

Ursino v 21/23 Ave. B Realty LLC

2020 NY Slip Op 30474(U)

February 21, 2020

Supreme Court, New York County

Docket Number: 158161/2018

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM
Justice
INDEX NO. 158161/2018
BRIAN URSINO,
Plaintiff, MOTION DATE 04/30/2019,
- v - 04/30/2019,
21/23 AVENUE B REALTY LLC, AVE B SM TIC1 LLC, AVE B SM TIC2 LLC MOTION SEQ. NO. 001 002 002
Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 25, 27, 28, 29, 30, 31, 32, 42, 44, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 were read on this motion to/for CANCEL/EXTEND LIS PENDENS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 47, 48, 49, 50, 51, 52 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 47, 48, 49, 50, 51, 52 were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

Motion sequence numbers 003 and 004 pending under Index No. 154991/2018 (Action 1) and motion sequence numbers 001 and 002 pending under Index No. 158161/2018 (Action 2) are hereby consolidated for disposition.

Action 1 arises from a claim for, inter alia, breach of a contract of sale for a commercial property located at 21-23 Avenue B, New York, New York (the Property),¹ brought by plaintiffs

¹ The Property is a mixed use building with both commercial and residential rental units.

21/23 Avenue B Realty LLC (Buyer), Ave B SM TIC1 LLC and Ave B SM TIC2 LLC (together, the SM TIC Entities) against defendant 21&23 Avenue B Realty, LLC (Seller). In addition, in Action 1, Buyer asserts claims against defendant/third-party plaintiff Brian Ursino (Ursino) sounding in tortious interference with contract and breach of fiduciary duty.

In motion sequence 003 of Action 1, Ursino moves, pursuant to CPLR 3212, for summary judgment dismissing the 11th, 12th, 13th and 14th causes of action in the amended complaint as against him,² and for sanctions pursuant to 22 NYCRR 130-1.1, as against Buyer.

In motion sequence 004 of Action 1, Ursino moves, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), to dismiss the counterclaims of third-party defendant Icon Ventures, LLC (Ventures).

Action 2 was commenced by Ursino against the Buyer and the SM TIC entities seeking to impose a constructive trust on the Property and to compel the transfer of the Property to him from Buyer and the SM TIC Entities.

In motion sequence 001 of Action 2, Buyer moves, by order to show cause, pursuant to CPLR 6514 (b), to cancel the notice of pendency filed by Ursino on September 1, 2018 (and subsequently refiled on September 14, 2018), as well as for sanctions and attorneys' fees.

In motion sequence 002 of Action 2, Buyer and the SM TIC Entities move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against them.

FACTUAL & PROCEDURAL HISTORY

Andrew Chang, the principal/owner of Seller, decided to sell the Property and, upon doing so, allegedly provided Ursino with a "Letter of Intent" to sell the Property dated November 29,

² Respectively: (11) tortious interference with contract, (12) a declaration that Ursino tortuously interfered with Buyer's right to purchase the Property, (13) a declaration that Ursino has no right to purchase the Property on his own in the name of Buyer, and (14) breach of fiduciary duty.

2016 (the LOI).³ On December 28, 2016, Ursino entered into an agreement with Ventures (the 2016 Agreement) wherein Ventures would create a new company (ultimately, Buyer) to purchase the Property and, in exchange for the presentation of the LOI, Ursino would “become a member of [Buyer] by executing a counterpart of the New Purchaser operating agreement . . .” (Russ affirmation, exhibit E, § 2.2, the 2016 Agreement).

The 2016 Agreement also contained a default clause providing, in pertinent part, as follows:

“If [Ventures] fails to perform its material obligations . . . [Ursino] may elect to (a) terminate this Agreement by written notice to [Ventures], in which event, [Ursino] may, if it so elects, proceed to take title to the Property in [Ursino’s] name, or in the name of [Buyer] (in which instance any Operating Agreement theretofore executed and delivered shall be null and void so that [Ventures] does not have any interest or rights in [Buyer])”

(*id.* § 6.1).

Pursuant to an agreement dated February 1, 2017 (the Contract of Sale), Seller agreed to sell, and Buyer agreed to buy, the Property for a purchase price of \$10.2 million and the closing was scheduled for January 17, 2017. However, as alleged in the amended complaint, Buyer learned of several purportedly material misrepresentations made by Seller regarding the status of the tenancy of a commercial tenant at the Property at that time, non-party EZ Sneaks,⁴ as well as the fact that the residential rent roll did not accurately reflect the occupancy status of at least one

³ This document is not provided to the court.

⁴ Namely that it was a month to month tenant, when in fact it had a lease expiring in 2021, with an option to renew (*see* Action 1, NYSCEF Doc No. 13, EZ Sneak Lease]).

apartment (collectively, the Misrepresentations). Based on the Misrepresentations, the closing was adjourned pending further investigation by Buyer.

On May 29, 2018, Buyer commenced Action 1, sounding in breach of contract and fraudulent inducement, in order to, *inter alia*, resolve the issues surrounding the Misrepresentations and the failure to close.

Less than one month later, on June 25, 2018, pursuant to section 6.1 of the 2016 Agreement, counsel for Ursino provided to Ventures written notice of Ventures' breach of the 2016 Agreement, based on 14 purported material breaches by Ventures (the Default Notice).⁵ In the Default Notice, counsel for Ursino represented that Ursino had elected "to acquire the [Property] 'in the name[] of [Buyer]'" (Ursino aff, exhibit D [Action 1, NYSCEF Doc No. 61]).

Subsequently, on July 14, 2018, Buyer amended its complaint to include allegations that Ursino was responsible for the Misrepresentations and that "Ursino's actions were intended to cause Seller to hold [Buyer] in default of the [Contract of Sale]," therefore creating the situation that would allow for Ursino to trigger the 2016 Agreement's default provision and "allow Ursino to purchase the Property in the name of the [Buyer] in his own right" pursuant to section 6.1 of the 2016 Agreement (Amended Complaint, ¶¶ 57-58).

⁵ As set forth in the Default Notice, Ventures' purported material breaches included, *inter alia*, (1) contacting Seller directly about closing matters "without Ursino's prior consent" or notice, (2) failing to obtain Ursino's written consent and contacting Seller in a manner that violated the 2016 Agreement, (3) creating delay, (4) "[f]ailing to make progress toward a closing of title, and creating or allowing roadblocks and obstacles to a closing of title . . . particularly about the buyout of [EZ Sneaks]," (5) disclosing confidential information, (6) "[c]reating dissension" between Seller and Ursino, and (7) "[f]ailing and refusing to form entities consistent with the 2016 Agreement, and failing and refusing to sign and deliver Operating Agreements consistent with the [2016 Agreement]" (Ursino aff, exhibit D [Action 1, NYSCEF Doc No. 61], the Default Notice, at 4-5).

Buyer then moved, by order to show cause, for an injunction enjoining Seller from holding Buyer in default of the Contract of Sale. The motion was resolved by stipulation of settlement dated August 1, 2018 wherein Buyer and Seller agreed to terms that allowed for a September 7, 2018 closing date (Russ affirmation, exhibit H).

Then, on September 1, 2018, Ursino commenced Action 2 against Buyer, seeking the imposition of a constructive trust over the Property and compelling the transfer of the Property to Ursino, in the exercise of his purported rights under the 2016 Agreement's default provision. Ursino also filed a notice of pendency on the Property. As of that time, Buyer had not yet closed on the Property and was not its owner.

On September 7, 2018, Buyer moved, by order to show cause, to cancel the notice of pendency. By so ordered stipulation, dated the same day, Ursino and Buyer agreed to the following:

“1. The notice of pendency filed by [Ursino] dated September 1, 2018 . . . is withdrawn without prejudice to refile on or after September 14, 2018. . . .

“ 2. [Buyer] agree[s] not to transfer title to the [Property] before September 17, 2018. . . .

“3. [Defendant's] counsel represents that title will be taken in the name of [Buyer].

“4. The Clerk is directed to immediately cancel the notice of pendency”

(Action 2, NYSCEF Doc No. 12). Notwithstanding the stipulation, the order to show cause, signed by this Court on September 12, 2018, remained on the docket and was scheduled for a hearing on December 4, 2018.

Subsequently, as reflected by a deed dated September 7, 2018 (but not recorded/filed until September 17, 2018), the sale was ultimately completed, and the Property changed hands from Seller to Buyer (Deed, annexed to Russ affirmation, exhibit I [Action 1, NYSCEF Doc No. 113]).

On September 14, 2018, Ursino filed a second notice of pendency on the Property, the terms of which essentially mirrored those in the original notice of pendency.⁶ Pursuant to the direction of this Court at the December 4, 2018 hearing, on January 2, 2019, Ursino and Buyer executed a stipulation amending the relief requested in the order to show cause to address the new notice of pendency (Eiben reply affirmation, exhibit D).

By stipulation so-ordered stipulations entered February 4, 2020, the parties agreed to consolidate Action 1 and Action 2 for the purpose of discovery and joint trial. Action 1, Doc. 125; Action 2, Doc. 63.

LEGAL CONCLUSIONS

“[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions”

⁶ On September 14, 2018, the Buyer and the SM TIC Entities also discontinued against all defendants in Action 1 except Ursino. Doc. 73.

(*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (1) governs motions to dismiss where a defense is founded upon documentary evidence. A motion to dismiss a complaint pursuant to 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ladenburg Thalmann & Co. v Tim’s Amusements* 275 AD2d 243, 246 [1st Dept 2000]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action.

“In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory”

(*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]; citing *Leon*, 84 NY2d at 87-88). In addition, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

Ursino’s Motion for Summary Judgment Against Buyer (Action 1, Motion Sequence 003)

Ursino moves pursuant to CPLR 3212 for summary judgment dismissing Buyer’s causes of action against him.

Tortious Interference with Contract

In the 11th cause of action, Buyer seeks relief as against Ursino for tortious interference with the Contract of Sale. To establish a claim for tortious interference with a contract, “the plaintiff must show the existence of its valid contract with a third party, defendant’s knowledge of that contract, defendant’s intentional and improper procuring of a breach, and damages” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Here, Buyer has shown the existence of a valid contract with a third party, i.e., the Contract of Sale, with Seller. It has also shown that Ursino was aware of the Contract of Sale. However, it is undisputed that, subsequent to the filing of this motion, the Contract of Sale was executed and the Property was sold from Seller to Buyer pursuant to that agreement.

The Court of Appeals has held that an actual breach is required to sustain a cause of action for tortious interference with contract (*see Lama Holding Co. v Smith Barneyd*, 88 NY2d 413, 424

[1996]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]). Since the Property changed hands pursuant to the Contract of Sale, the agreement was not breached, and Ursino is entitled to summary judgment dismissing Buyer's 11th cause of action for tortious interference with the said agreement.

To the extent that Buyer contends that the delay in obtaining title is tantamount to a breach, such argument is unpersuasive (*see Ulysses I & Co., Inc. v Feldstein*, 75 AD3d 990, 992 [3d Dept 2010] ["even accepting that plaintiff . . . systematically charter[ed] a course designed to deprive [defendants] of the property, the fact remains that there was no breach of the . . . contract]).

Buyer's cause of action seeking a declaration that Ursino tortiously interfered with the Contract of sale is dismissed as duplicative (*Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016] [A cause of action seeking a declaratory judgment is "unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract"]). Here, Buyer had an adequate alternate remedy, specifically its tortious interference claim. Thus, Ursino is entitled to summary judgment dismissing the 11th and 12th causes of action as against him.

Declaration of Ursino's Rights

The 13th cause of action seeks a declaration that Ursino has no right to purchase the Property in the name of Buyer, a claim derived from Ursino's agreement with Ventures in the 2016 Agreement. In his motion, Ursino argues that this claim seeks "the opposite of what Ursino seeks in the Third-Party Action" as against Ventures and that "[it] is for Ursino to seek such relief" (memorandum in support, at 17). Therefore, he argues, summary judgment is warranted dismissing this claim as against him (memorandum in support, at 17).

Ursino cites to no case law and does not establish through argument, evidence or analysis why it would be improper for Buyer to seek a declaration that would, essentially, clarify Buyer's and Ursino's rights as to the Property (CPLR 3001 ["The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed"]). Accordingly, Ursino is not entitled to summary judgment dismissing the 13th cause of action against him.

Breach of Fiduciary Duty

The 14th cause of action alleges that Ursino breached his fiduciary duty to Buyer by orchestrating the Misrepresentations, causing delay and damaging Buyer.

"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 Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2011]). "When one party is under a duty to act for, or give advice for the benefit of, another on matters within the scope of their relationship, a fiduciary relationship is created" (*Dembect v 220 Cent. Park S. LLC*, 33 AD3d 491, 492 [1st Dept 2006]).

