SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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SLATTERY ADVISORS, INC.,

Plaintiff,

-against-

SEDONA PARTNERS, INC. and DAVID ITZKOWITZ,

Defendants.

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Index No. 653766/2015

DECISION & ORDER
Mot. Seq. 003

The following e-filed documents, listed by NYSCEF document number (Motion Seq. 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 89, 90, 91, 92, 93, 94, 95, 96, were read on this motion for summary judgment.

MELISSA A. CRANE, J.:

In this breach of contract action seeking declaratory relief and monetary damages, defendants Sedona Partners, Inc. (Sedona) and David Itzkowitz (Itzkowitz) move for summary judgment dismissing the complaint. Plaintiff Slattery Advisors, Inc. (Slattery or SAI) opposes and defendants reply. Both sides also submit additional papers, emails and correspondence.

BACKGROUND

The court first examines the various agreements the parties rely upon, in part or whole, to support their respective positions. A close reading of these agreements is necessary for the court's determination.

The Joint Venture Agreement and the Independent Contractor Agreements

By joint venture agreement (Agreement) (NYSCEF Doc. Nos. 40 and 54), Slattery and non-party Cranwell Advisors, Inc. (Cranwell or CAI), agreed to divide commissions for real estate brokerage services each provided to non-party Cushman & Wakefield Inc. (C & W) Both Slattery and Cranwell had separate independent contractor agreements with C & W, and C & W

(the "IC Agreements") (NYSCEF Doc. Nos. 48, 49 and 85). The Agreement referenced the IC Agreements "bearing even date herewith." The handwritten effective date of the Agreement was July 27, 2010, the typed date of March 26, 2007 having been crossed out. The Agreement identified SAI as a New York Corporation with principal offices located at 405 East 54th Street, New York, New York, and CAI as a New York Corporation located at 139 Wilmont Circle, Scarsdale, New York. The whereas clauses provided that "SAI employs John J. Slattery, Jr." and "CAI employs David Itzkowitz." In Article VI, SAI and CAI each represented that it is "duly formed, validly existing and in good standing under the laws of the State of New York." John J. Slattery signed the Agreement on SAI's behalf as its President. David Itzkowitz signed the Agreement on CAI's behalf.

By Modification to Joint Venture Agreement (Modification Agreement) (NYSCEF Doc. No. 41), Cranwell assigned, transferred and delegated to defendant Sedona all of its rights under the Agreement, with Slattery's consent (the Agreement and Modification Agreement are collectively the "Joint Venture Agreement"). The handwritten date of the Modification Agreement was July 27, 2010, the typed date of October 1, 2008 having been crossed-out. Both the Agreement and the Modification Agreement provided that they "shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives and permitted assigns."

Terms of the Joint Venture Agreement

The Joint Venture Agreement included provisions for: its term; compensation; a post-termination five-year period for compensation; reporting; duties; representations, warranties and covenants; a post-termination two year restrictive covenant and injunctive relief; the termination

procedure; its binding effect; and, a merger clause. It referenced, but did not incorporate, the terms of the IC Agreements, and did not provide for arbitration.

Article II of the Joint Venture Agreement, headed "Term," provided:

> "Unless sooner terminated in accordance herewith, the term of this Agreement (the 'Term') shall begin on the Effective Date and shall continue for so long as both IC Agreements, as may be amended and/or extended from time to time, remain in full force and effect. This agreement shall be valid and binding on the parties for the Term except as to obligations which survive the expiration of this agreement, which obligations shall remain in full force and effect in accordance with the terms hereof."

Article III, headed as "Compensation," provided that "[c]omissions earned by each party relative to performance of the C & W Services shall be divided between the parties upon receipt" in accordance with the "business initiated and brought in by or through" each party. The Joint Venture Agreement failed to define term "business initiated and brought in." The Agreement provided that:

> "a) Business initiated and brought in by or through SAI:
> SAI share = sixty (60%) per cent; CAI share = forty (40%) per cent.
>
> b) Business initiated and brought in by or through CAI:
> CIA share = sixty (60) per cent; SAI share = (40%) per cent.
>
> c) Business initiated and secured jointly by or through SAI and CAI-
> each party shall receive fifty (50%) per cent.
>
> d) Business initiated and provided by Cushman & Wakefield to SAI or CAI-
> each party shall receive fifty (50%) percent."

Article III further provided a five year tail: "For a period of five (5) years after the termination or expiration of this Agreement, each party and/or its heirs, successors or assigns as the case may be, shall be entitled to receive, as and when paid, the commission shares described in this paragraph with respect to any and all business falling within the scope." Additionally, Article III provided that: "On January 1 and July 1 of each year during which this agreement is in effect and at the termination or expiration hereof, each party shall provide to the other a complete

and accurate written report setting forth all then current business identifying client, nature of transaction, status and potential commission."

Under the heading of "Duties," Article IV provided that Slattery and CAI agreed "to devote their full time and use their diligent and good faith best efforts to fully, faithfully, effectively and timely perform the C & W Services when and as required under the IC Agreements, and, to the extent consistent with the requirements of the IC Agreements, using standards and practices that are generally used and recognized in the industry." Article IV further provided that "it is contemplated by the parties that they shall each contribute equitably, fairly and generally, over the course of time, equally to the performance of the C & W Services. In Article VI (1) (b) and Article VI (2) (b), SAI and CAI, respectively, "represents, warrants and covenants that . . . (b) there are not now nor at any time during the Term of this Agreement will there be any contract or agreement which [SAI] [CAI] or any of its subsidiaries, affiliates, officers, employees or agents are bound which would in any manner impede, prevent or prohibit it from performing all of its obligations hereunder."

The Joint Venture Agreement, in Article VII, also provided for a restrictive covenant and injunctive relief:

> "1 (a) During the term of this Agreement and for a period of two (2) years after termination of this Agreement for any reason:
>
> i) neither party shall, directly or indirectly, or as an individual or representative of any other person and/or entity, contact, deal with or approach for business purposes any client of the other or any person/entity that is or has commenced negotiations to become a client of the other during the Term;
>
> ii) neither party shall solicit, raid, entice or induce any employee or consultant of the other to become employed by or associated with any person or entity."

Article IX, headed "Termination," provided that either party had the right to terminate the Agreement immediately by giving written notice to the other in the event of specified events of default, including bankruptcy, discontinuation of its business, appointment of a receiver, or

inaccuracy in any material representation or warranty of the other party. Termination also was provided for failure, within ten days of receipt of written notice, to correct or cure any failure to perform a party's obligation under the Agreement. Additional time was possible for defaults that required it, so long as the cure was commenced. Additionally, either party "may terminate the Agreement at any time, with or without cause or reason, upon no less than ninety (90) days prior written notice to the other" (Article IX [b]). Article XI, headed
" Binding Effect," provides that this "Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives and permitted assigns."

The merger clause of the Joint Venture Agreement provided that the "Agreement contains the entire understanding between the parties and supersedes any prior or contemporaneous written or oral agreements between the parties. There are no representations, warranties, agreements, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Agreement" (Article XVII).

The Joint Venture Agreement did not include an arbitration clause. While it referenced the IC Agreements, the Joint Venture Agreement did not provide for incorporation of the terms of the IC Agreements or other agreements or documents between C & W and Slattery, Cranwell, Itzkowitz or Sedona.

Standard Schedule of Compensation for Brokerage and Sales Personnel and its Arbitration Clause

Another agreement in the record is entitled "Cushman & Wakefield, Inc. & Affiliates Standard Schedule of Compensation for Brokerage and Sales Personnel Effective as of January 1, 2006" (Schedule) (NYSCEF Doc. No. 49). The preamble provided that "[t]his schedule governs the division of commissions and fees on all transactions between Cushman & Wakefield, Inc. and its affiliates (hereinafter collectively referred to as 'C & W broker') and the

brokerage and sales personnel employed by C & W (hereinafter collectively referred to as 'broker')."

Paragraph VII is labeled "Arbitration." Subparagraph "A" reads as follows: "Conditions to Arbitration: If a broker has a dispute with one or more brokers," and sets forth the required good faith effort to resolve the dispute, prior to arbitration, with the assistance of the appropriate branch or regional directors. The paragraph specifically states that the arbitration procedures "do not apply to disputes between brokers and C & W" (VII ([A]). The lettered paragraphs that follow include the following headings: Panel of Arbitrators, Beginning the Process, Choosing Arbitrators, the Decision Process, Charges, and Final and Binding.

Addendum to IC Agreement and Assignment Agreement

There is also a document titled "Addendum to Independent Contractor Agreement," dated March 26, 2007, between C & W and Itzkowitz (NYSCEF Doc. No. 49). The whereas clause references the IC Agreement between Cranwell and C & W, and Itzkowitz is identified as "Agent," and a shareholder or member of Cranwell. Among other provisions, C & W and Itzkowitz mutually agree: "No Employment Relationship. C & W has engaged IC, not Agent, as an independent contractor. Agent is not an employee of C & W." Another agreement, titled "Assignment, Modification and Assumption Agreement" and dated October 1, 2008, assigned and transferred the March 26, 2007 IC Agreement between C & W and Cranwell to Sedona, with the consent of CW (NYSCEF Doc. No. 49).

The Termination

On May 23, 2012, Itzkowitz sent a certified letter terminating the Joint Venture Agreement effective August 23, 2012.

The Action

By summons and complaint, dated November 13, 2015, plaintiff alleges that defendant Sedona and its alter ego, defendant Itzkowitz, breached the Joint Venture Agreement by failing to provide complete and accurate accountings, by withholding commissions, and by marginalizing Slattery's involvement with clients prior to the termination of the agreement. Plaintiff further alleges that although required to do so pursuant to the five year tail on sharing commissions earned from clients as of the August 23, 2012 termination date, defendants have failed to report on and share compensation with Slattery. Instead, they are using Slattery's May 22, 2014, termination from Cushman & Wakefield as a pretext to avoid sharing all commissions received after that date.

The complaint asserts two causes of action. First, plaintiff asserts that a bona fide justifiable and substantial controversy exists between the parties, namely, whether the obligations of defendant Sedona and Itzkowitz to share commissions earned from clients existing as of the effective termination date of the Joint Venture Agreement is still in effect and continues for five years until August 23, 2017. Plaintiff seeks a declaratory judgment that under the Joint Venture Agreement, Sedona and Itzkowitz must share commissions in accordance with the commission split the Joint Venture Agreement sets forth and that this obligation continues for five years following the termination date. Additionally, plaintiff seeks attorneys' fees and costs.

The second cause of action alleges breach of the Joint Venture Agreement in that defendant(s): i) failed to share commissions in accordance with the terms of the Joint Venture Agreement; ii) refused to share any commissions earned after Slattery's relationship with C & W terminated; iii) failed to provide complete and accurate financial reports including the bi-annual reports the contract required; and iv) failed to use their diligent and good faith efforts to perform their obligations under the Joint Venture Agreement using general industry standards and

practices as Article IV requires. Plaintiff seeks damages in an amount to be determined at trial, but in excess of $25,000.00, plus attorneys' fees and costs.

By pre-answer motion, defendants sought an order dismissing the complaint as against Itzkowitz for failure to state a cause of action, pursuant to Civil Practice Law and Rules (CPLR) § 3211(a)(7). By Decision and Order dated July 14, 2016, the Honorable Eileen A. Rakower denied the motion. The Court found that, at the pre-answer stage and prior to discovery, and drawing all inferences in favor of the non-moving party, the complaint stated a claim against Itzkowitz individually based upon a piercing the corporate veil theory of liability.

By separate answers dated August 11, 2016, each defendant admitted that Itzkowitz is an employee of Sedona and that Sedona is a Subchapter S corporation, referred to the court for legal interpretation of the various documents and correspondence, and otherwise denied the allegations of the complaint. Sedona also asserted eight affirmative defenses. Itzkowitz asserted ten affirmative defenses. Each asserted that plaintiff's claims are barred on the grounds of: plaintiff's breach of the contract; laches; waiver; plaintiff's untimely pursuit of exclusive contractual remedies; lack of subject matter jurisdiction; and, failure to include a necessary party. As a ninth affirmative defense, defendant Itzkowitz asserted that he has no contractual relationship with plaintiff. Defendants did not specifically assert that the arbitration clause barred the action and have never moved to compel arbitration. Defendants also did not move, until this summary judgment motion, to dismiss the complaint or stay the action on the basis of the arbitration clause. Defendants also did not assert a cause of action for declaratory relief.

Defendants subsequently moved for and were granted leave to amend Sedona's answer. By amended answer with counterclaims dated June 25, 2018, Sedona asserted two counterclaims. The first counterclaim, for monies had and received, asserted that the sum of

$42,707.02 that was paid to Slattery should have been allocated to Sedona pursuant to the Joint Venture Agreement. The second counterclaim for unjust enrichment, asserted that Slattery was unjustly enriched, at Sedona's expense, and sought damages in the amount of $42,707.02.

By answer to counterclaims dated July 26, 2018, plaintiff denied the allegations and asserted nine affirmative defenses, including that defendant Sedona is estopped from recovering the damages it alleges, laches, unclean hands, and that plaintiff is entitled to a set-off of any amount allegedly due to defendant.

Summary Judgment

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]. On a summary judgment motion, "facts must be viewed in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the "drastic remedy" of summary judgment is

"issue - finding, rather than issue - determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Discussion

Arbitration

Defendants first argue that they are entitled to dismissal, or in the alternative, a stay, because plaintiff failed to pursue arbitration. Defendants assert that the IC Agreement between Slattery and C & W, and the IC Agreement between Cranwell and C & W, provide for arbitration, and that this arbitration clause is binding on the parties to this dispute.

Defendants have failed to demonstrate entitlement to relief. First, defendants have failed to show sufficient facts establishing, as a matter of law, the existence of an arbitration clause as between Slattery and Sedona that is binding on the parties in the instant dispute. The Joint Venture Agreement did not provide for arbitration. Moreover, the Joint Venture Agreement provided that it was the entire agreement between the parties, and did not incorporate the terms of the IC Agreements and related documents. Further, the terms of the IC Agreements provided that Slattery and Sedona are independent contractors, and that independent contractors providing brokerage services to C & W are not covered under the arbitration clause in the Schedule that describes an agreement between C & W and "its affiliates (hereinafter collectively referred to as 'C & W broker') and the brokerage and sales personnel employed by C & W (hereinafter collectively referred to as 'broker')."

Moreover, even if the arbitration clause was applicable to this dispute, defendants have waived their rights to arbitration. While New York has a "long and strong public policy favoring arbitration" (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997]), "[n]onetheless, like contract rights generally, a right to arbitrate may be modified, waived or

abandoned. Accordingly, a litigant may not compel arbitration when its use of the courts is clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007] [internal quotation marks and citations omitted]). "[A] defendant's right to compel arbitration and the concomitant right to stay an action, does not remain absolute regardless of the degree of his participation in the action" (*De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]).

While "not every foray into the courthouse effects a waiver of the right to arbitrate" (*Sherrill v Grayco Bldrs*, 64 NY2d 261, 273 [1985]), "[w]here the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, [its] actions are then inconsistent with a later claim that only the arbitral forum is satisfactory" (*Id.*). A defendant "waive[s] any right to arbitration by failing to raise it as a defense in its answer, asserting counterclaims, making a dispositive motion, and otherwise actively participating in [the] litigation for almost three years through the completion of extensive disclosure proceedings and the filing of a note of issue" (*Ryan v Kellog Partners Institutional Services*, 58 AD3d 481 [App Div 1st Dept 2009]).

Here, the totality of defendants' conduct establishes a waiver of a right to arbitrate. Defendants actively participated in the litigation and availed themselves of the judicial forum. Notably, defendant Sedona amended its answer in June 2018 to assert two counterclaims. Additionally, defendants did not clearly assert an affirmative defense of arbitration, did not seek to compel arbitration or stay the action during the approximate three years of ongoing litigation. Moreover, they brought a pre-answer motion to dismiss the action against defendant Itzkowitz for failure to state a cause of action to pierce the corporate veil, and affirmatively participated in the discovery.

The Court finds unpersuasive defendants' argument that they could not have waived arbitration and that they are not estopped from now seeking relief as they were not aware of the existence of the arbitration clause and plaintiff's failure to pursue arbitration until 2016 paper discovery confirmed the terms of Slattery's IC Agreement and Slattery's February 2018 deposition, First, the IC Agreements were referenced in the Joint Venture Agreement and there is no evidence that these agreements were not standard in form. Second, to the extent applicable, the arbitration clause in the Schedule provided for arbitration regarding disputes between "brokers" not between C & W and a "broker." As defendant(s) would have been a party to any arbitration in a dispute between Slattery and Sedona, defendants would have received service had arbitration been pursued.

Finally, even after receiving the agreement with the arbitration clause in 2016, defendants affirmatively continued to participate in the court case. Indeed, defendant Sedona amended its answer and asserted two counterclaims in July 2018. Accordingly, the Court denies this ground of defendants' motion for summary judgment.

Contractual Interpretation

Defendants next argue that they are entitled to summary judgment on plaintiff's first cause of action seeking declaratory relief. As a preliminary matter, the Court addresses the specific wording of the relief as sought in the notice of motion and portions of defendants' papers, as it encompasses affirmative declaratory relief defendants did not seek in their pleadings.

In their notice of motion, defendants seek an order under CPLR 3212 "granting summary judgment on the First Cause of Action in favor of Defendants and against SAI, declaring that [the] subject agreement, dated July 27, 2010, is interpreted to extend the parties' post-termination

commission-splitting obligations under Article III of the subject agreement extent only to pending transactions which existed on the effective date of the agreement's termination." Defendants' other papers contain similar wording. Defendants did not, however, assert a cause of action for such declaratory relief by way of counterclaim. To the extent they now seek it by way of a summary judgment motion, the court denies that part of the motion. However, defendants also ask for summary judgment dismissing plaintiff's first cause of action for declaratory relief. The Court now proceeds to address this part of the motion.

Defendants contend that, as a matter of law, the term "business initiated and brought in," as set forth in Article III, is unambiguous and that plaintiff's interpretation contradicts a plain and common sense reading of the term and the Joint Venture Agreement. Defendants assert that the term applies to transactions existing as of the termination date, and not a five year tail on commissions earned from business from the client(s) each party brought in, as plaintiff contends.

In support of their respective positions, each side points to certain language within the Joint Venture Agreement and as well as extrinsic and parol evidence to support their interpretation of the term in dispute: "business initiated and brought in." Among other documents, the parties submit, as applicable, affidavits from John Slattery, Jr., David Itzkowitz, and the attorney who represented Slattery in connection with the Joint Venture Agreement. These address, among other issues, the parties' intent, the events preceding, surrounding and following the Joint Venture Agreement, the parties' customary practices and industry practices. Among other documents, each side also attaches and relies upon selected portions of the deposition testimonies of David Itzkowitz and John Slattery, Jr., and various other agreements.

At the Court's direction, the parties also made additional submissions regarding the term "business initiated and brought in," particularly as to whether these words are an industry term.

While many matters are strongly disputed, both sides state that the phrase is not one with particular usage or meaning in the industry and is not a term of art.

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc.*, 77 NY2d at 162).

The question of whether a contract term is ambiguous "is to be determined by looking within the four corners of the document" (*Goldman Sachs Group, Inc. v Almah LLC*, 85 AD3d 424, 426 [1st Dept 2011] [internal quotation marks and citations omitted]). An agreement or contract term "is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [internal quotation marks omitted]). "Conversely, a contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*Goldman Sachs Group, Inc.*, 85 AD3d at 426 [internal quotation marks omitted]). The entire agreement is read as a whole "to ensure that excessive emphasis is not placed upon particular words or phrases" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]).

While "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face" (*W.W.W. Assoc.*, 77 NY2d at 163), parol evidence may "be considered to clarify the disputed portions of the parties' agreement" (*Impala Partners v Borom,* 133 AD3d 498, 499 [1st Dept 2015]). The parties reliance upon parol evidence to clarify an ambiguous term of an agreement might instead present a triable issue of fact (*see Pacheco v Kushner Cos*, 88 AD3d 550, 551 [1st Dept 2011]. As "resolution of the ambiguity is for the trier of fact" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]), summary judgment is not appropriate (*see NFL Enters. LLC. v Comcast Cable Communications, LLC*, 51 AD3d 52 (1st Dept. 2008). Additionally, extrinsic evidence proferred by the parties may raise questions of credibility from which conflicting inferences can be drawn (*see generally State of New York v Home Indem*, 66 NY2d at 671-672), thus precluding the granting of summary judgment.

Defendants did not meet their prima facie burden of demonstrating that a pivotal term of the Joint Venture Agreement was unambiguous and that their interpretation was the only reasonable interpretation. To the extent, if at all, defendants met their prima facie burden, plaintiff defeated that showing, and defendants failed to rebut it. Accordingly, defendants failed to demonstrate entitlement to judgment dismissing the first cause of action as a matter of law.

Dismissal of Complaint as Against Itzkowitz

Lastly, defendants seek summary judgment dismissing the complaint as against defendant Itzkowitz, asserting that plaintiff failed to and cannot demonstrate that Itzkowitz should be held liable under an alter ego theory of liability. Defendants argue that the allegations in the complaint are insufficient, pointing to language in the Decision and Order denying defendants' pre-answer

motion to dismiss, and assert that the allegations remain devoid of merit upon the conclusion of discovery.

Defendants argue that as Sedona is a closely held corporation, and therefore, its admitted failure to observe certain corporate formalities falls well short of warranting the drastic relief of piercing the corporate veil, and, contrary to the allegations in the complaint, Sedona did file federal and state tax returns and maintained a corporate bank account to which corporate expenses were written and profits disbursed.

Defendants do not dispute that Sedona is no longer actively conducting business. They argue the reason an Itzkowitz subsequently contracted directly with C & W is because C & W changed its policy in early 2015 to permit brokers to contract directly as individuals. Sedona's income stream, accordingly, was reduced commencing July 2015. Further, defendants argue that plaintiff cannot point to a contractual provision that required Sedona to retain any balances, much less for judgments which may be entered in the future, and Sedona's breach of contract claim is an insufficient wrong or injury to justify the extreme equitable relief plaintiff seeks.

In opposition, plaintiff argues that summary judgment dismissing the complaint as against Itzkowitz should be denied because: i) Itzkowitz succeeded to Sedona's rights, obligations and liabilities pursuant to the Joint Venture Agreement; and ii) piercing the corporate veil and holding Itzkowitz personally liable is an appropriate remedy under the facts and circumstances.

Plaintiff sets forth a very different version of facts than those defendant portrayed. For example, plaintiff asserts that Itzkowitz surreptitiously caused C & W to distribute to defendant Sedona 100 % of the joint commissions that should have been distributed to both plaintiff and defendant. Plaintiff asserts this lack of revenue, that should have been credited to plaintiff's

account, created the false impression that plaintiff's business was failing. As a result, C & W terminated plaintiff's employment. Relying on C & W records, plaintiff asserts that from 2012 to May 22, 2014, Itzkowitz diverted approximately $500,000.00 in commissions owing to plaintiff under the Joint Venture Agreement. From 2013 to approximately July 2015, Itzkowitz further caused C & W to deposit into Sedona's bank account $800,000.00 in commissions that were owed to Slattery.

Plaintiff asserts that Itzkowitz then depleted these monies that represented joint commissions under the Joint Venture Agreement. Itzkowitz diverted the funds to pay his own and his family's personal expenses, and did not set aside any reserve, even though Itzkowitz knew that plaintiff contested the non-payment of its commissions. Plaintiff raises a triable issue of fact that Itzkowitz withdrew these funds to pay for his vacations, family expenses, restaurants and other personal expenses. Indeed, Sedona's last bank statement indicated that only $1,714.28 remains in the account. It is therefore essentially judgment proof. Further, following Itzkowitz's individual agreement with C & W, Itzkowitz then diverted to his own individual bank account commissions C & W paid that were to have been shared with plaintiff under the five year tail in the Joint Venture Agreement. In addition to abusing the corporate form, Itzkowitz also completely dominated Sedona's activities and disregarded corporate formalities. For example, while Itzkowitz's wife bore the title of Sedona's CEO, she was not in any way involved in Sedona's business. Meanwhile, Itzkowitz utilized his home address, and C & W's and his personal telephone number and email.

Defendants contest plaintiff's version of the facts regarding events occurring prior and subsequent to the termination of the Joint Venture Agreement and the parties' acts. Additionally, defendants assert that, contrary to plaintiff's assertions, Itzkowitz did not divert

funds, and Sedona paid its corporate expenses as well as certain costs, such as medical care and transportation as employee benefits, a policy found in many companies big and small. Otherwise, all remaining profits were distributed either to Itzkowitz as its sole employee or to Itzkowitz's wife as owner.

Defendants' motion to dismiss the complaint as against Itzkowitz is denied. Defendants failed to demonstrate that there are no remaining issues of material fact. The Court accordingly denies this part of the motion.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear at a pre-trial conference scheduled for October 30, 2019 at 11:00 a.m. at 71 Thomas Street, IAS Part 15, Courtroom 304.

This constitutes the Decision and Order of the Court.

Dated: October 15, 2019
New York, New York

MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.