

Sandler v Independent Living Aids, LLC

2016 NY Slip Op 30861(U)

May 6, 2016

Supreme Court, New York County

Docket Number: 652154/2013

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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MARVIN SANDLER, MIMI BERMAN SANDLER
AND MIMARV, INC. F/K/A INDEPENDENT
LIVING AIDS, INC.,

Plaintiffs,

-against-

INDEPENDENT LIVING AIDS, LLC (A
NEW YORK LLC), INDEPENDENT LIVING
AIDS LLC (A DELAWARE LLC), RSS
ADVENTURE CAPITAL, LLC, THE CHOW/
SPEACH TRUST, ECONOMIC SOLUTIONS,
INC., MATTHEW SHEPPARD, PRINCE JOHN
RADZIWILL AND IRWIN SCHNEIDMILL,

Defendants.

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DECISION AND ORDER

JEFFREY K. OING, J.:

This action arises from the sale of plaintiff Mimarv, Inc. f/k/a Independent Living Aids, Inc. ("ILA, Inc.") to defendant Independent Living Aids LLC ("ILA Delaware"), and defendants' alleged attempt to deprive plaintiffs Marvin and Mimi Sandler (together, the "Sandlers"), the owners of ILA, Inc., of the benefits of that transaction.

The twelve count amended complaint asserts causes of action for breach of contract (first and second causes of action), tortious interference with contract (third cause of action), civil conspiracy (fourth cause of action), conversion (fifth cause of action), violations of the Debtor and Creditor Law (sixth, seventh, eight, ninth, and tenth causes of action), fraud

(eleventh cause of action), and breach of the duty of good faith and fair dealing (twelfth cause of action).

I. Reliefs Sought

Defendants RSS Adventure Capital, LLC ("RSS"), the Chow/Speach Trust ("Chow Trust"), Economic Solutions, Inc. ("Economic Solutions"), Matthew Sheppard ("Sheppard"), Prince John Radziwill ("Radziwill"), and Irwin Schneidmill ("Schneidmill") move, pursuant to CPLR 3211, to dismiss the amended complaint in its entirety based upon documentary evidence and for failure to state a cause of action.

In addition, ILA Delaware moves, pursuant to CPLR 3211, to dismiss the third, fourth, fifth, eleventh, and twelfth causes of action based upon documentary evidence and failure to state a cause of action. ILA Delaware, however, does not seek dismissal of plaintiffs' breach of contract claims (first and second causes of action), or plaintiffs' claims of Debtor and Creditor Law violations (sixth through tenth causes of action) (Defendants' opening brief at 5, n 5).

Defendant Independent Living Aids, LLC ("ILA New York") separately moves to dismiss the amended complaint, and does so by joining and adopting the arguments of its co-defendants.

All of these defendants seek dismissal of claims asserted by the Sandlers based upon lack of capacity to sue.

Plaintiffs cross-move for an order setting forth an expedited discovery schedule and granting plaintiffs a special trial preference.

II. Factual Allegations

In 1986, the Sandlers acquired ILA, Inc., which provided services to disabled individuals. In 2008, the Sandlers sought to sell ILA, Inc. To this end, they entered into an Asset Purchase Agreement ("APA"), dated May 23, 2008, for the sale of ILA, Inc. to ILA Delaware for \$10 million (Amended Complaint, ¶¶ 31-33). Plaintiffs aver that ILA Delaware's members included: RSS, whose members included Sheppard and Radziwill; the Chow Trust, which was controlled by nonparty Peter Chow; Economic Solutions, a company whose sole shareholder was Schneidmill; and Sheppard and Radziwill individually (Id., ¶ 33).

Plaintiffs claim that in order to obtain tax advantages \$2 million of the \$10 million purchase price of ILA, Inc. was to be paid as a "consulting fee" in regular monthly installments over the course of seven years (Amended Complaint, ¶ 36). ILA Delaware entered into a "Consulting Agreement," also dated May 23, 2008, with ILA, Inc. as "Consultant," and the Sandlers as "Key Employees" (Id., ¶ 37; Rubeo Affirm., Ex. G at 1). Under the Consulting Agreement, plaintiffs were to receive monthly

payments ranging from \$18,000 in year one to \$38,000 in year seven (Amended Complaint, ¶ 38).