Ursino's sole argument is that he was not in a fiduciary relationship with, and did not owe a fiduciary duty to, Buyer. In support of this position, Ursino argues that the 2016 Agreement "anticipates that [he] become a non-managing LLC member, not a manager" of Buyer and that, under the Limited Liability Corporation Law, a non-managing member owes no fiduciary duty to a managing member, which is purportedly Ventures herein (Ursino aff, ¶ 14; Limited Liability Company Law § 409; see *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] ["[a]s the

managing member of the LLCs, [the defendant managing member] owed plaintiff – a nonmanaging member – a fiduciary duty”). However, Ursino provides no documentation affirmatively establishing such status or lack thereof.

The 2016 Agreement, in and of itself, does not explicitly establish Ursino’s membership status (managing or otherwise) or his responsibilities with respect to Buyer. Rather, the 2016 Agreement merely provides that Ursino “shall become a member of [Buyer] by executing a counterpart of the New Purchaser operating Agreement . . .” (the Operating Agreement) and that Ursino and Ventures “shall be the owners of all of the outstanding membership interests of [Buyer] . . .” (Russ affirmation, exhibit E, § 2.2, the 2016 Agreement). A copy of the Operating Agreement, which purports to set various values, including the percentage of ownership of Buyer and Ursino, is annexed to the 2016 Agreement (*id.*, exhibit A). However, the copy provided to this Court is unexecuted and contains blank spaces for nearly all values, including percent ownership. Moreover, on its face, it is entirely silent with respect to whether Ursino was considered a managing member.

Since the 2016 Agreement contains ambiguities regarding the relationship between Ursino and Ventures regarding Buyer, which this Court is unable to clarify, it is insufficient to establish Ursino’s role or capacity with respect to Buyer. Such ambiguities must be resolved through discovery, which has yet to be conducted. Absent such information, this Court cannot determine, as a matter of law, what fiduciary obligations, if any, Ursino may have had to Buyer.

Accordingly, Ursino’s pre-discovery motion for summary judgment seeking the dismissal of the 14th cause of action is denied.

Sanctions

Ursino seeks sanctions for Buyer's purportedly frivolous conduct in bringing this action against him. However, since Buyer's claims for breach of fiduciary duty and a declaration of Ursino's rights are viable, this Court declines to impose sanctions.

Ursino's Motion to Dismiss Counterclaims Against Ventures (Action 1, Motion Sequence 004)

Ursino argues that, based on documentary evidence, Ventures' third-party counterclaims should be dismissed for the failure to state a cause of action, and because Ventures has no standing to bring claims against him.

Ursino's third-party action against Ventures alleges claims sounding in breach of contract and specific performance of the 2016 Agreement.⁷ In opposition, Ventures raises 15 counterclaims, sounding in (1, 2) breach of the implied covenant of good faith and fair dealing with respect to the 2016 Agreement; (3, 12 and 13) fraud; (4 through 11) breach of an amendment to the 2016 Agreement and specific performance with respect thereto; (14) unjust enrichment; and (15) legal fees.

Additional Facts Raised in Ventures' Counterclaims

The parties submit to this Court a document, dated May 4, 2017, entitled "First Amendment to Agreement," which purports to modify the 2016 Agreement (the Amendment) (Russ aff, exhibit F). It provides, in pertinent part, as follows:

"Whereas, in consideration of agreements between [Ursino] and [Ventures] relating to the [Property], [Ursino] agrees to provide [Ventures] with a right of first offer ('ROFO') to purchase properties

⁷ Specifically, Ursino seeks the benefits he claims he was to receive under the 2016 Agreement, including: (1) a membership interest in Buyer, (2) the contribution value of the LOI, (3) "the protections and benefits of a signed Operating Agreement" and (4) "his [unspecified] Units" (amended third-party complaint, ¶¶ 28 and 31).

currently owned or controlled by the seller of the [Property] . . . if and to the extent that [Ursino] is presented with the opportunity to purchase such additional properties.

“Now, Therefore, it is mutually agreed as follows:

“1. Before [Ursino] participates in any business transaction . . . to purchase any of the properties in Manhattan listed below, [Ursino] shall provide a five (5) business day written notice . . . to [Ventures]. . . . [Ventures than] shall have a five (5) day period to enter into an agreement with [Ursino] . . . whereby [Ventures] would agree to purchase said property(ies) and [Ursino] would receive payment and/or participate, at its option, in the ownership of the purchaser of said properties. . . . The properties where [Ventures] has the ROFO are:

- 9-11 Avenue B, New York, New York
- 207 East 4th Street, New York, New York
- 231-233 East 4th Street, New York, New York
- 106 Avenue B, New York, New York
- 102 Suffolk Street, New York, New York
- 187 East 7th Street, New York, New York”

(*id.*). The Amendment also contains a handwritten addition in the right-hand margin (the Handwriting), purporting to modify paragraph 1. The modified paragraph reads as follows:

“1. Before [Ursino] participates in any business transaction . . . to purchase any of the properties in Manhattan listed below, provided that no litigation has commenced against the seller or [Ursino], or is being threatened as it relates to the [Property], [Ursino] shall provide . . .”

(*id.* [emphasis added]). The remainder of the document remains unchanged.

The Amendment is signed by Ursino and the managing member of Ventures, but the Handwriting is initialed only by Ursino. In addition, although the document is dated May 4, 2017, the individual signatures on the Amendment, as well as the initials on the Handwriting, are undated.

Ventures alleges that Ursino failed to provide the purportedly agreed upon right of first offer (ROFO) to Ventures with respect to 207 East 4th Street, New York, New York; 106 Avenue

B, New York, New York, 102 Suffolk Street, New York, New York and 187 East 7th Street, New York, New York (collectively, the Counterclaim Properties).

Standing

Ursino argues that Ventures lacks standing to bring any counterclaims because “once title to the [Property] closed pursuant to the [Contract of Sale] . . . the [Contract of sale was] no longer operative” (Ursino memorandum of law, ¶ 1-2) (*TIAA Glob. Invs. LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85 [1st Dept 2015] [“The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract”). However, none of Ventures’ counterclaims are premised on violations of the Contract of Sale. Rather, its claims are based on the 2016 Agreement and/or the Amendment. Ursino fails to explain how or why the 2016 Agreement or the Amendment would merge into the deed and bar Ventures from prosecuting any claims related thereto. Accordingly, this argument is unpersuasive.

Next, Ursino argues that Ventures has no standing because its counterclaims “are those of the LLC which owns the [Property]”, i.e., Buyer, and, therefore, because Ventures is a shareholder of Buyer, each of its counterclaims are purely derivative (Ursino memorandum of law, ¶ 6). However, Ursino fails to particularize this argument with respect to the varied counterclaims asserted by Ventures (breach of the implied covenant of good faith and fair dealing with respect to the 2016 Agreement, unjust enrichment, fraud, and breach of the Amendment with respect to the Counterclaim Properties). Nor does Ursino address his argument to the substance of each counterclaim or explain how each is a derivative claim. Since his argument is overbroad and fails

to substantively address any of the counterclaims, Ursino is not entitled to dismissal of the counterclaims on this ground (*see e.g., Martirano Constr. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1029 [2d Dept 1984] [“a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed”]).

The Breach of the Implied Covenant of Good Faith Claims (Counterclaims 1 and 2)

The first and second counterclaims allege that Ursino owed Ventures a duty to act in good faith with respect to the 2016 Agreement, the purpose of which “was to purchase [the Property]” (third-party answer, ¶ 226; see also ¶ 22 [“The purpose of the 2016 Agreement was to close on the sale of the [Property]”). Ventures then alleges that Ursino breached this duty by “intentionally making material misrepresentations” about the Property and by “imparting” Buyer’s confidential information to Seller.

All contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). “This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010] [internal citations and quotation marks omitted]). To that end, the implied covenant would be breached “when a party acts in a manner that – although not expressly forbidden by any contractual provision – would

deprive the other party of receiving the benefits under their agreement” (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

Here, Ventures specifically pleads that the purpose of the 2016 Agreement was for Ventures to arrange for the purchase of the Property. It is undisputed that Ventures arranged for the purchase of the Property and that the Property was, in fact, purchased by an entity established by Ventures. Therefore, the alleged purpose of the 2016 Agreement was fulfilled with respect to Ventures and, even when viewed in a light most favorable to Ventures, Ventures cannot plead that it was deprived of the benefit that it was owed under the 2016 Agreement. Accordingly, Ventures has failed to plead a claim for the breach of the implied covenant of good faith and fair dealing.

Thus, Ursino is entitled to the dismissal of the first and second counterclaims.

The Fraud Counterclaims (Counterclaims 3, 12 and 13)

Counterclaims 3, 12 and 13 sound in fraudulent inducement and fraudulent omission.

“A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages” (*Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]).⁸ In addition, CPLR 3016 (b) provides, in pertinent part, that “[w]here a cause of action or defense is based upon misrepresentation [or] fraud . . . the circumstances constituting the wrong shall be stated in detail.”

⁸ The elements of a fraudulent inducement claim are essentially identical to the elements of a fraud claim (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]), while a cause of action for fraudulent omission requires, in addition to the elements of a fraud claim, “an allegation that the defendant had a duty to disclose material information and that it failed to do so” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011], quoting *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

Importantly, “[s]tatements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud” (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015]). Here, each fraud counterclaim alleges nearly all material facts upon information and belief (amended third-party answer ¶¶ 235, 299 and 305).⁹ Such pleadings, without further explanation or specificity, are insufficient to sustain the heightened pleading requirements of a fraud claim (*id.*).

Moreover, while the counterclaims generally allege that Ventures relied on Ursino’s misrepresentations, they do not allege or explain *how* it relied on the claimed misrepresentations (*see Nicosia v Bd. of Managers of Weber House Condominium*, 77 AD3d at 456 [dismissing the fraud claim because, among other things, the plaintiff did “not explain how he relied to his detriment on the [defendant’s] alleged exercise” of its rights]). Similarly, while the counterclaims generally allege that Ventures was damaged by Ursino’s misrepresentations, Ventures fails to set forth *how* it was damaged thereby (*1711 LLC v 231 W. 54th Corp.*, 7 AD3d 261, 262 [1st Dept 2004] [dismissing fraud claim where the defendants “wholly failed to specify how they were injured as a result of plaintiffs’ alleged misrepresentations”]).

Given the foregoing, Ventures has failed to allege its fraud counterclaims with the requisite specificity mandated by CPLR 3016. Accordingly, Ursino is entitled to dismissal of Ventures’ 3rd, 12th and 13th counterclaims.

Ventures’ Counterclaims Based on the Amendment (Counterclaims 4 through 11)

⁹ Respectively, “Upon information and belief, Ursino was to receive a commission on the sale of the [Property]” (amended third-party answer, ¶ 235); “Upon information and belief, Ursino was communicating with Seller’s Principal in a manner intended to sabotage the purchase of the [Property]” (*id.* at 299), and “Upon information and belief, Ursino agreed to pay the mortgage on the [Property] on the Seller’s behalf, prior to the sale of the building” (*id.* at 305).

In its 4th, 6th, 8th and 10th counterclaims, Ventures alleges that Ursino breached the 2016 Agreement when he failed to provide a ROFO for the Counterclaim Properties prior to their respective sales. The 5th, 7th, 9th and 11th counterclaims seek specific performance of the Amendment with respect to the Counterclaim Properties, specifically requesting that this Court grant Ventures its purported ownership interests in said properties.

In his motion to dismiss, Ursino argues that the Amendment is a nullity because, although the Agreement was signed, the Handwriting (as noted above, Ursino's written modification to the Agreement) was never countersigned by Ventures. In addition, Ursino noted that, at oral argument before this Court on June 27, 2018, counsel for Ventures conceded that Ursino "unilaterally made a change that was unacceptable, so to the extent of the [Handwriting], we would submit that that is immaterial" (tr. at 4). Therefore, Ursino argues, there was no meeting of the minds and no binding agreement as to the Amendment.

"To form a binding contract, there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted]). Where there is no meeting of the minds "as to an essential term" of an agreement, there is no binding contract (*Harper v Rodriguez*, 272 AD2d 372, 372 [2d Dept 2000]).

Here, Ursino fails to establish, or even argue, that the Handwriting modified an essential or material term of the Amendment to the 2016 Agreement, such that Ventures' failure to assent would constitute a failure of the parties to have a meeting of the minds. Ursino does not supply his own affidavit to explain his understanding of the Amendment or the Handwriting, nor is there any other document submitted that addresses the materiality of the Handwriting. Ursino's reliance

on the statement by Ventures' counsel during oral argument is unpersuasive. Although counsel acknowledged that Ursino made a unilateral change to the Agreement, the attorney also stated that the Handwriting was "immaterial" (tr at 4). Accordingly, the issue of materiality was not conclusively established so as to warrant the dismissal of these claims on the ground that there was no meeting of the minds.

