SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 651682/2014
CURTIS WEST 76 LLC
vs.
BENISHAI, DAVID
SEQUENCE NUMBER : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. _____
MOTION DATE 10/1/14
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 2-13
Answering Affidavits — Exhibits _____ **No(s).** 14-24, 34-35
Replying Affidavits _____ **No(s).** 29-33

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 11/5/14

SHIRLEY WERNER KORNREICH J.S.C.
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**

☒ Cross-motion Granted In Part

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CURTIS WEST 76 LLC, individually, and derivatively on behalf of ILAN PROPERTIES, INC.,

Index No.: 651682/2014

DECISION & ORDER

Plaintiff,

-against-

DAVID BENISHAI,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Curtis West 76, LLC (Curtis) moves by order to show cause for a preliminary injunction against defendant David Benishai (David). David opposes and cross-moves to dismiss the complaint and for sanctions against Curtis. Curtis' preliminary injunction motion was denied at oral argument. *See* Dkt. 37 (7/8/14 Tr. at 36). Below, the court explains why (1) the injunction motion was denied, (2) David's cross-motion to dismiss is granted in part and denied in part, and (3) David's cross-motion for sanctions is denied.

I. Procedural History & Factual Background

The following facts are taken from the complaint and the documentary evidence submitted by the parties.

This action alleges malfeasance in connection with a company owned by the Benishai brothers, David and Jack, the latter of whom is not a party to this action. The company at issue, Ilan Properties, Inc. (Ilan), has a history that goes back to 1963, before David and Jack were involved. Ilan owns real estate located at 250-256 West 76th Street in Manhattan (the Property). Ilan does not have a written shareholders' agreement.[1] Until recently, Ilan was jointly owned by

[1] Section 16.4.2 of the SPA, discussed below, states that "there is no written agreement between the owners of [Ilan's equity] governing shareholder rights and obligations with respect to [Ilan], other than the Settlement Agreement," which is also discussed below. *See* Dkt. 24 at 13.

David and Jack, who each owned 50% of the company. No written agreement exists that prohibits either David or Jack from selling their equity in Ilan. David runs and controls Ilan.[2]

Pursuant to a stock purchase agreement executed on September 4, 2013 (the SPA) [*see* Dkt. 24], Curtis purchased 49.9% of Ilan's equity from Jack for $8.3 million. Curtis purportedly controls the 0.1% that Jack still owns. Neither Jack nor Curtis sought David's approval of this sale and notified David of the sale after it occurred. Section 16.4.6 of the SPA states that "the execution and delivery of [the SPA] by [Jack] ... [does not] require any additional consent or approval, or notice under, constitute a violation of, or default under, or conflict with any contract, commitment, agreement, understanding, arrangement or restriction of any kind by which [Jack] is bound." Dkt. 24 at 14.

On May 30, 2014, David notified Curtis that David had entered into a contract to sell his Ilan equity to another investor. Four days later, on June 3, 2014, Curtis commenced this action. The complaint: (1) asserts an equitable lien/constructive trust on David's equity; (2) seeks an injunction of the sale of David's equity; (3) seeks specific performance of a settlement agreement, discussed below; (4) asserts breach of a loan agreement, also discussed below; (5) seeks reformation of the settlement agreement; and (6) seeks a declaratory judgment that the settlement agreement is void *ab initio*. After filing the complaint, Curtis immediately moved by order to show cause for a temporary restringing order (TRO) barring David from selling his equity. Curtis claims David owes Ilan $6 million and that the sale of David's equity must be

[2] In another lawsuit pending before this court [*Benishai v BMC LLC*, Index No. 650385/2013], the court ordered Jack and his management company (BMC) to provide David with Ilan's corporate and financial records so that Ilan could file tax returns, which it apparently had not done for 10 years. In the *BMC* case, in an order dated November 20, 2013 [Index No. 650385/2013, Dkt. 91], this court set forth the circumstances under which control over Ilan shifted from Jack to David. That order also discusses Jack's alleged malfeasance and withholding of records that prevented Ilan from filing tax returns.

stopped so that Ilan's ability to collect this debt can be secured by David's equity.[3] As discussed below, this is not a basis to enjoin the sale. Hence, the court did not grant a TRO and, after oral argument on July 8, 2014, the court denied Curtis' motion for a preliminary injunction.

Curtis seeks relief based upon a settlement agreement, executed on March 31, 2009, between David, Jack, the Estate of Bella Benishai (their mother), and Ilan (the Settlement Agreement). *See* Dkt. 7.[4] The Settlement Agreement resolved lawsuits that were pending in this court and litigation involving David's and Jack's sisters (Geula Lazar and Bracha Opotovski) in Israel.[5] In addition to the exchange of general releases,[6] the Settlement Agreement provided, *inter alia*, for (1) refinancing of the Property; (2) writing off loans Ilan made to Bella; (3) David granting Jack 50% of Ilan's equity; and (4) a "Compromise Agreement" to be executed and approved by the Israeli Family Court, where Jack was being sued by his sisters. Under the

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[3] Curtis originally argued there was some contractual limitation on the sale and that Curtis must first consent to it. However, as Curtis now admits, there is no such restriction on Ilan's equity. Moreover, and somewhat cynically, Curtis complains about David not obtaining Curtis' consent even though it purchased Jack's equity without providing notice to David beforehand or procuring his consent. It also should be noted that while Curtis complains about how David runs Ilan, the derivative claims asserted do not include any actual claims for waste or mismanagement (claims David is currently asserting against Jack in the *BMC* case). Nonetheless, while Curtis takes issue with the fact that David, and not a full board of directors, runs Ilan, Curtis knew of this reality when it purchased its equity, as section 16.4.5 of the SPA states that "[e]xcept for [David] there *shall* be no directors, managers and officers of [Ilan] in office as of the closing." Dkt. 24 at 13 (emphasis added). In any event, Curtis' objection to how David runs Ilan would be mooted by David's sale of his equity, a result Curtis is trying to prevent.

[4] According to section 16.1.2 of the SPA, Curtis was provided a copy of the Settlement Agreement. *See* Dkt. 24 at 12.

[5] To wit, the Settlement Agreement reveals that Ilan's failure to file tax returns was an issue that long predates the *BMC* case. *See* Dkt. 7 at 2; *see also* SPA § 16.5 [Dkt. 24 at 14] (Jack's representations about the status of Ilan's past and current tax compliance).

[6] According to the SPA, these releases were never executed. *See* Dkt. 24 at 12.

Compromise Agreement, Jack was to pay his sisters $510,000 of the money he would receive from the refinancing.

In the complaint, Curtis alleges that the refinancing involved Ilan lending $6 million to David, which loan allegedly would be due on March 31, 2014.[7] In support of these allegations, Curtis relies on paragraph 16 of the Settlement Agreement, which provides:

> [David and Jack] as owners of ILAN agree to execute on behalf of ILAN, all documents required for refinancing the current mortgage on the [Property] to a total of approximately [$6 million]. All proceeds from the refinancing shall then be loaned by ILAN to [Jack and David]. Both [Jack and David] shall execute [5] year renewal loan agreements stipulating an interest rate on the loans at 3% per annum. At the closing of the refinancing half of the net funds actually received from the refinancing will be utilized by [Jack], for the purpose of remitting payments to his [sisters] in the sum of $510,000.00 ... in furtherance of settlement of the Israeli [Family Court litigation]. The other half of the net proceeds realized from the refinancing shall be remitted to [David].

Dkt. 7 at 5-6.[8]

In opposition, David submits a promissory note, dated March 31, 2009, reflecting a $1,118,124.64 debt, carrying 3% interest, fully payable (including interest, which need not be paid monthly) on March 30, 2014 (the Note). *See* Dkt. 23. The Note further provides that "if payment in full has not been made by the Borrower by March 30, 2014, the note is renewable for an additional [5] years at [3%] per annum." David explains that, after taxes, fees, and legal costs, the net proceeds from the refinancing was $2,236,249.28. Pursuant to the Settlement Agreement, David and Jack each borrowed $1,118,124.64 (the note amount) from Ilan. The

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[7] Curtis claims that the outstanding loans reflected in Ilan's tax returns must be the loan to David. David, however, avers that this refers to the loans to his mother, which were written off pursuant to the Settlement Agreement. This disputed fact cannot be resolved on a motion to dismiss.

[8] It should be noted that the Settlement Agreement is governed by New York law and, pursuant to paragraph 26, all disputes arising thereunder are subject to mandatory and binding arbitration with an individual named Richard Cohn.

