

243rd St. Bronx R&R LLC v Jungreis

2015 NY Slip Op 30951(U)

June 3, 2015

Supreme Court, New York County

Docket Number: 651734/2014

Judge: Eileen Bransten

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

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243rd STREET BRONX R&R LLC and TRI-STATE
REALTY LLC,

Plaintiffs,

-against-

Index No. 651734/2014
Motion Date: 3/3/2015
Motion Seq. No. 001 & 002

AARON JUNGREIS, DANIEL J. WRUBLIN, J.
MICHAEL FRIED, SCOTT ALTER, ROSEWOOD
REALTY GROUP, INC., DALAN MANAGEMENT
ASSOCIATES INC., PHOENIX REALTY GROUP LLC,
and METROPOLITAN WORKFORCE HOUSING
FUND LLC,

Defendants.

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BRANSTEN, J.

In this action, Plaintiffs 243rd Street Bronx R&R LLC and Tri-State Realty LLC (“Tri-State”) bring a variety of contract and tort claims, stemming from their attempt to negotiate a “workout” of a mortgage loan for certain properties owned by them in the Bronx. Plaintiffs assert that Defendants Aaron Jungreis and Rosewood Realty Group Inc. (“Rosewood”) agreed to act as their agent and fiduciary; however, to the contrary, Jungreis and Rosewood purportedly worked in secret with their Co-Defendants to buy out the mortgage in question and enforce it against Plaintiffs. Defendants Jungreis and Rosewood now seek dismissal of the Complaint, pursuant to CPLR 3211(a)(1) & (a)(7), as well as CPLR 3016(b). Defendants Daniel J. Wrublin, J. Michael Fried, Scott Alter, Rosewood Realty Group, Inc., Dalan Management Associates Inc., Phoenix Realty Group LLC, and Metropolitan Workforce Housing Fund LLC (collectively, the “Lender

Defendants”) likewise seek dismissal, pursuant to CPLR 3211(a)(1), (a)(5), (a)(7), and 3016(b). For the reasons that follow, Jungreis and Rosewood’s motion is granted in part and denied in part, while the Lender Defendants’ motion to dismiss is granted in its entirety.

I. Background¹

Plaintiffs owned two properties located on East 243rd Street in the Bronx. After Plaintiffs defaulted on their mortgage, Plaintiffs hired Defendant Aaron Jungreis, a real estate broker, to facilitate a “workout” of the mortgage note held by non-party Citibank. Through the “workout,” Plaintiffs sought to come to an agreement with Citibank regarding the amount to be paid by Plaintiffs to purchase the note.

Plaintiffs allege that Jungreis breached his fiduciary duties and committed fraud by secretly working behind Plaintiffs’ back to purchase the note himself in conjunction with Defendant Rosewood. Plaintiffs also contend that the Lender Defendants worked with Jungreis to buy out the Citibank mortgage and enforce the mortgage against Plaintiffs, causing millions of dollars in damage. The remaining defendants – the Lender Defendants – are the principals of non-party 243rd Street Lender LLC (“243rd St. Lender”). 243rd St. Lender was the ultimate purchaser of the Citibank note at issue.

¹ All allegations referenced in this section are drawn from the Complaint, unless otherwise noted.

Plaintiffs filed a seven-count complaint in this Court, asserting claims against Jungreis and Rosewood for fraud, breach of fiduciary duties, breach of contract, tortious interference with prospective economic relations, and unjust enrichment. Plaintiff brings claims against the Lender Defendants for aiding and abetting fraud, aiding and abetting breach of fiduciary duties, tortious interference, and unjust enrichment.

Presently before the Court are the motions to dismiss filed by (1) Jungreis and Rosewood and (2) the Lender Defendants.

II. 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.

CPLR 3211(a)(5) provides for dismissal where the cause of action may not be maintained because of, *inter alia*, collateral estoppel and res judicata. CPLR 3211(a)(5).

III. Jungreis and Rosewood’s Motion to Dismiss

Jungreis and Rosewood contend that all claims asserted against them are barred by documentary evidence or, in the alternative, fail to state a claim. These arguments will be addressed in turn below.

A. *Documentary Evidence*

Jungreis and Rosewood first contend that all claims against them are premised on the allegedly false allegation that Jungreis was an investor in 243rd Street Lender while Jungreis and Rosewood were acting on behalf of Plaintiffs. To demonstrate the falsity of that allegation, Jungreis and Rosewood submit a February 27, 2012 email chain in which a Capital One employee notifies a ruthyjungreis@aol.com of a “fed reference number.” See Affidavit of Aaron Jungreis Ex. 1. Defendants maintain that this email shows that Jungreis acquired an economic interest in 243rd Street Lender in February 2012 – over eight months after 243rd Street Lender purchased the Citibank Note from Citibank.

Where the motion to dismiss is based on documentary evidence under CPLR 3211(a)(1), “such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Contrary to Defendants’ characterization, the February 27, 2012 email does not “conclusively establish” that Jungreis first acquired an interest in 243rd Street Lender after the sale of the Note. In fact, it is difficult to discern from the face of the document what, if anything, this email represents. The email simply reflects that a “fed reference number” was sent to a “ruthyjungreis,” who then sent that “fed reference number” to

Aaron Jungreis. This email thus falls short of “utterly refut[ing] plaintiff’s factual allegations.” Accordingly, this branch of Defendants’ motion to dismiss is denied.

In addition, Jungreis and Rosewood point to averments in two affidavits. The Jungreis Affidavit and Tisman Affirmation – each submitted by Defendants in support of dismissal – state that Jungreis was not contacted about making an investment in 243rd Street Lender until November or December 2011, purportedly contradicting the Complaint’s assertion that Jungreis already had invested in 243rd Street Lender at the time he was acting on behalf of Plaintiffs in spring 2011. *See* Jungreis Aff. ¶ 11; Tishman Affirm. ¶ 17. Defendants contend that these affidavits mandate dismissal of all claims pursuant to CPLR 3211(a)(7) for failure to state a claim.

While Defendants are correct that courts may review affidavits on a CPLR 3211 motion, such motion should only be granted “where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep’t 1999). Here, Plaintiff’s allegations regarding Jungreis’ interest in 243rd Street Lender have not been “negated beyond substantial question.” Instead, Defendants merely have introduced a factual dispute that is the proper subject of discovery. Therefore, Defendants’ motion likewise is denied on these grounds.

B. *Count One – Fraud*

Jungreis and Rosewood attack Plaintiffs' fraud claim on three grounds.

First, Jungreis and Rosewood contend that the fraud claim is a miscast breach of contract claim. Plaintiffs premise their fraud claim on alleged misrepresentations made by Jungreis to Plaintiffs' Chief Operating Officer, George Dfouni, during a February 9, 2011 meeting. Jungreis purportedly stated that he was working solely and exclusively for Plaintiffs' interest; was not working on behalf of anyone else seeking to purchase the Note or otherwise compete with Plaintiffs; and needed all of Plaintiffs' information concerning the Property in order to assist in the workout negotiations. *See* Compl. ¶ 51. Based on these misrepresentations, Plaintiffs contend that they were fraudulently induced to enter into the Confidentiality and Non-Circumvention Agreement ("Agreement") with Jungreis. *See* Compl. ¶ 51.

The Agreement states, *inter alia*, that Jungreis will "keep all Confidential Information strictly confidential and shall not disclose such Confidential Information, in whole or in part ... to anyone other than [Jungreis'] Representatives who have a need to know such Confidential Information." *See* Compl. Ex. A ¶ 2. Likewise, the Agreement provides that Jungreis "will refrain from disclosing or using the Confidential Information, including the Business Strategy, to Third Parties with respect to the Properties and will

not use the Confidential Information, including the Business Strategy, in any manner competitive with or detrimental to the Owner or its affiliates.” *Id.* ¶ 7(a).

Defendants now contend that Plaintiffs’ fraudulent inducement allegations are duplicative of Plaintiffs’ breach of contract claim. Defendants maintain that Plaintiffs’ fraudulent inducement claim is a recasting of their breach of contract claim and parrots the provisions in the Agreement that Jungreis allegedly breached.

However, “[a] fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff’s breach of contract claim.” *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 292 (1st Dep’t 2011). Here, Plaintiffs allege that Jungreis made misrepresentations of present fact during the February 9, 2011 meeting, including that he was working exclusively for Plaintiffs’ interests and that he was not working on behalf of anyone else seeking to purchase the note. “Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty.” *MBIA Ins. Corp.*, 87 A.D.3d at 293. Accordingly, Plaintiffs have pleaded a fraud independent of the breach of contract claim, notwithstanding the overlap between the contractual provisions and the fraud allegations. *See id.* at 294 (“It is

of no consequence that some of the allegedly false representations are also contained in the agreements as warranties and form a basis of the breach of contract claim.”).

Second, Defendants rely on a similar argument in support of their contention that the fraud claim fails to state a claim. Defendants contend that Jungreis’ alleged misrepresentations are nothing more than “mere unfulfilled promissory statements” that are not actionable as fraud. Defendants correctly quote the case law that “[a] failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract.” *Tesoro Petroleum Corp. v. Holborn Oil Co. Ltd.*, 108 A.D.2d 607, 607 (1st Dep’t 1985). However, as explained above, the misrepresentations cited by Plaintiffs in support of count one are misstatements of present fact and do not relate to future action or conduct.

Finally, Defendants next contend that Plaintiffs’ fraud allegations do not meet the heightened pleading standard set forth in CPLR § 3016(b), which states that the “circumstances constituting the wrong shall be stated in detail.” However, as already noted, Plaintiffs’ fraud claim, provides the words used by Jungreis, the date of the alleged misrepresentation, and the individual to whom the misrepresentation was made. *See* Compl. ¶ 51 (recounting misrepresentations made by Jungreis at February 9, 2011 meeting to Dfouni). This satisfies the particularity requirement of CPLR § 3016(b). *See Gregor v. Rossi*, 120 A.D.3d 447, 447 (1st Dep’t 2014) (noting that the “words used by

defendants” and “the date of the alleged false representations” are required to plead fraud and fraudulent inducement with “the requisite particularity”.); *Riverbay Corp. v. Thyssenkrupp Northern Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep’t 2014) (stating that CPLR 3016(b) required that fraud cause of action allege “specific facts with respect to the time, place, or manner in which defendants-appellants made the purported misrepresentations.”).

C. *Count Three – Breach of Fiduciary Duty*

To state a claim for breach of fiduciary duty, Plaintiffs must allege the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty, and (3) resulting damages. *Jones v. Voskresenskaya*, 125 A.D.3d 532, 532 (1st Dep’t 2015).

Defendants first argue that the breach of fiduciary duty claim is duplicative of the breach of contract claim. Defendants contend that the allegations underlying both claims turn on Jungreis and Rosewood’s disclosure of Plaintiffs’ confidential information to the Lender Defendants. While Defendants are correct that the allegations are similar, there is an important distinction. Plaintiffs allege a fiduciary duty arising from Jungreis’ position as their “agent and licensed real estate broker ... in connection with the workout and/or settlement negotiations with Citibank concerning the Note.” (Compl. ¶ 63.) “In New York, it is well settled that a real estate broker is a fiduciary with a duty of loyalty and an

obligation to act in the best interests of the principal.” *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340 (2001); *Douglas Elliman LLC v. Tretter*, 84 A.D.3d 446, 448 (1st Dep’t 2011) (“During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal.”); *see also EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 20 (2005) (sustaining breach of fiduciary duty claim brought by issuer against underwriter since that “the complaint alleges an advisory relationship that was independent of the underwriting agreement.”). “Where a broker’s interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker’s interest in the transaction or the material facts illuminating the broker’s divided loyalties.” *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340 (1st Dep’t 2001).

Jungreis disputes this factual allegation, stating in his affidavit that his relationship as Plaintiffs’ real estate broker ended “sometime in 2008-2009” and that he was never retained as a real estate broker with regard to Plaintiffs’ attempt to purchase the Citibank Note. *See Jungreis Aff.* ¶¶ 27, 30. Again, Jungreis’ averments in his affidavit highlight factual disputes between the parties and do not render Plaintiffs’ allegations “negated beyond substantial question.” *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep’t 1999). Therefore, for the purpose of this motion, Plaintiffs have pleaded the

existence of a fiduciary duty independent of the Agreement, and Defendants' motion to dismiss the breach of fiduciary duty claim as duplicative lacks merit.

Next, Defendants contend that the breach of fiduciary duty claim is not pleaded with particularity. Plaintiffs allege that Jungreis and Rosewood, *inter alia*, failed to inform Plaintiffs that they were working with the Lender Defendants to attempt to purchase the Note and failed to provide Plaintiffs their absolute and undivided loyalty. *See* Compl. ¶ 63. In addition, Plaintiffs contend that Jungreis and Rosewood failed to disclose their relationship to other interested parties. *Id.* As a result, Plaintiffs assert that they were unable to purchase the Note and suffered at least \$4 million in damages. *Id.* ¶ 64. In addition, the Complaint alleges that “[i]n furtherance of the Fraudulent Scheme, Jungreis disclosed Plaintiffs’ confidential business information – including, but not limited to, the rent rolls for the Property and Plaintiffs’ bidding strategy and parameters – to [Defendant] Wrublin ... and to [Defendant] Fried...” (Compl. ¶ 34.) “Jungreis also was speaking with Fried during this time, and, in fact, in May 2011, just weeks before Defendants purchased the Note, attended a meeting with Fried, at which, upon information and belief, he disclosed the details of Plaintiffs’ confidential business information.” *Id.* Such allegations adequately support the claim and are set forth with sufficient particularity to survive a motion to dismiss. *Jones*, 125 A.D.3d at 532.

Defendants attack the pleading in paragraph 34 of the Complaint because it makes one allegation “upon information and belief.” However, claims premised in part on allegations asserted “information and belief” do not fail automatically for lack of particularity. Instead, courts in the First Department have held that a complaint *entirely* based upon “information and belief,” with no indication of the source of the allegations, is not sufficiently specific. *See Apfelberg v. East 56th Plaza, Inc.*, 78 A.D.2d 606, 606 (1st Dep’t 1980) (“We further note that the complaint is almost entirely grounded “upon information and belief”, without indication of the sources of said information and belief. The allegations are conclusory and without support or probative value.”); *Fidelity Nat’l Title Ins. Co. v. Weisz*, 2013 WL 942379, at *3 (Sup. Ct. N.Y. Cnty. Mar. 6, 2013); *Gluckman v. Laserline-Vulcan Energy Leasing, LLC*, 2009 WL 5225209, at *1 (Sup. Ct. N.Y. Cnty. Dec. 17, 2009) (“[V]irtually all of the operative allegations of the amended complaint that form the basis of [Plaintiffs’ twenty-six] causes of action are pled solely ‘upon information and belief.’ Because these operative allegations are all alleged only ‘upon information and belief,’ the amended complaint is defective, and must be dismissed for that reason alone.”).

That is not the case here. Instead, Plaintiffs plead one portion of their breach of fiduciary duty claim upon information and belief – actions taken both at a May 2011 meeting at which it was not present and during negotiations between Defendants and

Citibank to which it was not a part. Such allegations only can be made upon information and belief since Plaintiffs were not present at the meetings. Accordingly, Jungreis and Rosewood's motion likewise fails on this basis.

D. *Count Five – Breach of Contract*

Jungreis and Rosewood next seek dismissal of Plaintiffs' breach of contract claim. In support of this claim, Plaintiffs assert that they entered into a Confidentiality and Non-Circumvention Agreement ("Agreement") with Jungreis and that Jungreis breached the Agreement by: (1) disclosing Plaintiffs' "Confidential Information," *see* Compl. Ex. A ¶ 2 and (2) using that Confidential Information in a manner competitive with, and detrimental to, Plaintiffs. *See id.* ¶ 7(a).

As a threshold matter, Jungreis and Rosewood asserted that Plaintiff 243rd Street Bronx lacks standing to bring a claim for breach of contract, since it is not a party to the Agreement. The Court agrees. "The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). The only parties to the Agreement are Jungreis and Tristate. *See* Compl. Ex. A. Where there is no contract, there can be no breach of contract claim. Therefore, the breach of contract claim is dismissed as to Plaintiff 243rd Street Bronx.

Next, Jungreis and Rosewood contend that Plaintiff Tri-State fails to assert damages proximately caused by their alleged breach. Since the note and the mortgage at issue were between 243rd Street Bronx and Citibank, Jungreis and Rosewood maintain that Tri-State was unable to enter into a workout with Citibank to purchase the note and mortgage, meaning that Tri-State suffered no damage from the alleged breach.

However, Jungreis and Rosewood point to no case law and no documentary evidence establishing that the loss of the opportunity to purchase a note hinges on prior ownership. In fact, 243rd St. Lender was able to purchase the note, notwithstanding the fact that it was not a party to the Note. Therefore, Jungreis and Rosewood's argument fails to provide a basis for dismissal of Tri-State's breach of contract claim.

Finally, Jungreis and Rosewood argue that Tri-State's breach of contract claim fails because the Agreement is not an enforceable contract. Defendants contend that the Agreement is unenforceable for lack of consideration. Specifically, Defendants point to paragraph C of the Agreement, which states:

As a condition to the [Tri-State]'s entering into the Arrangement, [Tri-State] requires that [Jungreis] and its affiliates, members, partners, officers, employees, agents, successors and assigns (collectively, the "Recipient Parties") deal exclusively with [Tri-State] in connection with the Project and not in any way circumvent or divert for the benefit of the Recipient Parties any gain or profit of any nature whatsoever, *other than a commission to be paid by [Tri-State] to [Jungreis] as provided for in any subsequent written commission fee or agreement.*

(Compl. Ex. A ¶ C) (emphasis added).

This paragraph makes clear that, as a condition to Plaintiffs' engagement of Jungreis and giving him access to Plaintiffs' confidential business information, Tri-State required Jungreis and his affiliates, agents, successors, etc. to deal exclusively with Tri-State in connection with the purchase of the Note and not to divert any profit from Tri-State, aside from a commission to be paid by Tri-State to Jungreis. In other words, Plaintiffs granted Jungreis access to their confidential business information to enable him to act as their agent. *See id.* ¶ B. In exchange, Jungreis agreed to forebear from disclosing that information and profiting from it. The agreement contains a carveout specifying that the commission to be paid to Jungreis at a later date is not a "profit" that Jungreis agreed to forbear.

The fact that the language at issue notes that the fee agreement was collateral to the Agreement and would be negotiated later does not render the contract unenforceable. *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 427 (1st Dep't 2010) ("[I]n determining whether the document in a given case is an enforceable contract or an agreement to agree, the question should be asked in terms of 'whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance.'") (quoting *IDT Corp. v. Tyco Group, S.A.R.L.*, 13 N.Y.3d 209, 213 n.2 (1st Dep't 2009)).

Jungreis' performance under the Agreement does not depend on the execution of a fee agreement. Instead, the provision states that as a condition to Tristate's entry into the Agreement, Tristate requires Jungreis and his affiliates, agents, successors, etc. to deal exclusively with Tristate in connection with the purchase of the Note and not to divert any profit from Tristate, aside from a commission to be paid by Tristate to Jungreis. This language does not contemplate that the execution of the commission fee agreement was a precondition to Jungreis' performance. The provision simply made clear that Jungreis was not to use the information given to him by Tristate under the agreement for his own gain. Under this agreed upon language, the only financial gain that Jungreis was to extract from Plaintiffs' confidential business information was a commission to be paid at a later date subject to a commission fee agreement to be negotiated by the parties. Accordingly, Jungreis and Rosewood's argument that the Agreement is unenforceable fails.

E. *Claim Six – Tortious Interference with Prospective Economic Advantage*

To state a claim for tortious interference with prospective business advantage, Plaintiffs must allege that “(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was

resulting injury to the business relationship.” *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 108 (1st Dep’t 2009); *see also Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dep’t 2009).

Defendants attack this claim on several fronts. First, they contend that Plaintiffs failed to plead “unlawful means” and resulting injury. Next, they assert that there was no pleading of interference through conduct aimed at a third party. Only the last argument regarding conduct aimed at a third party has merit.

1. Unlawful Means

“Unlawful means” has been defined to include “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.” *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 191 (2004). “[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort.” *Id.* at 190. In support of their tortious interference claim, Plaintiffs plead that Defendants breached their fiduciary duties and committed fraud. This pleading satisfies the unlawful means requirement.

2. Injury

Defendants next contend that Plaintiffs fail to plead facts demonstrating that they would have purchased the Note from Citibank but for Defendants' misconduct.

Defendants correctly state the case law. "Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." *Vigoda v. DCA Prods. Plus*, 293 A.D.2d 265, 266 (1st Dep't 2002).

Here, Plaintiffs have made such a pleading. Plaintiffs allege that on June 6, 2011, Citibank responded to Plaintiffs' offer to purchase the Note by email. (Compl. ¶ 32.) While Plaintiffs offered \$7.4 million, Citibank submitted a counter-offer of \$8 million. *Id.* Plaintiffs plead that they informed Jungreis privately that they would be willing to pay \$7.6 million for the Note. *Id.* ¶ 28. Jungreis was copied on that email and allegedly shared Plaintiffs' offer and Citibank's counter-offer with Defendants. On June 7, 2011 – the next day – Citibank withdrew its counter-offer and ceased negotiations with Plaintiffs. *Id.* Just three weeks later, the Investor Defendants entered into an agreement with Citibank to purchase the Note for \$7.7 million -- \$100,000 above Plaintiffs' bidding parameters. *Id.* ¶ 38. As a result, Plaintiffs assert that Defendants successfully competed with Plaintiffs and undermined their position with Citibank using the confidential

information shared by Jungreis. Thus, according to the Complaint, “[b]ut for Defendants’ wrongdoing, Citibank would have sold the Note to Plaintiffs.” *Id.* ¶ 37.

Construing all factual allegations in the light most favorable to Plaintiffs and giving Plaintiffs the benefit of all favorable inferences, as this Court must on a CPLR 3211(a)(7) motion, Plaintiffs have alleged facts demonstrating that they would have purchased the Note but for Defendants’ conduct.

3. Conduct Aimed at a Third-Party

Finally, Plaintiffs plead that Jungreis interfered with Plaintiffs’ relationship with Citibank by disclosing Plaintiffs’ confidential business information to his Co-Defendants. However, “conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.” *Arnon Ltd. v. Beierwaltes*, 125 A.D.3d 453, 453 (1st Dep’t 2015). Here, Plaintiffs wished to enter into a relationship with Citibank but have not pleaded conduct aimed at Citibank. Plaintiffs assert that Jungreis’ actions were not targeted at Citibank; instead, he allegedly gave information to his Co-Defendants to enable them to outbid Plaintiffs. Since the conduct was not aimed at Citibank, Plaintiffs’ tortious interference claim must be dismissed.

F. *Count Seven – Unjust Enrichment*

Jungreis and Rosewood seek dismissal of Plaintiff's breach of contract claim on the grounds that it is duplicative of their breach of contract claim. The Court agrees. Unjust enrichment is a quasi-contract theory of recovery, and "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). Here, however, Plaintiffs have pleaded the existence of an agreement governing the sharing of confidential business information and the profit therefrom – the Agreement. Thus, Plaintiffs' unjust enrichment claim is dismissed as duplicative of their breach of contract claim. *See N.Y. City Educ. Constr. Fund v. Verizon N.Y. Inc.*, 114 A.D.3d 529, 532 (1st Dep't Feb.18, 2014).

IV. Lender Defendants' Motion to Dismiss

The Lender Defendants likewise seek dismissal of all claims asserted against them. Their principal argument is that Plaintiffs' claims are barred by res judicata and collateral estoppel.

In support of their dismissal argument, the Lender Defendants highlight that Plaintiff 243rd Street Bronx R&R attempted to assert the same claims based on the same

facts against 243rd St. Lender in Plaintiff's bankruptcy proceeding in the Southern District of New York. The Bankruptcy Court referred to these claims as the "Overreaching and Bad Faith Claims."

After permitting discovery and conducting an evidentiary hearing on the allegations, the Bankruptcy Court stated in its Order confirming 243rd Street Bronx R&R's Plan of Reorganization (the "Confirmation Decision") that it was "barred from asserting any such claims against the Mortgagee [243rd St. Lender]." *See* Affirmation of Michael Fried in Support of Dismissal Ex. C at 2. In full, the Bankruptcy Court ordered that "under the Confirmation Decision, [Plaintiff 243rd Street Bronx R&R] shall have the post-confirmation right to pursue the so-called 'Overreaching and Bad Faith' causes of action in the New York State Supreme Court or any other court of competent jurisdiction to the extent permitted by the Confirmation Decision; provided that [Plaintiff 243rd Street Bronx R&R] is barred from asserting any such claims against the Mortgagee [243rd St. Lender]..." *Id.*

Since the Bankruptcy Court barred claims against 243rd St. Lender, the Lender Defendants now contend that the same claims are barred as to them as *res judicata* since they are in privity with 243rd St. Lender as its principals. The Court agrees. *See, e.g., Prospect Owners Corp. v. Tudor Realty Serv. Corp.*, 260 A.D.2d 299, 300 (1st Dep't 1999) ("Although the individual defendants herein, Shaughnessy and Colella, were not

named in the original action, it is fundamental that a final determination in a prior action is subsequently binding [for res judicata purposes] not only as to the parties to that lawsuit but also those in privity with them, and Shaughnessy and Colella are clearly in privity with defendant Tudor Realty Services, which they own and operate.”).

Likewise, Plaintiffs’ claims are barred by collateral estoppel, which prevents a party “from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party *or those in privity.*” *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001) (emphasis added). Plaintiffs’ opposition attempts to recast the Confirmation Decision to state that Plaintiffs can bring these identical claims against the Individual Defendants as “third-parties” to the Bankruptcy. However, this argument ignores the clear bar on claims brought against 243rd St. Lender that was set forth by the Bankruptcy Court.

Next, Plaintiffs weakly state that the Lender Defendants cannot show privity on this motion since Plaintiffs did not plead in the complaint that they are in privity with 243rd St. Lender. However, Plaintiffs pleaded in the Complaint that the Lender Defendants own 243rd St. Lender (Compl. ¶ 38), which is all that the First Department required to dismiss a complaint on res judicata grounds in *Prospect Owners Corp.*, 260 A.D.2d at 300.

Accordingly, the Lender Defendants' motion to dismiss is granted and the claims asserted against them are dismissed.

V. Conclusion

Accordingly, it is

ORDERED that Defendants Daniel J. Wrublin, J. Michael Fried, Scott Alter, Rosewood Realty Group, Inc., Dalan Management Associates Inc., Phoenix Realty Group LLC, and Metropolitan Workforce Housing Fund LLC's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said Defendants, with costs and disbursements to said Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendants; and it is further

ORDERED that Defendants Jungreis and Rosewood Realty Group, Inc.'s motion to dismiss is granted insofar as the breach of contract claim asserted by Plaintiff 243rd Street Bronx R&R LLC, as well as the tortious interference with prospective economic advantage and unjust enrichment claims asserted by both Plaintiffs are dismissed; and it is further

ORDERED that Defendants Jungreis and Rosewood Realty Group, Inc.'s motion is otherwise denied; and it is further

ORDERED that the action is severed and continued against Defendants Jungreis and Rosewood Realty Group, Inc.; and it is further

ORDERED that counsel for Defendants Daniel J. Wrublin, J. Michael Fried, Scott Alter, Rosewood Realty Group, Inc., Dalan Management Associates Inc., Phoenix Realty Group LLC, and Metropolitan Workforce Housing Fund LLC shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158), and the Clerk of the E-Filing Support Office (Room 119), who are directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that counsel for Plaintiffs and the remaining Defendants are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on Tuesday, July 28, 2015 at 10:00 am.

Dated: New York, New York
June 3, 2015

ENTER


Hon. Eileen Bransten, J.S.C.