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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 45

EMMET AUSTIN, individually and derivatively on behalf of STONEMAR MM JACKSON, LLC, STONEMAR MANAGING MEMBER, LLC, STONEMAR MM WEST DES MOINES, LLC, STONEMAR MM JONESBORO, LLC, STONEMAR MM COOKEVILLE, LLC, and STONEMAR MM MILFORD, LLC,	:	Index No. 653921/13
Plaintiffs,	:	DECISION AND ORDER
- against -	:	Motion Sequence No. 001
JONATHAN GOULD, STONEMAR MM JACKSON, LLC, STONEMAR MANAGING MEMBER, LLC, STONEMAR MM WEST DES MOINES, LLC, STONEMAR MM JONESBORO, LLC, STONEMAR MM COOKEVILLE, LLC, STONEMAR MM MILFORD, LLC, STONEMAR REALTY MANAGEMENT, JACKSON RETAIL PARTNERS, LLC, OWENSBORO RETAIL HOLDINGS, LLC, STONEMAR WEST DES MOINES PARTNERS, LLC, STONEMAR JONESBORO PARTNERS, LLC, STONEMAR COOKEVILLE PARTNERS, LLC, and STONEMAR MILFORD PLAZA, LLC,	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiff Emmet Austin (Austin) brings this action individually and derivatively on behalf of Stonemar MM Jackson, LLC (Stonemar MM Jackson), Stonemar Managing Member, LLC, Stonemar MM West Des Moines, LLC, Stonemar MM Jonesboro, LLC, Stonemar MM Cookeville, LLC, and Stonemar MM Milford, LLC (Stonemar MM Milford) (collectively,

Management Entities) against defendants Jonathan Gould (Gould) and various entities. The defendant entities include: Stonemar Realty Management, Jackson Retail Partners, LLC, Owensboro Retail Holdings, LLC, Stonemar West Des Moines Partners, LLC, Stonemar Jonesboro Partners, LLC, Stonemar Cookeville Partners, LLC, and Stonemar Milford Plaza, LLC (collectively, Retail Partners), Stonemar Realty Management, and the Management Entities (together with the Retail Partners, Entity Defendants). The eight-count complaint asserts three causes of action on behalf of the Management Entities against Gould, including: (1) breach of fiduciary duty (first cause of action); (2) breach of contract (second cause of action); and (3) breach of the implied covenant of good faith and fair dealing (third cause of action). Austin also asserts, on behalf of himself and the Management Entities, causes of action against Gould for unjust enrichment (fourth cause of action) and tortious interference with contractual relations (sixth cause of action). In addition, Austin alleges a cause of action for salary owed to him by Stonemar Realty Management (fifth cause of action), and seeks Gould's removal as managing member for the Entity Defendants and the denial of indemnification for any damages that Gould may be required to pay (seventh cause of action). Lastly, Austin brings a cause of action of intentional infliction of emotional distress against Gould (eighth cause of action).

Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7) and CPLR 3013.

I. Factual Allegations

In April 2004, Gould hired Austin to perform financial analysis and to assist with real estate ventures. Complaint, ¶ 17. In May 2005, Austin and Gould formed a special purpose entity, of which Austin owned 33.33 percent and Gould 66.67 percent, to acquire a property in Jackson, Mississippi. *Id.*, ¶ 18. Following this model, Austin and Gould completed a total of six

commercial real estate transactions. *Id.*, ¶ 19. For each transaction, they created a "Management Entity" to locate commercial real property. *Id.*, ¶¶ 9, 20. Upon selection of the asset, the Management Entity formed another entity, the "Retail Partner," in which the Management Entity owned a managing interest. *Id.*, ¶ 20. The Retail Partner then solicited investors and acquired the real property. *Id.* Following this structure: (1) Stonemar MM Jackson owns a managing interest in Jackson Retail Partners, LLC; (2) Stonemar Managing Member, LLC owns a managing interest in Stonemar Owensboro Partners, LLC; (3) Stonemar MM West Des Moines, LLC owns a managing interest in Stonemar West Des Moines Partners, LLC; (4) Stonemar MM Jonesboro, LLC owns a managing interest in Stonemar Jonesboro Partners, LLC; (5) Stonemar MM Cookeville, LLC owns a managing interest in Stonemar Cookeville Partners, LLC; and (6) Stonemar MM Milford owns a managing interest in Stonemar Milford Plaza, LLC.[1] *d.*, ¶¶ 49. Stonemar Realty Management "manages and leases various commercial real estate properties in which Gould and Austin have an interest" and "conducts business on behalf of each of the Stonemar Management Entities." *Id.*, ¶ 10.

Each Retail Partner was "contractual[ly] obligat[ed]" to pay certain fees to its Management Entity. *Id.*, ¶ 31. Plaintiffs allege that, "upon acquisition" of a property, each Retail Partner "became obligated to pay an acquisition fee to [its Management Entity]" (Acquisition Fee), and that "[a]ll acquisition fees, which total $1,269,500 have been earned." *Id.*, ¶¶ 11-16, 21. However, plaintiffs allege that "the acquisition fees were otherwise diverted by Gould from the [Management Entities] and Austin himself, such that the balance of the

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[1] Stonemar Owensboro Partners, LLC is not named as a party in the caption of the instant action, but is included among the complaint's allegations. Complaint, ¶ 12. Defendant Owensboro Retail Holdings, LLC is named in the caption, but not identified in the allegations devoted to "Parties." *Id.*, ¶¶ 2-16.

Acquisition Fees, $1,119,500 remain[s] outstanding." *Id.*, ¶ 24. "Gould also required that an Equity Management Fee of 1% of the funds raised for the acquisition of the commercial development be paid quarterly to the appropriate [Management Entity]" (Equity Management Fee). *Id.* ¶ 25. Plaintiffs allege that, "[s]ince the acquisition of the relevant commercial development through October 31, 2013," a total of $640,445.31 in Equity Management Fees has been earned. *Id.*, ¶¶ 26, 27. No portion of these fees has been paid to Austin, who, as a one-third owner of each Management Entity, is allegedly owed $213,481.77. *Id.*, ¶¶ 27, 28, 30.

Plaintiffs state that Gould has either failed to collect the Equity Management Fees or has "diverted [them] to other entities, including entities controlled by Gould and for Gould's own benefit." *Id.*, ¶ 29. They allege that "Gould controls and is responsible for the enforcement of the contractual rights of each of the plaintiffs and each of the defendants," but has "failed to enforce those rights" by allowing "the bulk of the earned Acquisition Fees and all the Equity Management Fees to either be advanced to other unrelated Gould investments and/or he has permitted the responsible entity over a period of years to defer its contractual obligations to pay" the fees. *Id.*, ¶ 31. Because the Management Entities have not received the Acquisition Fees, they have not been able to pay Austin his earned share of these fees. *Id.*, ¶ 32. Similarly, because the Management Entities have not received, or if received, not retained, the Equity Management Fees, they have been unable to pay Austin his earned share of these fees. *Id.*, ¶ 34.

According to plaintiffs, Gould has diverted at least one corporate opportunity from Stonemar MM Milford. *Id.*, ¶ 36. 77 Charters, Inc. (77 Charters) owned an 11.22% interest in the Retail Partner Stonemar Milford Plaza, LLC. *Id.*, ¶ 36. In June 2011, in order to meet construction costs, Stonemar Milford Plaza, LLC made a capital call to investors. *Id.*, ¶ 37. 77 Charters' share of the costs was $88,798.00. *Id.* Upon 77 Charters' failure to satisfy the

capital call, "the managing member had the option of purchasing 77 Charters' interest for 50% of its capital account." *Id.*, ¶ 38. Gould formed an unrelated entity, in which Austin had no interest, and purchased 77 Charters' interest, valued at $2.216 million, for $1.108 million. *Id.* According to plaintiffs, Austin "was denied an opportunity as a 33.3% owner to attain a gain of $369,333." *Id.*

In addition, plaintiffs allege, in breach of his fiduciary duties to Austin and Stonemar MM Milford, "Gould created a fictitious account for the benefit of one Stanley Vickers in the amount of $182,000" in order to satisfy a personal obligation. *Id.*, ¶ 40. Plaintiffs allege that "Gould is now attempting to liquidate at least a portion of Stonemar MM Milford for the purpose inter alia of redeeming the Vickers capital account." *Id.* Plaintiffs claim this conduct warrants Gould's removal as the managing member of the Entity Defendants and that a replacement should be "selected and retained consistent with the provision of each Stonemar Management Entities' Operating Agreement." *Id.*, ¶ 41.

Plaintiffs also allege that "Gould was contractually committed to raise $1,362,000 to fund the acquisition of [Stonemar MM Jackson's] commercial property." *Id.*, ¶ 39. Gould raised "$1,860,000, almost $500,000 more that required, and then transferred this . . . excess to his own accounts." *Id.* Plaintiffs allege that, through the incurred indebtedness, "Gould has reduced Austin's equity in Stonemar MM Jackson by approximately $166,700." *Id.*

After Gould terminated Austin's employment (*id.*, ¶ 46), Gould allegedly engaged in a series of malicious acts intended to "create difficulties for Austin" and to "intimidate Austin and to cause him economic and emotional harm." *Id.*, ¶ 47. According to plaintiffs, Gould refused to admit that Austin was entitled to unemployment benefits, sent false 1099 and W-2 forms for 2009, which reflected $10,000 more in income than Austin had actually been paid, failed to

provide K-1s for all of Austin's partnerships, making it impossible to complete Austin's tax returns in a timely manner (*id.*, ¶¶ 35, 47), and refused "Austin's reasonable requests for access to the books and records of each of the Defendant entities." *Id.*, ¶ 42.

Plaintiffs allege that it would be futile to demand that the Management Entities take action against the Retails Partners or Gould, because the Entity Defendants are under Gould's control. *Id.*, ¶ 43.

On September 15, 2010, Austin commenced an action against Gould in the Supreme Court, New York County, under Index No. 651515/10 (2010 Austin Action). Zucker aff, ¶ 4, exhibit 1. In that action, as in the instant suit, Austin alleged that he and Gould had formed six limited liability companies to manage investments in commercial real estate. *Id.*, exhibit 1, ¶¶ 2, 5-14. Austin claimed that "Gould, acting individually and as a managing member of these entities," had denied Austin his rightful share of "the acquisition fees earned by Gould and their commonly owed companies upon conclusion of various transactions . . . [and] annual fees earned by these companies, which were derived from the acquisitions." *Id.*, exhibit 1, ¶ 5. In addition to alleging that the Acquisition Fees were earned upon the closing of an acquisition, Austin stated the respective dates for each deal, alleging that the: (1) property located in Jackson, Mississippi closed in May 2005; (2) property in Owensboro, Kentucky closed in September 2006; (3) property in Des Moines, Iowa closed in November 2006; (4) properties in Jonesboro, Arkansas closed in August 2007; (5) property in Cookeville, Tennessee closed in August 2007; and (6) property in Milford, Connecticut closed in November 2008. *Id.*, exhibit 1, ¶¶ 8, 10-14. Based on the nonpayment of the fees, Austin asserted four causes of action against Gould, including breach of contract, breach of fiduciary duty, misappropriation, and legal fees. *Id.*, exhibit 1, ¶¶ 18-20; 24, 26, 28-29.

Gould moved to dismiss the 2010 Austin Action pursuant to CPLR 3211 (a) (7), arguing that New York Limited Liability Company Law § 609 (a) precluded Gould from being held liable in his individual capacity. *Id.*, ¶ 13 and exhibit 4. In his reply memorandum of law on that motion, Gould argued that Austin chose not to name the relevant entities as defendants because that would have forced Austin to rely on the entities' "operating agreements which make clear that . . . all distributions are to be made at Gould's sole discretion." Boyle affirmation, exhibit C at 1. By order dated August 23, 2012, the court granted Gould's motion in its entirety (August 2012 Order), finding that:

> "Plaintiff asks the court to order Defendant to pay a judgment owed by various LLCs, essentially co-mingling personal and business assets, without any allegations sufficient to pierce the corporate veil of the LLCs. Absent such allegations, Defendant, as 'the majority member and the member manager of [the LLCs]' (Cpl ¶ 17) is not liable for those companies' 'debts, obligations, or liabilities . . . whether arising in tort, contract, or otherwise.'"

Austin v Gould, Sup Ct, NY County, Aug. 23, 2012, Sherwood, J., Index No. 651515/10 (quoting NY LLC Law § 609 [a]). Austin allegedly did not seek to reargue or appeal the August 2012 Order (Zucker aff, ¶ 19) and commenced the instant action against Gould and the Entity Defendants on November 11, 2013.

II. Discussion

"Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions . . . intended to be proved and the material elements of each cause of action." CPLR 3013. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *CBS Corp. v Dumsday*, 268 AD2d 350, 352 (1st Dept 2000). "[T]he pleadings must be liberally construed and the facts

alleged accepted as true." *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 (1st Dept 1998). However, "allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999).

Where a motion to dismiss is based on documentary evidence, pursuant to CPLR 3211 (a) (1), dismissal "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (internal quotation marks and citation omitted). The documentary evidence must "utterly refute[] plaintiff's factual allegations." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002).

A. Res Judicata and Collateral Estoppel

Defendants argue that the first five causes of action—breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and unpaid salary—are all barred by res judicata and/or collateral estoppel. Defendants contend that these cause of action are asserted against Gould, in his individual capacity, in violation of the August 2012 Order. To the extent that the breach of fiduciary duty cause of action alleges that Gould took advantage of his position as the managing member for personal gain, defendants argue that such claims are barred by New York's transactional approach to res judicata and point to the "co-mingling personal and business assets" language of the August 2012 Order. Plaintiffs counter that neither res judicata nor collateral estoppel is applicable in the instant action, because the August 2012 Order was not a final judgment on the merits. The decision merely held, plaintiffs argue, that Gould could not be held individually liable for the obligations of the limited liability companies. Plaintiffs contend that because the present action, unlike the 2010 Austin Action, names the relevant entities as parties and seeks recovery against Gould and the Entity

Defendants, it is not in violation of the August 2012 Order. In addition, plaintiffs argue that the breach of fiduciary duty cause of action is, at least in part, premised on misconduct that post-dates the commencement of the 2010 Austin Action.

The doctrine of res judicata, or claim preclusion, "refer[s] to situations in which one of the parties to a prior action or proceeding is foreclosed in a second action or proceeding between the same parties from relitigating a claim or cause of action (not infrequently involving several discrete issues) which was the subject matter of the prior action or proceeding." *Matter of American Ins. Co. (Messinger—Aetna Cas. & Sur. Co.)*, 43 NY2d 184, 190 n 2 (1977). Under New York's transactional approach to res judicata, "once a claim has been finally determined on the merits in a proceeding where the opponent of preclusion has had a full and fair opportunity to litigate the claim," claims arising out of the same transaction or series of transactions are precluded, "despite the fact that the claims are based on a different theory or seek a different remedy." *Thomas v City of New York*, 239 AD2d 180, 180 (1st Dept 1997). Collateral estoppel, or issue preclusion, "refers to discrete issues of fact or law rather than to claims or causes of action." *Matter of American Ins. Co.*, 43 NY2d at 190 n 2. Issue preclusion applies when:

> "(1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits."

Gersten v 56 7th Ave. LLC, 88 AD3d 189, 201 (1st Dept 2011). Both doctrines apply to the parties of record in the prior action or proceeding and those in privity with them. *See Buechel v Bain*, 97 NY2d 295, 303 (2001); *Parolisi v Slavin*, 98 AD3d 488, 490 (2d Dept 2012).

The 2010 Austin Action was not decided on the merits. The court merely concluded that Austin had not alleged facts sufficient to pierce the corporate veil and hold Gould liable for the

debts of entities that were not named as defendants. The instant action is a derivative suit against Gould and the Entity Defendants, and, as such, the August 2012 Order does not preclude the instant action. *See Tak Shing David Tong v Hang Seng Bank*, 210 AD2d 99, 100 (1st Dept 1994) (finding that the dismissal of the previous suit, for lack of standing by the plaintiff as an individual, did not have res judicata or collateral estoppel effect on the derivative suit before the court, where the prior judgment "was not a judgment on the merits conclusive of the issues of fact and questions of law" and "issues of fact or law raised . . . were not necessarily raised and decided in the prior action"). While the causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and unpaid salary are captioned "AGAINST GOULD," the complaint also contains allegations that implicate the Entity Defendants.[2] *See e.g.* complaint, ¶¶ 1, 57, 62, 72. In addition, the breach of fiduciary duty cause of action contains allegations of Gould's misconduct, beyond the alleged failure to collect or pay the fees that were the subject of the 2010 Austin Action. Complaint, ¶¶ 36-40, 51-53. Defendants' argument, that these allegations are precluded because they arise out of the same facts or transactions that led to the August 2012 Order, misconstrues the order. The August 2012 Order referred to Austin's implicit request to "co-mingl[e] personal and business assets," with no allegations that would justify piercing the corporate veil. This language, therefore, did not refer to the underlying substantive facts of that case, but rather, to the impermissible remedy sought. Thus, there was no judgment on the merits. Nor were issues concerning these facts and transactions previously decided in the 2010 Austin Action.

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[2] The court notes that the complaint is frequently vague about when a cause of action is alleged against Gould, the Entity Defendants, or both, and when it is seeking relief on behalf of Austin, the Management Entities, or both.

Therefore, defendants' motion to dismiss the first five causes of action, as barred by res judicata or collateral estoppel, is denied.

The court notes defendants' argument, raised in a footnote of its memorandum of law, that to the extent Austin seeks to recover Acquisition Fees and Equity Management Fees related to Stonemar Milford Plaza, LLC, he is barred by res judicata. Defendants' brief at 12 n 4. With respect to the acquisition conducted through Stonemar Milford Plaza, LLC, Austin concedes that $150,000 of the $292,500 Acquisition Fee has been paid, and that of that amount, Austin received $50,000. Complaint, ¶¶ 22, 23. Austin alleges, however, that "Gould subsequently reclassified this partial distribution of an acquisition fee as a loan and wrongfully demanded its repayment." *Id.*, ¶ 23. In the separate action, *Stonemar MM Milford, LLC v Austin*, Index No. 652099/10, the court heard arguments on the plaintiff's summary judgment motion. On the record, the court held that:

> "Based on the documentary evidence, specifically the wiring instructions noting that the $50,000 was a loan, Austin gave his assent to the notation that the $50,000 was a loan.
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> . . .
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> Accordingly, I find that on August 3rd, 2009 the parties agreed that Austin was to receive a $50,000 interest-free loan. Austin's statement that he believed that Gould would subsequently reclassify the loan as a distribution is self-serving. He agreed to the reclassification as a loan and got the benefit of an interest-free loan."

Stonemar MM Milford, LLC v Austin, Sup Ct, NY County, Oct. 12, 2011, Singh, J., Index No. 652099/10 at 15. Based upon the papers before the court, Gould has not conclusively established that the loan at issue in *Stonemar MM Milford, LLC v Austin* involved the same $50,000 transaction at issue here. Therefore, Gould fails to substantiate his res judicata

argument at this juncture. The court notes, however, that upon a proper showing that the $50,000 is the same in both actions, Austin's assertion that Gould improperly reclassified these funds as a "loan" would be barred. Complaint, ¶ 23.

B. Breach of Fiduciary Duty (First Cause of Action)

Defendants argue that the breach of fiduciary duty claim must be dismissed because the claim seeks monetary relief and, therefore, is time-barred by the three-year statute of limitations. According to defendants, because the complaint alleges that monies were due upon acquisition of the investment properties, which, according to the 2010 Austin Action, occurred between 2005 and 2008, the statute of limitations expired prior to the commencement of the instant action in November 2013. In addition, defendants contend that the breach of fiduciary duty cause of action is duplicative of the breach of contract claim. Plaintiffs counter that the cause of action is not duplicative. Plaintiffs contend that the Retail Partners owe a contractual duty to the Management Entities to pay the Acquisition Fees and Equity Management Fees, and Gould has a fiduciary duty to each Management Entity to collect the fees. Plaintiffs argue that, therefore, Gould's breach of fiduciary duty is separate and distinct form the Retail Partners' failure to pay. In addition, plaintiffs contend that the more recent allegations of Gould's misconduct are within the three-year statute of limitations, and that defendants previously argued that all fees are discretionary. If the fees are discretionary, plaintiffs reason, then they were not due upon acquisition of the investment properties and are not barred by the statute of limitations. Plaintiffs contend that it is premature to dismiss this cause of action, because it is first necessary to ascertain if and when the Retail Partners paid the Acquisition Fees and Equity Management Fees.

"A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 (1st Dept 2000) (affirming dismissal of breach of fiduciary duty claim where allegations of unethical conduct were the same as those for the breach of contract cause of action). While "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract," that duty must be "independent of the contract itself." *Mandelblatt v Devon Stores*, 132 AD2d 162, 167-68 (1st Dept 1987). The cause of action does not have "a single statute of limitations." *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). Where the plaintiff seeks a "purely monetary" remedy, the applicable statute of limitations is three years pursuant to CPLR 214 (4). *Id.* However, where "the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies." *Id.*

Here, the breach of fiduciary duty allegations are contained in three subheadings: "Breach of Fiduciary Duty as to Acquisition Fees" (complaint, ¶ 49); "Breach of Fiduciary Duty as to Equity Management Fees" (*id.*, ¶ 50); and "Breach of Fiduciary Duty as Member Manager." *Id.*, ¶¶ 51-53. The first two sub-headings are duplicative of the breach of contract claim, as they merely restate plaintiffs' breach of contract claim, couched in breach of fiduciary duty language. In addition, the claim is time-barred with respect to the Acquisition Fees, because the last acquisition occurred in 2008, more than three years before this action was commenced.

The allegations regarding Gould's breaches as the managing member, on the other hand, allege that Gould acted out of self-interest by "diverting a redemption opportunity" (*id.*, ¶ 51), "incur[ing] unnecessary indebtedness" (*id.*, ¶ 52), and "creating a fictitious loan account." *Id.*,

¶ 53. These allegations state a breach of duty independent of the contractual obligation to collect and pay the Acquisition Fees and Equity Management Fees and, therefore, are not duplicative of the breach of contract cause of action. Moreover, although plaintiffs seek a monetary remedy (*id.*, ¶ 84 [a]), defendants have not shown that these alleged breaches of fiduciary duty are time-barred by the three-year statute of limitations. The cause of action is timely with respect to the alleged diversion of the redemption opportunity, which occurred in June 2011 (*id.*, ¶ 37), as this action was commenced less than three years later, on November 11, 2013. With respect to the other two allegations of misconduct, defendants fail to satisfy their "initial burden of establishing prima facie that the time in which to sue has expired." *Savarese v Shatz*, 273 AD2d 219, 220 (2d Dept 2000). As such, defendants' motion to dismiss the breach of fiduciary duty cause of action is granted with respect to the Acquisition Fees and Equity Management Fees, but denied with respect to Gould's fiduciary duty as the managing member.

C. Breach of Contract (Second Cause of Action)

Defendants argue that plaintiffs' breach of contract cause of action must be dismissed for failure to adequately plead which contracts and contractual provisions defendants allegedly breached. In addition, defendants contend that, with the exception of the Stonemar Milford Plaza, LLC transaction, which allegedly closed in November 2008 (Zucker aff, exhibit 1, ¶ 14), the six-year statute of limitations has expired. Plaintiffs do not respond to defendants' contention that the claim is inadequately pled. Instead, they repeat their argument that defendants may not maintain that the claims accrued upon the closing of each transaction having previously argued that the payment of fees was discretionary. To this, defendants reply that although their ultimate position is that plaintiffs' claims are without merit, the present motion is addressed to the adequacy of plaintiffs' pleadings only.

A breach of contract claim is governed by a six-year statute of limitations (CPLR 213), which "is triggered when the plaintiff had the right to demand payment." *Elie Intl., Inc. v Macy's W. Inc.*, 106 AD3d 442, 443 (1st Dept 2013). To state a cause of action for breach of contract, plaintiffs must allege "the existence of a contract, the plaintiff[s'] performance thereunder, the defendant[s'] breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). "[T]he complaint must, *inter alia*, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract." *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 (3d Dept 1987); *see Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995) (affirming dismissal of breach of contract claim due to "plaintiff's failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated"). "Vague and conclusory allegations are insufficient to sustain a breach of contract cause of action." *Marino v Vunk*, 39 AD3d 339, 340 (1st Dept 2007).

Plaintiffs allege that "upon acquisition" of the commercial real property, each Retail Partner "became obligated to pay an acquisition fee to [its Management Entity]." Complaint, ¶¶ 11-16, 21. In the 2010 Austin Action, Austin alleged that the first five transactions closed between May 2005 and August 2007. Zucker aff, exhibit 1, ¶¶ 8, 10-13. Plaintiffs did not commence the instant action until November 11, 2013, more than six years after all but the Stonemar Milford Plaza, LLC transaction closed. Therefore, the breach of contract cause of action is time-barred with respect to fees arising from all but the Stonemar Milford Plaza, LLC transaction. Similarly, plaintiffs' claims with respect to the annual Equity Management Fees, which were to be "paid quarterly to the appropriate [Management Entity]" (complaint, ¶ 25), are

time-barred to the extent that any Equity Management Fees were owed before November 11, 2007.

Moreover, the complaint contains nothing more than bare allegations of "contractual right[s]" to the Acquisition Fees and Equity Management Fees. Complaint, ¶¶ 55, 58. While the complaint alleges the existence of operating agreements generally (*id.*, ¶ 41), it does not identify the specific operating agreements at issue, the specific provisions that were allegedly breached, or the parties to those agreements. Accordingly, the cause of action for breach of contract is dismissed in its entirety.

D. Breach of the Implied Covenant of Good Faith and Fair Dealing (Third Cause of Action)

Defendants argue that the third cause of action, for breach of the implied covenant of good faith and fair dealing, should be dismissed as time-barred by the six-year statute of limitations and as duplicative of the breach of contract cause of action. Plaintiffs counter that the claim is not duplicative because, rather than seeking to hold Gould accountable for failure to pay the monies owed to the Management Entities and Austin, it seeks to hold Gould accountable for his bad faith conduct in diverting the money to himself or his other business interests. Because the precise timing of this conduct has not been established, plaintiffs argue, the statute of limitations argument is premature.

Every contract contains an implied covenant of good faith and fair dealing. *Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 (1st Dept 2010). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *511 W. 232nd Owners Corp.*, 98 NY2d at 153 (internal quotation marks and citation omitted). In order to survive a motion to

dismiss, plaintiffs must allege facts demonstrating that defendants sought to prevent performance of the agreement or withhold its benefits from plaintiffs. *See Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 (1st Dept 1996). A cause of action alleging breach of the implied covenant of good faith and fair dealing that is merely duplicative of the breach of contract cause of action must be dismissed. *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004) ("[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" [internal quotation marks and citation omitted]). The cause of action is governed by a six-year statute of limitations. *Liberman v Worden*, 268 AD2d 337, 339 (1st Dept 2000).

Here, plaintiffs allege that Gould breached the covenant of good faith and fair dealing by: (1) not exercising Stonemar MM Milford's redemption rights with respect to 77 Charters (complaint, ¶ 64); (2) incurring $500,000 of additional indebtedness for Stonemar MM Jackson (*id.*, ¶ 65); and (3) creating a fictitious capital account for Stanley Vickers in the amount of $182,000 at Stonemar MM Milford. *Id.*, ¶ 65. In so doing, plaintiffs allege, Gould has failed to act in good faith in the exercise of his management duties and has frustrated the purpose of the management agreements. Plaintiffs also allege that the Management Entities have been damaged "with respect to acquisition fees" and with respect to "management fees." *Id.*, ¶ 86.

To the extent that this cause of action attempts to recover the Acquisition Fees and Equity Management Fees, it is dismissed as duplicative of the breach of contract cause of action. *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 (1st Dept 2000) (holding that a claim for breach of the implied covenant of good faith and fair dealing "may not be used as a substitute for a nonviable claim of breach of contract"). However, the remaining allegations state a claim for

breach of the implied covenant of good faith and fair dealing. Not only are these allegations distinct from those forming the breach of contract cause of action, but they allege that Gould frustrated the basic purpose of the parties' contract by abusing his role as the managing member, and deprived plaintiffs of their rights. Complaint, ¶¶ 38-40. And just as with the breach of fiduciary duty cause of action, the timing of the alleged breaches has not been established and, therefore, a determination of the timeliness of this claim is premature at this juncture. Accordingly, defendants' motion to dismiss the third cause of action is granted with respect to the Acquisition Fees and Equity Management Fees only.

E. Unjust Enrichment (Fourth Cause of Action)

Defendants argue that the unjust enrichment cause of action should be dismissed as duplicative of the breach of contract claim and time-barred under the applicable six-year statute of limitations. Plaintiffs counter that the claim is not time-barred, as it is first necessary to ascertain when and if Gould exercised his discretion to collect the Acquisition Fees and Equity Management Fees.

As the Court of Appeals has explained:

> "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.
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> [I]f plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects."

Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790-91 (2012) (internal quotation marks and citations omitted).

Here, plaintiffs allege that Gould unjustly enriched himself by "fail[ing] to collect the revenue earned by and due to" plaintiffs, and "instead used these revenues for other business purposes." Complaint, ¶ 70. These allegations are nothing more than a restatement of the failed breach of contract claim. Accordingly, the unjust enrichment cause of action is dismissed. Because the unjust enrichment cause of action is dismissed as duplicative of the breach of contract cause of action, the court does not address the statute of limitations argument.

F. Unpaid Salary (Fifth Cause of Action)

Defendants contend that the cause of action for unpaid salary must be dismissed because it is vague, conclusory, and does not state a claim. Plaintiffs do not counter this argument, except to say that the cause of action is sufficiently pled.

The cause of action consists of two main allegations: (1) "[i]n 2009, while Stonemar Realty Management reported Austin's salary at $120,000 only $110,000 was paid to him;" and (2) "there is presently due to Austin unpaid salary of $10,000." Complaint, ¶¶ 73, 74. Plaintiffs "fail[] to allege any facts which would establish any contractual or other entitlement to" the $10,000. *McEntee v Van Cleef & Arpels*, 166 AD2d 359, 360 (1st Dept 1990) (affirming dismissal of claim for commissions); *see also Marino*, 39 AD3d at 340 (holding that "[s]ince plaintiff failed to allege the existence of any contract entitling her to the unspecified compensation she claims to have been denied, or the precise terms thereof, her [breach of contract] cause of action was properly dismissed"). Therefore, Austin fails to plead a cognizable cause of action and the unpaid salary claim is dismissed.

G. Tortious Interference with Contractual Relations (Sixth Cause of Action)

Defendants argue that the tortious interference with contractual relations claim should be dismissed as vague, conclusory, and insufficient as a matter of law. In addition, defendants argue, Gould cannot tortiously interfere with contracts to which he is a party. Plaintiffs do not respond to this.

To establish a cause of action for tortious interference with contractual relations, plaintiffs must allege: "(1) the existence of a valid contract between [plaintiffs] and [a third-party]; (2) defendants' knowledge of that contract; (3) defendants' intentional procuring of the breach of that contract; and (4) damages." *Burrowes v Combs*, 25 AD3d 370, 373 (1st Dept 2006).

Here, the complaint states that "[the Management Entities] had valid and enforceable agreements with Defendant Gould which set forth their right to receive compensation," and that "Defendant Gould intentionally procured the breach of these agreements." Complaint, ¶¶ 76, 78. As plaintiffs seek to hold Gould accountable for tortiously interfering with his own contracts, the sixth cause of action is dismissed. *See Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 (1st Dept 2012) ("asserting that a defendant tortiously interfered with its own contract 'quite clearly does not state a legally sufficient cause of action'").

H. Removal of Gould as Member Manager and Denial of Indemnification (Seventh Cause of Action)

Defendants argue that plaintiffs' seventh cause of action, seeking Gould's removal as managing member and denial of indemnification if Gould is found liable to plaintiffs, is inadequately pled. In particular, defendants argue, the cause of action fails to identify the contractual provisions that govern the removal of the managing member and indemnification.

Plaintiffs counter that the relief sought is clearly stated and is within the court's power to grant, but plaintiffs do not identify any authority for this assertion.

"Unless there is a vote of a majority in interest of the members (LLC Law § 414), this court is unaware of a legal basis for directing, ordering or adjudging that an LLC member be removed from a management position." *Janklowicz v. Landa*, 41 Misc 3d 1220(A), 2013 NY Slip Op 51779(U), *6 (Sup Ct, Kings County 2013). Similarly, plaintiffs have not provided any authority, nor has the court found any, to support the existence of a cause of action seeking denial of indemnification without a contractual basis for doing so. *See* LLC Law § 420 (providing that a limited liability company may indemnify its manager "from and against any and all claims and demands whatsoever," except where there has been a final adjudication determining that manager acted in bad faith and his conduct was "material to the cause of action so adjudicated" or he "personally gained in fact a financial profit or other advantage to which he . . . was not legally entitled"); *546-552 W. 146th St. LLC v Arfa*, 70 AD3d 512, 512-13 (1st Dept 2010) (interpreting indemnification provision of operating agreement to require indemnification upon the resolution of the action without "await[ing] a finding that defendants were free of misconduct"); *TIC Holdings v HR Software Acquisition Group*, 301 AD2d 414 (1st Dept 2003) (denying motion for summary judgment on the cause of action for indemnification where it was unclear whether defendants' conduct fell within the operating agreement's indemnification provision). Accordingly, the seventh cause of action is dismissed.

I. Intentional Infliction of Emotional Distress (Eighth Cause of Action)

Defendants argue that the cause of action for intentional infliction of emotional distress should be dismissed, because plaintiffs fail to allege that Gould's conduct was outrageous or caused Austin mental or physical injury. Defendants also argue that the claim is barred by the

one-year statute of limitations, as it is based on events that took place in 2009, more than four years prior to commencement of the instant action. Plaintiffs do not respond to these arguments. To establish a cause of action for intentional infliction of emotional distress, plaintiffs must allege: "(i) extreme and outrageous conduct, (ii) an intent to cause—or disregard of a substantial probability of causing—severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress." *Lau v S&M Enters.*, 72 AD3d 497, 498 (1st Dept 2010). The cause of action must be commenced within one year of accrual. CPLR 215 (3).

Here, plaintiffs' allegations "do not describe conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Seltzer v Bayer*, 272 AD2d 263, 264, 265 (1st Dept 2000) (internal quotation marks and citations omitted). Plaintiffs also fail to allege any injury caused by Gould's conduct. Moreover, the claim is based on events that transpired in 2009 (complaint, ¶ 35), and, therefore, it is barred by the one-year statute of limitations. Therefore, the eighth cause of action for intentional infliction of emotional distress is dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent of dismissing:

(1) those portions of the first and third causes of action that seek recovery of the Acquisition Fees and Equity Management Fees under the parties' agreements; and

(2) the second, fourth, fifth, sixth, seventh, and eighth causes of action; and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, at 60 Centre on October 8, 2014 at 11 a.m.

Dated: July 9, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER