeffrey A. Moerdler testified extensively, stating that:

> "Ms. Arfa had a role that varied from time to time and involved many things" (*id.* at 46:7-24);
>
> "[Arfa] was, as best as I recall, actively involved in the flow of funds in connection with the closing, and in the preparation of this closing statement. And she coordinated that document with the accountants" (*id.* at 48:12-18);
>
> "Multiple times during our representation of our clients, [Arfa] described her role to me as general counsel to the entities" (*id.* 54:23-55:7);
>
> "And [Arfa] put together the sort of corporate structure and the mechanism of doing these deals and she was the quarterback of doing that" (*id.* at 316:9-18);
>
> "[Arfa] was the person who created the overall structure of how they -- this group of companies did acquisitions" (*id.* at 317:9-14).

Ample evidence has been presented by the Plaintiffs that demonstrate that Arfa undeniably held a significant role in the business venture. In support of her contentions, Arfa references deposition testimony from the investors that purportedly establishes that she never spoke with the Plaintiffs before the Transactions closed.

While the testimony referenced by Plaintiffs cannot create a

fiduciary relationship on its own, it does undermine Arfa's credibility and is evidence of her performance as a promoter. Even if Arfa was not primarily responsible for soliciting the investors, it is apparent from the record before this Court that she held a significant role in planning and organizing the Transactions. Consequently, this Court finds Arfa's contention is not credible.

"While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment," Arfa's self-serving deposition testimony in opposition, which clearly contradicts her own prior affidavit testimony and "can only be considered to have been tailored to avoid the consequences of her earlier testimony," is insufficient to raise a triable issue of fact to defeat the Plaintiffs' motion for summary judgment (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

As a result, Arfa has failed to submit credible evidence to sufficient to rebut the evidence submitted by the Plaintiffs. Thus, this Court concludes that the evidence demonstrates, as a matter of law, that Arfa was a promoter of the Property LLCs and owed Plaintiffs a fiduciary duty.

By concluding that the Promoters owed a fiduciary duty to the Plaintiffs based on their status as promoters, it is unnecessary for this Court to determine whether a fiduciary duty arose as a result of the Promoters superior experience and

expertise, the alternative basis that the Plaintiffs' causes of action are premised.

Duty to Disclose

Having determined that the Promoters owed a fiduciary duty to the Plaintiffs, this Court must determine if the Promoters' purported disclosures of the Commissions satisfied their fiduciary obligations.

It should be noted that the Promoters concede that AEP received the Commissions on behalf of Arfa and Shpigel, but dispute "that disclosure of these [Commissions] beyond that made in the relevant documentation was required" (Van Der Tuin Aff., Ex. II, ¶ 3).

The Promoters argue that the disclosures in the Set Ups and some of the Property LLC operating agreements (the "Agreements") were sufficient.

Based on the record, it is clear that the Set Ups do not contain any reference to the Commissions, rather, the Set Ups contain investment analysis, financial information, and projections (id. at Exs. I, J, K).

Moreover, the Agreements merely provide that the Promoters "may engage in other activities in addition to those relating to the [Property LLC], including, without limitation, providing services to the seller of the Property and/or its principals or affiliates" and that "the [Promoters] and any of their affiliates

can provide services to the [Property LLC] and collect fees or other payments, including, without limitation, acting as broker, agent, or otherwise, or based on transactions where the fee has been disclosed to the [Plaintiffs] or taken into consideration in projections, pro forma statements or otherwise in writing" (*id.*, Ex. P, § 6.7).

Both documents fail to specify the amount of the Commissions that will be taken by AEP, the method for determining the amount of Commissions for each transaction, and that the Commissions were being paid by the sellers of the Properties. The purported disclosures by the Promoters were inadequate to inform the Plaintiffs of the Commissions and thus, insufficient to satisfy the Promoters fiduciary obligations.

Furthermore, the Promoters assert that Mor and Perry were aware of the Commissions, but fail to provide any details as to the extent of the disclosure or when such disclosure occurred. In support of their assertion that Mor was informed of the Commissions, the Promoters submit testimony from non-parties Michael Geffen ("Geffen") and Shmuel Tadmor ("Tadmor").

Geffen testifies that he witnessed Mor demand a portion of the Commissions from Shpigel, but could not recall if the conversation occurred in late 2004 or early 2005 (Geffen Aff., ¶¶ 4, 8-10). Tadmor testified that he overhead Mor demand a portion of the Commissions during a phone conversation with Zamir, but

was unsure if the conversation occurred before or after 2005 (Arfa Opp., Ex. AA, 6:4-9; 7:1-17; 8:22-25).

It is undisputed that the transactions all closed between the period of October 2002 through February 2005 (Pl. 19-a, ¶ 1; Def. 19-a, ¶ 1). At best, the testimony only establishes that Mor may have known of the Commissions as early as late 2004, after six of the seven transactions had already closed. Furthermore, it is not even clear from the testimony if Mor was aware of more than the mere existence of the Commissions or if was aware of the amount of Commissions or how the Commissions were calculated.

The record is completely devoid of any evidence that would demonstrate that Mor was aware of the Commissions before his investments in the Transactions. The Promoters have failed to submit evidence sufficient to raise a triable issue of fact.

Based on the record it is clear that the Commissions were not disclosed in any manner that would satisfy the Promoters' "obligation to disclose fully any interests of the promoter that might affect the company and its members, including profits that the promoter makes from organizing the company" (*Roni II* at 444-5). Furthermore, even if Mor did know of the Commissions, it is unclear how that fact, by itself, relieves the Promoters of their fiduciary obligation of full disclosure.

As a result, the Plaintiffs are granted summary judgment as

to liability on their second cause of action for breach of fiduciary duty.

Constructive Fraud

The Court also grants the Plaintiffs' motion for summary judgment as to liability on their fourth cause of action for constructive fraud.

Plaintiffs base their cause of action on Arfa and Shpigel's representations that they were investing their own funds in the Transactions and that the Promoters and Plaintiffs would be "partners," and on the Promoters' undisputed omission that they were receiving Commissions from the Plaintiffs and the sellers of the Properties, and their omission of the Commissions from the Set Ups and Agreements (Pl. Mem., pp. 22-3).

Plaintiffs must establish that: (1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in a fiduciary or confidential relationship (*Del Vecchio By Del Vecchio v Nassau County*, 118 AD2d 615, 618 [2d Dept 1986]).

This Court has already determined that the Promoters owed a fiduciary duty to the Plaintiffs. The evidentiary record establishes that the subject representations and omissions did

occur, were related to material facts, were false, were made with the intent that the Plaintiffs rely upon the statements and that the Plaintiffs did rely on them to their detriment.

The Promoters' arguments in opposition are relative to misrepresentations that are not the basis for the Plaintiffs' cause of action for constructive fraud. As a result, the Promoters fail to raise any triable issues of fact that would preclude the granting of summary judgment as to liability to Plaintiffs on their fourth cause of action.

Damages

The Plaintiffs allege that as a result of the Promoters' breach of fiduciary duty and constructive fraud the purchase prices for the Properties were inflated by the seller of the Properties to account for the Commissions to AEP.

In support, the Plaintiffs submit deposition testimony from Lukashok, wherein he opines that the increases in the purchase price of some the Properties may have been a direct result of the Commissions that the sellers of the Properties were paying to AEP (Pl. 19-a, ¶¶ 54-8).

In opposition, the Promoters argue that appraisals for the Properties were obtained, which provides "independent verification that the prices paid by the Property LLCs for the buildings were less than or equal to fair market value" (Def. 19-a, ¶ 55). However, the Promoters have not submitted any of the

appraisals in support of its cross-motion.

As a result, an issue has been raised with respect to the amount of damages suffered by the Plaintiffs, which must be resolved at trial.

Cross-Motion

For the reasons stated, that portion of the Promoters' cross-motion seeking summary judgment dismissing all the causes of action in the Complaint is denied.

The remainder of the Defendant's cross-motion for summary judgment asserts a counterclaim for contribution against Mor and Perry. However, the Promoters fail to establish that they are entitled to contribution from Mor and Perry, as a matter of law. The Promoters fail to cite any authority that would enable this Court to reach such a result. Consequently, the summary judgment is denied with respect to the counterclaim.

Joint and Several Liability

The Plaintiffs seek to impose joint and several liability on Arfa, Shpigel, and AEP on the basis that the Promoters were jointly engaged in the transactions at issue, held themselves out as "partners," and jointly received distributions of the Commissions.

It is well established that "[w]hen two or more tort-feasors act concurrently or in concert to produce a single injury, they may be held jointly and severally liable" (*Ravo by Ravo v*

Rogatnick, 70 NY2d 305, 309 [1987]). "This is so because such concerted wrongdoers are considered 'joint tort-feasors' and in legal contemplation, there is a joint enterprise and a mutual agency, such that the act of one is the act of all and liability for all that is done is visited upon each (*id.*).

The Promoters argue that they could not be joint tort-feasors because Arfa did not solicit the Plaintiffs or even meet with them. The Court finds this argument unpersuasive. This Court has already determined that the record establishes that Arfa played a pivotal role in the transactions, even if she was not the primary solicitor, that is sufficient to conclude that the Promoters were all acting as a part of a single enterprise.

Even, assuming *arguendo*, that the Promoters were not joint tort-feasors, there is a question as to this Court's ability to practically apportion liability. Independent tort-feasors may be considered jointly and severally liable "in the instance of certain injuries which, because of their nature, are incapable of any reasonable or practicable division or allocation among multiple tort-feasors" (*Ravo* at 310). The Promoters fail to provide any practical method to apportion the liability between the Promoters to avoid joint and several liability.

Accordingly, it is

ORDERED that the plaintiffs' motion for partial summary judgment is granted (MS 019), thereby granting partial summary

judgment as to liability on the plaintiffs' second and fourth causes of action, and it is further

ORDERED that the Promoters' cross-motion for summary judgment is denied in its entirety, and it is further

ORDERED that parties are directed to contact the Clerk of Part 53 and schedule a pre-trial conference on or before July 15, 2013 in aide of a trial on damages.

Dated: June 27, 2013

ENTER:

J.S.C.

CHARLES E. RAMOS