Benjamin v Yeroushalmi
2016 NY Slip Op 33065(U)
May 3, 2016
Supreme Court, Nassau County
Docket Number: 003563-14
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

JIM BENJAMIN and BEHROUZ BENYAMINPOUR,

Plaintiffs,

-against-

MOTION SEQUENCES: 02,03
INDEX NO.:003563-14

MOUSSA YEROUSHALMI, FARZANEH YEROUSHALMI, DAVID POUR and DAVID POUR & ASSOCIATES, LLP,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

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Defendants David Pour and David Pour & Associates, LLP move for an order pursuant to CPLR 3211(a)(1), (5) and (7), and CPLR 3016(b) dismissing the amended complaint insofar as asserted against them (Motion Sequence No. 2).

Defendants Moussa Yeroushalmi and Farzaneh Yeroushalmi move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the amended complaint (Motion Sequence No. 3).

Introduction

Plaintiff Jim Benjamin ("Jim") is a real estate developer and investor. Plaintiff Behrouz Benyaminpour ("Bruce") is Jim's brother and an investment partner with Jim (Bruce and Jim are collectively referred to as the "Benjamins").

Defendant Moussa Yeroushalmi ("Moussa") is also a real estate developer and investor. His wife, Farzaneh Yeroushalmi ("Farzaneh"), is his investment partner and an attorney (Moussa and Farzaneh are collectively referred to as the "Yeroushalmis").

This action arises from a series of transactions that the Benjamins and Yeroushalmis entered into in 2007, three of which concerned properties located in Mineola, Brooklyn, and Syracuse, and a fourth which concerned an investment in a beverage company.

The Mineola Property

The Benjamins allege that on April 18, 2007, they entered into a joint venture agreement with the Yeroushalmi Defendants in connection with property located at 242 and 250 Old Country Road in Mineola, New York (the "Mineola Property"). This property was being offered for sale by the Metropolitan Transportation Authority ("MTA") through a closed bid procedure . Pursuant to a joint venture agreement, the parties agreed that profits earned in connection with the Mineola Property would be divided as follows: 30% to Jim Benjamin; 65% to Moussa Yeroushalmi; and 5% to non-party Morad Yeroushalmi.

Following the formation of the Mineola joint venture, the Benjamins and the Yeroushalmis submitted a bid at auction to purchase the Mineola Property for $12,222,000. Having won the bid, the Benjamins and the Yeroushalmis subsequently agreed to assign their purchase rights of the Mineola Property to Robert Kahen ("Kahen") (the brother in law of Defendant David Pour) for $13,500,000 with the $1,278,000 difference between the purchase price from the MTA ($12,222,000) and the price of the assignment to Kahen ($13,500,000) to be distributed as profits to the parties according to their joint venture agreement.

On July 26, 2013, Kahen closed on the sale of the Mineola Property with the MTA and "paid or otherwise credited the Yeroushalmis with the $1,278,000". According to the Benjamins, however, the Yeroushalmis failed to distribute the Benjamins' share of profits pursuant to the Mineola joint venture agreement (Amended Complaint at ¶¶ 13-21).

Syracuse Resort Development, Inc.

On February 11, 2008, the Benjamins and the Yeroushalmis formed Syracuse Resort Development Incorporated ("SRDI") with the Benjamins and the Yeroushalmis each having a 50% interest. The Benjamins allege that they, on behalf of SRDI, entered into an agreement to purchase 800 South Wilbur Avenue, Syracuse, New York for $2,222,000 (the "Syracuse Transaction"), and that, in order to consummate the Syracuse Transaction, and with the assistance of Pour, SRDI obtained a private loan in the amount of $850,000. The Benjamins and the Yeroushalmis agreed that they would each invest $550,000 of their own funds to make up the difference.

The Yeroushalmis, however, were unable to obtain the necessary funds to close the Syracuse Transaction. Thus, according to the complaint, the Benjamins secured $550,000 in private loans from investors in order to close the transaction and the Yeroushalmis agreed to reimburse them for these funds upon closing. After the Syracuse Transaction closed, the Yeroushalmis repaid only $100,000 of the $550,000 loan.

The Syracuse Transaction was a "colossal failure" causing SRDI to file bankruptcy and liquidate its assets.

Hip Pop Beverages, LLC

The Benjamins allege that in July of 2008, Moussa presented to them a business proposal in connection with the creation of a "high quality beverage" to target the "hip hop" culture and to ultimately take the company public (Amended Complaint at ¶ 35).

According to the complaint, Moussa made "specific oral misrepresentations of material fact" that he used to induce the Benjamins to invest $75,000 in Hip Pop Beverages, LLC ("Hip Hop"), including that: Moussa's "business partner" had connections with various clubs and venues in which the beverage could be promoted in order to develop a following among the targeted consumer group; Moussa was negotiating competing offers from Coca Cola and Pepsi to buy Hip Hop for $500,000,000; and a nationally known rap artist known as "50 Cent" had agreed to promote Hip Hop (Amended Complaint at ¶¶ 36-39).

