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

PRESENT: EILEEN BRANSTEN **PART** 3

Justice

VON LAVRINOFF, NIKOL LOUIS

INDEX NO. 651153/2013

MOTION DATE 10/25/2013

- V -

LAUFER, MEIR

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) 1

Answering Affidavits - Exhibits ..... No(s) 2

Replying Affidavits ..... No(s) 3

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

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

DATED: 12/19/2013

EILEEN BRANSTEN , J.S.C.

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

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NIKOL LOUIS MIASSOEDOFF VON LAVRINOFF a/k/a NIK LAVRINOFF and BUILDERS CAPITAL GROUP LLC,

Plaintiffs,

- *against* -

MEIR LAUFER, PLAZA CAPITAL MANAGEMENT, LLC and NEW YORK WHEEL, LLC,

Defendants.

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Index No. 651153/2013
Motion Date: 10/25/13
Motion Seq. No.: 001

BRANSTEN, J.

This matter comes before the Court on Defendant New York Wheel, LLC's ("NY Wheel") motion to dismiss Plaintiffs Nikol Louis Miassoedoff Von Lavrinoff a/k/a Nik Lavrinoff ("Lavrinoff") and Builders Capital Group LLC's ("BCG" together with Lavrinoff, "Plaintiffs") Complaint pursuant to CPLR (a)(7). Plaintiffs oppose. For the reasons set forth below, NY Wheel's motion is granted in part, and denied in part.

Background

According to the Complaint, Plaintiff Lavrinoff and non-moving Defendant Meir Laufer began discussing a development project, "The Wheel," in late 2010. (Compl. ¶ 10). "The Wheel" was envisioned as a large observation wheel similar to the "London Eye." (Compl. ¶ 10). Laufer had already been unsuccessful in obtaining land for "The Wheel" project on Governor's Island. (Compl. ¶ 10).

In 2011, Lavrinoff and Laufer allegedly agreed to form a joint venture to prepare and submit a proposal regarding "The Wheel" to a public agency. (Compl. ¶ 11). The joint venture included Lavrinoff, Laufer, and two companies, Lavrinoff's BCG and Laufer's Plaza Capital Management LLC ("Plaza Capital," together with NY Wheel and Laufer, "Defendants"). (Compl. ¶ 11). Laufer and Lavrinoff allegedly agreed to contribute their respective skill and labor to the joint venture. Lavrinoff also contributed $90,000 to finance drafting a proposal that would be submitted to an appropriate government agency ("Proposal"). (Compl. ¶ 13).

In August 2011, the New York City Economic Development Corporation ("EDC") requested proposals to develop the waterfront of St. George in Staten Island. (Compl. ¶ 16). Allegedly at Lavrinoff's prompting, the joint venture targeted Staten Island as a potential area for development of "The Wheel." (Compl. ¶¶ 15, 16). The parties drafted the Proposal, outlining the parameters of the project, including parking and a retail building, and estimating 4.5 million annual visitors. (Compl. ¶ 18).

Laufer and Lavrinoff agreed that Laufer would be responsible for drafting the Proposal. (Compl. ¶ 17). Prior to submitting the proposal to the EDC, Laufer allegedly requested that Lavrinoff's name be excluded from the Proposal. (Compl. ¶ 20). Lavrinoff allegedly agreed because he had been involved in real estate litigation and Laufer promised him 50% ownership of the developer named in the Proposal for "The

Wheel" project, Defendant NY Wheel. (Compl. ¶ 20). Laufer submitted the Proposal to the EDC on November 10, 2011. (Compl. ¶ 18).

In early 2012, the EDC allegedly informed Laufer that it favored "The Wheel" Proposal and wanted to negotiate formal agreements. (Compl. ¶ 23). In May 2012, Laufer formed NY Wheel to serve as the developer, as contemplated in the Proposal. (Compl. ¶ 24). Laufer allegedly refused to provide Lavrinoff any information about the status of "The Wheel" negotiations with the EDC. (Compl. ¶ 24).

Shortly after Laufer formed NY Wheel, NY Wheel entered into two agreements with the EDC to facilitate development of the project. (Compl. ¶ 26). Allegedly as a result of the EDC's selection of "The Wheel" project Proposal, investors contributed capital to NY Wheel in exchange for ownership interests, to the exclusion of Lavrinoff. (Compl. ¶ 27). On July 27, 2012, NY Wheel and its new members executed the "Limited Liability Company Operating Agreement," which delineated the ownership structure, operations of the company and rights of the members. (Affirmation of Elizabeth G. McCabe Ex. B).