A question of fact also exists with respect to the timing of the Handwriting, i.e., whether it was written simultaneously with Ursino's execution of the Agreement or subsequent thereto. Such questions cannot be resolved by the evidence currently before this Court, although they may be resolved during discovery.

Ursino also argues that Ventures failed to sufficiently allege damages because any damages would be speculative. However, Ursino provides no documentation or analysis (aside from his own conclusory assertions) that would establish why the damages alleged, specifically the lost value of the Counterclaim Properties, are speculative.

In his memorandum of law, Ursino articulates no specific arguments with respect to the sufficiency of the 5th, 7th, 9th and 11th counterclaims. Given the absence of such arguments, this Court need not address the sufficiency of each of these counterclaims.

The remainder of Ursino's arguments with respect to these counterclaims are similarly unsupported by law or facts sufficient to warrant their dismissal at this stage of the litigation.

Thus, Ursino is not entitled to dismissal of the 4th through 11th counterclaims.

The Remaining Counterclaims (Counterclaims 14 and 15)

Although Ursino moves for dismissal of Ventures' counterclaims that seek recovery under a theory of unjust enrichment (counterclaim 14) and for attorneys' fees pursuant to the 2016

Agreement (counterclaim 15), Ursino makes no arguments supporting their dismissal aside from a general assertion, unsupported by facts or legal analysis, that such claims are baseless and frivolous. Accordingly, Ursino has failed to establish his entitlement to the dismissal of these counterclaims.

Buyer's Motion to Cancel Notice of Pendency (Action 2, Motion Sequence Number 001)

This Court now turns to Action 2, in which Ursino seeks to impose a constructive trust on the Property and compel the transfer of the Property from Buyer to himself.

In motion sequence number 001, Buyer moves to cancel the second notice of pendency filed by Ursino against the Property on September 14, 2018. This motion contains several procedural arguments as to the validity of the second notice of pendency. Assuming, *arguendo*, that the second notice of pendency is a properly filed, existing document, it must nevertheless must be cancelled.

A notice of pendency may be filed pursuant to CPLR 6501 “in any action . . . in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property . . .” (CPLR 6501). A notice of pendency “cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some other wrong” (*New Journey Global Inc. v Liu*, 2018 NY Slip Op 32921[U], *4 [Sup Ct, NY County 2018], quoting *Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 305 [1961]).

To determine whether the notice of pendency is proper, that is whether Ursino has the requisite right, title or interest to the Property, “the court must examine the complaint in its entirety” (*5303 Realty Corp. v. O & Y Equity Corp.*, 64 NY2d 313, 323 [1984]). Moreover, the court should apply “a narrow interpretation in reviewing whether an action” affects such title, possession, use or enjoyment (*id.* at 321).

In his complaint in Action 2, Ursino explicitly incorporates by reference his third-party complaint in Action 1, alleging, in pertinent part, that:

“[U]pon the termination of the 2016 Agreement by reason of the breach by [Ventures], [Ursino] had and has the absolute right to take title to the [Property] by owning all membership interests of [Buyer] . . .”

(Action 2’s complaint, ¶ 10[k]).

Therefore, despite Ursino’s claim for a direct interest in the title to the Property, his allegation makes clear that his interest in this action is not a direct interest in the Property, but rather an interest in the ownership of Buyer. “[N]otices of pendency may not be used in actions where the relief sought is a declaration of ownership in a corporation, ‘even where the sole corporate asset is real property’” (*Ostad v Nehmadi*, 31 Misc 3d 1211(A), *2 [Sup Ct, NY County 2011], quoting *Schlesinger v Schlesinger*, 2002 WL 221100, *10 [Sup Ct, Kings County 2002]; see e.g. *5303 Realty Corp.*, 64 NY2d at 313; *General Prop. Corp. v Diamond*, 29 AD2d 173, 175 [dismissing lis pendens where plaintiff claimed “no interest in the lease . . . but only in a new project”]). Moreover, the facts of this case, as alleged in the pleadings in both Action 1 and 2, as well as the third-party complaint in Action 1, describe a transaction in which Ursino provided a non-cash “investment” to Ventures in consideration for being given an unspecified percentage share of a company dealing in real property, which company ultimately purchased the Premises.

New York courts have held that similar schemes do not directly affect title to, or the possession, use or enjoyment of real property (see *5303 Realty Corp.*, 64 NY2d at 323; *Yonaty v Glauber*, 40 AD3d 1193, 1195 [3d Dept 2007]).¹⁰

Thus, Buyer is entitled to the cancellation of the second notice of pendency on the Property.

Finally, Buyer's application for costs and expenses pursuant to CPLR 6514 (c) is denied since it failed to set forth any grounds for such relief.

Buyer's Motion to Dismiss Action 2 (Action 2, Motion Sequence Number 002)

Buyer moves to dismiss the complaint on the ground that it fails to state a cause of action. Action 2 contains a single cause of action that seeks to impose a constructive trust on the Property and compel the transfer of the Property to Ursino. Buyer also moves to dismiss the complaint as against the SM TIC Entities on the ground that they are not title owners of the Property.

"The elements of a cause of action to impose a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment" (*JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222, 1223 [2d Dept 2016]).

As discussed above, Ursino's arguments with respect to fiduciary duties (either owed to him by Buyer or owed by him to Buyer) rest entirely on terms purportedly found in the Operating

¹⁰ The default provision of the 2016 Agreement further indicates that Ursino's interest is related to the ownership of Buyer (as opposed to the Premises). Specifically, it provides that Ursino's right to "take title to the Property" is tied to Ventures' loss, in default, of "any interest or rights in [Buyer]" – i.e. Ventures' percent ownership of Buyer, not Buyer's ownership of the Premises (Russ affirmation, exhibit E, § 6.1, the 2016 Agreement).

Agreement annexed to the 2016 Agreement. As noted previously, the Operating Agreement, as presented to this Court, is unexecuted and contains several blanks, thereby rendering its terms ambiguous at this nascent stage of the litigation. Discovery is necessary to further address this issue and any determination regarding the existence of a fiduciary relationship running from Buyer to Ursino would be premature at this time.

Thus, Buyer is not entitled to dismissal of the complaint as against it.

The SM TIC Entities

The documents submitted to this Court establish that the Property is owned by Buyer (*see* Deed, annexed to Russ affirmation, exhibit I [Action 1, NYSCEF Doc No. 113]). There is no evidence that would establish that the SM TIC Entities own the Property, such that they would be a proper party to Ursino's claim to impose a constructive trust over the Property.

Ursino's sole argument is that the SM TIC Entities purportedly "held funds of the transaction" to purchase the Property, and therefore, they should be "[bound] to the judgment." This argument fails to establish any basis for a claim that Ursino had a fiduciary relationship with the SM TIC Entities, that the SM TIC Entities promised him anything, that he relied on any promise made by the SM TIC Entities, or that the SM TIC Entities were unjustly enriched.

Thus, the SM TIC Entities are entitled to dismissal of the complaint as against them.

The parties' remaining arguments are either without merit or need not be addressed given the findings set forth above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant/third-party plaintiff Brian Ursino's motion (motion sequence number 003 filed under Index Number 154991/18), pursuant to CPLR 3212, for summary judgment dismissing the 11th, 12th, 13th, and 14th causes of action alleged against him is granted to the extent that the 11th and 12th causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Ursino's motion to dismiss (motion sequence number 004 filed under Index Number 154991/18), pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), to dismiss all third-party counterclaims of third-party defendant Icon Ventures (Ventures) is granted to the extent that counterclaims 1, 2, 3, 12 and 13 are dismissed as against Ursino, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendants 21/23 Avenue B Realty LLC (Buyer), Ave B SM TIC1 LLC and Ave B SM TIC2 LLC (together the SM TIC Entities) (motion sequence number 001 filed under Index Number 158161/18), pursuant to CPLR 6514, to cancel the notice of pendency currently in place as against the premises known as 21/23 Avenue B, New York, New York 10009, Block 395, Lot 2 (the Property), is granted and the Clerk of the Court is directed to immediately cancel the notice of pendency affecting the Property; and it is further

ORDERED that the motion by 21/23 Avenue B Realty LLC and the SM TIC Entities (motion sequence number 002 filed under Index Number 158161/18) to dismiss the complaint is granted with respect to the SM TIC Entities only, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, pursuant to the so-ordered stipulations executed by the parties (Index No. 154991/18, Doc. 125; Index No. 158161/18, Doc. 63), the captioned action is consolidated for the purposes of discovery and joint trial with the matter of *Brian Ursino v 21/23 Avenue B Realty LLC, Ave B SM TIC1 LLC and Ave B SM TIC2 LLC*, pending in this Court under Index No. 158161/18; and it is further

ORDERED, that within 30 days from the entry of this order, counsel for Ursino shall serve a copy of this order, with notice of entry, upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation for purposes of discovery and joint trial; it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; it is further

ORDERED that all remaining parties to Action 1 (154991/18) and Action 2 (158161/18) are directed to appear for a status conference at 80 Centre Street, Room 280, New York, New York on April 28, 2020, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Motion sequence numbers 003 and 004 pending under Index No. 154991/2018 (Action 1) and motion sequence numbers 001 and 002 pending under Index No. 158161/2018 (Action 2) are hereby consolidated for disposition.

Action 1 arises from a claim for, *inter alia*, breach of a contract of sale for a commercial property located at 21-23 Avenue B, New York, New York (the Property),¹¹ brought by plaintiffs 21/23 Avenue B Realty LLC (Buyer), Ave B SM TIC1 LLC and Ave B SM TIC2 LLC (together, the SM TIC Entities) against defendant 21&23 Avenue B Realty, LLC (Seller). In addition, in Action 1, Buyer asserts claims against defendant/third-party plaintiff Brian Ursino (Ursino) sounding in tortious interference with contract and breach of fiduciary duty.

In motion sequence 003 of Action 1, Ursino moves, pursuant to CPLR 3212, for summary judgment dismissing the 11th, 12th, 13th and 14th causes of action in the amended complaint as against him,¹² and for sanctions pursuant to 22 NYCRR 130-1.1, as against Buyer.

In motion sequence 004 of Action 1, Ursino moves, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), to dismiss the counterclaims of third-party defendant Icon Ventures, LLC (Ventures).

Action 2 was commenced by Ursino against the Buyer and the SM TIC entities seeking to impose a constructive trust on the Property and to compel the transfer of the Property to him from Buyer and the SM TIC Entities.

¹¹ The Property is a mixed use building with both commercial and residential rental units.

¹² Respectively: (11) tortious interference with contract, (12) a declaration that Ursino tortuously interfered with Buyer's right to purchase the Property, (13) a declaration that Ursino has no right to purchase the Property on his own in the name of Buyer, and (14) breach of fiduciary duty.

In motion sequence 001 of Action 2, Buyer moves, by order to show cause, pursuant to CPLR 6514 (b), to cancel the notice of pendency filed by Ursino on September 1, 2018 (and subsequently refiled on September 14, 2018), as well as for sanctions and attorneys' fees.

In motion sequence 002 of Action 2, Buyer and the SM TIC Entities move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against them.

FACTUAL & PROCEDURAL HISTORY

Andrew Chang, the principal/owner of Seller, decided to sell the Property and, upon doing so, allegedly provided Ursino with a "Letter of Intent" to sell the Property dated November 29, 2016 (the LOI).¹³ On December 28, 2016, Ursino entered into an agreement with Ventures (the 2016 Agreement) wherein Ventures would create a new company (ultimately, Buyer) to purchase the Property and, in exchange for the presentation of the LOI, Ursino would "become a member of [Buyer] by executing a counterpart of the New Purchaser operating agreement . . ." (Russ affirmation, exhibit E, § 2.2, the 2016 Agreement).

The 2016 Agreement also contained a default clause providing, in pertinent part, as follows:

"If [Ventures] fails to perform its material obligations . . . [Ursino] may elect to (a) terminate this Agreement by written notice to [Ventures], in which event, [Ursino] may, if it so elects, proceed to take title to the Property in [Ursino's] name, or in the name of [Buyer] (in which instance any Operating Agreement theretofore executed and delivered shall be null and void so that [Ventures] does not have any interest or rights in [Buyer])"

(*id.* § 6.1).

¹³ This document is not provided to the court.

Pursuant to an agreement dated February 1, 2017 (the Contract of Sale), Seller agreed to sell, and Buyer agreed to buy, the Property for a purchase price of \$10.2 million and the closing was scheduled for January 17, 2017. However, as alleged in the amended complaint, Buyer learned of several purportedly material misrepresentations made by Seller regarding the status of the tenancy of a commercial tenant at the Property at that time, non-party EZ Sneaks,¹⁴ as well as the fact that the residential rent roll did not accurately reflect the occupancy status of at least one apartment (collectively, the Misrepresentations). Based on the Misrepresentations, the closing was adjourned pending further investigation by Buyer.

On May 29, 2018, Buyer commenced Action 1, sounding in breach of contract and fraudulent inducement, in order to, inter alia, resolve the issues surrounding the Misrepresentations and the failure to close.

Less than one month later, on June 25, 2018, pursuant to section 6.1 of the 2016 Agreement, counsel for Ursino provided to Ventures written notice of Ventures' breach of the 2016 Agreement, based on 14 purported material breaches by Ventures (the Default Notice).¹⁵ In the Default Notice, counsel for Ursino represented that Ursino had elected "to acquire the [Property] 'in the name[] of [Buyer]'" (Ursino aff, exhibit D [Action 1, NYSCEF Doc No. 61]).

¹⁴ Namely that it was a month to month tenant, when in fact it had a lease expiring in 2021, with an option to renew (*see* Action 1, NYSCEF Doc No. 13, EZ Sneak Lease)].

¹⁵ As set forth in the Default Notice, Ventures' purported material breaches included, *inter alia*, (1) contacting Seller directly about closing matters "without Ursino's prior consent" or notice, (2) failing to obtain Ursino's written consent and contacting Seller in a manner that violated the 2016 Agreement, (3) creating delay, (4) "[f]ailing to make progress toward a closing of title, and creating or allowing roadblocks and obstacles to a closing of title . . . particularly about the buyout of [EZ Sneaks]," (5) disclosing confidential information, (6) "[c]reating dissension" between Seller and Ursino, and (7) "[f]ailing and refusing to form entities consistent with the 2016 Agreement, and failing and refusing to sign and deliver Operating Agreements consistent with the [2016 Agreement]" (Ursino aff, exhibit D [Action 1, NYSCEF Doc No. 61], the Default Notice, at 4-5).

Subsequently, on July 14, 2018, Buyer amended its complaint to include allegations that Ursino was responsible for the Misrepresentations and that “Ursino’s actions were intended to cause Seller to hold [Buyer] in default of the [Contract of Sale],” therefore creating the situation that would allow for Ursino to trigger the 2016 Agreement’s default provision and “allow Ursino to purchase the Property in the name of the [Buyer] in his own right” pursuant to section 6.1 of the 2016 Agreement (Amended Complaint, ¶¶ 57-58).

Buyer then moved, by order to show cause, for an injunction enjoining Seller from holding Buyer in default of the Contract of Sale. The motion was resolved by stipulation of settlement dated August 1, 2018 wherein Buyer and Seller agreed to terms that allowed for a September 7, 2018 closing date (Russ affirmation, exhibit H).

Then, on September 1, 2018, Ursino commenced Action 2 against Buyer, seeking the imposition of a constructive trust over the Property and compelling the transfer of the Property to Ursino, in the exercise of his purported rights under the 2016 Agreement’s default provision. Ursino also filed a notice of pendency on the Property. As of that time, Buyer had not yet closed on the Property and was not its owner.

On September 7, 2018, Buyer moved, by order to show cause, to cancel the notice of pendency. By so ordered stipulation, dated the same day, Ursino and Buyer agreed to the following:

“1. The notice of pendency filed by [Ursino] dated September 1, 2018 . . . is withdrawn without prejudice to refiling on or after September 14, 2018. . . .

“ 2. [Buyer] agree[s] not to transfer title to the [Property] before September 17, 2018. . . .

“3. [Defendant’s] counsel represents that title will be taken in the name of [Buyer].

“4. The Clerk is directed to immediately cancel the notice of pendency”

(Action 2, NYSCEF Doc No. 12). Notwithstanding the stipulation, the order to show cause, signed by this Court on September 12, 2018, remained on the docket and was scheduled for a hearing on December 4, 2018.

Subsequently, as reflected by a deed dated September 7, 2018 (but not recorded/filed until September 17, 2018), the sale was ultimately completed, and the Property changed hands from Seller to Buyer (Deed, annexed to Russ affirmation, exhibit I [Action 1, NYSCEF Doc No. 113]).

On September 14, 2018, Ursino filed a second notice of pendency on the Property, the terms of which essentially mirrored those in the original notice of pendency.¹⁶ Pursuant to the direction of this Court at the December 4, 2018 hearing, on January 2, 2019, Ursino and Buyer executed a stipulation amending the relief requested in the order to show cause to address the new notice of pendency (Eiben reply affirmation, exhibit D).

By stipulation so-ordered stipulations entered February 4, 2020, the parties agreed to consolidate Action 1 and Action 2 for the purpose of discovery and joint trial. Action 1, Doc. 125; Action 2, Doc. 63.

LEGAL CONCLUSIONS

“[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68

¹⁶ On September 14, 2018, the Buyer and the SM TIC Entities also discontinued against all defendants in Action 1 except Ursino. Doc. 73.

NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (1) governs motions to dismiss where a defense is founded upon documentary evidence. A motion to dismiss a complaint pursuant to 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ladenburg Thalmann & Co. v Tim’s Amusements* 275 AD2d 243, 246 [1st Dept 2000]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action.

“In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory”

(*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]; citing *Leon*, 84 NY2d at 87-88). In addition, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

Ursino’s Motion for Summary Judgment Against Buyer (Action 1, Motion Sequence 003)

Ursino moves pursuant to CPLR 3212 for summary judgment dismissing Buyer’s causes of action against him.

Tortious Interference with Contract

In the 11th cause of action, Buyer seeks relief as against Ursino for tortious interference with the Contract of Sale. To establish a claim for tortious interference with a contract, “the plaintiff must show the existence of its valid contract with a third party, defendant’s knowledge of that contract, defendant’s intentional and improper procuring of a breach, and damages” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Here, Buyer has shown the existence of a valid contract with a third party, i.e., the Contract of Sale, with Seller. It has also shown that Ursino was aware of the Contract of Sale. However, it

is undisputed that, subsequent to the filing of this motion, the Contract of Sale was executed and the Property was sold from Seller to Buyer pursuant to that agreement.

The Court of Appeals has held that an actual breach is required to sustain a cause of action for tortious interference with contract (*see Lama Holding Co. v Smith Barneyd*, 88 NY2d 413, 424 [1996]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]). Since the Property changed hands pursuant to the Contract of Sale, the agreement was not breached, and Ursino is entitled to summary judgment dismissing Buyer's 11th cause of action for tortious interference with the said agreement.

To the extent that Buyer contends that the delay in obtaining title is tantamount to a breach, such argument is unpersuasive (*see Ulysses I & Co., Inc. v Feldstein*, 75 AD3d 990, 992 [3d Dept 2010] ["even accepting that plaintiff . . . systematically charter[ed] a course designed to deprive [defendants] of the property, the fact remains that there was no breach of the . . . contract]).

Buyer's cause of action seeking a declaration that Ursino tortiously interfered with the Contract of sale is dismissed as duplicative (*Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016] [A cause of action seeking a declaratory judgment is "unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract"]). Here, Buyer had an adequate alternate remedy, specifically its tortious interference claim. Thus, Ursino is entitled to summary judgment dismissing the 11th and 12th causes of action as against him.

Declaration of Ursino's Rights

The 13th cause of action seeks a declaration that Ursino has no right to purchase the Property in the name of Buyer, a claim derived from Ursino's agreement with Ventures in the 2016

Agreement. In his motion, Ursino argues that this claim seeks “the opposite of what Ursino seeks in the Third-Party Action” as against Ventures and that “[it] is for Ursino to seek such relief” (memorandum in support, at 17). Therefore, he argues, summary judgment is warranted dismissing this claim as against him (memorandum in support, at 17).

Ursino cites to no case law and does not establish through argument, evidence or analysis why it would be improper for Buyer to seek a declaration that would, essentially, clarify Buyer’s and Ursino’s rights as to the Property (CPLR 3001 [“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed”]). Accordingly, Ursino is not entitled to summary judgment dismissing the 13th cause of action against him.

Breach of Fiduciary Duty

The 14th cause of action alleges that Ursino breached his fiduciary duty to Buyer by orchestrating the Misrepresentations, causing delay and damaging Buyer.

“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 Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2011]). “When one party is under a duty to act for, or give advice for the benefit of, another on matters within the scope of their relationship, a fiduciary relationship is created” (*Dembect v 220 Cent. Park S. LLC*, 33 AD3d 491, 492 [1st Dept 2006]).

Ursino’s sole argument is that he was not in a fiduciary relationship with, and did not owe a fiduciary duty to, Buyer. In support of this position, Ursino argues that the 2016 Agreement

“anticipates that [he] become a non-managing LLC member, not a manager” of Buyer and that, under the Limited Liability Corporation Law, a non-managing member owes no fiduciary duty to a managing member, which is purportedly Ventures herein (Ursino aff, ¶ 14; Limited Liability Company Law § 409; *see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] “[a]s the managing member of the LLCs, [the defendant managing member] owed plaintiff – a nonmanaging member – a fiduciary duty”). However, Ursino provides no documentation affirmatively establishing such status or lack thereof.

The 2016 Agreement, in and of itself, does not explicitly establish Ursino’s membership status (managing or otherwise) or his responsibilities with respect to Buyer. Rather, the 2016 Agreement merely provides that Ursino “shall become a member of [Buyer] by executing a counterpart of the New Purchaser operating Agreement . . .” (the Operating Agreement) and that Ursino and Ventures “shall be the owners of all of the outstanding membership interests of [Buyer] . . .” (Russ affirmation, exhibit E, § 2.2, the 2016 Agreement). A copy of the Operating Agreement, which purports to set various values, including the percentage of ownership of Buyer and Ursino, is annexed to the 2016 Agreement (*id.*, exhibit A). However, the copy provided to this Court is unexecuted and contains blank spaces for nearly all values, including percent ownership. Moreover, on its face, it is entirely silent with respect to whether Ursino was considered a managing member.

Since the 2016 Agreement contains ambiguities regarding the relationship between Ursino and Ventures regarding Buyer, which this Court is unable to clarify, it is insufficient to establish Ursino’s role or capacity with respect to Buyer. Such ambiguities must be resolved through discovery, which has yet to be conducted. Absent such information, this Court cannot determine, as a matter of law, what fiduciary obligations, if any, Ursino may have had to Buyer.

Accordingly, Ursino's pre-discovery motion for summary judgment seeking the dismissal of the 14th cause of action is denied.

Sanctions

Ursino seeks sanctions for Buyer's purportedly frivolous conduct in bringing this action against him. However, since Buyer's claims for breach of fiduciary duty and a declaration of Ursino's rights are viable, this Court declines to impose sanctions.

Ursino's Motion to Dismiss Counterclaims Against Ventures (Action 1, Motion Sequence 004)

Ursino argues that, based on documentary evidence, Ventures' third-party counterclaims should be dismissed for the failure to state a cause of action, and because Ventures has no standing to bring claims against him.

Ursino's third-party action against Ventures alleges claims sounding in breach of contract and specific performance of the 2016 Agreement.¹⁷ In opposition, Ventures raises 15 counterclaims, sounding in (1, 2) breach of the implied covenant of good faith and fair dealing with respect to the 2016 Agreement; (3, 12 and 13) fraud; (4 through 11) breach of an amendment to the 2016 Agreement and specific performance with respect thereto; (14) unjust enrichment; and (15) legal fees.

Additional Facts Raised in Ventures' Counterclaims

¹⁷ Specifically, Ursino seeks the benefits he claims he was to receive under the 2016 Agreement, including: (1) a membership interest in Buyer, (2) the contribution value of the LOI, (3) "the protections and benefits of a signed Operating Agreement" and (4) "his [unspecified] Units" (amended third-party complaint, ¶¶ 28 and 31).

The parties submit to this Court a document, dated May 4, 2017, entitled “First Amendment to Agreement,” which purports to modify the 2016 Agreement (the Amendment) (Russ aff, exhibit F). It provides, in pertinent part, as follows:

“Whereas, in consideration of agreements between [Ursino] and [Ventures] relating to the [Property], [Ursino] agrees to provide [Ventures] with a right of first offer (‘ROFO’) to purchase properties currently owned or controlled by the seller of the [Property] . . . if and to the extent that [Ursino] is presented with the opportunity to purchase such additional properties.

“Now, Therefore, it is mutually agreed as follows:

“1. Before [Ursino] participates in any business transaction . . . to purchase any of the properties in Manhattan listed below, [Ursino] shall provide a five (5) business day written notice . . . to [Ventures]. . . . [Ventures than] shall have a five (5) day period to enter into an agreement with [Ursino] . . . whereby [Ventures] would agree to purchase said property(ies) and [Ursino] would receive payment and/or participate, at its option, in the ownership of the purchaser of said properties. . . . The properties where [Ventures] has the ROFO are:

- 9-11 Avenue B, New York, New York
- 207 East 4th Street, New York, New York
- 231-233 East 4th Street, New York, New York
- 106 Avenue B, New York, New York
- 102 Suffolk Street, New York, New York
- 187 East 7th Street, New York, New York”

(*id.*). The Amendment also contains a handwritten addition in the right-hand margin (the Handwriting), purporting to modify paragraph 1. The modified paragraph reads as follows:

“1. Before [Ursino] participates in any business transaction . . . to purchase any of the properties in Manhattan listed below, provided that no litigation has commenced against the seller or [Ursino], or is being threatened as it relates to the [Property], [Ursino] shall provide . . .”

(*id.* [emphasis added]). The remainder of the document remains unchanged.

The Amendment is signed by Ursino and the managing member of Ventures, but the Handwriting is initialed only by Ursino. In addition, although the document is dated May 4, 2017, the individual signatures on the Amendment, as well as the initials on the Handwriting, are undated.

Ventures alleges that Ursino failed to provide the purportedly agreed upon right of first offer (ROFO) to Ventures with respect to 207 East 4th Street, New York, New York; 106 Avenue B, New York, New York, 102 Suffolk Street, New York, New York and 187 East 7th Street, New York, New York (collectively, the Counterclaim Properties).

Standing

Ursino argues that Ventures lacks standing to bring any counterclaims because “once title to the [Property] closed pursuant to the [Contract of Sale] . . . the [Contract of sale was] no longer operative” (Ursino memorandum of law, ¶ 1-2) (*TIAA Glob. Invs. LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85 [1st Dept 2015] [“The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract”]). However, none of Ventures’ counterclaims are premised on violations of the Contract of Sale. Rather, its claims are based on the 2016 Agreement and/or the Amendment. Ursino fails to explain how or why the 2016 Agreement or the Amendment would merge into the deed and bar Ventures from prosecuting any claims related thereto. Accordingly, this argument is unpersuasive.

Next, Ursino argues that Ventures has no standing because its counterclaims “are those of the LLC which owns the [Property]”, i.e., Buyer, and, therefore, because Ventures is a shareholder

of Buyer, each of its counterclaims are purely derivative (Ursino memorandum of law, ¶ 6). However, Ursino fails to particularize this argument with respect to the varied counterclaims asserted by Ventures (breach of the implied covenant of good faith and fair dealing with respect to the 2016 Agreement, unjust enrichment, fraud, and breach of the Amendment with respect to the Counterclaim Properties). Nor does Ursino address his argument to the substance of each counterclaim or explain how each is a derivative claim. Since his argument is overbroad and fails to substantively address any of the counterclaims, Ursino is not entitled to dismissal of the counterclaims on this ground (*see e.g., Martirano Constr. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1029 [2d Dept 1984] [“a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed”]).

The Breach of the Implied Covenant of Good Faith Claims (Counterclaims 1 and 2)

The first and second counterclaims allege that Ursino owed Ventures a duty to act in good faith with respect to the 2016 Agreement, the purpose of which “was to purchase [the Property]” (third-party answer, ¶ 226; see also ¶ 22 [“The purpose of the 2016 Agreement was to close on the sale of the [Property]”). Ventures then alleges that Ursino breached this duty by “intentionally making material misrepresentations” about the Property and by “imparting” Buyer’s confidential information to Seller.

All contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). “This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010] [internal citations and quotation marks omitted]). To that end, the implied covenant would be breached “when a party acts in a manner that – although not expressly forbidden by any contractual provision – would deprive the other party of receiving the benefits under their agreement” (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

Here, Ventures specifically pleads that the purpose of the 2016 Agreement was for Ventures to arrange for the purchase of the Property. It is undisputed that Ventures arranged for the purchase of the Property and that the Property was, in fact, purchased by an entity established by Ventures. Therefore, the alleged purpose of the 2016 Agreement was fulfilled with respect to Ventures and, even when viewed in a light most favorable to Ventures, Ventures cannot plead that it was deprived of the benefit that it was owed under the 2016 Agreement. Accordingly, Ventures has failed to plead a claim for the breach of the implied covenant of good faith and fair dealing.

Thus, Ursino is entitled to the dismissal of the first and second counterclaims.

The Fraud Counterclaims (Counterclaims 3, 12 and 13)

Counterclaims 3, 12 and 13 sound in fraudulent inducement and fraudulent omission.

“A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages” (*Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept

2010]).¹⁸ In addition, CPLR 3016 (b) provides, in pertinent part, that “[w]here a cause of action or defense is based upon misrepresentation [or] fraud . . . the circumstances constituting the wrong shall be stated in detail.”

Importantly, “[s]tatements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud” (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015]). Here, each fraud counterclaim alleges nearly all material facts upon information and belief (amended third-party answer ¶¶ 235, 299 and 305).¹⁹ Such pleadings, without further explanation or specificity, are insufficient to sustain the heightened pleading requirements of a fraud claim (*id.*).

Moreover, while the counterclaims generally allege that Ventures relied on Ursino’s misrepresentations, they do not allege or explain *how* it relied on the claimed misrepresentations (*see Nicosia v Bd. of Managers of Weber House Condominium*, 77 AD3d at 456 [dismissing the fraud claim because, among other things, the plaintiff did “not explain how he relied to his detriment on the [defendant’s] alleged exercise” of its rights]). Similarly, while the counterclaims generally allege that Ventures was damaged by Ursino’s misrepresentations, Ventures fails to set forth *how* it was damaged thereby (*1711 LLC v 231 W. 54th Corp.*, 7 AD3d 261, 262 [1st Dept

¹⁸ The elements of a fraudulent inducement claim are essentially identical to the elements of a fraud claim (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]), while a cause of action for fraudulent omission requires, in addition to the elements of a fraud claim, “an allegation that the defendant had a duty to disclose material information and that it failed to do so” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011], quoting *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

¹⁹ Respectively, “Upon information and belief, Ursino was to receive a commission on the sale of the [Property]” (amended third-party answer, ¶ 235); “Upon information and belief, Ursino was communicating with Seller’s Principal in a manner intended to sabotage the purchase of the [Property]” (*id.* at 299), and “Upon information and belief, Ursino agreed to pay the mortgage on the [Property] on the Seller’s behalf, prior to the sale of the building” (*id.* at 305).

2004] [dismissing fraud claim where the defendants “wholly failed to specify how they were injured as a result of plaintiffs' alleged misrepresentations”]).

Given the foregoing, Ventures has failed to allege its fraud counterclaims with the requisite specificity mandated by CPLR 3016. Accordingly, Ursino is entitled to dismissal of Ventures’ 3rd, 12th and 13th counterclaims.

Ventures’ Counterclaims Based on the Amendment (Counterclaims 4 through 11)

In its 4th, 6th, 8th and 10th counterclaims, Ventures alleges that Ursino breached the 2016 Agreement when he failed to provide a ROFO for the Counterclaim Properties prior to their respective sales. The 5th, 7th, 9th and 11th counterclaims seek specific performance of the Amendment with respect to the Counterclaim Properties, specifically requesting that this Court grant Ventures its purported ownership interests in said properties.

In his motion to dismiss, Ursino argues that the Amendment is a nullity because, although the Agreement was signed, the Handwriting (as noted above, Ursino’s written modification to the Agreement) was never countersigned by Ventures. In addition, Ursino noted that, at oral argument before this Court on June 27, 2018, counsel for Ventures conceded that Ursino “unilaterally made a change that was unacceptable, so to the extent of the [Handwriting], we would submit that that is immaterial” (tr. at 4). Therefore, Ursino argues, there was no meeting of the minds and no binding agreement as to the Amendment.

“To form a binding contract, there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms” (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted]). Where there is no meeting of the

minds “as to an essential term” of an agreement, there is no binding contract (*Harper v Rodriguez*, 272 AD2d 372, 372 [2d Dept 2000]).

Here, Ursino fails to establish, or even argue, that the Handwriting modified an essential or material term of the Amendment to the 2016 Agreement, such that Ventures’ failure to assent would constitute a failure of the parties to have a meeting of the minds. Ursino does not supply his own affidavit to explain his understanding of the Amendment or the Handwriting, nor is there any other document submitted that addresses the materiality of the Handwriting. Ursino’s reliance on the statement by Ventures’ counsel during oral argument is unpersuasive. Although counsel acknowledged that Ursino made a unilateral change to the Agreement, the attorney also stated that the Handwriting was “immaterial” (tr at 4). Accordingly, the issue of materiality was not conclusively established so as to warrant the dismissal of these claims on the ground that there was no meeting of the minds.

A question of fact also exists with respect to the timing of the Handwriting, i.e., whether it was written simultaneously with Ursino’s execution of the Agreement or subsequent thereto. Such questions cannot be resolved by the evidence currently before this Court, although they may be resolved during discovery.

Ursino also argues that Ventures failed to sufficiently allege damages because any damages would be speculative. However, Ursino provides no documentation or analysis (aside from his own conclusory assertions) that would establish why the damages alleged, specifically the lost value of the Counterclaim Properties, are speculative.

In his memorandum of law, Ursino articulates no specific arguments with respect to the sufficiency of the 5th, 7th, 9th and 11th counterclaims. Given the absence of such arguments, this Court need not address the sufficiency of each of these counterclaims.

The remainder of Ursino's arguments with respect to these counterclaims are similarly unsupported by law or facts sufficient to warrant their dismissal at this stage of the litigation.

Thus, Ursino is not entitled to dismissal of the 4th through 11th counterclaims.

The Remaining Counterclaims (Counterclaims 14 and 15)

Although Ursino moves for dismissal of Ventures' counterclaims that seek recovery under a theory of unjust enrichment (counterclaim 14) and for attorneys' fees pursuant to the 2016 Agreement (counterclaim 15), Ursino makes no arguments supporting their dismissal aside from a general assertion, unsupported by facts or legal analysis, that such claims are baseless and frivolous. Accordingly, Ursino has failed to establish his entitlement to the dismissal of these counterclaims.

Buyer's Motion to Cancel Notice of Pendency (Action 2, Motion Sequence Number 001)

This Court now turns to Action 2, in which Ursino seeks to impose a constructive trust on the Property and compel the transfer of the Property from Buyer to himself.

In motion sequence number 001, Buyer moves to cancel the second notice of pendency filed by Ursino against the Property on September 14, 2018. This motion contains several procedural arguments as to the validity of the second notice of pendency. Assuming, *arguendo*, that the second notice of pendency is a properly filed, existing document, it must nevertheless must be cancelled.

A notice of pendency may be filed pursuant to CPLR 6501 “in any action . . . in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property . . .” (CPLR 6501). A notice of pendency “cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some’ other wrong” (*New Journey Global Inc. v Liu*, 2018 NY Slip Op 32921[U], *4 [Sup Ct, NY County 2018], quoting *Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 305 [1961]).

To determine whether the notice of pendency is proper, that is whether Ursino has the requisite right, title or interest to the Property, “the court must examine the complaint in its entirety” (*5303 Realty Corp. v. O & Y Equity Corp.*, 64 NY2d 313, 323 [1984]). Moreover, the court should apply “a narrow interpretation in reviewing whether an action” affects such title, possession, use or enjoyment (*id.* at 321).

In his complaint in Action 2, Ursino explicitly incorporates by reference his third-party complaint in Action 1, alleging, in pertinent part, that:

“[U]pon the termination of the 2016 Agreement by reason of the breach by [Ventures], [Ursino] had and has the absolute right to take title to the [Property] by owning all membership interests of [Buyer] . . .”

(Action 2’s complaint, ¶ 10[k]).

Therefore, despite Ursino’s claim for a direct interest in the title to the Property, his allegation makes clear that his interest in this action is not a direct interest in the Property, but rather an interest in the ownership of Buyer. “[N]otices of pendency may not be used in actions where the relief sought is a declaration of ownership in a corporation, ‘even where the sole corporate asset is real property’” (*Ostad v Nehmadi*, 31 Misc 3d 1211(A), *2 [Sup Ct, NY County 2011], quoting *Schlesinger v Schlesinger*, 2002 WL 221100, *10 [Sup Ct, Kings County 2002];

see e.g. *5303 Realty Corp.*, 64 NY2d at 313; *General Prop. Corp. v Diamond*, 29 AD2d 173, 175 [dismissing lis pendens where plaintiff claimed “no interest in the lease . . . but only in a new project”]). Moreover, the facts of this case, as alleged in the pleadings in both Action 1 and 2, as well as the third-party complaint in Action 1, describe a transaction in which Ursino provided a non-cash “investment” to Ventures in consideration for being given an unspecified percentage share of a company dealing in real property, which company ultimately purchased the Premises. New York courts have held that similar schemes do not directly affect title to, or the possession, use or enjoyment of real property (see *5303 Realty Corp.*, 64 NY2d at 323; *Yonaty v Glauber*, 40 AD3d 1193, 1195 [3d Dept 2007]).²⁰

Thus, Buyer is entitled to the cancellation of the second notice of pendency on the Property.

Finally, Buyer’s application for costs and expenses pursuant to CPLR 6514 (c) is denied since it failed to set forth any grounds for such relief.

Buyer’s Motion to Dismiss Action 2 (Action 2, Motion Sequence Number 002)

Buyer moves to dismiss the complaint on the ground that it fails to state a cause of action. Action 2 contains a single cause of action that seeks to impose a constructive trust on the Property and compel the transfer of the Property to Ursino. Buyer also moves to dismiss the complaint as against the SM TIC Entities on the ground that they are not title owners of the Property.

²⁰ The default provision of the 2016 Agreement further indicates that Ursino’s interest is related to the ownership of Buyer (as opposed to the Premises). Specifically, it provides that Ursino’s right to “take title to the Property” is tied to Ventures’ loss, in default, of “any interest or rights in [Buyer]” – i.e. Ventures’ percent ownership of Buyer, not Buyer’s ownership of the Premises (Russ affirmation, exhibit E, § 6.1, the 2016 Agreement).

“The elements of a cause of action to impose a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment” (*JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222, 1223 [2d Dept 2016]).

As discussed above, Ursino’s arguments with respect to fiduciary duties (either owed to him by Buyer or owed by him to Buyer) rest entirely on terms purportedly found in the Operating Agreement annexed to the 2016 Agreement. As noted previously, the Operating Agreement, as presented to this Court, is unexecuted and contains several blanks, thereby rendering its terms ambiguous at this nascent stage of the litigation. Discovery is necessary to further address this issue and any determination regarding the existence of a fiduciary relationship running from Buyer to Ursino would be premature at this time.

Thus, Buyer is not entitled to dismissal of the complaint as against it.

The SM TIC Entities

The documents submitted to this Court establish that the Property is owned by Buyer (*see* Deed, annexed to Russ affirmation, exhibit I [Action 1, NYSCEF Doc No. 113]). There is no evidence that would establish that the SM TIC Entities own the Property, such that they would be a proper party to Ursino’s claim to impose a constructive trust over the Property.

Ursino’s sole argument is that the SM TIC Entities purportedly “held funds of the transaction” to purchase the Property, and therefore, they should be “[bound] to the judgment.” This argument fails to establish any basis for a claim that Ursino had a fiduciary relationship with the SM TIC Entities, that the SM TIC Entities promised him anything, that he relied on any promise made by the SM TIC Entities, or that the SM TIC Entities were unjustly enriched.

Thus, the SM TIC Entities are entitled to dismissal of the complaint as against them.

The parties' remaining arguments are either without merit or need not be addressed given the findings set forth above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant/third-party plaintiff Brian Ursino's motion (motion sequence number 003 filed under Index Number 154991/18), pursuant to CPLR 3212, for summary judgment dismissing the 11th, 12th, 13th, and 14th causes of action alleged against him is granted to the extent that the 11th and 12th causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Ursino's motion to dismiss (motion sequence number 004 filed under Index Number 154991/18), pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), to dismiss all third-party counterclaims of third-party defendant Icon Ventures (Ventures) is granted to the extent that counterclaims 1, 2, 3, 12 and 13 are dismissed as against Ursino, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendants 21/23 Avenue B Realty LLC (Buyer), Ave B SM TIC1 LLC and Ave B SM TIC2 LLC (together the SM TIC Entities) (motion sequence number 001 filed under Index Number 158161/18), pursuant to CPLR 6514, to cancel the notice of pendency currently in place as against the premises known as 21/23 Avenue B, New York, New

York 10009, Block 395, Lot 2 (the Property), is granted and the Clerk of the Court is directed to immediately cancel the notice of pendency affecting the Property; and it is further

ORDERED that the motion by 21/23 Avenue B Realty LLC and the SM TIC Entities (motion sequence number 002 filed under Index Number 158161/18) to dismiss the complaint is granted with respect to the SM TIC Entities only, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, pursuant to the so-ordered stipulations executed by the parties (Index No. 154991/18, Doc. 125; Index No. 158161/18, Doc. 63), the captioned action is consolidated for the purposes of discovery and joint trial with the matter of *Brian Ursino v 21/23 Avenue B Realty LLC, Ave B SM TIC1 LLC and Ave B SM TIC2 LLC*, pending in this Court under Index No. 158161/18; and it is further

ORDERED, that within 30 days from the entry of this order, counsel for Ursino shall serve a copy of this order, with notice of entry, upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation for purposes of discovery and joint trial; it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; it is further

ORDERED that all remaining parties to Action 1 (154991/18) and Action 2 (158161/18) are directed to appear for a status conference at 80 Centre Street, Room 280, New York, New York on April 28, 2020, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Motion sequence numbers 003 and 004 pending under Index No. 154991/2018 (Action 1) and motion sequence numbers 001 and 002 pending under Index No. 158161/2018 (Action 2) are hereby consolidated for disposition.

Action 1 arises from a claim for, *inter alia*, breach of a contract of sale for a commercial property located at 21-23 Avenue B, New York, New York (the Property),²¹ brought by plaintiffs 21/23 Avenue B Realty LLC (Buyer), Ave B SM TIC1 LLC and Ave B SM TIC2 LLC (together, the SM TIC Entities) against defendant 21&23 Avenue B Realty, LLC (Seller). In addition, in Action 1, Buyer asserts claims against defendant/third-party plaintiff Brian Ursino (Ursino) sounding in tortious interference with contract and breach of fiduciary duty.

In motion sequence 003 of Action 1, Ursino moves, pursuant to CPLR 3212, for summary judgment dismissing the 11th, 12th, 13th and 14th causes of action in the amended complaint as against him,²² and for sanctions pursuant to 22 NYCRR 130-1.1, as against Buyer.

²¹ The Property is a mixed use building with both commercial and residential rental units.

²² Respectively: (11) tortious interference with contract, (12) a declaration that Ursino tortuously interfered with Buyer's right to purchase the Property, (13) a declaration that Ursino has no right to purchase the Property on his own in the name of Buyer, and (14) breach of fiduciary duty.

In motion sequence 004 of Action 1, Ursino moves, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), to dismiss the counterclaims of third-party defendant Icon Ventures, LLC (Ventures).

Action 2 was commenced by Ursino against the Buyer and the SM TIC entities seeking to impose a constructive trust on the Property and to compel the transfer of the Property to him from Buyer and the SM TIC Entities.

In motion sequence 001 of Action 2, Buyer moves, by order to show cause, pursuant to CPLR 6514 (b), to cancel the notice of pendency filed by Ursino on September 1, 2018 (and subsequently refiled on September 14, 2018), as well as for sanctions and attorneys' fees.

In motion sequence 002 of Action 2, Buyer and the SM TIC Entities move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against them.

FACTUAL & PROCEDURAL HISTORY

Andrew Chang, the principal/owner of Seller, decided to sell the Property and, upon doing so, allegedly provided Ursino with a "Letter of Intent" to sell the Property dated November 29, 2016 (the LOI).²³ On December 28, 2016, Ursino entered into an agreement with Ventures (the 2016 Agreement) wherein Ventures would create a new company (ultimately, Buyer) to purchase the Property and, in exchange for the presentation of the LOI, Ursino would "become a member of [Buyer] by executing a counterpart of the New Purchaser operating agreement . . ." (Russ affirmation, exhibit E, § 2.2, the 2016 Agreement).

The 2016 Agreement also contained a default clause providing, in pertinent part, as follows:

²³ This document is not provided to the court.

“If [Ventures] fails to perform its material obligations . . . [Ursino] may elect to (a) terminate this Agreement by written notice to [Ventures], in which event, [Ursino] may, if it so elects, proceed to take title to the Property in [Ursino’s] name, or in the name of [Buyer] (in which instance any Operating Agreement theretofore executed and delivered shall be null and void so that [Ventures] does not have any interest or rights in [Buyer])”

(*id.* § 6.1).

Pursuant to an agreement dated February 1, 2017 (the Contract of Sale), Seller agreed to sell, and Buyer agreed to buy, the Property for a purchase price of \$10.2 million and the closing was scheduled for January 17, 2017. However, as alleged in the amended complaint, Buyer learned of several purportedly material misrepresentations made by Seller regarding the status of the tenancy of a commercial tenant at the Property at that time, non-party EZ Sneaks,²⁴ as well as the fact that the residential rent roll did not accurately reflect the occupancy status of at least one apartment (collectively, the Misrepresentations). Based on the Misrepresentations, the closing was adjourned pending further investigation by Buyer.

On May 29, 2018, Buyer commenced Action 1, sounding in breach of contract and fraudulent inducement, in order to, *inter alia*, resolve the issues surrounding the Misrepresentations and the failure to close.

Less than one month later, on June 25, 2018, pursuant to section 6.1 of the 2016 Agreement, counsel for Ursino provided to Ventures written notice of Ventures’ breach of the 2016 Agreement, based on 14 purported material breaches by Ventures (the Default Notice).²⁵ In the Default Notice,

²⁴ Namely that it was a month to month tenant, when in fact it had a lease expiring in 2021, with an option to renew (*see* Action 1, NYSCEF Doc No. 13, EZ Sneak Lease]).

²⁵ As set forth in the Default Notice, Ventures’ purported material breaches included, *inter alia*, (1) contacting Seller directly about closing matters “without Ursino’s prior consent” or notice, (2) failing to obtain Ursino’s written consent and contacting Seller in a manner that violated the 2016 Agreement, (3) creating delay, (4) “[f]ailing to make progress toward a closing of title, and

counsel for Ursino represented that Ursino had elected “to acquire the [Property] ‘in the name[] of [Buyer]” (Ursino aff, exhibit D [Action 1, NYSCEF Doc No. 61]).

Subsequently, on July 14, 2018, Buyer amended its complaint to include allegations that Ursino was responsible for the Misrepresentations and that “Ursino’s actions were intended to cause Seller to hold [Buyer] in default of the [Contract of Sale],” therefore creating the situation that would allow for Ursino to trigger the 2016 Agreement’s default provision and “allow Ursino to purchase the Property in the name of the [Buyer] in his own right” pursuant to section 6.1 of the 2016 Agreement (Amended Complaint, ¶¶ 57-58).

Buyer then moved, by order to show cause, for an injunction enjoining Seller from holding Buyer in default of the Contract of Sale. The motion was resolved by stipulation of settlement dated August 1, 2018 wherein Buyer and Seller agreed to terms that allowed for a September 7, 2018 closing date (Russ affirmation, exhibit H).

Then, on September 1, 2018, Ursino commenced Action 2 against Buyer, seeking the imposition of a constructive trust over the Property and compelling the transfer of the Property to Ursino, in the exercise of his purported rights under the 2016 Agreement’s default provision. Ursino also filed a notice of pendency on the Property. As of that time, Buyer had not yet closed on the Property and was not its owner.

creating or allowing roadblocks and obstacles to a closing of title . . . particularly about the buyout of [EZ Sneaks],” (5) disclosing confidential information, (6) “[c]reating dissension” between Seller and Ursino, and (7) “[f]ailing and refusing to form entities consistent with the 2016 Agreement, and failing and refusing to sign and deliver Operating Agreements consistent with the [2016 Agreement]” (Ursino aff, exhibit D [Action 1, NYSCEF Doc No. 61], the Default Notice, at 4-5).

On September 7, 2018, Buyer moved, by order to show cause, to cancel the notice of pendency. By so ordered stipulation, dated the same day, Ursino and Buyer agreed to the following:

“1. The notice of pendency filed by [Ursino] dated September 1, 2018 . . . is withdrawn without prejudice to refiling on or after September 14, 2018. . . .

“ 2. [Buyer] agree[s] not to transfer title to the [Property] before September 17, 2018. . . .

“3. [Defendant’s] counsel represents that title will be taken in the name of [Buyer].

“4. The Clerk is directed to immediately cancel the notice of pendency”

(Action 2, NYSCEF Doc No. 12). Notwithstanding the stipulation, the order to show cause, signed by this Court on September 12, 2018, remained on the docket and was scheduled for a hearing on December 4, 2018.

Subsequently, as reflected by a deed dated September 7, 2018 (but not recorded/filed until September 17, 2018), the sale was ultimately completed, and the Property changed hands from Seller to Buyer (Deed, annexed to Russ affirmation, exhibit I [Action 1, NYSCEF Doc No. 113]).

On September 14, 2018, Ursino filed a second notice of pendency on the Property, the terms of which essentially mirrored those in the original notice of pendency.²⁶ Pursuant to the direction of this Court at the December 4, 2018 hearing, on January 2, 2019, Ursino and Buyer executed a stipulation amending the relief requested in the order to show cause to address the new notice of pendency (Eiben reply affirmation, exhibit D).

²⁶ On September 14, 2018, the Buyer and the SM TIC Entities also discontinued against all defendants in Action 1 except Ursino. Doc. 73.

By stipulation so-ordered stipulations entered February 4, 2020, the parties agreed to consolidate Action 1 and Action 2 for the purpose of discovery and joint trial. Action 1, Doc. 125; Action 2, Doc. 63.

LEGAL CONCLUSIONS

“[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are

not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (1) governs motions to dismiss where a defense is founded upon documentary evidence. A motion to dismiss a complaint pursuant to 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ladenburg Thalmann & Co. v Tim’s Amusements* 275 AD2d 243, 246 [1st Dept 2000]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action.

“In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory”

(*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]; citing *Leon*, 84 NY2d at 87-88). In addition, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

Ursino’s Motion for Summary Judgment Against Buyer (Action 1, Motion Sequence 003)

Ursino moves pursuant to CPLR 3212 for summary judgment dismissing Buyer’s causes of action against him.

Tortious Interference with Contract

In the 11th cause of action, Buyer seeks relief as against Ursino for tortious interference with the Contract of Sale. To establish a claim for tortious interference with a contract, “the plaintiff must show the existence of its valid contract with a third party, defendant’s knowledge of that contract, defendant’s intentional and improper procuring of a breach, and damages” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Here, Buyer has shown the existence of a valid contract with a third party, i.e., the Contract of Sale, with Seller. It has also shown that Ursino was aware of the Contract of Sale. However, it is undisputed that, subsequent to the filing of this motion, the Contract of Sale was executed and the Property was sold from Seller to Buyer pursuant to that agreement.

The Court of Appeals has held that an actual breach is required to sustain a cause of action for tortious interference with contract (*see Lama Holding Co. v Smith Barneyd*, 88 NY2d 413, 424 [1996]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]). Since the Property changed hands pursuant to the Contract of Sale, the agreement was not breached, and Ursino is entitled to summary judgment dismissing Buyer’s 11th cause of action for tortious interference with the said agreement.

To the extent that Buyer contends that the delay in obtaining title is tantamount to a breach, such argument is unpersuasive (*see Ulysses I & Co., Inc. v Feldstein*, 75 AD3d 990, 992 [3d Dept 2010] [“even accepting that plaintiff . . . systematically charter[ed] a course designed to deprive [defendants] of the property, the fact remains that there was no breach of the . . . contract]).

Buyer’s cause of action seeking a declaration that Ursino tortiously interfered with the Contract of sale is dismissed as duplicative (*Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016] [A cause of action seeking a declaratory judgment is “unnecessary

and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract”). Here, Buyer had an adequate alternate remedy, specifically its tortious interference claim. Thus, Ursino is entitled to summary judgment dismissing the 11th and 12th causes of action as against him.

Declaration of Ursino’s Rights

The 13th cause of action seeks a declaration that Ursino has no right to purchase the Property in the name of Buyer, a claim derived from Ursino’s agreement with Ventures in the 2016 Agreement. In his motion, Ursino argues that this claim seeks “the opposite of what Ursino seeks in the Third-Party Action” as against Ventures and that “[it] is for Ursino to seek such relief” (memorandum in support, at 17). Therefore, he argues, summary judgment is warranted dismissing this claim as against him (memorandum in support, at 17).

Ursino cites to no case law and does not establish through argument, evidence or analysis why it would be improper for Buyer to seek a declaration that would, essentially, clarify Buyer’s and Ursino’s rights as to the Property (CPLR 3001 [“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed”). Accordingly, Ursino is not entitled to summary judgment dismissing the 13th cause of action against him.

Breach of Fiduciary Duty

The 14th cause of action alleges that Ursino breached his fiduciary duty to Buyer by orchestrating the Misrepresentations, causing delay and damaging Buyer.

“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 Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2011]). “When one party is under a duty to act for, or give advice for the benefit of, another on matters within the scope of their relationship, a fiduciary relationship is created” (*Dembect v 220 Cent. Park S. LLC*, 33 AD3d 491, 492 [1st Dept 2006]).

Ursino’s sole argument is that he was not in a fiduciary relationship with, and did not owe a fiduciary duty to, Buyer. In support of this position, Ursino argues that the 2016 Agreement “anticipates that [he] become a non-managing LLC member, not a manager” of Buyer and that, under the Limited Liability Corporation Law, a non-managing member owes no fiduciary duty to a managing member, which is purportedly Ventures herein (Ursino aff, ¶ 14; Limited Liability Company Law § 409; *see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] “[a]s the managing member of the LLCs, [the defendant managing member] owed plaintiff – a nonmanaging member – a fiduciary duty”). However, Ursino provides no documentation affirmatively establishing such status or lack thereof.

The 2016 Agreement, in and of itself, does not explicitly establish Ursino’s membership status (managing or otherwise) or his responsibilities with respect to Buyer. Rather, the 2016 Agreement merely provides that Ursino “shall become a member of [Buyer] by executing a counterpart of the New Purchaser operating Agreement . . .” (the Operating Agreement) and that Ursino and Ventures “shall be the owners of all of the outstanding membership interests of [Buyer] . . .” (Russ affirmation, exhibit E, § 2.2, the 2016 Agreement). A copy of the Operating Agreement, which purports to set various values, including the percentage of ownership of Buyer and Ursino, is annexed to the 2016 Agreement (*id.*, exhibit A). However, the copy provided to this Court is

unexecuted and contains blank spaces for nearly all values, including percent ownership. Moreover, on its face, it is entirely silent with respect to whether Ursino was considered a managing member.

Since the 2016 Agreement contains ambiguities regarding the relationship between Ursino and Ventures regarding Buyer, which this Court is unable to clarify, it is insufficient to establish Ursino's role or capacity with respect to Buyer. Such ambiguities must be resolved through discovery, which has yet to be conducted. Absent such information, this Court cannot determine, as a matter of law, what fiduciary obligations, if any, Ursino may have had to Buyer.

Accordingly, Ursino's pre-discovery motion for summary judgment seeking the dismissal of the 14th cause of action is denied.

Sanctions

Ursino seeks sanctions for Buyer's purportedly frivolous conduct in bringing this action against him. However, since Buyer's claims for breach of fiduciary duty and a declaration of Ursino's rights are viable, this Court declines to impose sanctions.

Ursino's Motion to Dismiss Counterclaims Against Ventures (Action 1, Motion Sequence 004)

Ursino argues that, based on documentary evidence, Ventures' third-party counterclaims should be dismissed for the failure to state a cause of action, and because Ventures has no standing to bring claims against him.

Ursino's third-party action against Ventures alleges claims sounding in breach of contract and specific performance of the 2016 Agreement.²⁷ In opposition, Ventures raises 15 counterclaims, sounding in (1, 2) breach of the implied covenant of good faith and fair dealing with respect to the 2016 Agreement; (3, 12 and 13) fraud; (4 through 11) breach of an amendment to the 2016 Agreement and specific performance with respect thereto; (14) unjust enrichment; and (15) legal fees.

Additional Facts Raised in Ventures' Counterclaims

The parties submit to this Court a document, dated May 4, 2017, entitled "First Amendment to Agreement," which purports to modify the 2016 Agreement (the Amendment) (Russ aff, exhibit F). It provides, in pertinent part, as follows:

"Whereas, in consideration of agreements between [Ursino] and [Ventures] relating to the [Property], [Ursino] agrees to provide [Ventures] with a right of first offer ('ROFO') to purchase properties currently owned or controlled by the seller of the [Property] . . . if and to the extent that [Ursino] is presented with the opportunity to purchase such additional properties.

"Now, Therefore, it is mutually agreed as follows:

"1. Before [Ursino] participates in any business transaction . . . to purchase any of the properties in Manhattan listed below, [Ursino] shall provide a five (5) business day written notice . . . to [Ventures]. . . . [Ventures than] shall have a five (5) day period to enter into an agreement with [Ursino] . . . whereby [Ventures] would agree to purchase said property(ies) and [Ursino] would receive payment and/or participate, at its option, in the ownership of the purchaser of said properties. . . . The properties where [Ventures] has the ROFO are:

²⁷ Specifically, Ursino seeks the benefits he claims he was to receive under the 2016 Agreement, including: (1) a membership interest in Buyer, (2) the contribution value of the LOI, (3) "the protections and benefits of a signed Operating Agreement" and (4) "his [unspecified] Units" (amended third-party complaint, ¶¶ 28 and 31).

- 9-11 Avenue B, New York, New York
- 207 East 4th Street, New York, New York
- 231-233 East 4th Street, New York, New York
- 106 Avenue B, New York, New York
- 102 Suffolk Street, New York, New York
- 187 East 7th Street, New York, New York”

(*id.*). The Amendment also contains a handwritten addition in the right-hand margin (the Handwriting), purporting to modify paragraph 1. The modified paragraph reads as follows:

“1. Before [Ursino] participates in any business transaction . . . to purchase any of the properties in Manhattan listed below, provided that no litigation has commenced against the seller or [Ursino], or is being threatened as it relates to the [Property], [Ursino] shall provide . . .”

(*id.* [emphasis added]). The remainder of the document remains unchanged.

The Amendment is signed by Ursino and the managing member of Ventures, but the Handwriting is initialed only by Ursino. In addition, although the document is dated May 4, 2017, the individual signatures on the Amendment, as well as the initials on the Handwriting, are undated.

Ventures alleges that Ursino failed to provide the purportedly agreed upon right of first offer (ROFO) to Ventures with respect to 207 East 4th Street, New York, New York; 106 Avenue B, New York, New York, 102 Suffolk Street, New York, New York and 187 East 7th Street, New York, New York (collectively, the Counterclaim Properties).

Standing

Ursino argues that Ventures lacks standing to bring any counterclaims because “once title to the [Property] closed pursuant to the [Contract of Sale] . . . the [Contract of sale was] no longer operative” (Ursino memorandum of law, ¶ 1-2) (*TIAA Glob. Invs. LLC v One Astoria Sq. LLC*,

127 AD3d 75, 85 [1st Dept 2015] [“The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract”). However, none of Ventures’ counterclaims are premised on violations of the Contract of Sale. Rather, its claims are based on the 2016 Agreement and/or the Amendment. Ursino fails to explain how or why the 2016 Agreement or the Amendment would merge into the deed and bar Ventures from prosecuting any claims related thereto. Accordingly, this argument is unpersuasive.

Next, Ursino argues that Ventures has no standing because its counterclaims “are those of the LLC which owns the [Property]”, i.e., Buyer, and, therefore, because Ventures is a shareholder of Buyer, each of its counterclaims are purely derivative (Ursino memorandum of law, ¶ 6). However, Ursino fails to particularize this argument with respect to the varied counterclaims asserted by Ventures (breach of the implied covenant of good faith and fair dealing with respect to the 2016 Agreement, unjust enrichment, fraud, and breach of the Amendment with respect to the Counterclaim Properties). Nor does Ursino address his argument to the substance of each counterclaim or explain how each is a derivative claim. Since his argument is overbroad and fails to substantively address any of the counterclaims, Ursino is not entitled to dismissal of the counterclaims on this ground (*see e.g., Martirano Constr. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1029 [2d Dept 1984] [“a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed”])).

The Breach of the Implied Covenant of Good Faith Claims (Counterclaims 1 and 2)

The first and second counterclaims allege that Ursino owed Ventures a duty to act in good faith with respect to the 2016 Agreement, the purpose of which “was to purchase [the Property]” (third-party answer, ¶ 226; see also ¶ 22 [“The purpose of the 2016 Agreement was to close on the sale of the [Property]”). Ventures then alleges that Ursino breached this duty by “intentionally making material misrepresentations” about the Property and by “imparting” Buyer’s confidential information to Seller.

All contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). “This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010] [internal citations and quotation marks omitted]). To that end, the implied covenant would be breached “when a party acts in a manner that – although not expressly forbidden by any contractual provision – would deprive the other party of receiving the benefits under their agreement” (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

Here, Ventures specifically pleads that the purpose of the 2016 Agreement was for Ventures to arrange for the purchase of the Property. It is undisputed that Ventures arranged for the purchase of the Property and that the Property was, in fact, purchased by an entity established by Ventures. Therefore, the alleged purpose of the 2016 Agreement was fulfilled with respect to Ventures and, even when viewed in a light most favorable to Ventures, Ventures cannot plead that

it was deprived of the benefit that it was owed under the 2016 Agreement. Accordingly, Ventures has failed to plead a claim for the breach of the implied covenant of good faith and fair dealing.

Thus, Ursino is entitled to the dismissal of the first and second counterclaims.

The Fraud Counterclaims (Counterclaims 3, 12 and 13)

Counterclaims 3, 12 and 13 sound in fraudulent inducement and fraudulent omission.

“A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages” (*Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]).²⁸ In addition, CPLR 3016 (b) provides, in pertinent part, that “[w]here a cause of action or defense is based upon misrepresentation [or] fraud . . . the circumstances constituting the wrong shall be stated in detail.”

Importantly, “[s]tatements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud” (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015]). Here, each fraud counterclaim alleges nearly all material facts upon information and belief (amended third-party answer ¶¶ 235, 299 and 305).²⁹ Such pleadings, without further explanation or specificity, are insufficient to sustain the heightened pleading requirements of a fraud claim (*id.*).

²⁸ The elements of a fraudulent inducement claim are essentially identical to the elements of a fraud claim (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]), while a cause of action for fraudulent omission requires, in addition to the elements of a fraud claim, “an allegation that the defendant had a duty to disclose material information and that it failed to do so” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011], quoting *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

²⁹ Respectively, “Upon information and belief, Ursino was to receive a commission on the sale of the [Property]” (amended third-party answer, ¶ 235); “Upon information and belief, Ursino

Moreover, while the counterclaims generally allege that Ventures relied on Ursino's misrepresentations, they do not allege or explain *how* it relied on the claimed misrepresentations (*see Nicosia v Bd. of Managers of Weber House Condominium*, 77 AD3d at 456 [dismissing the fraud claim because, among other things, the plaintiff did "not explain how he relied to his detriment on the [defendant's] alleged exercise" of its rights]). Similarly, while the counterclaims generally allege that Ventures was damaged by Ursino's misrepresentations, Ventures fails to set forth *how* it was damaged thereby (*1711 LLC v 231 W. 54th Corp.*, 7 AD3d 261, 262 [1st Dept 2004] [dismissing fraud claim where the defendants "wholly failed to specify how they were injured as a result of plaintiffs' alleged misrepresentations"]).

Given the foregoing, Ventures has failed to allege its fraud counterclaims with the requisite specificity mandated by CPLR 3016. Accordingly, Ursino is entitled to dismissal of Ventures' 3rd, 12th and 13th counterclaims.

Ventures' Counterclaims Based on the Amendment (Counterclaims 4 through 11)

In its 4th, 6th, 8th and 10th counterclaims, Ventures alleges that Ursino breached the 2016 Agreement when he failed to provide a ROFO for the Counterclaim Properties prior to their respective sales. The 5th, 7th, 9th and 11th counterclaims seek specific performance of the Amendment with respect to the Counterclaim Properties, specifically requesting that this Court grant Ventures its purported ownership interests in said properties.

In his motion to dismiss, Ursino argues that the Amendment is a nullity because, although the Agreement was signed, the Handwriting (as noted above, Ursino's written modification to the

was communicating with Seller's Principal in a manner intended to sabotage the purchase of the [Property]" (*id.* at 299), and "Upon information and belief, Ursino agreed to pay the mortgage on the [Property] on the Seller's behalf, prior to the sale of the building" (*id.* at 305).

Agreement) was never countersigned by Ventures. In addition, Ursino noted that, at oral argument before this Court on June 27, 2018, counsel for Ventures conceded that Ursino “unilaterally made a change that was unacceptable, so to the extent of the [Handwriting], we would submit that that is immaterial” (tr. at 4). Therefore, Ursino argues, there was no meeting of the minds and no binding agreement as to the Amendment.

“To form a binding contract, there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms” (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted]). Where there is no meeting of the minds “as to an essential term” of an agreement, there is no binding contract (*Harper v Rodriguez*, 272 AD2d 372, 372 [2d Dept 2000]).

Here, Ursino fails to establish, or even argue, that the Handwriting modified an essential or material term of the Amendment to the 2016 Agreement, such that Ventures’ failure to assent would constitute a failure of the parties to have a meeting of the minds. Ursino does not supply his own affidavit to explain his understanding of the Amendment or the Handwriting, nor is there any other document submitted that addresses the materiality of the Handwriting. Ursino’s reliance on the statement by Ventures’ counsel during oral argument is unpersuasive. Although counsel acknowledged that Ursino made a unilateral change to the Agreement, the attorney also stated that the Handwriting was “immaterial” (tr at 4). Accordingly, the issue of materiality was not conclusively established so as to warrant the dismissal of these claims on the ground that there was no meeting of the minds.

A question of fact also exists with respect to the timing of the Handwriting, i.e., whether it was written simultaneously with Ursino’s execution of the Agreement or subsequent thereto. Such

questions cannot be resolved by the evidence currently before this Court, although they may be resolved during discovery.

Ursino also argues that Ventures failed to sufficiently allege damages because any damages would be speculative. However, Ursino provides no documentation or analysis (aside from his own conclusory assertions) that would establish why the damages alleged, specifically the lost value of the Counterclaim Properties, are speculative.

In his memorandum of law, Ursino articulates no specific arguments with respect to the sufficiency of the 5th, 7th, 9th and 11th counterclaims. Given the absence of such arguments, this Court need not address the sufficiency of each of these counterclaims.

The remainder of Ursino's arguments with respect to these counterclaims are similarly unsupported by law or facts sufficient to warrant their dismissal at this stage of the litigation.

Thus, Ursino is not entitled to dismissal of the 4th through 11th counterclaims.

The Remaining Counterclaims (Counterclaims 14 and 15)

Although Ursino moves for dismissal of Ventures' counterclaims that seek recovery under a theory of unjust enrichment (counterclaim 14) and for attorneys' fees pursuant to the 2016 Agreement (counterclaim 15), Ursino makes no arguments supporting their dismissal aside from a general assertion, unsupported by facts or legal analysis, that such claims are baseless and frivolous. Accordingly, Ursino has failed to establish his entitlement to the dismissal of these counterclaims.

Buyer's Motion to Cancel Notice of Pendency (Action 2, Motion Sequence Number 001)

This Court now turns to Action 2, in which Ursino seeks to impose a constructive trust on the Property and compel the transfer of the Property from Buyer to himself.

In motion sequence number 001, Buyer moves to cancel the second notice of pendency filed by Ursino against the Property on September 14, 2018. This motion contains several procedural arguments as to the validity of the second notice of pendency. Assuming, *arguendo*, that the second notice of pendency is a properly filed, existing document, it must nevertheless must be cancelled.

A notice of pendency may be filed pursuant to CPLR 6501 “in any action . . . in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property . . .” (CPLR 6501). A notice of pendency “cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some’ other wrong” (*New Journey Global Inc. v Liu*, 2018 NY Slip Op 32921[U], *4 [Sup Ct, NY County 2018], quoting *Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 305 [1961]).

To determine whether the notice of pendency is proper, that is whether Ursino has the requisite right, title or interest to the Property, “the court must examine the complaint in its entirety” (*5303 Realty Corp. v. O & Y Equity Corp.*, 64 NY2d 313, 323 [1984]). Moreover, the court should apply “a narrow interpretation in reviewing whether an action” affects such title, possession, use or enjoyment (*id.* at 321).

In his complaint in Action 2, Ursino explicitly incorporates by reference his third-party complaint in Action 1, alleging, in pertinent part, that:

“[U]pon the termination of the 2016 Agreement by reason of the breach by [Ventures], [Ursino] had and has the absolute right to take title to the [Property] by owning all membership interests of [Buyer] . . .”

(Action 2’s complaint, ¶ 10[k]).

Therefore, despite Ursino’s claim for a direct interest in the title to the Property, his allegation makes clear that his interest in this action is not a direct interest in the Property, but rather an interest in the ownership of Buyer. “[N]otices of pendency may not be used in actions where the relief sought is a declaration of ownership in a corporation, ‘even where the sole corporate asset is real property’” (*Ostad v Nehmadi*, 31 Misc 3d 1211(A), *2 [Sup Ct, NY County 2011], quoting *Schlesinger v Schlesinger*, 2002 WL 221100, *10 [Sup Ct, Kings County 2002]; see e.g. *5303 Realty Corp.*, 64 NY2d at 313; *General Prop. Corp. v Diamond*, 29 AD2d 173, 175 [dismissing lis pendens where plaintiff claimed “no interest in the lease . . . but only in a new project”]). Moreover, the facts of this case, as alleged in the pleadings in both Action 1 and 2, as well as the third-party complaint in Action 1, describe a transaction in which Ursino provided a non-cash “investment” to Ventures in consideration for being given an unspecified percentage share of a company dealing in real property, which company ultimately purchased the Premises. New York courts have held that similar schemes do not directly affect title to, or the possession, use or enjoyment of real property (see *5303 Realty Corp.*, 64 NY2d at 323; *Yonaty v Glauber*, 40 AD3d 1193, 1195 [3d Dept 2007]).³⁰

³⁰ The default provision of the 2016 Agreement further indicates that Ursino’s interest is related to the ownership of Buyer (as opposed to the Premises). Specifically, it provides that Ursino’s right to “take title to the Property” is tied to Ventures’ loss, in default, of “any interest or rights in [Buyer]” – i.e. Ventures’ percent ownership of Buyer, not Buyer’s ownership of the Premises (Russ affirmation, exhibit E, § 6.1, the 2016 Agreement).

Thus, Buyer is entitled to the cancellation of the second notice of pendency on the Property.

Finally, Buyer's application for costs and expenses pursuant to CPLR 6514 (c) is denied since it failed to set forth any grounds for such relief.

Buyer's Motion to Dismiss Action 2 (Action 2, Motion Sequence Number 002)

Buyer moves to dismiss the complaint on the ground that it fails to state a cause of action. Action 2 contains a single cause of action that seeks to impose a constructive trust on the Property and compel the transfer of the Property to Ursino. Buyer also moves to dismiss the complaint as against the SM TIC Entities on the ground that they are not title owners of the Property.

“The elements of a cause of action to impose a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment” (*JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222, 1223 [2d Dept 2016]).

As discussed above, Ursino's arguments with respect to fiduciary duties (either owed to him by Buyer or owed by him to Buyer) rest entirely on terms purportedly found in the Operating Agreement annexed to the 2016 Agreement. As noted previously, the Operating Agreement, as presented to this Court, is unexecuted and contains several blanks, thereby rendering its terms ambiguous at this nascent stage of the litigation. Discovery is necessary to further address this issue and any determination regarding the existence of a fiduciary relationship running from Buyer to Ursino would be premature at this time.

Thus, Buyer is not entitled to dismissal of the complaint as against it.

The SM TIC Entities

The documents submitted to this Court establish that the Property is owned by Buyer (*see* Deed, annexed to Russ affirmation, exhibit I [Action 1, NYSCEF Doc No. 113]). There is no evidence that would establish that the SM TIC Entities own the Property, such that they would be a proper party to Ursino's claim to impose a constructive trust over the Property.

Ursino's sole argument is that the SM TIC Entities purportedly "held funds of the transaction" to purchase the Property, and therefore, they should be "[bound] to the judgment." This argument fails to establish any basis for a claim that Ursino had a fiduciary relationship with the SM TIC Entities, that the SM TIC Entities promised him anything, that he relied on any promise made by the SM TIC Entities, or that the SM TIC Entities were unjustly enriched.

Thus, the SM TIC Entities are entitled to dismissal of the complaint as against them.

The parties' remaining arguments are either without merit or need not be addressed given the findings set forth above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant/third-party plaintiff Brian Ursino's motion (motion sequence number 003 filed under Index Number 154991/18), pursuant to CPLR 3212, for summary judgment dismissing the 11th, 12th, 13th, and 14th causes of action alleged against him is granted to the extent that the 11th and 12th causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Ursino's motion to dismiss (motion sequence number 004 filed under Index Number 154991/18), pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), to dismiss all third-party counterclaims of third-party defendant Icon Ventures (Ventures) is granted to the extent that counterclaims 1, 2, 3, 12 and 13 are dismissed as against Ursino, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendants 21/23 Avenue B Realty LLC (Buyer), Ave B SM TIC1 LLC and Ave B SM TIC2 LLC (together the SM TIC Entities) (motion sequence number 001 filed under Index Number 158161/18), pursuant to CPLR 6514, to cancel the notice of pendency currently in place as against the premises known as 21/23 Avenue B, New York, New York 10009, Block 395, Lot 2 (the Property), is granted and the Clerk of the Court is directed to immediately cancel the notice of pendency affecting the Property; and it is further

ORDERED that the motion by 21/23 Avenue B Realty LLC and the SM TIC Entities (motion sequence number 002 filed under Index Number 158161/18) to dismiss the complaint is granted with respect to the SM TIC Entities only, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, pursuant to the so-ordered stipulations executed by the parties (Index No. 154991/18, Doc. 125; Index No. 158161/18, Doc. 63), the captioned action is consolidated for the purposes of discovery and joint trial with the matter of *Brian Ursino v 21/23 Avenue B*

Realty LLC, Ave B SM TIC1 LLC and Ave B SM TIC2 LLC, pending in this Court under Index No. 158161/18; and it is further

ORDERED, that within 30 days from the entry of this order, counsel for Ursino shall serve a copy of this order, with notice of entry, upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation for purposes of discovery and joint trial; it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; it is further

ORDERED that all remaining parties to Action 1 (154991/18) and Action 2 (158161/18) are directed to appear for a status conference at 80 Centre Street, Room 280, New York, New York on April 28, 2020, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

20200221160819KFBP DJE 718EB869D3419E825E197E7CBFA02

KATHRYN E. FREED, J.S.C.

2/21/2020

DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE