

Blumenstyk v Singer
2014 NY Slip Op 32124(U)
August 4, 2014
Sup Ct, New York County
Docket Number: 651018/2013
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**LARRY BLUMENSTYK AND HOLLY BLUMENSTYK
(INDIVIDUALLY, AS TRUSTEE OF THE NATHAN
LEDIS S/E DEFINED BENEFIT PLAN, AND AS
TRUSTEE OF THE NATHAN LEDIS IRA),**

Plaintiffs,

-against-

**HENRY SINGER, JAY SEEMAN, HAS OMAHA CORP.,
DODGE MORTGAGE, LLC, 75th & DODGE I LP, 75th &
DODGE II LP, JOHN DOES AND XYZ CORPS.,**

Defendants.

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O. PETER SHERWOOD, J.:

DECISION AND ORDER

**Index No.: 651018/2013
Motion Sequence No.: 001**

I. OVERVIEW

As this is a motion to dismiss the complaint, the facts are taken from the complaint and are deemed true for purposes of the motion. This Decision and Order also references facts set forth in the decision of the Nebraska Supreme Court in the related case of *Davenport Limited Partnership v 75th and Dodge I, LP*, 279 Neb 615 (2010).

The complaint alleges that plaintiffs are shareholders in defendants Dodge Mortgage LLC (“Dodge Mortgage”), 75th & Dodge I LP (Dodge I) and 75th & Dodge II LP (Dodge II).¹ HAS Omaha Corp. is the general partner of Dodge I and Dodge II. Henry Singer (“Singer”) is the president and sole shareholder of HAS Omaha Corp., which was found by a Nebraska court to be a shell corporation and the alter ego of Singer. Singer was also the managing member of Dodge Mortgage. Plaintiffs additionally allege that Singer “exercised unfettered dominion and control over Dodge Mortgage” (Compl. at ¶158). Jay Seeman is no longer a party to this litigation.

¹ Plaintiff Larry Blumenstyk’s interests in the three companies were all obtained after the events giving rise to the complaint.

Dodge I and II held leases on a mall property in Nebraska. Dodge Mortgage had loaned money to the other Dodge entities, and was being paid back monthly from rents collected from mall store rentals. The practice was for Dodge I and Dodge II to pay the Dodge Mortgage members directly.

Plaintiffs claim that Singer failed to properly renew the lease on the land, resulting in the loss of the lease and the three Dodge entities losing all value. Plaintiffs also assert that Singer used Dodge entity money to defend himself in a lawsuit, hid the problems with the lease from them and that Dodge II made payments to preferred members of Dodge Mortgage (relatives of Singer) without also paying Plaintiffs.

Defendants move to dismiss this action (1) because, it asserts, claims are time-barred, as they are all based on Singer's failure to renew the lease in 1997; (2) for failure to state a claim for which relief may be granted; (3) based on documentary evidence; and (4) for failure to plead fraud with sufficient particularity. The parties also raise the issue of a prior ruling from a New Jersey court in a pair of related cases, one brought by Larry Blumenstyk ("Blumenstyk") against Dodge Mortgage, Singer and Seeman, and the other brought by the Nathan Ledis Self-Employed Defined Benefit Plan against the same defendants (the "New Jersey Decision" attached as Exhibit I to the Singer Aff.). Defendants, in their Reply, argue that the plaintiffs lack standing to bring derivative claims.

II. BACKGROUND

Dodge I held a ground lease on a mall property in Omaha Nebraska owned by non-party Davenport. Dodge II leased that property from Dodge I, and rented shops in the mall to various stores. Dodge Mortgage was formed to lend money to Dodge I and Dodge II, using the leases on the mall property as collateral. The three Dodge entities have many (but not all) of the same investors. For several years, Dodge I and II repaid the loan by distributing rental income directly to the shareholders of Dodge Mortgage.

In or around 1997, Singer renewed Dodge I's underlying lease for the first time, but did so verbally, despite a provision in the ground lease requiring the renewal notice to be in writing. The then owner of the fee interest waived its right to a written renewal at that time, and renewed the lease for ten years. On or about October 31, 2007 Davenport advised Singer that it had not received the required written notice for a second renewal during the Spring of 2007 that the lease would expire

as of May 31, 2008, and would not be renewed (Singer Aff., Exh. C at 5). In December, 2007, Singer informed the shareholders in Dodge I, Dodge II, and Dodge Mortgage that Davenport was contesting the validity of the lease (Compl. ¶ 42). A court proceeding in Nevada followed. In March, 2009, the Nevada trial court found for Davenport (*see* Singer Aff., Ex. C). On March 26, 2010, the Supreme Court of Nevada affirmed (*see id.*, Ex. F). Davenport subsequently sued Dodge I and Dodge II to recover rents which those entities had collected since termination of the lease. Davenport obtained a judgment, but could not collect. Davenport then sued Singer, individually, for conversion. Singer claims he was entitled to indemnification from Dodge Mortgage in connection with that suit. He adds that Davenport could have reached Dodge Mortgage and its shareholders to recover the rents paid out to them, so Singer settled with Davenport (Singer Aff. ¶ 29). Singer claims to have had the consent of the other members of Dodge Mortgage to the settlement (Singer Reply Aff. ¶ 20).

Plaintiffs allege that while the dispute regarding the underlying lease was pending, certain shareholders of Dodge Mortgage (including the Plaintiffs) stopped receiving payments. Plaintiffs also claim Singer used company funds for his personal defense in the Davenport lawsuits.

III. DISCUSSION

A. The Nature of the Case

In what may be described as an exemplar of overly zealous pleading, the complaint alleges twenty-four separate causes of action, few of which survive this motion to dismiss. The essential claim in this case is simple: plaintiffs were injured as a result of a reduction in value of Dodge I, Dodge II, and Dodge Mortgage. Plaintiffs claim that Singer and others injured them by (1) failing to renew the lease properly; (2) hiding Singer's failure to renew; (3) using company money to defend Singer in litigation brought by Davenport; and (4) failing to pay out rents to Plaintiffs. Defendants seek to dismiss the entire complaint for a variety of reasons discussed below.

B. Standing

1. The New Jersey Action

Defendants point out that Larry Blumenstyk and the Nathan Ledis Self-Employed Defined Benefit Plan had previously sued Singer, Dodge Mortgage, and Seeman in New Jersey Superior Court (Singer Aff., NYSECF Doc. No. 9, at ¶ 30). Defendants argue that since that court dismissed

the matter on March 30, 2011, ordering that “[t]he complaints in [Blumenstyk’s action] and [the Nathan Ledis Self-Employed Defined Benefit Plan’s action] are dismissed with prejudice as to Henry Singer for failure to state a claim upon which relief may be granted [and that the] complaint in [the Blumenstyk action] is dismissed with prejudice for lack of standing” (Ex. I), that Singer should be dismissed as a defendant here and that all of plaintiff Larry Blumenstyk’s claims should be dismissed. Plaintiffs respond that the New Jersey court order is misleading, and that the transcript indicates the intent of the judge was to dismiss the proceeding on grounds of lack of personal jurisdiction, and not on the merits of the underlying complaint. In support, plaintiffs submit an excerpt of the transcript of the hearing which suggests that the court may have questioned whether there was any merit to the case but stated that the court did not reach the merits (Tobia Aff., NYSECF Doc. No. 25, Ex. B).

No party has submitted the complaint in the New Jersey action. Thus, this court cannot tell what claims here may be affected by that order. Accordingly, defendants have failed to show that this case is barred by the New Jersey decision.

2. Plaintiffs’ Standing in Derivative Actions

Most of the claims in this case are derivative claims, but this case was not brought as a derivative action. The complaint alleges injuries to the companies and not individually to the plaintiffs (*see* NYPRAC-COMM § 82:4, [“In a direct action, the plaintiff-shareholder must demonstrate that the defendant breached a duty owed directly to the plaintiff”]).

In their Reply brief, defendants assert for the first time that the plaintiffs lack standing to bring a derivative suit on behalf of Dodge Mortgage, as it is a Delaware company, and Delaware law bars derivative claims by limited partners when the limited partners have neither demanded that the general partner(s) bring the claim nor stated a justification for failing to do so (*see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 [Del 2004]). The complaint does not allege that plaintiffs demanded that the managing member of Dodge Mortgage bring a suit². Nor do they

² Because Dodge Mortgage is a limited liability company, the right of unitholders to bring suit derivatively is triggered if the managers or managers with authority refuse to bring the action (*see* 6 Del.C. § 18-1001 [“A member or an assignee of a limited liability company interest may bring an action in th Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the

provide a justification for not doing so. Under Delaware law, mere assertions of mismanagement are insufficient to satisfy this requirement (*see Litman v Prudential-Bache Properties, Inc.*, 611 A2d 12, 17 [Del Ch 1992]).

Defendants also argue that Larry Blumenstyk lacks standing to bring a derivative suit on behalf of Dodge Mortgage, since he obtained his interests in all of the companies long after the events giving rise to these claims. Defendants assert that Delaware law provides that the assignee of a membership interest is only entitled to the economic interest of the assigning member (*see* 6 Del Code § 18-702[b] [“An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member”]).

While “the function of a reply . . . is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion, (*see Ritt by Ritt v Lenox Hill Hosp.* 182 AD2d 560, 562, [1st Dept, 1992]) the court has discretion to consider such an argument (*see Eujoy Realty Corp. v Van Wagner Communications LLC*, 22 NY3d 413, 422 [2013] [“even if Eujoy had, in fact, presented a new legal argument about the lease to Supreme Court in a reply brief, neither that court nor the Appellate Division would have been prohibited from considering it”]).

Accordingly, because Dodge Mortgage is a Delaware LLC, any claims that are properly those of the LLC must be dismissed. Similar principles apply under Nebraska law: “[a]s a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation” (*Klingelhoefer v Parker, Grossart, Bahensky & Beucke, L.L.P.* 20 Neb App 825, 832, 834 NW2d 249, 255 [Neb App 2013]). Nebraska Revised Statutes §67-288 states:

action or if an effort to cause those manager or members to bring the action is not likely to succeed.”]). Delaware law requires the complaint to “set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort” (6 Del. C. § 18-1003). These statutes mirror the Delaware statutes for bringing derivative actions for limited partnerships (6 Del. C. § 17-1001-3).

A limited partner or an assignee of a limited partner may bring an action in the name of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

Nebraska law also requires that:

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

Neb.Rev.St. § 67-290. Accordingly, plaintiffs cannot be considered to have brought derivative claims for either Dodge I or Dodge II.

C. Statute of Limitation Defenses

1. Negligence

Defendants claim that the applicable statute of limitations for negligence is three years, pursuant to CPLR 214 (4) (damages for injury to property) and CPLR 214 (6) (malpractice other than medical malpractice). Injury to property is “an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract” (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 649 n. 5 [2011]).

Plaintiffs argue that CPLR 214(6) does not apply, because this is a case to which a six year limitations period applies under CPLR 213. The CPLR 213 limitations period applies in actions for: breach of contract (CPLR 213[2]); “an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith” (CPLR 213[7]); and for other actions for which there is no specified period (CPLR 213[1]).

As plaintiffs are suing as individuals and not as representatives of shareholding entities, CPLR 213(7) does not apply. Depending on the specific cause of action, the 3-year statute of limitations for negligence causing injury to property, and 6-year statute of limitations for breach of contract claims apply.

2. Breach of Fiduciary Duty

New York applies different statutes of limitations for claims alleging breach of fiduciary duty, depending on the remedy sought. (*see Kaufman v Cohen*, 307 AD2d 113, 118 [2003]). For equitable relief, the six-year limitations period in CPLR 213(1) applies. However, when the plaintiff seeks only money damages, courts interpret the claims as alleging injury to property and subject to the three year limitations period set forth in CPLR 214(4). Claims for breach of fiduciary duty accrue, and the statute of limitations begins to run, as of the date of the alleged breach, not when it was discovered (*see IDT Corp. v Morgan Stanley*, 12 NY3d 132, 140 [2009]). Generally, the three-year statute of limitations to recover damages for injury to property (*see* CPLR 214[4]) accrues when the injury occurs, “irrespective of when the damage was actually discovered” (*Suffolk County Water Auth. v J.D. Posillico, Inc.*, 267 AD2d 301, 302 [1999]; *509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48, 51–52 [1964]).

The statute of limitations may be tolled while a relationship of trust and confidence exists between the parties (*see Ciccone v Hersh*, 530 F Supp 2d 574, 579 [2008], *affd* 320 Fed Appx 48 [2009]). In such cases, the statutory period does not begin to run until the fiduciary relationship is repudiated or otherwise ended (*see Steele v Anderson*, 2004 WL 45527 [ND NY, Jan. 8, 2004, No. 03-CV-1251 (TJM)] citing *Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]).

3. Fraud

CPLR 213(8) provides that, as to claims of fraud, there is either a six year statute of limitations running from the time the cause of action accrued, or a two year period from “the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it.” However, “courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims” (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1985], *affd* 67 NY2d 981 [1986]). Thus, “where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts 'look for the reality, and the essence of the action and not its mere name'” (*id.*, quoting *Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 [1937]).

D. Standard for Dismissal Under CPLR 3211 (a) (7)

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

E. Standard for Dismissal Under CPLR 3211 (a) (1)

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]).

CPLR 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons.

Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically, that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, “the contents of which are ‘essentially undeniable’” (*id.* at 84-85).

F. The Causes of Action Asserted in This Case

1. Breach of Fiduciary Duty

As plaintiffs seek money damages for the first cause of action, the three year limitations period in CPLR 214(4) applies. Defendants argue that the claim accrued in 1997, the first time the lease was not properly renewed. Plaintiffs argue that the claim did not accrue until March 26, 2010, when the Nebraska Supreme Court ruled and terminated the interests of the Dodge entities in the property.

In 1997, when Singer renewed orally, the landlord waived the requirement for a written renewal. No damage was done and no claim accrued. The injury underlying this action occurred in the Spring of 2007, when Singer failed to give timely written notice of renewal and the lease thereafter expired. The Nebraska court ruling merely confirmed Davenport’s right to require written notice of renewal as provided for in the lease. Accordingly, the three year statute of limitations applicable to this claim expired in early 2010, long before this case was commenced. The first cause of action is time barred. Also, this claim alleges an agent-principal relationship, but not that any of the plaintiffs was the principal. Thus, as discussed above, this derivative claim must be dismissed because plaintiffs did not bring a derivative suit.

2. Negligence in Caring for Collateral or Security

In the second cause of action, plaintiffs assert that defendants had an obligation to act with reasonable care to preserve the collateral in their possession. This is essentially a negligence claim. It seeks damages for injury to property based on a failure to renew the lease, as to which, pursuant to CPLR 214 (4), a three-year statute of limitations applies. As with the first cause of action, the claim accrued in 2007 when Singer failed to give written notice of renewal of the lease, not when the lease terminated or when the Nebraska Supreme Court confirmed that the lease had not been renewed. Accordingly, the three year statute of limitations applicable to this claim has run, and the claim is barred. Additionally, this claim does not articulate any damage to the plaintiffs, and can

only be brought by the corporate entities, or in a derivative suit. The second cause of action shall be dismissed.

3. Conversion- Escrow Agent Improperly Disbursing Funds

The third cause of action appears to be addressed to money paid out of Dodge entity funds to cover litigation and settlement expenses disbursed in connection with the various Davenport suits against the Dodge entities and Singer. Davenport had obtained judgments against Dodge I and Dodge II for the rents collected during the period when the validity of the lease was in litigation. Davenport then sued Singer individually. Defendants argue that while Davenport had not yet sued Dodge Mortgage (which, by that time, was holding that portion of the rent money not yet distributed to Dodge Mortgage shareholders), the Nebraska court had clearly indicated that the Dodge entities had no right to collect rent money after the lease terminated in March, 2008. Defendants argue that they believed such a claim was inevitable and would be successful. Defendants also maintain that had Davenport continued to follow the money, it would have been able to obtain judgments against Dodge Mortgage shareholders for those rents, as would have Singer, in a contribution claim. Thus, defendants argue, Singer properly settled Davenport's claims using his business judgment by paying Davenport with money from Dodge Mortgage's accounts, as well as his own money.

While Defendants' prognostication may be correct, their argument pursuant to CPLR 3211(a)(1) that the documentary evidence of the Nebraska court's ruling resolves all factual issues and definitively disposes of the plaintiff's claims fails. The Nebraska court did not address issues concerning any liability of Dodge Mortgage or its shareholders for those funds. However, there is no allegation in the complaint that any of the defendants in this action was an escrow agent, or otherwise held any money "in escrow." Additionally, this claim does not articulate any damage to the plaintiffs, and such damages can only be brought by the corporate entities, or in a derivative suit. Accordingly, this claim will be dismissed.

4. Breach of Fiduciary Duty

The fourth cause of action, to which the three year limitations period in CPLR 214(4) applies, asserts breaches of fiduciary duty in failing to renew the lease and in using company funds to gain a personal release for Singer from Davenport. In so far as this claim relates to the failure to renew the lease, the three year statute of limitations expired in the Spring of 2010. In so as far as the claim relates to the use of Dodge Mortgage funds, plaintiffs allege the transfer of that money to

Davenport took place in February, 2013 (Herbert Aff., NYSECF Doc. No. 24, at 21). As such, this portion of the claim is timely. However, the claim does not articulate any damage to the plaintiffs, and can only be brought by the corporate entities, or in a derivative suit. Accordingly, this claim shall be dismissed.

5. Fraudulent Concealment by Fiduciary

As to the fifth cause of action, defendants claim that the claim fails because plaintiffs have not pled a fraud claim with the required specificity. Pursuant to CPLR 3016, “[w]here a cause of action or defense is based upon misrepresentation, [or] fraud . . . , the circumstances constituting the wrong shall be stated in detail.” Defendants also argue that the six-year statute of limitations does not apply, as that period applies only when “there would be no injury but for the fraud”. Where, as here, “the allegations of fraud are only incidental to another cause of action” (*New York Seven-Up Bottling Company, Inc. v Dow Chemical Company*, 96 AD2d 1051 [2 d Dept 1983], *affd.* 61 NY2d 828 [1984]), the three-year statute of limitations applies, based on the alleged failure to renew the lease. Therefore, the claim is time barred.

Plaintiffs argue that the fraud claims were pled with specificity, and point to a meeting in which Singer allegedly lied about the status and likely outcome of the Davenport case. (Herbert Aff. at 12, 19-20). However, the plaintiffs make no specific claims as to what detrimental reliance they made on the alleged misrepresentations or what damages were suffered because of the alleged concealment. The court notes that the alleged misrepresentations occurred in a meeting held in December, 2007. On March 26, 2010, the Nebraska Supreme Court ruled that the lease had not been renewed (and the lower courts ruled on the issue before that). Plaintiff Larry Blumenstyk *purchased* his interests in Dodge Mortgage on March 29, 2010 (Complaint at ¶ 155-56). Defendants continued to acquire interests in the Dodge I and II entities in 2012 after all of the above. (*id.* at ¶ 175-77, 181-82). Plaintiffs have failed to assert reliance on or damage resulting from the alleged fraudulent concealment in 2007. This claim fails. Additionally, as the claim of fraud is merely incidental to the failure to give proper notice of renewal of the lease, the three year statute of limitations applies and the claim must be dismissed on the additional ground that it is time-barred.

6. Debtor's Fraudulent Conveyance

Defendants argue that the sixth cause of action, apparently related to the use of Dodge Mortgage funds to pay Singer's litigation and settlement costs, is definitively disposed of by documentary evidence (the Nebraska Supreme Court decision). As discussed above, that decision did not address use of funds held by Dodge Mortgage. However, this claim does not articulate any damage to the plaintiffs, and in any event, can only be brought by the corporate entities, or in a derivative suit. Accordingly, this claim shall be dismissed.

7. Noncompliance with Secured Transaction Laws

As to the seventh cause of action, defendants argue that this claim, also related to the use of Dodge Mortgage funds to pay Singer's litigation and settlement costs, is definitively disposed of by the Nebraska Supreme Court decision. Again, that decision did not address funds held by Dodge Mortgage. However, the plaintiffs have failed to specify which laws defendants have allegedly broken, making it impossible to ascertain the elements of the claim, or whether there is even a private right of action. Accordingly, this claim shall be dismissed for failure to state a cause of action (*see* CPLR 3211 [a][7]).

8. Accounting

Regarding the eighth cause of action, defendants argue this claim should be dismissed for failure to plead, as required, that the plaintiffs demanded an accounting, and that the defendants refused or failed to provide one (*see Blaustein v Lazar Borck & Mensch*, 161 AD2d 507 [1st Dept 1990]; *Conroy v Cadillac Fairview Shopping Ctr.*, 143 AD2d 762 [2nd Dept 1988]). Defendants also claim that they have provided all of the financial documents to the plaintiffs. Plaintiff Larry Blumenstyk asserts, in his affidavit, that plaintiffs have been provided with a partial set of financial records in response to plaintiffs' unspecified "extraordinary effort" (Blumenstyk Aff., NYSECF Doc. No. 26, ¶ 21). As there is some evidence that those records have indeed been requested, and there is a dispute over whether the plaintiffs have received all of the documents to which they are entitled, this branch of the motion to dismiss must be denied.

9. Anticipatory Breach of Contract

The ninth cause of action is based on the allegation that defendants "repudiated their duties to plaintiff by failing to maintain the collateral securing the note", essentially a negligence claim

couched in different language. As such, the three year statute of limitations applies. The claim is time-barred.

Additionally, plaintiffs allege in conclusory fashion that a contract existed between the parties, but do not specify which contract with which entities was allegedly breached and how. Since no contract between plaintiffs and Dodge I or Dodge II related to the payment of the loan from Dodge Mortgage is alleged, this claim can only be brought, if at all, by the corporate entities or in a derivative suit. Accordingly, this claim must be dismissed on the further ground of failure to state a claim.

10. Breach of Contract

As to the tenth cause of action, plaintiffs assert they fulfilled their obligations under an agreement by tendering funds, and that defendants failed to perform their obligations under that agreement (Compl, ¶ 253-259). The complaint does not identify what specific agreement was breached. It appears that plaintiffs are referring to the allegations that they, or their predecessors in interest, participated in Dodge Mortgage which provided financing to Dodge I and II, and expected to be repaid. This claim must be dismissed, as it does not articulate damage to plaintiffs. In any event, the claim can only be brought by the corporate entities or in a derivative suit. Alternatively, this claim could be interpreted to allege breach of a contract between Dodge Mortgage and the plaintiffs to distribute funds. However, that claim also fails, as plaintiffs have also failed to allege such a contract, and, as the complaint notes, Dodge Mortgage had no operating agreement (Compl, ¶ 105).

11. Guaranty

In the eleventh cause of action, plaintiffs claim that defendants failed to perform under a guaranty by not renewing the lease. As defendants argue, this claim was different language to restate the negligence claim to which the three year statute of limitations applies. It does not assert a separate breach of contract. The claim is time-barred. Additionally, this claim does not articulate any damage to the specific plaintiffs, and can only be brought by the corporate entities or in a derivative suit.

12. Promise Causing Detrimental Reliance

In yet another disguised negligence claim, plaintiffs assert in the twelfth cause of action that defendants failed to keep their promises to plaintiffs that defendants would act with reasonable care to ensure and maintain the collateral securing the note. This cause of action does not state a separate breach of contract claim. Because the three year statute of limitations applies, this claim is time-barred.

Additionally, plaintiffs do not assert by whom a promise was made, or to whom. Such a promise, if any, might have been made by Dodge I and/or Dodge II to Dodge Mortgage, but not to plaintiffs. Therefore, the claim can only be brought by the corporate entities or in a derivative suit.

13. Promissory Estoppel

Asserting, yet again, a negligence claim, plaintiffs allege in the thirteenth cause of action that defendants failed to keep their promises to handle the management of their assets with reasonable care, causing plaintiffs injury. Again, the three year statute of limitations applies, and this claim is time-barred.

Additionally, plaintiffs do not assert by whom a promise was made, or to whom. Such a promise might have been made by Dodge I and/or Dodge II to Dodge Mortgage, but not to plaintiffs. Therefore, the claim can only be brought by the corporate entities or in a derivative suit.

14. Unjust Enrichment

The fourteenth cause of action appears to concern the alleged use of Dodge Mortgage funds to defend against and settle the Davenport lawsuits. As this claim does not articulate any damage to the plaintiffs, and can only be brought by the corporate entities or in a derivative suit, it to must be dismissed.

15. Piercing the Corporate Veil

Defendants argue that the fifteenth cause of action is insufficiently pled and that it should be dismissed as mere “bare-bones allegations” (*Russo v Heller*, 80 AD3d 531, 532 [2011]). As for this claim, plaintiffs are required to allege facts that, if proved, indicate Singer exercised complete dominion and control over the corporations and abused the corporate form to perpetrate a wrong or injustice (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]; *D’Mel & Assocs. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]). In the complaint,

plaintiffs assert that Singer “exercised control” over the Dodge entities, but do not allege how, other than mentioning actions Singer has taken on behalf of those companies: making payments, establishing bank accounts, renewing (or failing to renew) the lease. Plaintiffs have utterly failed to make sufficient allegations of domination and control to support a viable claim for piercing the corporate veil. This cause of action shall be dismissed.

16. Partner Breaching Fiduciary Duty to Co-Partner

In the sixteenth cause of action, plaintiffs claim that defendants had a fiduciary duty which was breached because defendants “had obtained an opportunity to make personal profits or advantageous arrangements due to their positions in the businesses . . . [and] did not pass on these advantages to the plaintiffs” (Compl ¶¶ 291-292). Plaintiffs have failed to identify an opportunity taken by any of the defendants which could have been passed on to any of the plaintiffs. Accordingly, this claim should be dismissed for failure to state a cause of action.

17. Equitable Estoppel

As to the seventeenth cause of action, defendants argue that the claim fails to state a cause of action. “Equitable estoppel is not a cause of action or a defense; it is, rather, an equitable bar to the assertion of a defense or claim” NYJUR ESTOPPEL § 5. Accordingly, this claim shall be dismissed for failure to state a cause of action.

18. Equitable Fraud

Regarding the eighteenth cause of action, defendants argue this claim fails because plaintiffs have not pleaded fraud with the required specificity. Pursuant to CPLR 3016, “[w]here a cause of action or defense is based upon misrepresentation, fraud . . . , the circumstances constituting the wrong shall be stated in detail.” Plaintiffs have not alleged reliance in this claim, even in the cursory fashion in which they allege that “[d]efendants made material misrepresentations to Plaintiffs” (Compl, ¶ 303). It is also unclear what the defendants purportedly said that constituted actionable misrepresentation. Accordingly, this claim will be dismissed for failure to plead fraud with the required specificity.

19. Equitable Subrogation

Defendants argue that the allegations in the nineteenth cause of action are refuted by the Nebraska Supreme Court’s decision that Davenport was entitled to the rents collected while the lease

was under dispute. As discussed above, the claim will survive that argument. Additionally, this claim does not appear to be related to those funds.

Equitable subrogation is “the substitution of one person in place of another with reference to some lawful claim or right, clothing a party who makes a payment which another should have made with the legal garb with which the contract discharged was invested, and substituting the party paying to every equitable interest and purpose in the place of the creditor whose debt it has discharged” (NYJUR GUARANTY § 420). Here, plaintiffs allege that funds which should have been paid to them by Dodge Mortgage were instead used to discharge defendants’ obligations, specifically, payments made to other members of Dodge Mortgage in exchange for general releases. An equitable subrogation claim would provide a means for the plaintiffs to step into Dodge Mortgage’s shoes and to then make claims against the recipients of those funds, which claims would otherwise be made by Dodge Mortgage. Plaintiffs have not stated what claims Dodge Mortgage has against members who received the funds, as to which funds and members plaintiffs would now seek to bring an equitable subrogation claim. Only one of such members [Singer] is a party in this suit. This claim fails to state a claim for which relief can be granted.

20. Impress a Trust

The twentieth cause of action seems to concern the use of Dodge Mortgage funds to defend against and settle the Davenport lawsuits. Defendants argue that this claim is refuted by the Nebraska Supreme Court decision that Davenport was entitled to the rents collected during this period when the lease was in dispute. As discussed above, the claim survives that argument. However, this claim does not articulate any damage to the specific plaintiffs, and can only be brought by the corporate entities, or in a derivative suit. Accordingly, this claim shall be dismissed for failure to state a claim.

21. Conversion

The twenty first cause of action concerns the alleged failure of Dodge Mortgage to disburse funds to plaintiffs when funds were disbursed to other members of Dodge Mortgage. Defendants argue that this claim is refuted by the Nebraska Supreme Court decision that Davenport was entitled to the rents collected while the lease was under dispute. As discussed above, the claim will survive that argument.

22. Deceit

The twenty second cause of action is a claim for fraud, alleging that defendants “made false affirmations to plaintiffs with scienter and intent to defraud” (Compl, ¶ 327). It contains mere conclusory allegations, and fails to identify the specific false affirmations made by defendants or how the plaintiffs relied upon them and suffered damages. Accordingly, the claim shall be dismissed for failure to plead fraud with the required specificity.

23. Fraud and Deceit

The twenty third cause of action is yet another claim for fraud. As with the twenty second cause of action, it contains mere conclusory allegations and fails to specify specific false affirmations made by defendants or detrimental reliance. Accordingly, the claim will be dismissed for failure to plead fraud with the required specificity.

24. Negligence

As discussed above, the statute of limitations on this claim based on failure to renew the lease is the three years applicable to allegations of negligence causing injury to property, pursuant to CPLR 214(4). The twenty fourth cause of action is time-barred.

IV. SUMMARY AND CONCLUSION

The Plaintiffs have not pleaded derivative claims (and have not satisfied the requirements for doing so). Accordingly, any claims asserting damages to the companies or based on reduction to their value must fail. Only claims articulating injury directly to the plaintiffs, aside from the fact that their equity interests have lost value, will survive.

The defendants, having failed to file a copy of the complaint in the New Jersey action, have failed to carry their burden of showing that the order from the New Jersey action precludes claims in this matter.

The list below summarizes the court’s disposition of the twenty-four (24) causes of action alleged in the complaint of which two (counts 8 [Accounting] and 21 [Conversion]), shall survive defendants’ motion to dismiss.

1. **Breach of Fiduciary Duty**: Barred by statute of limitations and plaintiffs lack standing to sue.

2. **Caring for Collateral or Security**: Barred by statute of limitations and plaintiffs lack standing.
3. **Conversion**: Fails to state a claim for lack of an allegation any defendant was an escrow agent and plaintiffs lack standing.
4. **Breach of Fiduciary Duty**: As far as this relates to the failure to renew, it is barred by the statute of limitations. Additionally, plaintiffs lack standing.
5. **Fraudulent Concealment by Fiduciary**: Barred by statute of limitations, fails to state a claim, and fails to plead fraud with specificity.
6. **Fraudulent Conveyance**: Plaintiffs lack standing.
7. **Noncompliance with Secured Transaction Laws**: Fails to state a claim for which relief can be granted (doesn't specify what laws, and whether there is a private right of action).
8. **Accounting**: Survives, as there is dispute over whether all documents to which plaintiffs are entitled have been provided.
9. **Anticipatory Breach of Contract**: Barred by statute of limitations and plaintiffs lack standing.
10. **Breach of Contract**: As far as this relates to the failure to renew, it is barred by the statute of limitations. As far as this claim relates to the failure to distribute the Dodge Mortgage funds, the claim would be timely, but Plaintiffs fail to state a claim, as no contract is alleged.
11. **Guaranty**: Barred by statute of limitations and plaintiffs lack standing.
12. **Promise Causing Detrimental Reliance**: Barred by statute of limitations and plaintiffs lack standing.
13. **Promissory Estoppel**: Barred by statute of limitations and plaintiffs lack standing.
14. **Unjust Enrichment**: Plaintiffs lack standing.
15. **Piercing the Corporate Veil**: Fails to state a claim.
16. **Breach of Fiduciary Duty**: Fails to state a claim.
17. **Equitable Estoppel**: Fails to state a claim.

18. **Equitable Fraud**: Fails to plead fraud with the required specificity.
19. **Equitable Subrogation**: Fails to state a claim.
20. **Impress a Trust**: Plaintiffs lack standing.
21. **Conversion**: Survives, as far as it relates to Dodge Mortgage's failure to disburse funds to Plaintiffs.
22. **Deceit**: Fails to plead fraud with the required specificity.
23. **Fraud and Deceit**: Fails to plead fraud with the required specificity.
24. **Negligence**: Barred by statute of limitations.

It is hereby,

ORDERED that the motion of defendants to dismiss the complaint is GRANTED to the extent that the first through seventh, ninth through twentieth and twenty-second through twenty-fourth causes of action are DISMISSED; and it is further

ORDERED that defendants shall serve and file their answer within twenty (20) days of service of this Decision and Order with notice of entry; and it is further

ORDERED that counsel shall meet and confer to prepare a preliminary conference order and shall present it at the preliminary conference which shall be held on September 23, 2014 at 9:30 am at Part 49, Room 252, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the court.

DATED: August 4, 2014

ENTER,


O. PETER SHERWOOD
J.S.C.