The Benjamins claim that, at the time Moussa made the misrepresentations, he was aware of the extensive criminal investigation surrounding his business partner, whose participation was crucial to the marketing efforts, and who was shortly thereafter sentenced to prison. The Benjamins further allege that Moussa had previously been sued by the Securities and Exchange Commission and is barred from participating in the securities industry, a fact which they claim the Yeroushalmis concealed from them.

The Albemarle Property

On April 18, 2007, Moussa and Jim entered into a joint venture agreement for the purchase and development of 2415 and 2417 Albemarle Road, Brooklyn, New York (the "Albemarle Property"). The following week, A1 Universal Construction Realty LLC ("A1 Universal"), an entity owned by Moussa, entered into a contract of sale with Melamed Construction Corp. ("Melamed") (the contract vendee for the Albemarle Proerty) to purchase the property for $1,200,000, with a $60,000 down payment[1] and the balance of $1,140,000 due at closing.

According to the complaint, pursuant to a separate agreement with the Yeroushalmis, Defendant Pour, who was also legal counsel on the transaction, was to receive a $150,000 fee for effectuating an immediate "flip" sale of the contract with Melamed to Kahen for $2 million.[2] At that time, Kahen agreed to pay the $2 million to fund the purchase and development of the Albemarle Property, $1 million of which was a loan to the Albemarle joint venture with 8% interest. The Benjamins also allege that the parties to the Albemarle joint venture agreed that upon the sale of the Albemarle Property to a third party, the joint venture would be entitled to recover its closing costs of $38,536.93 and Kahen would receive back his $2 million investment, along with any accrued interest on the $1 million loan, and any profits would be split 50% to the Albemarle joint venture and 50% to Kahen.

On September 27, 2007, the initial sale of the Albemarle Property closed, and a 50% interest in the Albemarle Property was transferred to A1 Universal and the remaining 50% interest to Albe Associates, LLC ("Albe Associates"), which was an entity owned by Kahen.[3]

On October 22, 2008, AI Universal transferred its 50% interest in the Albemarle Property to "2415 Albemarle Road LLC" ("Albemarle LLC"), a Nevada limited liability company established on May 22, 2008 and whose sole members were Bruce Benjamin and and Farzaneh Yeroushalmi. As of that date, Albemarle LLC and Albe Associates each owned an undivided 50% interest in the Albemarle Property.

By letter dated March 24, 2013, Kahen requested that Moussa sell the Albemarle Property

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[1] The Benjamins and Moussa each contributed $30,000 towards the $60,000 down payment.

[2] Pour received $10,000 as partial payment of the $150,000. The $140,000 balance was to be paid when the Albemarle Property was sold to a third party.

[3] The Benjamins allege that Kahen paid the balance of the purchase price to Melamed and $791,463.07 to the Albemarle Joint Venture (with Moussa and Jim, each a party to the Albemarle Joint Venture, receiving $395,732).

and that the accrued interest on his $1 million loan be brought current.

The Benjamins further allege that on March 6, 2014, Moussa fraudulently filed papers in Nevada to reinstate Albemarle LLC - which had lapsed due to Farzaneh's failure "to pay the necessary taxes and fees in Nevada." According to the complaint, in Albemarle LLC's reinstatement application, Moussa "fraudulently misrepresented that he was the sole Managing Member, notwithstanding the fact that the Articles of Incorporation listed the managing members as [Bruce Benjamin and Farzaneh Yeroushalmi]". Moussa thereafter directed Adam Lipton CPA to list Jim (rather than Bruce), on the Albemarle LLC tax returns and issued a K-1 to Jim, contrary to all of the K-1s issued since the inception of Albemarle LLC and notwithstanding the fact that there was never any transfer of Bruce's membership interest to Jim. Plaintiffs allege that four days later, on March 10, 2014, Moussa (on behalf of Albemarle LLC), with Pour acting as the attorney, and Kahen (on behalf of Albe) sold the Albemarle Property to Hello Albemarle LLC, for $2.3 million. Moussa did not distribute any of the proceeds of the sale of the Albemarle Property to the Benjamins.

The Amended Complaint

Thereafter, the Benjamins commenced the instant action asserting the following 12 causes of action against the Pour and Yeroushalmi Defendants: breach of the Mineola joint venture agreement; breach of contract regarding SRDI; indemnification; fraud in the inducement; fraud with respect to the Albemarle Property; conversion with respect to Bruce's membership interest in Albemarle LLC; breach of fiduciary duty; quantum meruit; accounting; declaratory judgment as to Bruce's ownership in Albemarle LLC; malpractice; and breach of fiduciary duty.

The Pour Defendants and the Yeroushalmi Defendants separately move for an order dismissing the complaint insofar as asserted against them.

For the reasons that follow, the motion of the Pour Defendants is denied and the motion of the Yeroushalmi Defendants is granted in part and denied in part.

The Court's Determination

On a motion to dismiss pursuant to CPLR 3211, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*Simkin v Blank*, 19 NY3d 46, 52 [2012]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the

[redacted]cumentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Basalel v Youni Gems Corporation*, 95 AD3d 914, 915 [2d Dept 2012]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*Fontanetta v John Doe 1*, 73 AD3d 78, 84–86 [2d Dept 2010]). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" within the intendment of CPLR 3211(a)(1) (*Id.* at 85-87; *Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]).

When a party moves under CPLR 3211(a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts (*DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236 [2d Dept 1984]). Thus, bare legal conclusions and factual allegations "flatly contradicted by documentary evidence in the record are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing, could withstand a motion to dismiss for failure to state a cause of action'" (*Deutsche Bank National Trust Co. v Sinclair*, 68 AD3d 914, 915 [2d Dept 2009] *quoting Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2d Dept 2007]).

The Pour Defendants' Motion

The complaint asserts two causes of action against the Pour Defendants, to wit, the fifth cause of action for fraud and the eleventh cause of action for legal malpractice, both of which concern only the Albemarle Property.

Legal Malpractice (Eleventh Cause of Action)

To successfully plead a cause of action for legal malpractice, a plaintiff must allege that his attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that this failure proximately caused the plaintiff to sustain actual and ascertainable damages (*Siracusa v Sager*, 105 AD3d 937 [2d Dept 2013]; *Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812 [2d Dept 2013]).

Preliminarily, to "establish a cause of action alleging legal malpractice, a plaintiff must prove, *inter alia*, the existence of an attorney-client relationship" (*Nelson v Roth*, 69 AD3d 912, 913 [2d Dept 2010]; *Terio v Spodek*, 63 AD3d 719, 721 [2d Dept 2009]; *Velasquez v Katz*, 42

AD3d 566, 567 [2d Dept 2007]). Thus, "[w]hile privity of contract is generally necessary to state a cause of action for attorney malpractice, liability is extended to third parties, not in privity, for harm caused by professional negligence in the presence of fraud, collusion, malicious acts or other special circumstances" (*Good Old Days Tavern v Zwirn*, 259 AD2d 300, 300 [1st Dept 1999]; *Nelson v Roth*, 69 AD3d 912, 913 [2d Dept 2010]; *Moran v Hurst*, 32 AD3d 909, 910-11 [2d Dept 2006]).

The alleged malpractice, as set forth in the complaint, is that the "the Pour Defendants aided and abetted the Yeroushalmis' sale of the [Albemarle] Property without [Bruce Benjamin's] consent even though the Pour Defendants knew or should have known that [Bruce Benjamin] was an owner of a 50% interest in Albemarle and did not consent" (Amended Complaint at ¶ 123).[4] The court concludes that the facts alleged state a claim for legal malpractice.

The Pour Defendants argue that the Benjamins were, at most, non-managing members or minority owners of entities represented by the Pour Defendants, such that there was no privity between the Pour Defendants and the Benjamins which would give rise to an attorney-client relationship, the absence of which warrants dismissal of the claim for legal malpractice.

The complaint does not plead an attorney-client relationship between the Pour Defendants and the Benjamins. However, as stated above, privity is not required where, as here, the harm allegedly caused by the attorney was the result of fraud, collusion, malicious acts or other special circumstances (*Ginsburg Dev. Cos. LLC v Carbone*, 85 AD3d 1110, 1111 [2d Dept 2011]). The Plaintiffs' allegations that Pour aided and abetted Yeroushalmis' sale of the Albemarle Property without the consent of Bruce Benjamin, knowing that Bruce was an owner of a 50% interest in Albemarle LLC,[5] sufficiently forms a predicate for "special circumstances" such that the Benjamins, despite not having actual privity with the Pour Defendants, can nevertheless maintain a claim for malpractice at this juncture.

Fraud (Fifth Cause of Action)

A plaintiff asserting a cause of action for fraud must plead the following elements: 1) a material misrepresentation or a material omission of fact which was false and which the defendant knew to be false; 2) made for the purpose of inducing the plaintiff to rely upon it; 3)

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[4] According to the Plaintiffs, Pour, despite being fully aware that Bruce was an actual member of Albemarle, LLC, moved forward with the transaction in the absence of any documents transferring Bruce's interest to Moussa.

[5] Albemarle LLC and Albe Associates each owned one half of the Albemarle Property.

the plaintiff's justifiable reliance on the misrepresentation or material omission; and 4) injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996]; *Northeast Steel Prods., Inc. v John Little Designs, Inc.*, 80 AD3d 585, 585 [2d Dept 2011]).

The Benjamins assert in their fifth cause of action that: as attorneys for the Albemarle Property, Pour had a fiduciary duty to Bruce Benjamin, a 50% member of Albemarle LLC; Pour and the Yeroushalmis had a duty to disclose to Bruce the sale of the Albemarle Property; Pour and the Yeroushalmis "intentionally created and relied upon documents, which were false in order to conceal [Bruce Benjamin's] interest in Albemarle from the purchasers of the Albemarle Property";[6] and, by reason of the foregoing misrepresentations and fraudulent documents, they have been damaged (Amended Complaint at ¶¶ 90-96).

In support of dismissal, the Pour Defendants argue that the complaint fails to set forth allegations of fraud with adequate specificity, and, moreover, fails to set forth a single fact which would support a cause of action for fraud as to the Pour Defendants.

In opposition, the Benjamins argue that the Pour Defendants are liable for aiding and abetting the Yeroushalmis' fraud, rather than being liable for their own fraud, as alleged in the amended complaint.

Liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud (*Danna v Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286 [1987]). Given this principle, coupled with the fact that CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]), the complaint at bar, given its "most favorable intendment" and read as a whole, describes a scheme wherein the Pour Defendants, in concert with the Yeroushalmis, took advantage of an alleged fiduciary relationship in order to conceal Bruce Benjamin's interest in the Albemarle Property from those who purchased the Property (*see CPC Int'l Inc. v McKesson Corp.*, 70 NY2d at 286, *supra*; *Kuo Feng Corp. v Ma*, 248 AD2d 168, 169 [1st Dept 1998]). Whether Pour's work as attorney for the sale of the Albemarle Property was part of this scheme, as Plaintiffs allege, is a factual question which cannot be determined at the pleading stage.

Accordingly, a valid cause of action sounding in fraud is stated against the Pour

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[6] Insofar as also asserted against the Yeroushalmis, the Benjamins allege that the Yeroushalmis fraudulently induced the accountant to issue a 2013 K-1 to Jim Benjamin rather than Bruce Benjamin in furtherance of the fraudulent scheme (Amended Complaint at ¶ 95).

Defendants.[7]

The Yeroushalmi Defendants' Motion

The Yeroushalmi Defendants move for an order dismissing the first, fourth, fifth, sixth, seventh, eighth, tenth, and twelfth causes of action.

Breach of the Mineola Agreement (First Cause of Action)

In their first cause of action, the Plaintiffs allege that the Yeroushalmis breached the terms of the Mineola joint venture agreement by failing to pay the Benjamins the $383,400 due them as their share of profits when the Yeroushalmis assigned the right to purchase the Mineola Property to Kahen (Amended Verified Complaint at ¶¶ 76-78). According to the complaint, Moussa represented to Jim Benjamin that the pro rata share of the profits with respect to the Mineola Property "would be made when the transaction with the MTA closed" (Amended Complaint at ¶ 19). The closing between Kahen and the MTA closed on July 26, 2013 (Ex. "17" to Motion Seq. "2").

The elements of a cause of action to recover damages for breach of contract are: the existence of a contract; the plaintiff's performance under the contract; the defendant's breach of the contract; and resulting damages (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]).

In support of their motion, the Yeroushalmis submit that on July 2, 2008, the parties to the Mineola joint venture (Jim Benjamin, Moussa Yeroushalmi, and Morad Yeroushalmi) entered into a subsequent agreement with respect to "242 & 250 Old Country Road, Mineola, NY" which reads, in pertinent part, as follows:

> This agreement, made on July 2, 2008, *supersedes the previous agreement* made and signed on April 18, 2007, between Mr. Jim Benjamin . . . , Mr. Morad Yeroushalmi . . . and Mr. Moussa Yeroushalmi . . . , collectively were Partners for the purchase of the above referenced property.
>
> The Partners had a meeting at the above premises and following a discussion; the

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[7] The Benjamins do not assert a fraud cause of action against the Pour Defendants with respect to the Mineola Property; rather, their fraud claim is predicated only on the Albemarle Property. As such, the Pour Defendants' argument in their motion papers that the legal malpractice claim as to the Mineola Property should be dismissed pursuant to CPLR 3211(a)(5) as barred in part by the Statute of Limitations is without merit inasmuch as no fraud clam is asserted against them with respect to the Mineola Property.

following decision has been made and agreed upon:

1. Mr. Jim Benjamin has decided not to continue with the Partnership. This decision is completely of Mr. Jim Benjamin's free will.

2. Mr. Jim Benjamin would receive the money he invested into this deal, if Moussa Yeroushalmi assumes control. The funds Mr. Jim Benjamin has invested to date, check #250 in the amount of $750.00, paid on April 24, 2008, should be returned to him.[8]

3. The Partnership would continue as follows:
   a. Morad Yeroushalmi - 5%
   b. Moussa Yeroushalmi - 95%.

Moussa Yeroushalmi, Jim Benjamin and Morad Yeroushalmi "agreed and accepted" and signed the above agreement (the "July 2008 Agreement") (Ex. "B" to Motion Seq. No. 3) (emphasis added).

In view of the July 2008 Agreement, the Yeroushalmis argue that: the Benjamins "cannot assert claims arising out of an agreement that essentially never existed"; "Jim Benjamin expressly and unequivocally relinquished any interest he had in the [Mineola joint venture]"; and, further, by "relinquishing his interest in the [Mineola joint venture], Jim has no right to assert any claims in connection with interests he once had in the [Mineola joint venture] (Memorandum of Law in Support at p 17; Memorandum of Law in Reply at p 3 [Motion Seq. No. 3]).

Notably, the Benjamins do not deny the existence or authenticity of the July 2008 Agreement. Because the July 2008 Agreement, by its express terms, superseded the original April 17, 2007 Mineola joint venture agreement, the law treats the former agreement as if it never existed and states that the only recourse the parties would have arise under the superseding contract (*Northville Industries Corp. v Ft. Neck Oil Terminals Corp.*, 100 AD2d 865, 867 [2d Dept 1984]). Accordingly, by entering into the July 2008 Agreement, a novation occurred by which the prior April 17, 2007 joint venture agreement, and any interests Jim may have had pursuant to that agreement, were extinguished (*see Citigifts, Inc. v Pechnik*, 67 NY2d 774 1986] [because there was a novation, which extinguished the old agreement, plaintiffs were relegated to an action for breach of the new agreement]).

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[8] The Defendants argue that, in the July 2 Agreement, Jim Benjamin purportedly acknowledges that the only amount owed to him under the Mineola joint venture agreement was a payment of $750 which was made shortly thereafter.

In opposition, the Benjamins assert that they do "not seek any portion of profits from the joint venture going forward, only the profit that was already realized by the joint venture by virtue of the 'flip'" to Kahen (Memorandum of Law in Opposition at p 3 [Motion Seq. No. 3]). This argument does not warrant a different conclusion inasmuch as Plaintiffs' claim to their share of the "profits", which they allege arise under the April 17, 2007 Mineola joint venture agreement, fails by virtue of the fact that Jim Benjamin relinquished the interests he once had in the Mineola joint venture, including any entitlement to profits in connection with it.

Given the July 2008 Agreement, the branch of the Yeroushalmi Defendants' motion to dismiss the first cause of action for breach of the Mineola joint venture agreement is granted inasmuch as the documentary evidence herein, the authenticity of which is not disputed, utterly refutes the Benjamins' factual allegations that the Yeroushalmis owe them profits with respect to the Mineola Property (*see Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d at 326-27, *supra*; *Fontanetta v John Doe 1*, 73 AD3d at 86, *supra*).

Fraud in the Inducement Regarding Hip Hop Beverages
(Fourth Cause of Action)

In their fourth cause of action, which is only asserted against Moussa Yeroushalmi, the Benjamins allege that Moussa made material misrepresentations of fact in order to induce them to invest funds in Hip Hop and that they justifiably relied on Moussa's material misrepresentations by investing $75,000 (Verified Complaint at ¶¶ 86-89).[9] The misrepresentations allegedly made by Moussa included the following: 1) Moussa's "business partner" had connections with various "clubs and venues" in which the product could be promoted in order to develop a following among the targeted consumer group; 2) Moussa represented that he was negotiating "competing offers from Coca-Cola and Pepsi" to buy Hip Hop for $500 million; and 3) Moussa represented that a famous musician agreed to promote Hip Hop.

In order to assert a claim for fraud in the inducement, a plaintiff must establish that the defendant made material misrepresentations that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and plaintiff was damaged as a result of relying upon these misrepresentations (*Leno v DePasquale*, 18 AD3d 514 [2d Dept 2005]; *Stein v Douka*, 98 AD3d 1024, 1025 [2d Dept 2012]).

"[W]here the circumstances are such as to suggest to a person of ordinary intelligence the

[9] For a more detailed discussion of the facts surrounding Hip Hop Beverages, *see* discussion *supra* at pp 4-5).

probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*Prestandrea v Stein*, 262 AD2d 621, 622 [2d Dept 1999] *citing Higgins v Crouse*, 147 NY 411, 416 [1895]). That is, the party to whom the false statement has been made may not rely thereon if the truth of that statement can be verified through the exercise of ordinary intelligence or reasonable diligence (*Huron Street Realty Corp. v Lorenzo*, 19 AD3d 450 [2d Dept 2005]; *Curran, Cooney, Penney, Inc. v Young & Koomans, Inc.*, 183 AD2d 742 [2d Dept 1992]). Thus, a party who fails to exercise reasonable diligence cannot recover when the actual nature of the transaction could have been ascertained through the exercise of ordinary care or intelligence and the party failed to do so (*P. Chimento Co, Inc. v Banco Popular de Puerto Rico*, 208 AD2d 385 [1st Dept 1994]).

Moreover, "[w]here sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance" (*Siemens Westinghouse Power Corp. v Dick Corp.*, 299 FSupp2d 242, 247 [SDNY 2004] *quoting Grumman Allied Industries, Inc. v Rohr Industries, Inc.*, 748 F2d 729, 737 [2d Cir 1984]).

Given these principles, the court concludes that the Benjamins have failed to sufficiently plead that they "justifiably" relied upon the material misrepresentations set forth in the complaint in order to induce the Benjamins to invest $75,000 in Hip Hop.

Notwithstanding the fact that, by their own allegations, Jim Benjamin is a self-proclaimed "real estate developer and investor" and the Benjamins have a reputation for "successful investments" (Amended Complaint at ¶¶ 8, 9), the Benjamins nevertheless are, in effect, claiming that they blindly relied upon certain vague "oral misrepresentations" made by Moussa, without conducting any independent verification of these statements, and then invested $75,000 based on the oral misrepresentations. In this regard, the Benjamins do not allege that they conducted any due diligence before investing their funds which, in this court's view, undermines any argument that the reliance on the misrepresentations were reasonable or justified.

With respect to the Benjamins' claim that Moussa failed to disclose that he was barred from participating in the securities industry, the court notes that, insofar as Hip Hop is concerned, the complaint fails to plead the existence of a confidential or fiduciary relationship, or facts from which such a relationship may be inferred, that would give rise to a duty to disclose (*see Sitar v Sitar*, 61 AD3d 739 [2d Dept 2009]). Notably, the "prior business dealings and friendship" between Moussa and the Benjamins is insufficient (Amended Complaint at ¶ 43).

Accordingly, the branch of the Yeroushalmi Defendants' motion to dismiss the fourth cause of action for failure to state a cause of action for fraud in the inducement is granted.

Fraud with Respect to the Albemarle Sale
(Fifth Cause of Action)

In their fifth cause of action, the Benjamins allege that: the Yeroushalmis, acting as alter egos of each other, had a fiduciary duty to Bruce Benjamin as Farzaneh Yeroushalmi's co-member of Albemarle LLC; the Yeroushalmis had a duty to disclose to Bruce Benjamin the sale of the Albemarle Property (half of which was owned by the Albemarle LLC); they intentionally created and relied upon documents which were false in order to conceal Bruce Benjamin's interest in the Albemarle LLC from the purchasers of the Albemarle Property[10]; and, they fraudulently induced Adam Lipton (the new accountant for Moussa) to issue a 2013 K-1 to Jim Benjamin rather than Bruce Benjamin in furtherance of the fraudulent scheme (Amended Complaint at ¶¶ 91-96).[11]

The Yeroushalmis argue that the fifth cause of action, insofar as asserted against them, should be dismissed based upon documentary evidence consisting of emails annexed to the Yeroushalmis' motion papers, which, according to the Yeroushalmis, confirm that prior to the sale of the Albemarle Property, the Benjamins relinquished any interest they had in both the Albemarle joint venture and in the Albemarle Property, and, as such, any claims by the Benjamins with respect to the Albemarle Property are without merit.

In an e-mail dated August 7, 2012, Jim Benjamin wrote to Moussa stating that he could not "afford to hold nor to stay as part of this property [Albemarle] due to financial situation, with most of other properties that I own or involved" and that he would like to "release [himself] with any obligation that is fort coming [sic] on this property [Albemarle]". Moussa replied confirming Jim Benjamin's statement that Jim was "out of the deal in 2415 Albemarle Ave, Brooklyn" (Ex. "C" to Motion Seq. No. 3]).

In another e-mail dated February 18, 2013, Jim Benjamin wrote to Moussa that he did "not wish to reinstate" the "2415 Albermarle Road LLC" (Ex. "D" to Motion Seq. No. 3).[12]

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[10] *See* discussion at p 5, *supra,* wherein Moussa Yeroushalmi filed papers which "fraudulently misrepresented that he was the sole Managing Member" of Albemarle, notwithstanding the fact that the Articles of Incorporation listed the managing members as Bruce Benjamin and Farzaneh Yeroushalmi.

[11] Bruce Benjamin had received K-1s with respect to the Albemarle Property from 2009 through 2012 (Amended Complaint at ¶ 74; Bruce Benjamin Affidavit in Opposition at ¶ 7 [Motion eq. No. 3]).

[12] Bruce Benjamin states in his affidavit that he was unaware that the LLC has lapsed and that Moussa had applied for reinstatement listing himself as the sole member on the reinstatement application (Bruce Benjamin Affidavit in Opposition at ¶ 11 [Motion Seq. No. 3).

And on May 3, 2013, Jim Benjamin executed an agreement prepared on an email printout of the same date in which he agreed that the "deal" with respect to "2415 Albermarle" was "concluded" (Ex. "E" to Motion Seq. No. 3). This agreement was signed by Moussa and Jim.

Notwithstanding the fact that each of these three e-mails was authored or signed by Jim Benjamin, the Yeroushalmis nevertheless argue that Jim Benjamin entered into the Albemarle joint venture on behalf of both himself and his brother Bruce (Amended Complaint at ¶ 45) and, thus, "Jim had the authority to act on Bruce's behalf" and "remove Bruce's interest in the Albemarle JV" (Defendants' Memorandum of Law in Further Support at p 8).

Inasmuch as the Articles of Organization of the Albemarle LLC, which was formed on May 22, 2008 - more than one year after the formation of the Albemarle joint venture agreement - list the sole members of the Albemarle LLC as Bruce Benjamin and Farzaneh Yeroushalmi (Amended Complaint ¶ 55), and irrespective of whether the above referenced three e-mails constitute documentary evidence (*see Cives Corporation v George A. Fuller Company, Inc.*, 97 AD3d 713 [2d Dept 2012]; *Zellner v Odyl, LLC*, 117 AD3d 1040 [2d Dept 2014]), the e-mails nevertheless do not utterly refute the Benjamins' allegations that Bruce relinquished his membership interest in the Albemarle LLC or that the Yeroushalmis engaged in fraud by concealing Bruce Benjamin's interest in the Albemarle LLC at the time they were selling the Albermarle Property to a third party (*see Kolchins v Evolution Markets, Inc.*, 128 AD3d 47 [1st Dept 2015]; *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept 2014]).

Moreover, Bruce Benjamin stated in his affidavit in opposition to the motion that he "never signed anything transferring [his] membership interests in Albemarle LLC to anyone, including [his] brother Jim nor did [he] intend to transfer [his] interest to anyone" (Bruce Benjamin Affidavit in Opposition at ¶ 9 [Motion Seq. No. 3]).

Accordingly, the branch of the motion seeking dismissal of the fifth cause of action is denied.

Conversion with respect to Bruce's Membership Interest in Albermarle LLC (Sixth Cause of Action)

In their sixth cause of action for conversion, the Benjamins allege that Bruce Benjamin was the owner of a 50% membership interest in Albemarle LLC and that Moussa Yeroushalmi, without authorization, converted Bruce's membership interest to his own use (Amended Complaint at ¶¶ 97-99).

In order to sustain a claim for conversion, a plaintiff must have a possessory right or

interest in the property and the defendant must exercise dominion over the property or interference with it in derogation of the plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]).

The Yeroushalmis argue as their sole basis for dismissal of the conversion claim that Jim, on behalf of himself and his brother Bruce, "relinquished any rights either of them had in Albermarle LLC", as evidenced by the e-mails dated February 18, 2013, August 7, 2012, and May 3, 2013 (Memorandum of Law in Support at p 23 [Motion Seq. No. 3]). Inasmuch as the court concludes that the e-mails do not conclusively establish that Bruce Benjamin relinquished his membership interest in Albemarle LLC, the conversion cause of action remains viable.

Breach of Fiduciary Duty,
(Seventh and Twelfth Causes of Action)

In their seventh cause of action, the Benjamins allege that as co-joint venturers, the Yeroushalmis owed the Benjamins a fiduciary duty and that in reliance on the Yeroushalmis' promises to share the profits of the various ventures, the Benjamins transferred funds and performed services for the benefit of the joint ventures, but that the Yeroushalmis kept the profits, unjustly enriching themselves in breach of their duty to the Benjamins (Amended Complaint at ¶¶ 100-104).

The elements of a cause of action to recover damages for breach of fiduciary duty are: 1) the existence of a fiduciary relationship; 2) misconduct by the defendant; and 3) damages directly caused by the defendant's misconduct (*Rut v Young Adult Institute, Inc.*, 74 AD3d 776 [2d Dept 2010]). While parties to a joint venture owe each other a duty of undivided loyalty (*A.G. Homes, LLC v Gerstein*, 52 AD3d 546, 548 [2d Dept 2008]; *Gover v Escudo Construction Corp.*, 288 AD2d 435 [2d Dept 2001]; *Meinhard v Salmon*, 249 NY 458 [1928]), the court nevertheless dismisses the seventh cause of action inasmuch as it has not been pleaded with the requisite particularity (CPLR 3016[b]).[13]

In their twelfth cause of action for breach of fiduciary duty, asserted only on behalf of Bruce Benjamin, the Benjamins assert that: Bruce holds a "license" wherein he must maintain certain professional standards, including credit standards; the Yeroushalmis' acts of fraud and failure to manage the joint ventures in accordance with reasonably acceptable business practices (including the failure to accurately account for Bruce's interests and timely issue and file accurate

[13] In addition, the seventh cause of action, to the extent it alleges that the Yeroushalmis breached their fiduciary duty with respect to the Mineola Property and Syracuse Project, those allegations are duplicative of the first and second causes of action in the amended complaint asserting claims for breach of contract concerning the Mineola Agreement and Syracuse Agreement, respectively.

tax returns and K-1s) has damaged Bruce Benjamin in his profession, depriving Bruce Benjamin of his ability to do business; and, Yeroushalmis' failure to correct the fraudulent and erroneous tax returns and K-1s in a timely fashion, or at all, has damaged Bruce Benjamin (Amended Complaint at ¶¶ 129-132).

The Benjamins have failed to allege sufficient specific facts as to how Bruce's alleged damages were attributable to the actions of the Yeroushalmi Defendants. The Plaintiffs' conclusory allegations of damage to Bruce's profession and the deprivation of Bruce's "ability to do business" are conclusory and insufficient (CPLR 3016[b]; *DeRaffele v 210-220-230 Owners Corp.*, 33 AD3d 752 [2d Dept 2006]).

Accordingly, the seventh and twelfth causes of action are dismissed.

Quantum Meruit (Eighth Cause of Action)

In the eighth cause of action, asserted on behalf of Jim Benjamin only, the Plaintiffs allege that, with respect to the various ventures, Jim Benjamin provided work, labor and services in connection with the proposed developments with the understanding that he and Bruce Benjamin would reap the benefits of the developed projects; and that the Yeroushalmis failed to pay the Benjamins their share of the profits of the ventures and therefore must compensate Jim Benjamin for the value of his services. Further, according to the complaint, the Yeroushalmis received the benefit of services provided by Jim Benjamin and are indebted to Jim in quantum meruit (Amended Complaint at ¶¶ 105-108).

In order to establish a claim in quantum meruit, a plaintiff must establish: the performance of the services in good faith; the acceptance of the services by the person to whom they are rendered; an expectation of compensation therefor; and the reasonable value of the services (*Candreva v Ultra Kote Applied Technology, Ltd.*, 44 AD3d 601 [2d Dept 2007]).

In support of dismissal, the Yeroushalmis argue that the Benjamins have failed to sufficiently plead a claim for quantum meruit, as the allegations are stated "in the most conclusory and unsubstantiated terms" (Memorandum of Law in Support at p 25 [Motion Seq. No. 3]).

While the averments in the complaint are directed at the "various ventures", the Benjamins argue in their motion papers that the quantum meruit claim is pled in the alternative to a recovery of the profits Jim Benjamin is due with respect to the Mineola Property (Memorandum of Law in Opposition at p 21 [Motion Seq. No. 3]).

In light of the liberal construction accorded the pleadings on a motion pursuant to CPLR

3211(a)(7), and reading the allegations of the complaint in their entirety, coupled with the limited argument made by the movants in favor of dismissal, the branch of the motion seeking dismissal of the eighth cause of action is denied

Declaratory Judgment as to Bruce Benjamin's Ownership in Albemarle (Tenth Cause of Action)

In their tenth cause of action seeking a declaration that Bruce Benjamin is a 50% member of Albemarle LLC, the Benjamins allege that pursuant to the May 22, 2008 Articles of Organization, Farzaneh Yeroushalmi and Bruce Benjamin were the sole members of Albemarle LLC and that for all the years prior to 2013, Bruce was designated on the K-1s filed with Albemarle's tax returns and issued to Bruce, as a 50% member of Albemarle LLC. The Benjamins further claim that Bruce did not sell, devise or otherwise transfer his membership interest to anyone, including his brother Jim or the Yeroushalmis and, having no adequate remedy at law, Bruce Benjamin is entitled to a declaration that he is a 50% member of Albemarle (Amended Complaint at ¶¶ 115-120).

In support of their motion, the Yeroushalmis sole argument in support of dismissal of the cause of action seeking declaratory relief is that "by e-mail dated February 18, 2013, Jim, on his own and Bruce's behalf, unequivocally relinquished any membership interest they had in the LLC" (Memorandum of Law at p 25 [Motion Seq. No. 3]).

Inasmuch as the court previously addressed this issue and found that the Yeroushalmis' documentary evidence did not utterly refute Plaintiffs' allegation that Bruce did not relinquish his 50% membership interest in Albemarle (*see* discussion *supra* at p 15), the court denies the branch of the Yeroushalmis' motion seeking dismissal of the tenth cause of action.

Conclusion

Based on the forgoing, it is hereby

Ordered the motion of the Defendants, David Pour and David Pour & Associates, LLP for an order pursuant to CPLR 3211(a)(1), (5) and (7), and CPLR 3016(b) dismissing the amended complaint insofar as asserted against them is denied (Motion Sequence No. 2); and it is further

Ordered that the motion of the Defendants, Moussa Yeroushalmi and Farzaneh Yeroushalmi for an order pursuant to CPLR 3211 (a)(1) and (7) dismissing the amended complaint insofar as asserted against them is denied except that the motion is granted to the extent that the first, fourth, seventh and twelfth causes of action are dismissed (Motion Sequence No. 3); and it is further

Ordered that the Defendants are directed to serve an answer to the amended complaint within 30 days of the date hereof.

This constitutes the decision and order of the court.

DATE: May 3, 2016

Hon. Vito M. DeStefano, J.S.C.

ENTERED
MAY 06 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE