

<b>Eisenberg v Weisbecker</b>
2020 NY Slip Op 30840(U)
March 23, 2020
Supreme Court, New York County
Docket Number: 159690/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 15EFM

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MICHAEL EISENBERG

Plaintiff,

- v -

MIRIAM WEISBECKER,

Defendant.

INDEX NO. 159690/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. MELISSA ANNE CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Defendant Miriam Weisbecker (“Weisbecker”) moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the verified complaint (the “Complaint”) of plaintiff Michael Eisenberg (“Eisenberg”). This action arises out of a purported joint venture between Eisenberg and non-party Gerard Rem (“Rem”), who is Weisbecker’s husband. Eisenberg alleges he formed a joint venture with Rem to purchase, renovate, and sell a cooperative apartment 8H located at 205 East 77<sup>th</sup> Street, New York, NY (the “Apartment”), but that Rem breached his fiduciary duty to Eisenberg, with the assistance of Weisbecker, by perpetrating a scheme to deny him the profits of the joint venture by using a “straw man” purchaser. Eisenberg also commenced an earlier, separate action against Rem, titled *Eisenberg v Rem* Index No. 652247/2016 that is before Justice Lebovits.

## BACKGROUND

On October 19, 2012, Eisenberg executed a purported joint venture agreement with Rem wherein Eisenberg advanced \$220,000 to secure a 50% interest in the joint venture to purchase, renovate and sell the Apartment (the “Agreement”)(Complaint ¶ 7, exhibit 1).<sup>1</sup>

The relevant terms of the Agreement provide that: (1) Eisenberg would advance all principal, (2) Rem and Eisenberg would split the profits evenly, (3) the renovations would cost less than \$5,000, (4) Rem would transfer his share of the profits to Eisenberg, if necessary, to ensure that Eisenberg would receive a minimum annual return of 10%, and (5) Rem would personally guarantee the return of Eisenberg’s advances and principal in the event the Apartment was sold at a loss (*id.* at ¶¶ 10-13). Eisenberg alleges that Weisbecker was aware of the Agreement (*id.* at ¶ 14).

Unbeknownst to Eisenberg, the Apartment was purchased in May 2012 by non-party Henry Weisbecker (“Henry”), father of Weisbecker, and not by Rem or the joint venture, in breach of the Agreement (*id.* at ¶ 18). Eisenberg further alleges that Weisbecker assisted Rem’s breach of the Agreement by: (1) representing Henry during the closing for the purchase of the Apartment, (2) communicating with the managing agent and the cooperative corporation during the purchase, and (3) paying the closing costs, the purchase price, and maintenance payments with her own funds (Complaint ¶¶ 21-24).

Thereafter, in September 2013, Henry died. This further delayed the resale of the Apartment (*id.* at ¶ 25). Eisenberg alleges further, upon information and belief, that Rem with the

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<sup>1</sup> The Agreement incorrectly identified the Apartment as 8L instead of 8H (*id.* at ¶ 2; Kolko affirmation, exhibit 1, 190:23-191:7).

assistance of Weisbecker arranged for Henry to purchase the Apartment to gain advantageous tax treatment upon the death of Henry (*id.* at ¶ 27). Despite Rem's representations that the Apartment would be sold immediately after the renovation, and the profits promptly distributed, the Apartment did not sell until October 2015. Henry's estate was the seller and the price was \$357,000 creating a profit of \$152,000 (*id.* at ¶ 17, 34). Eisenberg made numerous demands for his share of the profits, but Rem was unresponsive (*id.* at ¶ 37).

Eisenberg commenced this action asserting two causes of action against Weisbecker for aiding and abetting Rem's breach of his fiduciary duty under the Agreement and for tortiously interfering with the Agreement.

## DISCUSSION

Weisbecker moves to dismiss pursuant to CPLR 3211 arguing that: (1) a joint venture was never formed because the Agreement fails to provide for the sharing of losses and thus there is no fiduciary duty owed to Eisenberg, and (2) that Eisenberg fails to allege the "but for" element of a cause of action for tortious interference. "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal quotation marks omitted]). When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*id.*). The motion must be denied if from the

pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

"In order to properly plead the existence of a joint venture agreement, a plaintiff must allege acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses"

(*Slabakis v Schik*, 164 AD3d 454, 455 [1st Dept 2018], *lv denied*, 32 NY3d 912 [2018] [internal quotation marks and citation omitted]).

"An indispensable element of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and *submit to the burden of making good the losses*" (*id.* [internal quotation marks, citations, and brackets omitted]).

The plain language of the Agreement provides that:

"12- All profits will be split 50-50% between the two partners, subject to the following exception-

13- If [Eisenberg] has not realized a return equal to a minimum 10% annual return, the profits shall be transferred to [Eisenberg] from the profit share of [Rem] until that minimum return is realized by [Eisenberg].

14- If for whatever reason the sale of [the Apartment] does not return the full principal and advances made by [Eisenberg] in the JV, then [Rem] will personally guarantee any deficiency"

(Complaint, exhibit 1, §§ 12-14). Thus, Eisenberg was guaranteed a 10% annual return even if Rem's profit share would have to be diminished and any losses Eisenberg incurred, Rem would personally guarantee.

Eisenberg contends that the failure to provide for a sharing of losses is not fatal to the formation of the joint venture with Rem because the parties had no expectation of losses. However, the unambiguous language of the Agreement contradicts this position. The Agreement clearly contemplates the possibility of losses and is explicit that Rem would be liable for any losses Eisenberg suffered. Further, Eisenberg fails to allege that he had any control or management of the joint venture, another key factor to the formation of a joint venture (*Slabakis* 164 AD3d at 455). Thus, this court concludes that there was no joint venture between the parties.

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). The court dismissed Eisenberg’s first cause of action for aiding and abetting a breach of fiduciary duty, because the alleged fiduciary duty arose from the purported joint venture that never formed.

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). The court dismisses the second cause of action for tortious interference because Eisenberg’s Complaint fails to allege that Weisbecker procured or caused Rem to breach the Agreement or that the Agreement would not have been breached “but for” Weisbecker’s conduct (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]).

Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted and the complaint is dismissed.

The clerk is directed to enter judgment dismissing this action accordingly.

DATED: March 23, 2020  
New York, New York

  
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MELISSA A. CRANE, J

Check one:  XFINAL DISPOSITION     NON-FINAL DISPOSITION