Plaintiffs claim that in order to finance the purchase of ILA, Inc. ILA Delaware required the Sandlers to securitize ILA Delaware's acquisition loan with \$450,000 of the Sandlers' own money, and that these funds were to be held as collateral by ILA Delaware's lender for up to four years (Amended Complaint, ¶¶ 39-40). ILA Delaware allegedly had a difficult time servicing its debt and, due to a shortfall, Schneidmill requested additional capital from the members of ILA Delaware (Id., ¶¶ 44, 46). ILA Delaware's members allegedly provided an additional \$715,001, but complained that their money was being used to pay off plaintiffs (Id., ¶¶ 47-48). According to plaintiffs, the members of ILA Delaware then conspired to defraud plaintiffs out of the remainder of the money owed to them under the APA and the Consulting Agreement (Id., ¶ 49). Specifically, ILA Delaware's members allegedly agreed to transfer all of ILA Delaware's assets to a newly-formed entity owned by Schneidmill -- defendant ILA New York - for \$1.00, leaving ILA Delaware a shell company and depriving plaintiffs of the benefits of the APA and the Consulting Agreement (Id., ¶ 50).

The sale of ILA Delaware to ILA New York occurred on June 1, 2012, and it was memorialized in another Asset Purchase Agreement

("Second APA") (Id., ¶ 54). The Second APA allegedly assigned the remaining debt of the Consulting Agreement to ILA New York (Id., ¶ 100). The Sandlers did not consent to the assignment, and they claim that they were not paid the remaining balance due under the Consulting Agreement (Id., ¶¶ 101, 110).

Plaintiffs claim that ILA Delaware's members and ILA New York also entered into a "side agreement" entitled "Agreement for Distribution of Profits of Independent Living Aids, LLC" (the "Side Agreement"), whereby the members of ILA Delaware would manage, control and receive a majority of the profits of ILA New York (Amended Complaint, ¶¶ 52, 61). Plaintiffs claim that pursuant to the Side Agreement RSS was to receive 50% of the profits of ILA New York and control its business, and the Chow Trust was to receive 25% of the profits (Id., ¶¶ 63, 64).

Sheppard stated in his December 3, 2013 affidavit that the Side Agreement "was designed to provide a means for reimbursing ILA Delaware's entity members for funds that they had invested in ILA Delaware" (Id., ¶ 68; 12/3/13 Sheppard Aff., ¶ 9). ILA Delaware was not a party to the Side Agreement (Amended Complaint, ¶ 62).

On July 6, 2012, Schneidmill informed Marvin Sandler of the sale to ILA New York (Id., ¶ 54). Schneidmill also allegedly misrepresented to Marvin Sandler that ILA Delaware had defaulted on its acquisition loan, and that the Sandlers' \$450,000 had been

confiscated by ILA Delaware's lender (Id., ¶¶ 56-57). Plaintiffs aver that in reality ILA Delaware had not defaulted on its acquisition loan, but, rather, ILA Delaware's members directed its lender to transfer the Sandlers' \$450,000 to an account for the benefit of ILA New York, in breach of the APA (Id., ¶¶ 58-59).

III. Legal Analysis

A. Defendants' Motion

1. **Breach of Contract (first and second causes of action and Debtor and Creditor Law (sixth through tenth causes of action))**

Defendants argue that these claims must be dismissed against them because plaintiffs lack standing to assert these claims or because they failed to allege sufficient facts that would warrant piercing the corporate veil.

(i) Standing

Defendants argue that the Sandlers lack standing to maintain this action, and that contract-based claims under the APA and the Consulting Agreement, as well as tort claims, can only be maintained by ILA, Inc. Although not characterized as such, in essence, defendants argue that the claims asserted by the Sandlers are derivative claims that belong to the corporation, rather than direct claims that belong to the Sandlers themselves.

"A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually" (Yudell v Gilbert, 99 AD3d 108, 113 [1st Dept 2012]). To determine whether a claim is direct or derivative, "a court should consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)" (Id. at 114 [internal quotation marks and citation omitted]).

The APA defined ILA, Inc. as "Seller," the Sandlers as "Stockholders," and ILA Delaware as "Buyer" (Rubeo Affirm., Ex. F at 1). The APA provides that "the Seller and Stockholders agree that they shall provide Four Hundred Fifty Thousand Dollars (\$450,000) of cash collateral required by Buyer's lender" (Id., § 6.4). Under the APA, ILA Delaware acknowledged that "the cash collateral provided by the Seller and/or the Stockholders shall be released pursuant to the terms and conditions of the documentation evidencing the Financing and upon such release, first the Seller shall be entitled to the cash collateral it provided, and any interest or earnings thereon" (Id.). The APA also required ILA Delaware to "provide its audited financial statements to Stockholders promptly following the completion of

its annual financial audit until the release or other final disposition of the cash collateral described in this section 6.4 in accordance with the documentation evidencing the Financing" (Id.). Thus, the express terms of the APA make clear that both ILA, Inc. and the Sandlers would suffer harm from the loss of the \$450,000 collateral, and that both ILA, Inc. and the Sandlers would receive the benefit of recovering these funds.

Based on the foregoing, both ILA, Inc. and the Sandlers have standing to bring the instant action (Yudell, 99 AD3d at 114, supra; see also Julien J. Studley, Inc. v Lefrak, 66 AD2d 208, 214 [2d Dept 1979] ["a creditor has standing to maintain an action to set aside a fraudulent transfer" under the Debtor and Creditor Law], aff'd 48 NY2d 954 [1979]).

(ii) Veil-Piercing

Defendants argue that all claims against RSS, the Chow Trust, Economic Solutions, Sheppard, Radziwill, and Schneidmill must be dismissed because plaintiffs fail to allege facts sufficient to justify piercing the corporate veil.

Generally, "a corporation exists independently of its owners, who are not personally liable for its obligations, and ... individuals may incorporate for the express purpose of limiting their liability" (East Hampton Union Free School Dist. v

Sandpebble Bldrs., Inc., 66 AD3d 122, 126 (2d Dept 2009), aff'd
as mod 16 NY3d 775 [2011]).

[P]iercing the corporate veil requires a showing 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.

While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.

(Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141-142 [1993] [internal citations omitted]). "Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (East Hampton Union Free School Dist., 66 AD3d at 127, supra [internal quotation marks and citation omitted]). "[C]onclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil" (Metropolitan Transp. Auth. v Triumph Adv.

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Prods., 116 AD2d 526, 528 [1st Dept 1986]; see also Matter of Goldman v Chapman, 44 AD3d 938, 939 [2d Dept 2007] ["[t]he mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil"). Instead, the plaintiffs must "allege particularized facts to warrant piercing the corporate veil" (Andejo Corp. v South St. Seaport Ltd. Partnership, 40 AD3d 407, 407 [1st Dept 2007]; see also Sheridan Broadcasting Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005] [claims seeking to pierce the corporate veil properly dismissed where they were not alleged "with the requisite 'particularized statements detailing fraud or other corporate misconduct'"]).

In support of their veil-piercing argument, plaintiffs rely upon Holme v Global Mins. & Metals Corp. 22 Misc 3d 1123(A), NY Slip Op 50252(U) (Sup Ct, NY County 2009), aff'd 63 AD3d 417 [1st Dept 2009]). In Holme, the plaintiff obtained a judgment against Global Minerals and Metals Corp. ("Global"), and when he attempted execution of the judgment was informed that Global was no longer doing business in its New York office. The plaintiff alleged that four other entities and two individuals, all named as defendants, were Global's alter egos. The trial court denied defendants' motion to dismiss, holding that the complaint

sufficiently alleged alter ego liability. Specifically, the court relied upon the plaintiff's allegations that "the Individual Defendants were common owners, operated the same business, at the same physical location, with the same assets, business operation, and many of the same employees as the Corporate Defendants" (Id. at *6). The court reasoned that "allegations that the Individual Defendants transferred money, shares, and assets to enrich themselves and their other companies, including [a co-defendant entity], while stripping Global of its assets and making it judgment proof, sufficiently allege[d] a wrong or injustice against [the plaintiff] which resulted in his injury" (Id.). The First Department affirmed, reasoning:

Plaintiff, who has been unable to collect a 2006 judgment he obtained against [Global], alleges that Global's individual shareholders named herein as defendants caused Global to cease doing business in or about 2000, stripping it of assets and leaving it a moribund shell in order to avoid payment of the contractual obligation underlying plaintiff's judgment, but continued to operate Global's business through the other corporate entities named herein as defendants, which they also dominated, the last of which was defendant GMMC, LLC (New GMMC) set up in 2003. These allegations of continuity, domination and fraudulent transfers, which are particularized with considerable detail in the complaint, are sufficient to state causes of action seeking to hold Global's individual shareholders liable for plaintiff's judgment against Global on the theory that they were Global's alter egos, and to impose the same liability on New GMMC on the theory that it succeeded to Global's obligations pursuant to a de facto merger.

(Holme, 63 AD3d at 417-418, supra [internal citations omitted]).

Here, the amended complaint alleges generally that defendants exercised "dominion and control over ILA Delaware" (Amended Complaint, ¶¶ 69, 78, 96). While such generalized allegations are insufficient to warrant piercing the corporate veil (Matter of Goldman, 44 AD3d at 939, supra), the pleading also contains more particularized allegations of domination and control. For example, under the purported Side Agreement, ILA Delaware's members were to manage, control and receive a majority of the profits of ILA New York (Amended Complaint, ¶¶ 52, 61, 63-64, 68; 12/3/13 Sheppard Aff., ¶ 9). In addition, the pleading alleges that Schneidmill personally withdrew \$228,133 from ILA Delaware's bank account the day before the sale to ILA New York, and the members of ILA Delaware then transferred all of ILA Delaware's assets to ILA New York for \$1.00 (Amended Complaint, ¶ 73). Plaintiffs aver that no bids were sought for the sale of ILA Delaware's assets, other than the \$1.00 paid by ILA New York, and that ILA Delaware's creditors were not notified of the sale (Id., ¶¶ 74-75). ILA Delaware's members allegedly disregarded the payment and discharge of its debts and liabilities rendering ILA Delaware insolvent and without assets (Id., ¶ 77). After the sale, ILA New York allegedly used the same offices, address, and telephone numbers as ILA Delaware, and continued the same

business as ILA Delaware, with the same suppliers and customers (Id., ¶¶ 85-86). Under these facts, Schneidmill's withdrawal of funds may have contributed to the inadequate capitalization of ILA Delaware that allegedly rendered it unable to make payments to plaintiffs.

Nonetheless, plaintiffs' allegation that defendants "unanimously approved the conveyance of all of ILA Delaware's assets to ILA New York for \$1" (id., ¶¶ 73, 78-79, 84) may ultimately support defendants' argument that voting on the conveyance evidences their compliance with corporate formalities. If plaintiffs prevail on their fraud-based claims under the Debtor and Creditor Law, however, this allegation could also show that defendants were knowing participants in a scheme to strip ILA Delaware "of assets and leav[e] it a moribund shell in order to avoid payment of the contractual obligation" to plaintiffs, and that defendants "continued to operate [ILA Delaware's] business through [ILA New York], which they also dominated," all with the intent to render ILA Delaware judgment-proof (Holme, 63 AD3d at 417-418, supra). As such, taken together, the amended complaint alleges: that defendants orchestrated the sale of ILA Delaware's assets to ILA New York to defraud plaintiffs; the inadequate capitalization of ILA Delaware; common ownership, offices, address, and telephone numbers; and ILA New York

operating the same business as ILA Delaware. Giving the pleading the "benefit of every possible favorable inference" at this pre-answer juncture of the litigation (Rivietz v Wolohojian, 38 AD3d 301, 301 [1st Dept 2007]), and "when the standard is much less exacting than on a motion for summary judgment, the [amended] complaint is sufficient to withstand a motion to dismiss" (Holme, 22 Misc 3d 1123(A), NY Slip Op 50252(U), *7, supra).

Accordingly, defendants' motion to dismiss the complaint for failure to allege sufficiently domination and control against RSS, the Chow Trust, Economic Solutions, Sheppard, Radziwill, and Schneidmill is denied.

Defendants' other argument is that under the Second APA joint and several liability does not apply to any of plaintiffs' claims, and does not provide a basis for piercing the corporate veil to assess individual liability in this action (Amended Complaint, ¶¶ 123, 137-138, 151, 191 [alleging that "the members of ILA Delaware are also jointly and severally liable in that they exercised complete dominion and control over ILA Delaware in the attacked transaction[s]]"). Defendants proffer a copy of the Second APA as documentary evidence (Rubeo Affirm., Ex. J).

The Second APA was entered into among ILA Delaware (as "Seller"), ILA New York (as "Buyer"), and RSS, the Chow Trust, Economic Solutions, and Schneidmill (as "Members") (Id. at 5).

Section 8.7 of the Second APA, entitled "Joint and Several Liability," provides as follows:

The Seller and the Members shall each be jointly, severally, unconditionally and absolutely liable for the prompt performance of each and every obligation, covenant and agreement of the Seller and each of the Stockholders arising out of, in connection with, or related to this Agreement or any documents ancillary hereto and any extensions, renewals or modifications hereof or thereof.

(Id. at 24). Defendants also submit as documentary evidence ILA Delaware's "Operating Agreement" (Sheppard Aff., Ex. P). Section 9.1 of the Operating Agreement, entitled "No Third Party Rights," provides that the Operating Agreement was:

entered into among the Company and the Members for the exclusive benefit of the Company, the Members, and their successors and assigns. This Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under this Agreement or any agreement between the Company and the Members with respect to any Capital Contribution or otherwise.

(Id. at 25).

Defendants submit no legal authority in support of their argument that they cannot be held jointly and severally liable. As discussed, supra, plaintiffs sufficiently pleaded alter ego liability. Further, ILA Delaware is not challenging in the instant motion the sufficiency of the allegations set forth for

the claims of breach of contract and violations of the Debtor and Creditor Laws.

Accordingly, that branch of defendants' motion seeking dismissal of plaintiffs' claims based on joint and several liability is denied.

Defendants also argue that plaintiffs' claim for breach of contract fails because the proper remedy for any alleged breach would be against ILA Delaware, not the individual defendants (Defendants' Reply Brief, at 11-12. Given this argument is raised for the first time in defendants' reply papers, and plaintiffs had no opportunity to respond to it, it was not considered (Leeds v Lenox Hill Hosp., 6 AD3d 232, 233-34 [1st Dept 2004])).

2. Fraud (eleventh cause of action)

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]). A fraud claim must be dismissed where "there is no evidence that the individual defendants made the alleged representation with a then-present intent not to carry out the supposed promise, or a then-present intent to deceive plaintiff" (Waterfront NY Realty Corp. v Weber, 281 AD2d

180, 181 [1st Dept 2001] [internal citation omitted]). A fraud claim will also be dismissed where it is duplicative of a breach of contract claim (Pollak v Moore, 85 AD3d 578, 579 [1st Dept 2011]).

The amended complaint alleges that ILA Delaware and its members fraudulently induced the Sandlers to use \$450,000 of their sale proceeds to securitize ILA Delaware's operating and acquisition loans (Amended Complaint, ¶ 193). Sheppard, on behalf of ILA Delaware, allegedly represented to the Sandlers that ILA Delaware would hold these funds for a maximum of four years (Id., ¶ 194). Sheppard allegedly renegotiated the acquisition loan after three years, cutting future monthly payments in half and doubling the remaining loan term from one year to two years (Id., ¶ 195). According to plaintiffs, ILA Delaware improperly allowed the Sandlers' collateral to be used to securitize ILA Delaware's \$2 million revolving operating loan in addition to their \$4 million acquisition loan, and ILA Delaware subsequently transferred the collateral to ILA New York without plaintiffs' consent (Id., ¶¶ 196-197). Plaintiffs claim that the \$450,000 plus interest was never returned to the them (Id., ¶ 198).

These allegations, however, do not allege that the Sandlers relied upon defendants' representations in entering into the APA.

Nor do plaintiffs allege that any of the purported misrepresentations were made with a present intent to deceive them. In essence, the fraud claim merely restates plaintiffs' first cause of action for breach of contract, which is likewise based upon ILA Delaware improperly using the Sandler's collateral, secretly renegotiating the acquisition loan terms, and improperly transferring ILA Delaware's assets to ILA New York, which made repayment to the Sandler's impossible (Amended Complaint, ¶¶ 116-121). As such, plaintiffs fail to state a cause of action for fraud, and defendants' motion to dismiss this claim is granted.

3. Tortious Interference with Contract (third cause of action)

Tortious interference with contractual relations "consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]). Plaintiffs must allege "that the contract would not have been breached but for the defendant's conduct" (Lana & Samer v Goldfine, 7 AD3d 300, 301 [1st Dept 2004]).

Here, the amended complaint alleges the existence of the APA and Consulting Agreements, that ILA Delaware knew of these

contracts, and that ILA Delaware's members intentionally procured ILA Delaware's breach of the contracts by conveying its assets to ILA New York for \$1.00 thereby rendering performance impossible (Amended Complaint, ¶¶ 141-143). Plaintiffs also allege that the sole purpose of this transaction was to cause ILA Delaware to breach its contracts with plaintiffs and to enrich the members of ILA Delaware (Id., ¶ 144).

The amended complaint, however, also alleges that ILA Delaware was "severely undercapitalized" (id., ¶ 42), and that ILA Delaware had to make principal and interest payments on the acquisition loan of \$4,000,000, interest payments on an additional revolving operating loan of \$2,000,000 plus monthly payments per the seven year Consulting Agreement" (Id., ¶ 43). ILA Delaware allegedly "had a difficult time servicing this debt and running its operations," and its "inventory began to run short and back-orders accumulated" (Id., ¶¶ 44-45). Plaintiffs claim that, "[d]ue to the shortfall, Schneidmill ... requested additional capital from the members of ILA Delaware," who "reluctantly provided an additional \$715,001" (Id., ¶¶ 46-47).

Based on the foregoing, plaintiffs have not alleged that the APA and Consulting Agreements would not have been breached but for defendants' conduct. Rather, the amended complaint expressly alleges that ILA Delaware suffered financially and could not

service its debt and operations. Plaintiffs fail to allege that "defendants were motivated 'solely' by actual malice," rather than by "economic interest" caused by ILA Delaware's financial difficulties (Barrett v Toroyan, 39 AD3d 366, 366 [1st Dept 2007]). The cause of action fails against ILA Delaware for the additional reason that "asserting that a defendant tortiously interfered with its own contract quite clearly does not state a legally sufficient cause of action" (Ahead Realty LLC v India House, Inc., 92 AD3d 424, 425 [1st Dept 2012] [internal quotation marks and citation omitted]).

Accordingly, that branch of defendants' motion to dismiss the third cause of action for tortious interference with contract is granted, and it is dismissed.

**4. Breach of the Covenant of Good Faith and Fair Dealing
(twelfth cause of action)**

"For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce, 265 AD2d 513, 514 [2d Dept 1999]). A claim for breach of the implied covenant of good faith and fair dealing will be dismissed as redundant where it "is intrinsically tied to the damages allegedly resulting from a breach of the

contract" (Canstar v Jones Constr. Co., 212 AD2d 452, 453 [1st Dept 1995]).

The twelfth cause of action alleges that defendants breached the implied covenant of good faith and fair dealing contained in both the APA and the Consulting Agreement by: (1) pledging plaintiffs' \$450,000 as collateral for the \$4 million acquisition loan and a \$2 million revolving operating loan without informing plaintiffs; (2) entering secret negotiations to cut loan payments in half and double the remaining loan term; and (3) transferring this collateral to ILA New York without adequate consideration, without the knowledge and consent of the Sandlers, and without using best efforts to fulfill contractual obligations (Amended Complaint, ¶¶ 202-206). Plaintiffs further allege that ILA Delaware "violated the portion of Paragraph 6.4 of the [APA] which provided that the Buyer 'shall have used its best efforts in good faith to fulfill its obligations in connection with the financing'" (Id., ¶ 207).

A comparison of these allegations, supra, with plaintiffs' first cause of action for breach of contract demonstrates that this cause of action is based upon some overlapping allegations concerning the alleged breaches. Thus, it is not conclusively duplicative of the breach of contract claim. As such, at this

pre-answer juncture, this claim may proceed as an alternative theory of recovery.

Accordingly, that branch of defendants' motion to dismiss this claim is denied.

5. Conversion (fifth cause of action)

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 [2006]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (Id. at 50 [internal citations omitted]). "[T]he plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights" (Independence Discount Corp. v Bressner, 47 AD2d 756, 757 [2d Dept 1975]).

Here, the amended complaint alleges that under the APA the Sandlers entrusted ILA Delaware with \$450,000, ILA New York was not a party to the APA, and ILA New York and the members of ILA

Delaware converted the Sandlers' funds by conveying them to ILA New York (Amended Complaint, ¶¶ 154-156). ILA Delaware members allegedly retained control and ownership of ILA New York under the Side Agreement, and they, along with ILA New York, refused to return the \$450,000 despite the Sandlers' demands (Id., ¶¶ 158-160). The amended complaint, however, repeatedly alleges that ILA Delaware "doubled the existing loan term," implicitly acknowledging that the loan had not been paid off, and that, therefore, plaintiffs had no possessory interest in the collateral (Id., ¶¶ 120, 195, 205). Plaintiffs also concede that the \$450,000 in collateral was held by the bank, not by the defendants, thereby undermining plaintiffs' allegation that the funds were "entrusted to ILA Delaware" (Id., ¶ 154; see also Id., ¶ 40 [the Sandlers' \$450,000 was "held as collateral by ILA Delaware's lender"], ¶ 116 [\$450,000 in cash collateral was "required by Buyer's lender"], and ¶¶ 120, 195, 205).

Accordingly, plaintiffs inconsistent allegations undermine their conversion claim. The conversion claim is also subject to dismissal on the ground that it is "duplicative of the breach of contract cause of action," as it merely seeks the return of the Sandlers' \$450,000 (Retty Fin. v Morgan Stanley Dean Witter & Co., 293 AD2d 341, 341 [1st Dept 2002]). As such, that branch of

defendants' motion to this claim is granted, and the conversion cause of action is dismissed.

6. Conspiracy (fourth cause of action)

A claim of civil conspiracy requires a showing of the underlying, primary tort, "plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (Abacus Fed. Sav. Bank v Lim, 75 AD3d 472, 474 [1st Dept 2010] [citation omitted]).

Significantly, "[t]here is no tort of civil conspiracy in and of itself absent the pleading of wrongful acts constituting independent torts" (Riverbank Realty Co. v Koffman, 179 AD2d 542, 543 [1st Dept 1992]).

Plaintiffs' conspiracy cause of action alleges the existence of an agreement among "the members of ILA Delaware to interfere with Plaintiffs' contractual rights with ILA Delaware and enrich themselves" (Amended Complaint, ¶ 149). The conveyance of all of ILA Delaware's assets to ILA New York allegedly constituted an "overt act" furthering the agreement" (Id., ¶ 150). This claim fails against ILA Delaware, because "one does not have a cause of action against another contracting party for conspiracy to breach the agreement between them" (Bereswill v Yablon, 6 NY2d 301, 306

(1959). Moreover, as the underlying tort claims -- tortious interference with contract, conversion, and fraud -- are dismissed, the conspiracy claim is likewise dismissed (Abacus Fed. Sav. Bank, 75 AD3d at 474, supra; Riverbank Realty Co., 179 AD2d at 543, supra).

B. Plaintiffs' Cross Motion

Plaintiffs cross-move for an order setting forth an expedited schedule for completing discovery within nine months and granting plaintiffs a special trial preference, arguing that Marvin Sandler is 82 years old and has a serious heart condition. The record demonstrates that the parties are actively engaged in discovery (NYSCEF Doc. No. 237). As such, that branch of the cross motion for expedited discovery is denied with leave to renew at the status conference. That branch of plaintiffs' cross motion for special trial preference is also denied without prejudice to renew at the status conference.

Accordingly, it is hereby

ORDERED that branch of defendants' motion to dismiss is granted to the extent that the third, fourth, fifth, and eleventh causes of action of the amended complaint are dismissed, and that branch of the motion as to the remaining causes of action is denied; and it is further

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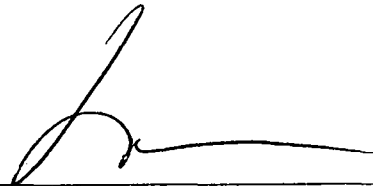
ORDERED that plaintiffs' cross motion is denied; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 48, Room 242, 60 Centre Street, on June 2, 2016, at 11:30 a.m.

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

Dated: 5/6/16



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

JEFFREY K. OING
J.S.C.