

Sitt v Sitt

2015 NY Slip Op 32316(U)

December 8, 2015

Supreme Court, New York County

Docket Number: 650353/2015

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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EDDIE SITT,

Plaintiff,

-against-

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RALPH SITT; DAVID SITT; SITT ASSET
MANAGEMENT, LLC; SITT LEASING, LCC;
113 SPRING OWNERS LLC; TAWIL 113
SPRING LLC; 145 SPRING OWNERS LLC;
169 SPRING OWNERS CORP.,

Defendants.

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JEFFREY K. OING, J.:

Relief Sought

Mtn Seq. No. 002

Defendants, Ralph Sitt ("Ralph"), David Sitt ("David"), Sitt Asset Management, LLC ("SAM"), Sitt Leasing, LLC ("Sitt Leasing") and 145 Spring Owners LLC ("145 Spring") (collectively, "Defendants") move, pursuant to CPLR 3211, for an order dismissing the first through fourth, seventh and eighth causes of action in the Amended Complaint. Defendants further seek an order, pursuant to CPLR 3211, dismissing the Amended Complaint against 145 Spring in its entirety.

Plaintiff Eddie Sitt ("Eddie") cross-moves, pursuant to CPLR 3211(d), for a continuance in order to gather evidence to support a further amendment of the complaint.

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Mtn Seq. No. 003

Defendants move, pursuant to CPLR 2304 and 3103, for a protective order and to quash the subpoena duces tecum served upon non-party Paramount Group, Inc., and four additional third-party subpoenas ad testificandum. Defendants further seek an order, pursuant to CPLR 2221, for an order staying the third-party discovery pending determination of the instant motion to dismiss.

Factual Background

The Sitt family, through SAM and Sitt Leasing, owns, invests in, and manages numerous properties throughout the New York metropolitan area (Am. Compl., at ¶ 24). SAM, a New York Limited Liability Company, is governed pursuant to a limited liability operating agreement dated June 2002 (the "SAM Operating Agreement") (SAM Operating Agreement, Am. Compl., Ex. A). Brothers, Eddie, Ralph, David and Jack Sitt ("Jack"), along with their mother Marilyn Sitt ("Marilyn"), each own twenty percent of SAM (Am. Compl., ¶ 28). The following provisions of the SAM Operating Agreement are at issue in this action.

Section 8 provides that the members "owning in the aggregate more than fifty percent (50%) of [SAM] ... shall have the right and power to conduct the business and affairs of [SAM] and to

carry on the business of [SAM]," and authorizes them to "to take any action of any kind and to do anything and everything ... necessary or appropriate in furtherance thereof" (SAM Operating Agreement at § 8, Am. Compl., Ex. A):

Section 9 provides that "[t]he profits and losses of [SAM] shall be allocated among the [m]embers on the basis of their respective [p]ercentage [i]nterests" and that "[d]istributions of cash or other assets of [SAM]" shall be made to the members on this same basis (SAM Operating Agreement at § 9, Am. Compl., Ex. A).

Section 13 provides that the members "may engage in or possess an interest in other business ventures of every kind and description, independently or with others, whether or not such business ventures compete with [SAM]" and that SAM "shall not have any rights in or to such independent ventures or the income or profits therefrom by virtue of this Agreement." (SAM Operating Agreement at § 13, Am. Compl., Ex. A)

Sitt Leasing is also a New York Limited Liability Company. Its Limited Liability Company Agreement ("Sitt Leasing Operating Agreement") was entered into on February 27, 2009 by Eddie, Ralph, David, and Jack, each of whom owns a twenty-five percent membership interest in Sitt Leasing (Sitt Leasing Operating

Agreement, Am. Compl, Ex. B). Sections 8, 9, and 13 of the Sitt Leasing Operating Agreement mirror the corresponding sections in the SAM Operating Agreement (Sitt Leasing Operating Agreement, §§ 8, 9, 13, Am. Compl, Ex. B).

This action involves alleged misappropriations and misuse of SAM and Sitt Leasing assets by Ralph and David over the last six years. Plaintiff alleges that in 2009 Ralph wrongfully sold Ralph's membership interest in real property located at 414 West 14th Street in Manhattan (which SAM owned in partnership with the Carlyle Group), and diverted \$400,000 from this unlawful sale for his own personal use (Am. Compl., ¶¶ 36-37). Then, in the summer of 2012, Ralph allegedly prevented SAM from buying 414 West 14th Street from the Carlyle Group in an effort to conceal his prior improper and unlawful actions (Am. Compl., ¶ 38).

Plaintiff alleges that on or about October 28, 2011 Eddie reached an agreement with Jacob Safra for SAM and/or Sitt Leasing to enter into a joint investment with Safra Bank to purchase certain property (the "Safra Properties") (Am. Compl ¶ 39, 115). Eddie brought this investment opportunity to the other members of SAM and Sitt Leasing for approval, but for reasons then unknown, Ralph Sitt rejected the opportunity (Am. Compl. ¶ 40).

The reason for Ralph's objection became clear. Plaintiff alleges that Ralph "secretly and improperly withdrew funds from SAM and/or Sitt Leasing bank accounts for the purpose of purchasing property in his own name at 450 Broadway and 208 Fifth Avenue in Manhattan" and then used "\$4,000,000 in profit generated by operations and a refinancing" of these properties -- as well as a portion of the proceeds from the 2012 sale of SAM property at 1370 Broadway in Manhattan that Ralph allegedly misappropriated -- to purchase the Safra Properties with Jacob Safra (Am. Compl., ¶¶ 42-44).

In addition, plaintiff alleges that Ralph improperly and without authorization took out a \$30 million loan on SAM's "flagship property," 2 Herald Square, New York, New York (Am. Compl., ¶ 46). Finally, plaintiff alleges that Ralph and David have improperly used SAM and Sitt Leasing funds for personal expenses, including, inter alia, trips, gifts, and the lease of a Bentley (Am. Compl., ¶ 48).

Discussion

As a preliminary matter, this Court notes that plaintiff has withdrawn this action against 145 Spring with prejudice (Plaintiff's Memo. Of Law in Opp. at pg. 1). Accordingly, that branch of the motion to dismiss the Amended Complaint as to 145

Spring is granted, the action is dismissed against it with prejudice.

In addition, plaintiff's cross motion to amend the caption to: (I) reflect that he is suing in a representative capacity as to the derivative causes of action; and (ii) name SAM and Sitt Leasing as nominal defendants is granted (Hu v Ziming Shen, 57 AD3d 616 [2d Dept 2008]).

Plaintiff's cross motion seeking a continuance pursuant to CPLR 3211(d) is denied. CPLR 3211(d) provides that where "facts essential to justify opposition may exist but cannot then be stated, the court may ... order a continuance to permit further affidavits to be obtained or disclosure to be had" (CPLR 3211[d]). Plaintiff claims that "upon inspection of the books and records [of SAM and Sitt Leasing], further facts will be revealed that will support the allegations that Ralph and David diverted to their own personal use far more of the assets of Sitt Asset Management and Sitt Leasing than has been alleged in the complaint and the amended complaint ... [and] will reveal diversion of corporate opportunities from SAM to Ralph and David" (Opp. Br. At 2). This argument is unavailing.

As this Court considers defendants' dismissal motion, only questions of law are at issue, and purported further evidence is

not sufficient to "substantiate opposition to the motion to dismiss" (Stephan v Cawley, 24 Misc 3d 1204(A) [N.Y. Sup. 2009]; Koeppel v Volkswagen Group of Am., Inc., 128 AD3d 441, 441-42 [1st Dept 2015] [denial of CPLR 3211(a)(7) motion to dismiss pursuant to CPLR 3211(d) improper where plaintiff failed to suggest existence of facts essential to opposition that could not yet be stated]).

Defendants move to dismiss plaintiff's derivative claims for: (i) breach of fiduciary duty against Ralph, SAM, and Sitt Leasing; (ii) breach of fiduciary duty against David, SAM, and Sitt Leasing; (iii) a declaratory judgment finding, inter alia, that Ralph's purchase of 450 Broadway and 208 Fifth Avenue is void, as are the subsequent purchases of the Safra Properties made with the proceeds from the operations and refinancing of 450 Broadway and 208 Fifth Avenue; and (iv) the imposition of a constructive trust over the Safra Properties. Defendants also move to dismiss two of plaintiff's direct claims against Ralph for breach of contract and fraud.

Plaintiff's Derivative Claims

I. Breach of Fiduciary Duty

In order to plead a breach of fiduciary duty, a plaintiff must allege the existence of "a fiduciary relationship,

misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (Fitzpatrick House III, LLC v Neighborhood Youth & Family Services, 55 AD3d 664, 664 [2d Dept 2008]).

Here, plaintiff alleges that Ralph and David are members of SAM and Sitt Leasing, pursuant to the SAM and Sitt Leasing Operating Agreements and, as such, owe these entities fiduciary duties of loyalty, care, and good faith. The Amended Complaint further alleges that Ralph breached this duty by, inter alia: (I) using SAM and/or Sitt Leasing funds to purchase 450 Broadway, 208 Fifth Avenue, and the Safra Properties, and then misappropriating the profits generated therefrom; (ii) taking out an unauthorized \$30,000,000 loan on 2 Herald Square; and (iii) improperly spending company funds for personal uses including leasing a Bentley. The Amended Complaint also alleges that David breached this duty by participating in: (I) the improper use of company funds to lease a Bentley; (ii) the misuse of tenant security deposits; and (iii) the unlawful dealings involving 450 Broadway and 208 Fifth Avenue, as well as the use of the proceeds therefrom to purchase the Safra Properties. Plaintiff alleges that SAM and Sitt Leasing sustained damages as a result of these actions.

Defendants raise a number of arguments in support of their motion to dismiss these claims. First, defendants argue that the applicable statute of limitations in this action is three years, and, that, therefore, it renders time barred that portion of the breach of fiduciary duty claims which arises from acts prior to February 6, 2012.

While the statute of limitations for a breach of fiduciary duty claim is three years if money damages are sought (CPLR § 214[4]; Kaufman v Cohen, 307 AD2d 113 (1st Dept 2003), where a breach of fiduciary duty action seeks both equitable relief and money damages, as here, the six-year statute of limitations applies (DiBartolo v Battery Place Assoc., 84 AD3d 474, 476 [1st Dept 2011]). Furthermore, as the money damages sought are meant only to make the organization whole, these damages are "akin to an equitable remedy" so the six year statute of limitations applies (Spitzer v Schussel, 7 Misc 3d 171, 174 [Sup Ct 2005]). As such, plaintiff's breach of fiduciary claim for acts occurring prior to February 6, 2012 is not time barred.

Second, defendants argue that the breach of fiduciary duty claims against David lack specificity. That argument is unavailing. Here, the claims that David improperly used company funds to lease a Bentley, misused tenant security deposits, and

was involved in the purchase of 450 Broadway, 208 Fifth Avenue, and the Safra Properties, are sufficiently detailed in their factual allegations to meet the specificity requirement of CPLR 3016(b) (PDK Labs, Inc. v Krape, 277 AD2d 212, 212-13 [2d Dept 2000]).

Finally, defendants argue that plaintiff's breach of fiduciary duty claims must be dismissed for failure to comply with Business Corporation Law ("BCL") § 626. As plaintiff's breach of fiduciary duty claims are brought derivatively, plaintiff's complaint must "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort" (BCL § 626).

If plaintiff alleges a demand was made, the amended complaint must state, "who made the demands, when they were made, which board members they were made to, the content of the demands" and, if the board refused to take action, the reason for that refusal (Kenney v Immelt, 41 Misc 3d 1225(A) [N.Y. Sup. 2013] discussing Tomczak v Trepel, 283 AD2d 229, 230 [1st Dept 2001]). Alternatively, demand will be excused as futile under three circumstances: (I) when a majority of the board of directors is interested in the challenged transaction (a director

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is "interested" when he or she either has an actual interest in the transaction at issue or is controlled by a self-interested director); (ii) when the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; or (iii) when the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors (Bansbach v. Zinn, 1 NY3d 1, 8-9 [2003]).

Here, plaintiff's Amended Complaint alleges that "Eddie Sitt did not demand action by the Board of either SAM or Sitt Leasing because such a demand would have been entirely futile insofar as the complained-of wrongdoings concerned self-dealing and wrongful acts perpetrated by Ralph Sitt -- the de facto controlling director of both SAM and Sitt Leasing -- in exclusive pursuit of his own financial interests" (Am. Compl., ¶ 65). This conclusory assertion, without more, is insufficient to establish demand futility (Compare Marx v. Akers, 88 NY2d 189, 199-200 [1996] and Glatzer v. Grossman, 47 AD3d 676, 677 [2d Dept 2008] with Bansbach v. Zinn, 1 NY3d 1 [2003]).

In an affidavit submitted in opposition to defendants' motion to dismiss, plaintiff states that in November 2014 he asked his mother, Marilyn Sitt -- whose vote is necessary to

achieve the majority needed for SAM to bring an action against Ralph and David -- to join him and Jack in taking control of SAM in order to "compel Ralph and David to return the moneys that they took above their pro rata shares", but that she "declined to get involved in a dispute among her sons" (Sitt Aff. at ¶ 5, Lipari Aff. In Opp., Ex. B). Plaintiff argues that this affidavit establishes that a demand was made under BCL § 626(c).

While a court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 144-45 [1st Dept 2014]), plaintiff's affidavit directly contradicts the Amended Complaint, and is therefore insufficient for consideration on this dismissal motion (LeBreton v Weiss, 256 AD2d 47, 47-48 [1st Dept 1998][where complaint alleged that defamatory statements were solicited from defendant by plaintiff's agents, thereby establishing complete defense as a matter of law, subsequent affidavits from plaintiff and plaintiff's agents contradicting complaint were insufficient to avoid dismissal]).

Alternatively, plaintiff argues that his affidavit establishes demand futility under the statute. The fact that the mother does not wish to become involved in a lawsuit between her

sons does not fall within any of the three categories of demand futility (Yudell v Gilbert, 99 AD3d 108, 115 [1st Dept 2012]). Further, as the mother is not a member of Sitt Leasing, plaintiff's affidavit could not be used to plead either demand or demand futility as to that entity vis-a-vis his mother's action or lack thereof.

Contrary to plaintiff's argument, Lemle v Lemle does not support his claim that his mother's refusal establishes demand futility. In that case, the plaintiff shareholder brought derivative claims against his siblings -- who were also shareholders in corporation -- seemingly without making a demand of his elderly mother, the majority owner of the corporation. The mother in Lemle, however, was elderly and was replaced as a board member in 2008 before the final amended complaint in that action was filed because she was no longer competent to serve on the board, (Lemle v. Lemle, 2010 WL 10680530 [N.Y. Sup. 2010]). Plaintiff does not contend that his mother suffers from a similar mental disability. Furthermore, and more importantly, neither the Supreme Court nor the First Department reached the issues of demand or demand futility in their decisions (Lemle v. Lemle, 2009 WL 10163015 [N.Y. Sup. 2009] aff'd as mod. 92 AD3d 494 [1st Dept 2012]).

Accordingly, that branch of the motion to dismiss plaintiff's derivative claims for breach of fiduciary duty is granted and they are hereby dismissed. To the extent plaintiff asserts these claims against SAM and Sitt Leasing, those claims are dismissed with prejudice. These entities do not owe fiduciary duties to their members or shareholders (Stalker v Stewart Tenants Corp., 93 AD3d 550, 552 [1st Dept 2012]; Unitel Telecard Distrib. Corp. v Nunez, 90 AD3d 568, 569 [1st Dept 2011]).

II. Constructive Trust

Plaintiff also brings a derivative claim seeking to impose a constructive trust over the Safra Properties. A constructive trust is an equitable remedy meant to prevent unjust enrichment (Tyree v Henn, 109 AD3d 906, 907 [2d Dept 2013]). The central considerations in determining whether a constructive trust is appropriate are the existence of "a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment" (In re Gupta, 38 AD3d 445, 446 [1st Dept 2007] [emphasis added] [internal citations omitted]).

Plaintiff alleges that: (I) Ralph owed fiduciary duties to SAM, Sitt Leasing, and the members of each entity; (ii) when Ralph rejected the opportunity to purchase the Safra Properties

he promised Eddie that he would not pursue the opportunity on his own, to the exclusion of SAM and/or Sitt Leasing; (iii) in reliance on this promise, Eddie stopped pursuing the purchase of the Safra Properties; and (iv) Ralph subsequently acquired the Safra Properties with Jacob Safra without providing prior notice to the members of SAM or Sitt Leasing, or sharing the proceeds from the acquisition and operation of those properties with the members of either entity, thereby unjustly enriching himself (Am. Compl., ¶¶ 114-117).

Defendants argue that because plaintiff had no prior interest in the Safra Properties to relinquish in reliance on Ralph's alleged promise dismissal of this claim is appropriate. However, an allegation that defendants improperly usurped certain business opportunities and profits rightfully belonging to SAM or Sitt Leasing states a claim for a constructive trust (see Fellner v Morimoto, 52 AD3d 352, 353 [1st Dept 2008]; Front, Inc. v Khalil, 103 AD3d 481, 483 [1st Dept 2013] aff'd, 24 NY3d 713 [2015] rearg. denied, 25 NY3d 1036 [2015]).

The predominant test for whether a corporate opportunity existed is to determine whether the corporation had an "interest" or "tangible expectancy" in the opportunity in question (Alexander & Alexander of New York, Inc. v Fritzen, 147 AD2d 241,

247-48 [1st Dept 1989] [internal citations omitted]). An "interest" or "tangible expectancy" is defined as an expectation "much less tenable than ownership," but "more certain than a 'desire' or a 'hope.'" (Alexander & Alexander of New York, Inc. v Fritzen, 147 AD2d 241, 247-48 [1st Dept 1989] [internal citations omitted]). In alleging that Ralph rejected the opportunity for SAM or Sitt Leasing to purchase the Safra Properties and then subsequently purchased these properties individually, plaintiff has sufficiently alleged that the purchase of the Safra Properties was a corporate opportunity that Ralph diverted (Poling Transp. Corp. v A & P Tanker Corp., 84 AD2d 796 [2d Dept 1981] [allegation that defendant corporate officer inspected certain ships at the request of corporation, advised corporation that specific vessel was not suitable, and subsequently purchased same vessel and offered it for lease to corporation stated claim for diversion of corporate opportunity]). Nonetheless, while plaintiff has stated a claim for a constructive trust, this claim is derivative in nature and, as such, must be dismissed for plaintiff's failure to allege sufficiently demand or demand futility. Accordingly, that branch of defendants' motion to dismiss this claim is granted, and it is hereby dismissed.

Plaintiff's Direct Claims

III. Breach of Contract

Plaintiff asserts a direct claim against Ralph for breach of contract by alleging that Ralph breached paragraph nine of the SAM Operating Agreement and Sitt Leasing Operating Agreement -- which provide that the profits and losses of SAM and Sitt Leasing shall be allocated among the members based on their respective percentage interests and that SAM and Sitt Leasing's cash and other assets shall be distributed to members on the same basis -- by: (I) misappropriating funds from the unauthorized sale of SAM property at 1370 Broadway, and (ii) failing to distribute the profits from the operations and refinancing of the properties at 450 Broadway and 208 Fifth Avenue to the members of SAM and Sitt Leasing.

This claim is improperly brought as a direct cause of action. An individual may proceed with a direct, rather than derivative, claim only where harm is "caused to the individual, as opposed to the corporation." Where a claimed individual harm is "confused with or embedded in the harm to the corporation, it cannot separately stand" as a direct claim (Serino v Lipper, 123 AD3d 34, 40 [1st Dept 2014][internal citations omitted]). Thus, allegations of mismanagement or diversion of assets "without

more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (Abrams v. Donati, 66 NY2d 951, 953 [1985]); Leonard v. Gateway II, LLC, 68 AD3d 408 [1st Dept 2009]).

Here, plaintiff has failed to allege that Ralph breached an obligation to Eddie that was independent of the duties Ralph owes to SAM and Sitt Leasing. To the contrary, plaintiff rests his breach of contract claim entirely on Ralph's alleged breach of the SAM and Sitt Leasing Operating Agreements. The alleged breaches are predicated on harms to SAM and Sitt Leasing -- the alleged reason these profits were not distributed to SAM or Sitt Leasing's members is because these funds were either misappropriated from those entities or never turned over to them. In short, plaintiff "seeks vindication of [his] rights as a shareholder, and recovery of corporate assets and profits diverted from [plaintiff] in that status" (Wolf v Rand, 258 AD2d 401, 403 [1st Dept 1999]). As such, this breach of contract claim may not be brought as an individual cause of action (Compare Delagrangre v Payard, 110 AD3d 491 [1st Dept 2013])[plaintiff did not adequately allege that defendant owed him any duty independent of the duty arising from operating

agreement] with Gjuraj v Uplift El. Corp., 110 AD3d 540, 540 [1st Dept 2013]).

Accordingly, that branch of defendants' motion to dismiss the breach of contract claim is granted, and it is hereby dismissed.

IV. Fraud

Plaintiff's direct claim against Ralph for fraud must also be dismissed. To establish fraud, a plaintiff must allege a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" Lemle v Lemle, 92 AD3d 494, 499 [1st Dept 2012]; Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]).

Plaintiff alleges the following to support his fraud claim:

Ralph's concealment of his wrongful diversion of funds from SAM and/or Sitt Leasing for the purpose of purchasing 450 Broadway and 208 Fifth Avenue; Ralph's misappropriation of the profits generated from these properties to his exclusive benefit; Ralph's sale of his membership interest in 414 West 14th Street; the unauthorized \$30,000,000 loan on 2 Herald Square; and Ralph and David's improper expenditures of company funds.

As with plaintiff's breach of contract claim, these allegations are based on "mismanagement or diversion of assets by officers or directors to their own enrichment" which are primarily a harm to the corporation for which a shareholder may sue derivatively, but not individually (Abrams v. Donati, 66 NY2d 951, 953 [1985]; Gordon v Credno, 102 AD3d 584, 585 [1st Dept 2013]).

Accordingly that branch of defendant's motion to dismiss the fraud claim is granted, and it is hereby dismissed.

V. Declaratory Judgment

Plaintiff seeks a declaratory judgment that: (I) Ralph's purchase of 450 Broadway and 208 Fifth Avenue is void; (ii) Ralph's purchase of the Safra Properties is void (because this purchase was made using funds from the operations and refinancing of 450 Broadway and 208 Fifth Avenue); and (iii) SAM and/or Sitt Leasing are entitled to equitable ownership of the Safra Properties (because the opportunity to purchase this property rightfully belonged to SAM and/or Sitt Leasing) (Am. Compl., ¶ 108).

A declaratory judgment is an extraordinary remedy that is only available when "resort to ordinary actions or proceedings would not afford adequate relief" (61 W. 62 Owners Corp. v CGM

EMP LLC, 77 AD3d 330, 341 [1st Dept 2010] [internal quotations omitted] aff'd as mod. and remanded, 16 NY3d 822 [2011]). .

In this case, plaintiff may have an adequate remedy were it not for the pleading insufficiencies. . Therefore, a declaratory judgment may be unnecessary and inappropriate (see Wells Fargo Bank, Nat. Ass'n v GSRE II, Ltd., 92 AD3d 535, 536 [1st Dept 2012] [claim for declaratory relief was properly dismissed in light of assertion of breach of contract claim] Artech Info. Sys., L.L.C. v Tee, 280 AD2d 117, 125 [1st Dept 2001][same]; Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 [1st Dept 1988]; JMF Consulting Group II, Inc. v Beverage Mktg. USA, Inc., 97 AD3d 540, 540-542 [2d Dept 2012]).

Accordingly, that branch of defendants' motion to dismiss the declaratory judgment claim is granted, and it is hereby dismissed.

In light of the dismissal of this action, defendants' motion for a protective order and to quash the subpoena duces tecum served upon non-party Paramount Group, Inc., and four additional third-party subpoenas ad testificandum is rendered academic. In any event, the motion is granted and the subpoenas are hereby quashed.

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Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint as to defendant 145 Spring Owners LLC is granted based on plaintiff's withdrawal of this action against it, and this action is dismissed against it with prejudice; and it is further

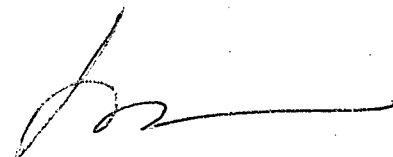
ORDERED that defendants' motion to dismiss this action against them is granted, and the action is dismissed against them without prejudice; and it is further

ORDERED that defendants' motion for a protective order and to quash subpoenas is granted, and the subpoenas are hereby quashed; and it is further

ORDERED that plaintiff's cross-motion for a continuance pursuant to CPLR 3211(d) is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/8/15


HON. JEFFREY K. OING, J.S.C.