Note references a "Loan Agreement" [*see* Dkt. 23 at 2], but it does not appear that such an agreement was ever executed.[9] The Note is signed by Jack in his individual capacity and by both Jack and David on behalf of Ilan. *Id.* at 3. While neither party submits a note signed individually by David, David admits he signed a virtually identical note but that he does not currently possess a copy. David maintains that Jack has the original. In any event, David does not contest the existence of this debt. David claims that, as the Note and the Settlement Agreement contemplate, the maturity date was extended by 5 years to March 30, 2019. No evidence of this extension is in the record, but, if such extension was validly executed, the Note cannot be collected on until 2019.[10]

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept

[9] This was surely inadvertent, as the Note earlier provides that the debt is evidenced exclusively by the Note. Moreover, in the paragraph titled "Defaults", the first recitation of the words "Loan Agreement" is crossed out by and replaced with "Promissory Note." It seems that the second recitation of the words "Loan Agreement" in that paragraph was overlooked. None of this really matters because it is undisputed that no such "Loan Agreement" exists.

[10] Curtis' claim for breach of the Note is a derivative claim asserted on behalf of Ilan. David does not challenge the sufficiency of Curtis' demand futility allegations. Clearly, David is not going to sue himself. However, one wonders if Curtis' serving the best interests of Ilan in enforcing the notes necessarily entails suing both David and Jack if Jack's note has not been paid. Additionally, it is worth noting that a claim challenging the validity of the Settlement Agreement, as discussed below, requires that all parties to that agreement be named in this lawsuit. Neither Jack nor his mother's estate are parties to this action. In that regard, it is further worth noting that paragraph 37A of the Settlement Agreement (which was handwritten) provides that Jack "or his assigns, successors, heirs and representatives agree not to cause anyone to bring any lawsuit against [David] on behalf of [Bella or her estate]." Further, in section 16.7.3 of the SPA [Dkt. 24 at 17], Jack promised not to amend the Settlement Agreement or cause Ilan to amend its "Existing Loan Documents." It is unclear if Jack's note is an Existing Loan Document (as defined in section 16.2.1), but, certainly, Jack cannot unilaterality prohibit David from renewing his note.

2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Note

The only cause of action validly pleaded is the claim for breach of David's note. Discovery may be taken to confirm that David's note was actually extended to 2019. If so, David's note is not collectible at this time. Curtis' other five causes of action, however, fail to state a claim upon which relief can be granted.

B. Equitable Lien & Constructive Trust

"[A]n equitable lien is dependent upon some agreement express or implied that there shall be a lien on specific property." *US Bank Nat'l Ass'n v Lieberman*, 98 AD3d 422, 424 (1st

Dept 2012), quoting *Teichman v Comm. Hosp. of Western Suffolk*, 87 NY2d 514, 520 (1996). "The proponent of an equitable lien on property must establish the existence of '**a clear intent between the parties** that such property be held, given or transferred as security for an obligation." *US Bank*, 98 AD3d at 424 (emphasis added), quoting *Ryan v Cover*, 75 AD3d 502 (2d Dept 2010); *see M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 (2009) ("A party's 'mere expectation, however sincere, is insufficient to establish an equitable lien"), quoting *Scivoletti v Marsala*, 61 NY2d 806, 809 (1984).

"The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment." *Abacus Fed. Savings Bank v Lim*, 75 AD3d 472, 473-74 (1st Dept 2010). The "purpose of [a] constructive trust is prevention of unjust enrichment." *See Genger v Genger*, 990 NYS2d 498, 503 (1st Dept July 24, 2014), quoting *Simonds v Simonds*, 45 NY2d 233, 242 (1978). A claim for unjust enrichment does not lie, however, where the rights at issue are expressly governed by written contracts. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009), accord *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987).

David's debt to Ilan is governed by a written note and the Settlement Agreement. Hence, any default on such debt is not a matter of unjust enrichment; it is simply a breach of contract. In any event, David's sale of his equity has no bearing on his contractual obligation to pay back the debt, whenever it may be due. Regardless, nothing about David's sale is inequitable or unjust. While Curtis may prefer that David's debt be secured or collateralized, it is not. Curtis cites no authority supporting the proposition that an equitable lien or constructive trust are valid means to impose restrictions on the alienation of equity not provided for by

contract. On the contrary, where, as here, there is no agreement for the debt to be secured, it is well settled that an equitable lien may not be imposed.

C. Injunction

Pursuant to CPLR 6301, "[i]njunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and that the balancing of the equities weighs in its favor." *Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101, 104-05 (1st Dept 2013), citing *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 (2005), accord *Doe v Axelrod*, 73 NY2d 748 (1988).

None of these factors weigh in Curtis' favor. For the reasons discussed herein, other than the claim under the Note, all of Curtis' substantive claims lack merit. While the claim under the Note is validly pleaded, the claim is simply a monetary dispute, which does not implicate an irreparable harm required to grant injunctive relief. *See Credit Index, L.L.C. v Riskwise Int'l L.L.C.*, 282 AD2d 246, 247 (1st Dept 2001); *Lombard v Station Square Inn Apts. Corp.*, 94 AD3d 717, 721 (2d Dept 2012) ("Where a plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief").

D. Specific Performance of the Settlement Agreement

As discussed earlier, the Note refers to a "Loan Agreement" and paragraph 16 of the Settlement Agreement provides that Jack and David shall execute "loans agreements." It is undisputed that, other than the two notes signed by Jack and David, there are no other contracts governing their loans. Curtis makes much of supposed difference between "loan agreements" and "notes". But, the Settlement Agreement does not define what such "loan agreements" must

entail other than that they be "[5] year renewal loan agreements stipulating an interest rate on the loans at 3% per annum." The notes executed by Jack and David contain such terms. The Settlement Agreement does not, however, require Jack and David to provide Ilan with the sort of protections that Curtis maintain a "Loan Agreement" entails. This claim is nothing more than another fleeting attempt to retroactively secure David's debt. Regardless, not all loan agreements provide for security. Curtis' claim for specific performance is dismissed.

E. Reformation and Alleged Invalidity of the Settlement Agreement

These claims border on the frivolous. Curtis asks the court to rewrite the Settlement Agreement to include an obligation to enter into more robust "loan agreements." Generally, reformation requires a showing of either fraud or mistake. *Chimart Assocs. v Paul*, 66 NY2d 570, 573-74 (1986); compare *Resort Sports Network Inc. v PH Ventures III, LLC*, 67 AD3d 132, 136 (1st Dept 2009) (reformation not allowed where the "an agreement [] is complete on its face, unambiguous and contains a merger clause that claims to [supersede] all prior agreements, particularly where, as here, the parties were sophisticated business entities represented by counsel"), with Settlement Agreement ¶ 28 (parties had opportunity to consult with attorney), ¶ 29 (prohibition of oral modifications), & ¶ 33 (merger clause).

Curtis does not plead facts regarding the rare circumstances of fraud and mistake. Curtis' conclusory allegation that fraud or mistake must have occurred when drafting the Settlement Agreement is insufficient. In fact, Curtis was not a party to the original settlement and was uninvolved in its drafting and the underlying conflicts that were being resolved. In any event, pursuant to CPLR 1001(a), a claim for reformation of a contract implicates the rights of all parties to that contract, making them necessary parties to the litigation. *Oppenheimerfunds, Inc.*

v TD Bank, N.A., 2014 WL 514653, at *9 (Sup Ct, NY County 2014) (collecting cases). Jack and Bella's estate, therefore, are necessary parties. Leave to amend to add them is denied, however, because this claim is palpably devoid of merit. *See MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010). Similarly, Curtis' claim that the Settlement Agreement was void *ab initio* for lack of consideration or unenforceability[11] are obviously untenable and, unsurprisingly, are not supported with any governing authority in Curtis' brief. Again, this claim would require Jack and Bella's estate as necessary parties.

F. Sanctions

The court exercises its discretion to decline to impose sanctions against Curtis and its counsel for the borderline frivolous claims asserted and for the less than forthright manner in which David's debt was alleged. The court declines to inquire as to whether such allegations were made in honest error or for some other improper purpose. Nonetheless, it should go without saying that it is unethical for an attorney to employ frivolous litigation to further a client's business interests. Accordingly, it is

ORDERED that Curtis' motion for a preliminary injunction is denied, David's cross-motion to dismiss is granted to the extent of dismissing all causes of action with prejudice except the fourth cause of action for breach of David's note, and the cross-motion for sanctions is denied.

Dated: November 5, 2014

ENTER:

J.S.C.

[11] Curtis alleges, without support, that the releases in the Settlement Agreement are unenforceable. As this claim is being dismissed, the court will not opine on this issue to avoid undermining the settlement that resolved so many of the Benishai family's disputes. The court notes that Curtis was aware of the Settlement before it executed the SPA.