Plaintiffs filed the Complaint against Laufer, Plaza Capital Management, LLC and NY Wheel ("Defendants") on April 1, 2013, asserting seven causes of action: (i) breach of fiduciary duty against Laufer and Plaza Capital, (ii) aiding and abetting breach of fiduciary duty against NY Wheel, (iii) constructive trust against all Defendants, (iv)

declaratory judgment against all Defendants, (v) breach of contract against Laufer and Plaza Capital, (vi) quantum meruit against all Defendants, and (vii) accounting against Laufer and Plaza Capital. Non-moving Defendants Laufer and Plaza Capital answered on May 31, 2013. NY Wheel moved for dismissal of the portions of the Complaint asserted against NY Wheel on October 25, 2013. Plaintiffs opposed.

I. Defendant's Motion to Dismiss

NY Wheel moves to dismiss the second cause of action, and so much of the third, fourth, and sixth causes of action as are asserted against it. NY Wheel seeks dismissal of the Complaint pursuant to CPLR 3211(a)(7), on the grounds that NY Wheel was not in existence at the time the alleged breach of fiduciary duty occurred. NY Wheel contends that it could not have had the requisite knowledge to aid and abet the fiduciary breach, nor could it accept services as required to recover under quantum meruit. In addition, NY Wheel posits that Plaintiffs have adequate alternative remedies and therefore are not entitled to a declaratory judgment. Finally, NY Wheels argues that it was not a gratuitous donee of Plaintiffs' services and therefore this Court cannot impose a constructive trust against it.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

B. *Aiding and Abetting Breach of Fiduciary Duty*

The Complaint's second cause of action is against NY Wheel for aiding and abetting the breach of Laufer and Plaza Capital's fiduciary duties to Plaintiffs. Plaintiffs allege that "Laufer and Plaza Capital breached their fiduciary duty when they excluded Lavrinoff and BCG from the joint venture, including failing to allocate to them any ownership interest in [NY Wheel]." *See* Compl. ¶ 31. Plaintiffs further allege that NY

Wheel "knew of Laufer and Plaza Capital's fiduciary duty . . . and substantially assisted . . . in breaching that duty by entering into [two agreements with the EDC]."

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). NY Wheel does not contest the existence of an underlying breach of fiduciary duty by Laufer and Plaza Capital. However, NY Wheel argues that it did not knowingly participate in the alleged breach.

A plaintiff is not required to allege that the aider and abettor had an intent to harm, but "there must be an allegation that such defendant had actual knowledge of the breach of duty." *Kaufman*, 307 A.D.2d at 125. NY Wheel argues that it was not in existence at the time any breach of fiduciary duty occurred, and therefore could not have had knowledge of the breaches. NY Wheel contends that "[NY] Wheel was not formed until after Laufer and Plaza Capital excluded [Plaintiffs] from their alleged joint venture."

However, on a motion to dismiss, the Court must take the allegations of the Complaint as true and assess whether the facts as alleged fit within any cognizable legal theory. Given the Complaint's allegation that the underlying breach was Laufer's failure to allocate shares in NY Wheel to Plaintiffs in July 2012, it is clear that NY Wheel was in existence at the time of the breach of fiduciary duty.

The fact that NY Wheel existed at the time of a breach does not, by itself, mean that knowledge of the underlying breach can be imputed to NY Wheel. However, because the Complaint alleges that Laufer founded NY Wheel, this Court may draw a reasonable inference that he was also the sole member or manager at the time NY Wheel was formed. *See* Compl. ¶ 25; *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004) ("the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences"). NY Wheel does not argue that it had other members before the Operating Agreement was executed in July 2012. *See* Compl. ¶ 25 (alleging NY Wheel was incorporated in May 2012).

As the sole initial member or manager, Laufer's knowledge can be imputed to NY Wheel. *See Arbor Leasing, LLC v. BTMU Capital Corp.*, 68 A.D.3d 580, 580 (1st Dep't 2009) ("It is clear that the acts and knowledge of plaintiff's sole member/manager, who had complete control over the company, may be imputed to [the LLC]"). Laufer knew that he was transferring investment interests to investors while the excluding Plaintiffs, and Laufer's knowledge as sole member can be imputed to NY Wheel. Therefore, the Complaint adequately alleges that NY Wheel had knowledge of the underlying breach.

In addition to knowing of the underlying breach of duty, "[a] person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial

assistance' to the primary violator." *Kaufman*, 307 A.D.2d at 126. "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the [breach] to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Stanfield Offshore Leveraged Asset, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009) (internal quotation marks omitted).

Here, Plaintiffs do not allege that NY Wheel owed any fiduciary duty to them. Therefore, any inaction on NY Wheel's part cannot sustain a claim for aiding and abetting breach of fiduciary duty. Instead, Plaintiffs argue that NY Wheel substantially assisted in the breach by entering into two agreements with the EDC that furthered "The Wheel" project. The Complaint states two possible breaches of Laufer and Plaza Capital's fiduciary duty to Plaintiffs. First, "Laufer and Plaza Capital essentially hijacked the joint venture . . . and refus[ed] to provide any information to Lavrinoff about the status of the Wheel project." Second, Laufer and Plaza Capital allegedly "fail[ed] to allocate to [Plaintiffs] any ownership interest in [NY Wheel]."

Plaintiffs cite two cases in opposition to the motion to dismiss the aiding and abetting claim. First, in *Front v. Khalil*, 103, A.D.3d 481, 483 (1st Dep't 2013), the corporate defendant affirmatively assisted in a disloyal employee's breach of duty by hiring him away from his original employer and "inducing him to disclose plaintiff's

confidential and proprietary information." Second, in *Williams v. Sidley Austin Brown & Wood, L.L.P.*, 38 A.D.3d 219, 220 (1st Dep't 2007), the corporate defendant "alter[ed] the confirmation slips to make the transactions appear to be part of a substantive investment strategy."

Like the active participation in the underlying breaches in *Front* and *Williams*, NY Wheel participated in causing the underlying injury. The harm alleged is Plaintiffs' loss of ownership in NY Wheel, which was caused by Laufer selling ownership interests in NY Wheel to investors other than Plaintiffs. NY Wheel aided in the sale, and thus the breach, by accepting capital contributions and issuing membership interests in exchange.

Defendant's motion to dismiss the second cause of action, for aiding and abetting breach of fiduciary against NY Wheel, is denied.

C. *Quantum Meruit*

In order to plead a cause of action for quantum meruit, the Complaint must allege (i) performance of services in good faith for the Defendant (not at the behest of someone else), (ii) acceptance of services by the person to whom they are rendered, (iii) expectation of compensation therefor, and (iv) the reasonable value of the services. *See Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 108 (1st Dep't 2002).

The Complaint alleges that Plaintiffs and Laufer formed the joint venture in 2011. *See* Compl. ¶ 11. Later, in November of 2011, the Complaint alleges that Lavrinoff contributed $90,000 to the joint venture for completion of the Proposal, as well as the "critically important strategy" to locate the project in Staten Island. *See* Compl. ¶ 15. Although acknowledging that NY Wheel was not incorporated until May 2012, Plaintiffs nevertheless argue that these services were intended for NY Wheel, were received by NY Wheel, and were accepted by NY Wheel.

Unlike the aiding and abetting claim, where NY Wheel existed at the time of the alleged breach, the fatal flaw in Plaintiffs' quantum meruit argument is that NY Wheel did not exist at the time the services were performed. The First Department has stated that a quantum meruit claim cannot "exist solely because defendants may have profited, in one form or another, from plaintiff's work. Such a broad reading improperly expands the claim [of quantum meruit], absent any contention that defendants induced plaintiff to do the work." *Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 A.D.3d 406, 409 (1st Dep't 2011) *aff'd*, 19 N.Y.3d 511 (2012).

Further, "a plaintiff must demonstrate that services were performed *for the defendant* resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery."

Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103, 108 (1st Dep't 2002), quoting *Kagan v. K–Tel Entm't*, 172 A.D.2d 375, 376 (1st Dep't 1991) (internal citations omitted) (emphasis in original).

As stated in the Complaint, "Laufer and Lavrinoff agreed to contribute their respective skill and labor, together with the resources of their respective companies, *to the joint venture.*" Compl. ¶ 12 (emphasis added). The services were performed by Lavrinoff and Laufer to benefit the joint venture. Lavrinoff's services could not have been performed at the behest of NY Wheel because NY Wheel did not exist at the time the services were rendered.

Plaintiffs argue that NY Wheel was the named developer of the project, and thus it received the benefit of the work. However, Plaintiffs also note that "all the work and services performed by plaintiffs *on behalf of the joint venture* were aimed at benefitting [NY Wheel]." *See* Opp. Br. 12. (emphasis added). Merely conferring a benefit does not sustain a claim for quantum meruit. *See Joan Hansen & Co., Inc.*, 296 A.D.2d at 108 ("It is not enough that the defendant received a benefit from the activities of the plaintiff"). The services for which Plaintiffs seek compensation were performed at the behest of the joint venture and its partners, and therefore Plaintiffs must look there for compensation.

Plaintiffs' sixth cause of action, for quantum meruit, is dismissed as against NY Wheel.

D. *Declaratory Judgment*

Plaintiffs' fourth cause of action seeks a declaration that Plaintiffs own 50% of NY Wheel. Plaintiffs argue that they are entitled to their ownership interest pursuant to the joint venture agreement. NY Wheel argues that the Court should dismiss the declaratory judgment action because Plaintiffs have adequate alternative remedies, such as breach of contract against Laufer.

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 99 (1st Dep't 2009).

Courts are not required to dismiss declaratory judgment actions merely because other remedies exist. *See Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 148 (1983) ("The mere existence of other adequate remedies, however, does not require dismissal" of an action for declaratory judgment). The Supreme Court "has a broader power to grant declaratory judgment . . . . It may decline to hear the matter if there are other adequate remedies available." *Morgenthau*, 59 N.Y.2d at 148.

Determining ownership interests in a corporation is a proper use for a declaratory judgment. *See Pross v. Jadam Equities Ltd.*, 134 A.D.2d 154, 155 (vacating summary

judgment that granted declaratory relief and ordering further discovery where issues of fact exist as to ownership of partnership interest); 43 N.Y. Jur. 2d *Declaratory Judgments* § 135 (2013) ("Matters dealing with the rights and status of corporations and their stockholders, and the relation between them, have frequently been the subject matter of declaratory judgment actions"). Plaintiffs claim that they were deprived of their right to half ownership of NY Wheel, a unique tourist attraction, which would entail the ability to direct the project's course.

The Court cannot say, at this early stage of the litigation, that there is no genuine controversy requiring a judicial determination of the ownership rights in NY Wheel. If Plaintiffs allegations are proven, equity may require that they receive more than merely monetary compensation. *See Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 99 (1st Dep't 2009). Therefore, NY Wheel's motion to dismiss the fourth cause of action, for a declaratory judgment, is denied.

E. *Constructive Trust*

Plaintiffs' third cause of action against NY Wheel seeks imposition of a constructive trust over one-half of all property and monies NY Wheel has received as a result of the EDC's selection of the Proposal. Generally a constructive trust will be imposed when "the holder of the legal title may not in good conscience retain the

beneficial interest." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121. The *Sharp* Court goes on to list four "requirements" for imposition of a constructive trust: (i) a confidential or fiduciary relation, (ii) a promise, (iii) a transfer in reliance thereon, and (iv) unjust enrichment. *Sharp*, 40 N.Y.2d at 121.

However, while the *Sharp* Court stated that these were "requirements," it proceeds to hold that not all of the elements are needed to impose a constructive trust. *See Sharp*, 40 N.Y.2d at 122 ("Even without an express promise, however, courts of equity have imposed a constructive trust"). Further, the Court of Appeals later expressly stated in *Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978), that the "[f]our factors [] posited in *Sharp v. Kosmalski* . . . are useful . . . [but the] constructive trust doctrine is not rigidly limited." Therefore, a court need not find all four factors available to impose a constructive trust.

"In the words of Judge Cardozo, '[a] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.'" *Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978) (quoting *Beatty v Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919) (Cardozo, J.)). Ultimately, "[t]he salutary purpose of the constructive trust remedy is to prevent unjust enrichment." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 123 (1976).

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. 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).

Here, there is no question that NY Wheel received the benefit of the Proposal. Further, the Complaint alleges that Plaintiffs contributed capital and services towards the Proposal. Therefore, the question regarding imposition of a constructive trust is whether or not "it is against equity and good conscience to permit" NY Wheel to retain the benefits of Plaintiffs' efforts.

The case of *Simonds v. Simonds*, 45 N.Y.2d 233 (1978), is apt. In *Simonds*, the Court of Appeals imposed a constructive trust on the life insurance proceeds of a deceased husband against the second wife and in favor of the first wife. The innocent second wife was unjustly enriched by the husband's failure to maintain the first wife as the beneficiary of his policy, as agreed in the separation decree. *Simonds*, 45 N.Y.2d at 240.

NY Wheel argues that *Simonds* is inapplicable because the second wife was a gratuitous donee, while NY Wheel's current members paid for their ownership interests.

However, NY Wheel did not pay for the $90,000 financial backing or other contributions allegedly made by Lavrinoff. Given the liberal standard on a motion to dismiss, the Court finds that if Plaintiffs allegations are proven, equity may require imposition of a constructive trust on NY Wheel or its assets. Therefore, NY Wheel's motion to dismiss the third cause of action, for a constructive trust, is denied.

(Order of the Court follows on next page.)

Conclusion

For the reasons set forth above, it is hereby

ORDERED that defendant NY Wheel's motion to dismiss the Complaint as against it is GRANTED in part, and the sixth cause of action for quantum meruit is dismissed as against NY Wheel; and it is further

ORDERED that NY Wheel's motion to dismiss the Complaint is otherwise DENIED; and it is further

ORDERED that counsel for all parties are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on January 28, 2014, at 10:00 A.M.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 19, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.