

**Cohen Ritz Retail Co., LLC v Manhattan ASC, LLC**

2015 NY Slip Op 30652(U)

April 17, 2015

Supreme Court, New York County

Docket Number: 650288/2014

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 3

-----X  
COHEN RITZ RETAIL COMPANY, LLC

Plaintiff,

-against-

Index No. 650288/2014  
Motion Seq. Nos.: 001, 002  
Motion Date: 11/13/2014

MANHATTAN ASC, LLC, d/b/a SURGERY  
CENTER OF MANHATTAN, et al.,

Defendants.

-----X  
**BRANSTEN, J.**

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

In motion sequence number 001, defendants Manhattan ASC, LLC, d/b/a Surgery Center of Manhattan (“Manhattan ASC”), NYEE Holding Corp. (“NYEE Holding”), Allan Fine, Anna Aronzon, Brian Campolattaro, Won-Taek Choe, Tahl Colen, Jay Dolitsky, David Godin, Gregory Levitin, Lisa Liberatore, Guy Lin, Anthony Panarelli, Stephen Perrone, Michael Pitman, Edward Shin, Shai Shinhar, David Volpi, H. Jay Wisnicki, Charles Figliozzi, and Ralph Lambiasi (collectively, the “Manhattan ASC defendants”) seek dismissal of the fraudulent misrepresentation, aiding and abetting fraud, fraudulent concealment, and civil conspiracy claims asserted against them, pursuant to CPLR 3211(a)(7).

In motion sequence number 002, defendants Regent Surgical Health, LLC (“Regent Surgical”), Thomas Mallon, William Karnes, and Jeffrey Simmons (collectively,

the “Regent Surgical defendants”) seek dismissal of the tort claims asserted against them, pursuant to CPLR 3211(a)(1) and (a)(7). For the reasons that follow, both motions to dismiss are granted in their entirety.

### **I. Background**<sup>1</sup>

This action arises from two agreements, each pertaining to the concourse, first sub-cellar, ground floor, second floor, second floor roof, and third floor of the building located at 461-465 Park Avenue in Manhattan. This space was to be used by defendants as an ambulatory surgery center.

The first agreement is a December 17, 2012 Lease, executed by plaintiff Cohen Ritz Retail Company, LLC (“Cohen Ritz”), as owner and landlord, and Manhattan ASC, as tenant. The second agreement is a so-called Rent Commencement Date Agreement, entered into on August 1, 2013 by Cohen Ritz and Manhattan ASC.

The Lease obligated Manhattan ASC to apply for and obtain, at its sole cost, a Certificate of Need (“CON”) from the New York State Department of Health (“DOH”). *See* Compl. Ex. 1 at § 2.01(a) (“Lease”). Manhattan ASC's obligation to commence paying rent on the leased premises began upon Manhattan ASC's receipt of the CON and

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<sup>1</sup> All allegations cited in this section are drawn from the Complaint, unless otherwise noted.

Cohen Ritz's completion of a build-out of the leased premises to create an ambulatory surgical center. *See* Lease § 2.01(a) & Schedule B.

On July 19, 2013, Defendant Allan Fine, the CEO of Manhattan ASC, sent an email to Cohen Ritz, advising it that approval for the CON had been granted at a meeting held the day before in Rochester, New York. *See* Compl. Ex. 3. In addition, the email noted that final governmental approval was expected to be granted at a meeting to be held August 1, 2013. *Id.*

On August 1, 2013, Cohen Ritz and Manhattan ASC executed a Rent Commencement Date Agreement, which included representations that the CON was issued on August 1, 2013 and that Cohen Ritz had completed its pre-rent-commencement-date construction work. *See* Compl. Ex. 2. The agreement further provided that in accordance with Section 2.01 of the Lease, the rent commencement date was August 1, 2013 and the lease expiration date was January 31, 2030. *Id.* Defendant William Karnes executed the agreement in his capacity as Manhattan ASC's Chief Financial Officer.

Cohen Ritz alleges that it relied on defendants' misrepresentations that they obtained the requisite governmental regulatory approval, as a result, Cohen Ritz continued to fulfill its lease obligations and renovated the premises for the planned usage. Cohen Ritz also maintains that it passed up potential leasing opportunities for the premises in reliance on those misrepresentations.

On September 16, 2013, Cohen Ritz contends that it learned for the first time on that the Manhattan ASC defendants had not obtained the CON. By letter dated October 23, 2013, Manhattan ASC advised Cohen Ritz that it was unable to obtain a contingent CON from the DOH because, contrary to Cohen Ritz's representations, the building in which the leased premises are located is not "fully sprinklered." *See* Compl. Ex. 4. In that letter, Manhattan ASC also advised Cohen Ritz that it could take upwards of a year to obtain the waivers required for the issuance of the CON and that there was no guarantee that such waivers would ever be issued. Manhattan ASC then notified Cohen Ritz that it requested that the Lease be terminated, and that its \$83,200 deposit be refunded.

Cohen Ritz rejected Manhattan ASC's termination of the lease and demanded a full refund of the space reservation fee. *See* Compl. Ex. 5. Likewise, Cohen Ritz suggested that Manhattan ASC's actions were premature and that the difficulties cited regarding the CON were not insurmountable. Manhattan ASC later withdrew its CON application.

Cohen Ritz then commenced the instant action, seeking to recover more than \$25 million, together with interest, costs, disbursements, and reasonable attorneys' fees, as well as punitive damages in the additional amount of \$25 million. In the complaint, Cohen Ritz alleges that defendants breached the lease by refusing to: take possession of the leased premises; pay monthly rent; pay a \$1,115,000 security deposit; operate an ambulatory surgical center at the premises; and by failing to obtain the CON.

Cohen Ritz also contends that defendants implemented a fraudulent scheme in which they deliberately misrepresented that they had obtained a CON in order to induce Cohen Ritz: (1) to continue the lease and (2) to commence, and complete, an approximately \$4 million build-out of the leased premises to create an ambulatory surgical center.

Based on these allegations, Cohen Ritz asserts claims for breach of contract, anticipatory breach of contract, fraudulent inducement and misrepresentation, aiding and abetting fraud, fraudulent concealment, and civil conspiracy.

## **II. Discussion**

The Manhattan ASC defendants and the Regent Surgical defendants now bring the instant motion to dismiss, seeking to dismiss the tort claims asserted against them. Notably, they do not request dismissal of the breach of contract claims asserted against Manhattan ASC in count one of the Complaint.

### *A. Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable

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

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under 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." *Leon*, 84 N.Y.2d at 88.

B. *Fraudulent Misrepresentation and Fraudulent Inducement Claim*

Cohen Ritz's second claim alleges that Manhattan ASC, Regent Surgical, and Karnes made misrepresentations in the Rent Commencement Date Agreement and in a July 19, 2013 email. Specifically, Plaintiff contends that they misrepresented that they received a CON, enabling them to operate an ambulatory surgical center.

Cohen Ritz also contends that Manhattan ASC, Regent Surgical, and Karnes deliberately made the misrepresentations, knowing that Cohen Ritz would rely on them in order to fraudulently induce it to fail to exercise its contractual right to terminate the Lease. Plaintiff likewise maintains that defendants made the misrepresentations to induce Cohen Ritz to continue to perform its obligations imposed by the lease, including promptly commencing, and completing, a \$4 million build-out of the premises tailored to Manhattan ASC's requirements as an ambulatory surgical center. By continuing the Lease, Cohen Ritz claims that it forfeited its right to do business with other potential retail and medical service tenants.

1. Plaintiff's Fraud Claim is Duplicative of its Breach of Contract Claim

"While . . . the same acts which give rise to a cause of action for fraud may also form the basis for a breach of contract claim, a cause of action for fraud will not arise if the alleged fraud merely relates to the breach of contract." *MBW Adver. Network v.*

*Century Bus. Credit Corp.*, 173 A.D.2d 306, 306 (1st Dep't 1991) (internal citations omitted). "It is well settled that a cause of action for fraud does not arise, where . . . the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation." *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233, 234 (1st Dep't 1994). This is true even if the plaintiff seeks different remedies for the contract and duplicative fraud claims. See *ESBE Holdings, Inc. v. Vanquish Acquisition Partners, LLC*, 50 A.D.3d 397, 398 (1st Dep't 2008). Moreover, "[a]llegations of scienter will not transform what is essentially a breach of contract cause of action into one to recover damages for fraud where . . . the fraud charged has to do with alleged misrepresentations of the breaching party's abilities and intentions." *Green v. Dolphy Constr. Co.*, 187 A.D.2d 635, 636 (2d Dep't 1992).

Manhattan ASC, as the tenant of the leased premises, was the single defendant which bore duties to obtain a CON, and to inform Cohen Ritz that the CON had been obtained. Section 2.01(a) of the Lease provides that Manhattan ASC "shall apply for . . . [and] diligently prosecute the issuance of the CON." Section 2.04 of the Lease provides that Manhattan ASC must, upon Cohen Ritz's request, "execute a statement confirming the Rent Commencement Date." The fraud claim arises out of allegations that Manhattan ASC breached both of these Lease provisions.

Similarly, the fraud claim arises out of allegations that Cohen Ritz was induced to forego its contractual rights and to perform its contractual duties. Cohen Ritz's right to terminate the Lease and obligation to renovate the leased premises each were created by the express terms of the Lease. Section 2.01(b)(iii)(1) of the Lease grants Cohen Ritz the right to terminate the lease upon written notice of termination "[i]f the Rent Commencement Date has not occurred by June 30, 2013." Section 2.02 of the Lease requires Cohen Ritz to "perform Landlord's Work in or about the Demised Premises," as defined in Schedule B annexed to the Lease. Indeed, Cohen Ritz alleges that "Defendants' alleged pursuit of a waiver and its continuing negotiations with [Cohen Ritz] regarding the CON and the Lease, were undertaken by the Defendants in bad faith solely to create the false impression with [Cohen Ritz] that Defendant would ultimately perform its Lease obligations." *See* Compl. ¶ 59; *see also MMCT, LLC v. JTR College Point, LLC*, 122 A.D.3d 497, 499 (1st Dep't 2014) ("A fraud-based claim is duplicative of breach of a contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract."). Accordingly, inasmuch as the second cause of action duplicates Cohen Ritz's breach of contract claims, the fraud claim is dismissed..

## 2. Failure to Plead Fraud With Particularity

The fraud claim likewise merits dismissal given Cohen Ritz's failure to plead the claim with particularity. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail." (CPLR 3016(b).) Here, Cohen Ritz makes its fraud allegations collectively as to defendants Manhattan ASC, Karnes, and Regent Surgical. *See, e.g.*, Compl. ¶¶ 56 ("To mislead the Plaintiff and induce it to continue the Lease and commence a costly build-out of the Demised Premises, each of the Defendants, including Manhattan ASC, Regent, and Karnes, knowingly and deliberately made false statements of material fact..."). Such group pleading is impermissible. A fraud claim asserted against multiple defendants must include specific and separate allegations for each defendant. *See Ramos v. Ramirez*, 31 A.D.3d 294, 295 (1st Dep't 2006); *see also Aetna Casualty & Surety Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981) (rejecting fraud claim where "pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant."); *CIFG Assur. N. Am., Inc. v. Bank of America, N.A.*, 41 Misc.3d 1203(A) at \*3 (Sup. Ct. N.Y. Cnty. 2013) ("A claim involving multiple defendants must make specific and separate allegations for each defendant."); *Excel Realty Advisors, L.P. v. SCP Capital, Inc.*, 2010 WL 5172417 (Sup. Ct. Nassau

Cnty. Dec. 2, 2010) (dismissing fraud claim where "primarily based upon a series of oblique averments which, in relevant part, lump the defendants together 'without any specification as to the precise' fraudulent conduct attributed to each, i.e., without identifying the discrete, fraudulent acts supposedly committed by the separately named parties.").

### 3. Failure to State a Claim

In addition, the fraud claim fails to state a claim. To state a legally viable claim of fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, deception and injury. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995) (internal quotation marks and citation omitted); *Nicosia v. Board of Mgrs. of Weber House Condo.*, 77 A.D.3d 455, 456 (1st Dep't 2010).

First, Cohen Ritz fails to state an actionable omission. While it alleges that all defendants had a duty in tort to disclose that the statement regarding issuance of the CON in the Rent Commencement Date Agreement was incorrect, such a duty arises only where there is a confidential or fiduciary relationship between the parties. It is well-settled that "[a]bsent a confidential or fiduciary relationship, failure to disclose cannot be the basis of a fraud claim." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Grp.*, 273 A.D.2d 140, 141 (1st Dep't 2000).

Next, the misrepresentations allegedly made by Manhattan ASC are not actionable. Cohen Ritz alleges that Manhattan ASC misrepresented its contractual agreement to obtain a CON in the future and to make diligent and prompt efforts to obtain a waiver of the conditions, if any arose, that prevented issuance of the CON. An allegation of a misrepresentation of present intent to perform an act in the future is not sufficient to support a claim sounding in fraud. *See Sandra Greer Real Estate v. Johansen Org.*, 182 A.D.2d 468, 469 (1st Dep't 1992).

Moreover, the misrepresentations allegedly made by Fine to Cohen Ritz, with copies to defendants Mallon, Karnes, and Simmons, in the July 2013 email are not actionable. In that email, Fine merely advised that approval for the CON had been granted at a July 18, 2013 meeting in Rochester and that final approval was expected at a meeting to be held August 1, 2013. He also warned that the July approval was not final and added that "there is every expectation that the final approval will be granted" on August 1, 2013. An opinion based on a "prediction as to future performance and not a statement of existing fact" is not actionable fraud. *FMC Corp. v. Fleet Bank*, 226 A.D.2d 225, 225 (1st Dep't 1996); *see also Elghanian v. Harvey*, 249 A.D.2d 206, 206 (1st Dep't 1998). Nothing in that email can be construed as a misrepresentation of a present fact. At most, Fine's statements amount to nothing more than forward-looking expressions of opinion, which are not actionable.

In addition to failing to plead an actionable misrepresentation, Cohen Ritz likewise did not allege any facts which, if proven, plead that its reliance on the alleged misrepresentations was reasonable. An essential element of the claim is an allegation that the plaintiff justifiably relied on the fraudulent statement to his detriment. *See, e.g. Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495-96 (1st Dep't 2006). Reasonable reliance "is a condition which cannot be met where . . . a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means." *Arfa v. Zamir*, 76 A.D.3d 56, 59 (1st Dep't 2010), *aff'd* 17 N.Y.3d 737 (2011) (internal quotation marks and citations omitted). In such circumstances, "[t]he 'adversarial' nature of the parties' relationship negate[s] as a matter of law any inference that business [people] as sophisticated as [plaintiffs] were relying on [defendant] for an objective assessment." *Id.* at 60 (internal quotation marks and citations omitted).

Cohen Ritz's reliance on the alleged misrepresentation set forth in the "Whereas" clause of the rent commencement date agreement regarding the issuance of the CON is neither reasonable nor justifiable. "[S]ophisticated parties have a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they [are] assuming." *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 195 (1st Dep't 2012) (internal quotation marks omitted). Cohen Ritz does not allege that it performed any investigation into the

accuracy of any of the statements in the Rent Commencement Date Agreement or review the CON itself, to ensure that it had, indeed, been issued.

Finally, Cohen Ritz's attempt to attribute Manhattan ASC's conduct to Karnes or any of the Regent Surgical defendants, is without merit. In order to pierce the corporate veil, generally, the plaintiff must demonstrate that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). Cohen Ritz does not allege any facts that may be held to demonstrate the necessary elements.

For the foregoing reasons, that branch of the motion to dismiss the second cause of action for fraud is granted, and the claim is dismissed in its entirety.

C. *Aiding and Abetting Fraud*

The Manhattan ASC defendants and the Regent Surgical defendants next contend that the third cause of action for aiding and abetting fraud asserted against NYEE Holding, Mallon, and Fine must be dismissed for failure to state a claim.

In support of this claim, Cohen Ritz alleges that NYEE Holding, Mallon, as Regent Surgical's chief executive officer, and Fine, as the highest-ranking manager of

NYEE Holding actively involved in the CON application process, aided and abetted Manhattan ASC, Regent Surgical, and Karnes by standing by silently while Manhattan ASC, Regent Surgical, and Karnes carried out the fraud scheme alleged in the second cause of action.

The aiding and abetting claim must be dismissed given that the underlying fraud claim is not legally viable and has been dismissed. "In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009) (internal quotation marks and citation omitted).

The claim is also fatally defective on the ground that Cohen Ritz failed to allege specific facts in support of its general allegations that NYEE Holding, Mallon, and Fine knew of the fraud scheme and assisted in its commission by being involved in the negotiation, facilitation, and approval of the Rent Commencement Date Agreement. Although an intent to commit fraud is divined from the surrounding circumstances, this does not mean "constructive knowledge, but actual knowledge of the fraud as discerned from the surrounding circumstances." *Oster v. Kirschner*, 77 A.D.3d 51, 56 (1st Dep't 2010). Here, Cohen Ritz alleges merely that Fine, by virtue of his position as the highest

ranking manager of NYEE Holding involved in the CON application process, aided and abetted the fraud scheme by approving Karnes's execution of the Rent Commencement Date Agreement on behalf of Manhattan ASC and by sending the July 2013 email discussed above. *See* Compl. ¶¶ 69, 70. Cohen Ritz thus has failed to allege that Fine did anything more than perform routine business functions and advise Cohen Ritz of his opinion that the CON will soon be issued. *See CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 472 (1st Dep't 2011) (stating that substantial assistance "means more than just performing routine business services for the alleged fraudster.").

Similarly, with regard to Mallon, Cohen Ritz alleges merely that, as Chief Executive Officer of Regent Surgical, Mallon was involved with the misrepresentation allegedly set forth in the Rent Commencement Date Agreement and stood by silently while that agreement was executed. Here, again, Cohen Ritz failed to allege that Mallon had actual knowledge and did anything more than perform routine business functions.

Cohen Ritz also failed to allege sufficient facts in support of its allegation that substantial assistance was provided by NYEE Holding, Mallon, and Fine in support of Manhattan ASC's commission of the alleged fraud. Without an independent fiduciary duty, or special relationship, to disclose, mere inaction or silence does not constitute substantial assistance. *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dep't 2003) ("[T]he

mere inaction of an alleged aider and abettor constitutes substantial assistance only if defendant owes a fiduciary duty directly to the plaintiff.").

For the foregoing reasons, the branches of both motions to dismiss the third cause of action are granted, and the claim is dismissed.

D. *Fraudulent Concealment*

In the fourth cause of action, Cohen Ritz alleges that defendants fraudulently concealed the fact that the Rent Commencement Date Agreement contained a misrepresentation regarding the issuance of a CON. Cohen Ritz further contends that all twenty-five defendants had knowledge superior to Cohen Ritz that the CON had not been issued and intended Cohen Ritz to rely on the misrepresentation. Cohen Ritz also claims that defendants' fraudulent concealment induced it to continue to perform its obligations imposed by the Lease, including expending more than \$4 million to renovate the leased premises as an ambulatory surgical center.

The fraudulent concealment claim fails to state a cause of action. "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements [of fraudulent misrepresentation], an allegation that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003).

As held above, Cohen Ritz's allegations of fraudulent conduct and omissions concerning Manhattan ASC duplicate the breach of contract allegations set forth in the first cause of action. Therefore, they cannot support a legally viable claim of fraud, aiding and abetting fraud, or fraudulent concealment against Manhattan ASC.

The branches of the claim asserted against Manhattan ASC's co-defendants are also fatally defective on the ground that Cohen Ritz failed to allege any specific facts that, if proven, demonstrate that any of them could have committed the alleged fraudulent concealment. The claim arises out of broad allegations that those defendants knew or should have known, yet failed to disclose to Cohen Ritz, that a CON had not been issued. A plaintiff must plead specific and separate allegations of each defendant's fraudulent conduct. *See Ramos v. Ramirez*, 31 A.D.3d 294, 295 (1st Dep't 2006); *see also Aetna Casualty & Surety Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981); *CIFG Assur. N. Am., Inc. v. Bank of America, N.A.*, 41 Misc.3d 1203(A) at \*3 (Sup. Ct. N.Y. Cnty. 2013).

Moreover, none of Manhattan ASC's co-defendants are alleged to have made any misrepresentation to Plaintiff.<sup>2</sup> Plaintiff contends that there was a misrepresentation regarding the CON in the recitals in the Rent Commencement Date Agreement; however,

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<sup>2</sup> As held, *supra*, Cohen Ritz's allegation that Defendant Fine made a misrepresentation regarding the contingent approval of the CON is not an actionable misrepresentation and thus cannot be the basis of a fraudulent concealment claim.

none of the individual defendants executed that agreement. The only signatory was Manhattan ASC.

To the extent that the fraudulent concealment claim is based on allegations that the Manhattan ASC defendants, by virtue of their membership in Manhattan ASC, possessed superior knowledge regarding the CON, the claim fails. No liability in contract or tort can be imposed on a member or manager of a limited liability corporation based solely on the member or manager's status as such. *See B&C Realty, Co. v. 159 Emmut Props. LLC*, 106 A.D.3d 653, 655 (1st Dep't 2013); New York Limited Liability Co. Law § 609).

Specifically, Cohen Ritz alleges that the individual defendant physicians: participated in a presentation in 2012 regarding the possibility of leasing space to operate an ambulatory surgical center; are Class A members of Manhattan ASC; controlled a majority interest in Manhattan ASC; and were regularly consulted for input and approval of every significant decision by Manhattan ASC. *See* Compl. ¶¶ 2, 17, 20. Cohen Ritz also alleges that Campolattaro, Liberatore, and Wisnicki are managers of Manhattan ASC and that Shin is expected to serve as its medical director. *See id.* ¶ 17. In addition, Cohen Ritz notes that Figliozzi and Lambiasi are "Class C" Manhattan ASC members and Manhattan ASC managers and NYEE Holding officers. *See id.* ¶ 2. Thus, Cohen Ritz's tort claims against the individual defendant physicians appear to be based merely on their official status as corporate officers or members and as participants in a meeting with

Cohen Ritz, prior to execution of the lease. These allegations are not sufficient to meet the pleading requirements for a viable claim of fraud.

Moreover, Cohen Ritz failed to alleged any facts from which a fiduciary duty may be imposed upon defendants. A claim of fraudulent concealment or omission requires that the defendant was duty-bound to disclose, based upon a confidential, special, or fiduciary relationship. *Kaufman v. Cohen*, 307 A.D.2d 113, 119-120 (1st Dep't 2003). "A fiduciary relationship does not exist between parties engaged in an arm's length business transaction." *Dembeck v. 220 Cent. Park S., LLC*, 33 A.D.3d 491, 492 (1st Dep't 2006). A landlord-tenant relationship is not a fiduciary relationship but an arm's length one. *Sehera Food Servs. Inc. v. Empire State Bldg. Co. L.L.C.*, 74 A.D.3d 542, 543 (1st Dep't 2010). There is no dispute that the only relationship between Cohen Ritz and any of the defendants was a landlord-tenant relationship.

For the foregoing reasons, the branches of both motions to dismiss the fourth cause of action are granted and the claim is dismissed.

#### E. *Civil Conspiracy*

To allege a viable claim for civil conspiracy, the plaintiff must allege the existence of a primary tort; an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of the plan or

purpose; and damages. *1766-68 Assoc., LP v. City of New York*, 91 A.D.3d 519, 520 (1st Dep't 2012). "New York does not recognize an independent cause of action for conspiracy to commit a civil tort." *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st Dep't 2010).

In its civil conspiracy claim, Cohen Ritz broadly alleges that all defendants "conspired together to accomplish an unlawful and wrongful purpose," including the concealment of the CON issuance misrepresentation on the rent commencement date agreement, "thereby inducing [Cohen Ritz] to continue the lease." (Compl. ¶ 89.)

The conspiracy claim must be dismissed since no primary tort has been alleged. Plaintiff asserts a conspiracy to commit fraud; however, the fraud claim premised on the same allegations has been dismissed. *See 1766-68 Assoc., LP*, 91 A.D.3d at 520 (dismissing civil conspiracy claim where "[t]he complaint fails to allege a cognizable tort..."); *Abacus Fed. Savings Bank*, 75 A.D.3d at 474 ("[A]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort."). Therefore, defendants' motions to dismiss the civil conspiracy claim are granted.

This court has considered Cohen Ritz's remaining arguments regarding each of the tort claims, and finds them to be without merit.

**III. Conclusion**

Accordingly, it is

ORDERED that motion sequence number 001 is granted in its entirety, and the second, third, fourth, and fifth causes of action for fraud, aiding and abetting fraud, fraudulent concealment, and civil conspiracy asserted against defendants Manhattan ASC, LLC, d/b/a Surgery Center of Manhattan, NYEE Holding Corp., Allan Fine, Anna Aronzon, Brian Campolattaro, Won-Taek Choe, Tahl Colen, Jay Dolitsky, David Godin, Gregory Levitin, Lisa Liberatore, Guy Lin, Anthony Panarelli, Stephen Perrone, Michael Pitman, Edward Shin, Shai Shinhar, David Volpi, H. Jay Wisnicki, Charles Figliozzi, and Ralph Lambiasi are dismissed, and the complaint is dismissed in its entirety against defendants NYEE Holding Corp., Allan Fine, Anna Aronzon, Brian Campolattaro, Won-Taek Choe, Tahl Colen, Jay Dolitsky, David Godin, Gregory Levitin, Lisa Liberatore, Guy Lin, Anthony Panarelli, Stephen Perrone, Michael Pitman, Edward Shin, Shai Shinhar, David Volpi, H. Jay Wisnicki, Charles Figliozzi, and Ralph Lambiasi, with costs and disbursements to those defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of those defendants; and it is further

ORDERED that the breach of contract claim asserted against defendant Manhattan ASC, LLC d/b/a Surgery Center of Manhattan is severed and shall continue; and it is further

ORDERED that defendant Manhattan ASC, LLC d/b/a Surgery Center of Manhattan is 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 motion sequence number 002 is granted in its entirety, and the second, third, fourth, and fifth causes of action for fraud, aiding and abetting fraud, fraudulent concealment, and civil conspiracy asserted against defendants Regent Surgical Health, LLC, Thomas Mallon, William Karnes, and Jeffrey Simmons are dismissed and the complaint asserted against those defendants is dismissed in its entirety, with costs and disbursements to those defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of those defendants; and it is further

ORDERED that counsel for plaintiff Cohen Ritz Retail Company, LLC and defendant Manhattan ASC, LLC d/b/a Surgery Center of Manhattan are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on June 2, 2015, at 10 AM.

Dated: New York, New York  
April 17, 2015

ENTER



Hon. Eileen Bransten, J.S.C.