Otto v Otto
2020 NY Slip Op 31078(U)
April 7, 2020
Supreme Court, New York County
Docket Number: 108886/2010
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** IAS MOTION 48EFM

Justice

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MARIA OTTO,

Plaintiff,

- v -

JONATHAN OTTO, METROCENTERS LLC,METRO CAPITAL HOLDINGS LLC,METROCAPITAL, LLC., METRO ASSETS TRUST, BAYBOARD INC.,RIDGEBAY INC.,BELLMORE SUNRISE REALTY CORP., COURTESY BRENTWOOD INC.,ELMONT REALTY INC.,HICKSVILLE ASSOCIATES INC.,HOMEPORT ASSOCIATES INC.,LEVITTOWN EAST MEADOW CORP., MASPETH GRAND REALTY CORP., MASSAPEQUA MALL ASSOCIATES, INC.,MERRICK MASS REALTY CORP., PARKCHESTER RB CORP.

Defendant.

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INDEX NO. 108886/2010

MOTION DATE 07/26/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 259

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

In Motion Sequence Number (Motion) 008, defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's second amended complaint (SAC) (NYSCEF 210 [SAC, dated 05/20/2011]). In opposition to Motion 008, plaintiff Maria Otto (Maria) asks the court to search the record and grant summary judgment in her favor.

In this court's December 20, 2018 order, the court reinstated the note of issue, which the parties had previously stipulated to withdraw (see NYSCEF 195 [12/20/2018 order]). Plaintiff seeks damages and an accounting for her individual and derivative

claims related to numerous dissolved real estate entities (RE Entities) in which she and defendant Jonathan Otto (Jonathan), her step-son, held ownership interests and which were allegedly managed and/or controlled by Jonathan through various general partner entities, managing memberships, and other business forms. Specifically, each of the derivative plaintiff RE Entities, various dissolved real estate limited partnerships (LPs) and limited liability companies (LLCs) formed under the laws of New York and in Delaware, were individually managed in some manner by a defendant corporation.

Defendants' prior motion to dismiss, Motion 002, was denied in its entirety by Justice Oing (NYSCEF 68 [03/30/2012 tr]) and was modified by the First Department on appeal only to the extent that Maria's derivative claims raised on behalf of the dissolved Delaware LPs and LLC were dismissed for lack of capacity (*Otto v Otto*, 110 AD3d 620, 620 [1st Dep't 2013]). Thus, the specific claims that remain in this action include Maria's: (1) derivative breach of fiduciary duty cause of action against defendants as limited by the decision on Motion 002; (2) unjust enrichment claim raised individually against all defendants and as raised derivatively as to the Surviving Parties; (3) aiding and abetting breach of fiduciary duty against Jonathan raised derivatively on behalf of only the Surviving Parties; and (4) request for an accounting against the management entities owned or controlled by Jonathan, Metrocenters, LLC, Metrocapital Holdings, LLC, Metrocapital, LLC, and Metro Assets Trust (together, Metro) (*see generally* NYSCEF 210 [second amended complaint]).

Subsequently, on August 24, 2018, the Surrogate's Court issued a decision (SC Decision) resolving the final accounting in the related probate matter (SC Action) and explicitly rejected Maria's contention that the agreements transferring control of the RE

Entities to Jonathan was an invalid forgery (NYSCEF 193 at 5 [SC Decision]). The "Revised Agreement," by which Jonathan purchased majority ownership of the RE Entities and related business interests for the sum of $10,000, is a letter agreement executed in 1999 by Jonathan and his father, Richard Otto, to whom Maria was married and whose death triggered the SC Action (*see id.*).

Defendants now move for summary judgment dismissing the SAC and Maria asks the court to enter judgment in her favor upon searching the record for Motion 008.

Factual and Procedural Background

Maria is Richard Otto's third wife and Jonathan is Richard Otto's son from a prior marriage. Richard Otto (Richard) died on August 18, 1999. The SC Action concerned a "contested accounting by the executors of the estate of Richard [and] resolution of the remaining objections by . . . Maria" (NYSCEF 199 at 1). The Surrogate's Court explained in the SC Decision, which resolved all objections to the final accounting of Richard's estate (Estate):

> "In October 2006, the executors commenced the instant proceeding to settle their final account for the period beginning from the date of decedent's death through April 30, 2006, to which Maria filed objections (the 'Original Account'). Thereafter, the executors amended the Original Account through April 30, 2007 (the 'Amended Account') and then supplemented the Amended Account to cover the period through April 30, 2009 (the 'Supplemental Account'). Maria did not file objections to either the Amended Account or the Supplemental Account. However, the court later deemed her pleading to be objections to the Amended Account to the extent of matters raised in the Original Account.
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> . . . . A dispute then arose over the parties' respective statements of issues for trial. The court determined that the only issues raised by Maria's objections were whether professional fees were reasonable and whether the executors had failed to investigate the propriety of the Revised Agreement"

(NYSCEF 199 at 2-3 [internal citations omitted]).

The Estate

Briefly, the Estate's value was derived from the sale of Richard's majority interest in Rock Bottom Stores, Inc. (RB Inc.) to Duane Reade, Inc. (Duane Reade) and from Richard's interest in the various RE Entitles (*see generally* NYSCEF 195, 12/20/18 court order reinstating the note of issue). According to Maria, the RE Entities "were formally controlled by Jonathan directly as a managing member or by a managing member or general partner entity . . . , for each of which Jonathan was the president, director and owner of the controlling interest, and managed by separate managing agents (NYSCEF 210, ¶ 2). Specifically, 12 of the 14 RE Entities were controlled by general partner or managing member entities (GP Entities) (NYSCEF 210, ¶ 39) and each of the RE Entities were managed by one or more of the Metro defendants (*id.* ¶¶ 2, 39). Maria alleges that Metro was paid fees by the RE Entities for management services but:

> "Jonathan and . . . Metro . . . : did not properly manage the Real Estate Entities, maintain the books and records, or distribute the income earned. They refused to provide to Maria and [the Estate] proper information, charged unreasonable management fees, wrongfully converted monies and real estate interests belonging to Maria and the Estate, and sold certain real estate held by the Real Estate Entities for less than fair market value and refused to properly distribute the sales proceeds to Maria and the Estate"

(*id.* ¶¶ 3-4).

Maria alleges and defendants concede that, as a 10% to 16% owner of the various RE Entities, Maria was entitled to more than $815,000 in distributions for the proceeds from Jonathan's sales of the RE Entities; however, she never received those funds as she refused to sign a settlement agreement in 2006 that would have given her immediate access to her distributions but waived and released defendants from all claims past and present (*see generally e.g. id.*).

Jonathan's Alleged Control of the RE and GP Entities

Prior to his death, Richard and Jonathan executed a letter agreement and revised agreement (together, Transfer Agreement), the superseding revised copy dated "[a]s of September 15, 1998 (revised 1/5/99)," giving Jonathan majority ownership of the GP Entities and control of the RE Entities in exchange for $10,000 (*id.* ¶¶ 43-49; NYSCEF 214 [revised Transfer Agreement, dated 01/05/1999]; *see also* NYSCEF 213 [original Transfer Agreement, dated 09/15/1998]). The Transfer Agreement further provides that Jonathan would not, without Richard Otto's consent, "impose costs or expenses on the [RE Entities], for example, by allocating overhead incurred by companies under [his] control or by paying compensation to [Jonathan or] persons or entities affiliated with [him]" (NYSCEF 213). However, the RE Entities were permitted to pay Metro, "or any other affiliate of [Jonathan's] which renders services to" the entities, a fee of 3% of the gross rents generated by the properties (*id.*). Jonathan further agreed to "permit [Richard Otto and his] representatives to inspect and copy the books and records of the [RE Entities] upon request" and to ensure that the RE Entities "distribute all available cash on a quarterly basis" apart from "reasonable reserves for debt service" and maintenance (*id.*). Jonathan also promised not to sell the underlying properties "unless the sale price is equal to or greater than ten . . . times the cash flow . . . of the" properties (*id.*).

Between 1999 and 2006, over the objections of certain Estate fiduciaries including Maria, Jonathan sold all the properties and "retained only the [E]state's pro rata share of the sales proceeds and distributed the rest to . . . other partners and members of the [RE] Entities" (*see* NYSCEF 199 at 13-14). In the course of the SC

Action for a final accounting of the Estate, the executors engaged a forensic accounting firm, Gettry Marcus Stern & Lehrer, CPA (Gettry), on the recommendation of Maria, to investigate the sales (*id.*). Gettry issued a final report on October 21, 2005, which it supplemented by letter in December 2005 (together, Gettry Report), "concluding that Jonathan had overcharged the [RE] Entities for his management services and that he had improperly distributed the proceeds of the real estate sales" (*id.* at 14).

In the midst of the sales, in 2004, the SC Action petitioners, in light of the Gettry Report, "prepared to file derivative actions on behalf of the [RE] Entities" and "demanded that Jonathan correct the overcharges and improper distributions with respect to each of the" as-yet unsold properties held by the RE Entities (*id.* at 14-16). Settlement negotiations then took place and, on August 20, 2006, the parties to the SC Action, other than Maria, executed an agreement resolving the accounting dispute (Settlement Agreement) (*see id.*). Under that agreement, Jonathan paid to the RE Entities approximately $520,000 and the settling parties executed a release (*see* NYSCEF 228 [2006 Settlement Agreement]; *see* NYSCEF 259 at 28-29 [Motion 008 tr] [indicating that the overpayments to Jonathan and Metro were repaid, as identified in the Gettry Report, to the executor/Estate]).

Here, the parties agree that Jonathan and defendants never paid Maria the $815,000 in distributions from the sales of the RE Entities. However, Maria claims that Jonathan, controlling the relevant entities, refused to tender to Maria her distributions "only upon her execution of the 2006 Settlement Agreement and . . . agreeing to reimburse any overpayment upon demand" (*see e.g.* NYSCEF 210, ¶¶ 5, 71-73).

The SC Action

In the course of the SC Action, three accountings of the Estate were submitted by the executors: a September 29, 2006 accounting (Original Account), which spanned the period from Richard Otto's death through April 30, 2006; an amended accounting that extended to April 30, 2007 (Amended Account); and supplemental account which covered the period through April 30, 2009 (Supplemental Account) (NYSCEF 199 at 2). Those Accounts incorporated the Gettry Report and, subsequently, the 2006 Settlement Agreement.

Maria filed a pleading (Objection), dated January 29, 2007, objecting to only the Original Account (NYSCEF 256 [Objection]). In the Objection, Maria challenged the Transfer Agreement as an invalid forgery and objected to the Original Account, and the original Gettry Report that underscored it, as failing to consider: 17 of the 30 RE Entities and limiting review of the 13 examined RE Entities to only two of the seven years that had elapsed since Richard Otto's death; nearly $500,000 of overpaid fees to Metro; and the value of and/or losses that the Estate sustained with regard to the sale of RB Inc. and subsequent payments by the Estate to RBH (*id.* at 1-2). Maria further asserted that the executors acquiesced to Jonathan's sale of certain properties for less than fair market value and failed to adequately account for those sales (*id.* at 2-7).

Maria sought an order directing the executors to:

> "A. Order a more complete and definite accounting.
> B. Determine the validity of the letter agreement selling control of all [RE] Entities to Jonathan Otto for $10,000.00, and verify the consideration received.
> C. Determine the validity of the fairness of the consideration received by the Estate on the sales of the [RE] Entities by Jonathan Otto.

> D. Determine and explain the validity of the transactions with [RBH] including the $5,626,714.01 paid by the Estate to [RBH] and the loss by the Estate of $8,761,002.00 in [RBH].
> E. Surcharging the account of Executors [in an amount to be determined by a new forensic accounting] . . ."

(*id.* at 7-8).

After the Objection was filed, the executors submitted the Amended and Supplemental Accounts. Though Maria interposed no objections to the Amended and Supplemental Accounts, the Surrogate's Court deemed the Objection applicable "to the Amended Account to the extent of matters raised in the Original Account" (*see id.* at 2-3 [citation omitted]).

The executors had submitted a statement of issues, and Maria submitted a counter-statement of issues, to be resolved at trial (*see generally Matter of Otto*, 2015 WL 1289847 [Sur Ct, NY County 2015] [03/18/2015 decision and order, SC Action]; NYSCEF 209 [same]). An executor moved to strike Maria's counter-statement and Maria cross-moved for leave to file amended objections (*see generally* NYSCEF 209). The Surrogate's Court had previously permitted Maria's original Objection to be applied to the later-filed Supplemental and Amended Accounts but noted, in resolving the motion to strike and cross motion to amend, that the application of Maria's original Objection to the Amended and Supplemental Accounts "in no way broadened the scope of [Maria's] objections to embrace new matters that 1) she could have, but failed to raise in her [original Objection] or 2) could not have raised because they were first detailed in the Amended Account," and that Maria could not, "through her Counterstatement, raise matters for determination that were not embraced in her pleading," the Objection (*id.* at 5).

Maria sought to add the following issues to the trial in Counterstatement Issues 8-12 regarding: (1) the propriety of the 2006 Settlement Agreement involving Jonathan and Metro; (2) whether the executors breached their fiduciary duties in not requiring Jonathan to repay more than $500,000 in excess distributions he received from the proceeds of sales of RE Entity properties; (3) and "whether the executors have required Jonathan or companies he controls to satisfy certain obligations allegedly due the estate" (*id.* at 7-9). The court struck the above first and third issues on the grounds that they were untimely raised, as Maria did not include them in the Objection or file new objections to the Amended or Supplemental Accounts (*id.*). As to the second issue, whether the executors breached their fiduciary duty in connection with Jonathan's excess distributions, the court noted that Maria had raised the matter of Jonathan's distributions in her original Objection but had not asserted that issue as a breach of the executors' fiduciary duties; thus, that issue was also stricken (*id.* at 7-8).

Accordingly, "the only issues [properly] raised by Maria's objections were whether professional fees were reasonable and whether the executors had failed to investigate the propriety of the [Transfer] Agreement" (NYSCEF 199 at 2-3 [citations omitted]). Specifically, as pertinent, the issue to be tried relating to Jonathan at trial in the SC Action was whether the executors "failed to investigate properly the propriety of the alleged [Transfer] Agreement, . . . including but not limited to whether such [it] was a forgery" (*id.* at 3).

After trial, the Surrogate's Court ruled that Maria did not rebut the executors' established prima facie "accuracy and completeness of their Amended Account" in that she failed "[t]o meet her evidentiary burden" by demonstrating that the executors "failed

to investigate her theory, as supported by a purported handwriting expert's report, that the [Transfer] Agreement was a forgery" (*id.* at 4-11). Further, the Surrogate's Court found that Maria "failed to establish that [the executors'] conduct related to the [Transfer] Agreement was a breach of fiduciary duty warranting a surcharge" as they had considered, but disregarded as lacking substance, Maria's complaint when first raised in 2003 along with a handwriting expert's report that Maria had provided (*id.* at 5-6). Finally, the court declined to rely on the opinions of Maria's handwriting expert, whose testimony and report were "undermined in several important respects," and found Maria's other arguments that the Transfer Agreement was a forgery unavailing (*id.* at 5-11 [determining executors "acted appropriately upon learning of (Maria's) forgery theory"]).

With the SC Action concluded, this court reinstated the note of issue and defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the SAC.

Discussion

Under CPLR 3212, summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to

demonstrate, with admissible evidence, facts sufficient to require a trial (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

1. Breach of Fiduciary Duty/Aiding and Abetting and Res Judicata/Collateral Estoppel

Defendants have established prima facie entitlement to summary judgment dismissing the derivative breach of fiduciary duty and aiding and abetting breach of fiduciary claims.

a. Res judicata and collateral estoppel

> "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again . . . . Additionally, under New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy . . ."

(*Matter of Hunter*, 4 NY3d 260, 269-270 [2005] [internal citations and quotation marks omitted]).

Further:

> "These principles apply with equal force to judicially settled accounting decrees. As a general rule, an accounting decree is conclusive and binding with respect to all issues raised and as against all persons over whom Surrogate's Court obtained jurisdiction . . . . Indeed this principle is so well settled that the drafters of the SCPA determined that it was unnecessary to include former section 274 of the Surrogate's Court Act which had codified this rule, noting that it was 'self-evident . . . that every decree whether upon an accounting or otherwise is binding upon all persons of whom jurisdiction was obtained' . . . . In accord with res judicata, a[Surrogate's Court's] decree is therefore conclusive as to issues that were decided as well as those that could have been raised in the accounting"

(*id.*, quoting Revisers' Notes, McKinney's Cons Laws of NY, Book 58A, SCPA 2226 [now 2227] at 292 [1967 ed.] [internal citations and quotation marks omitted]).

Additionally:

> "The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules. Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity. The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result"

(*Buechel v Bain*, 97 NY2d 295, 303 [2001]).

The SC Decision is binding upon Maria because she had a full and fair opportunity in the SC Action and who raised, or had the opportunity to raise, her objections to many of the complained-of transactions and other acts at issue here in her fiduciary duty claims. Specifically, Maria's fiduciary duty claims are foreclosed by the SC Action inasmuch as she could have or did raise the issues of Jonathan's/defendants' breaches of fiduciary duty relating to the sale price of the properties underlying the RE Entities and overpayments to Jonathan in the form of distributions and to Metro in the form of management fees as those issues affected the entire Estate and Maria had a full and fair opportunity to litigate those matters.

The Surrogate's Court, in resolving the accounting of the Estate and issuing the final SC Decision, accepted the Amended and Supplemental Accounts, which included detailed schedules pertaining to the RE Entities and the Gettry Report. As noted in the SC Decision, the Gettry Report "conclude[ed] that Jonathan had overcharged the [RE] Entities for his management services and that he had improperly distributed the proceeds of the real estate sales," prompting the "petitioners [to prepare] to file derivative actions on behalf of the [RE] Entities" (NYSCEF 199 at 14). On August 20,

2006, the parties to the SC Action, apart from Maria, settled their disputes in the 2006 Settlement Agreement by which "Jonathan paid to the [RE] Entities in which the estate had an interest a total of approximately $520,000" and about one-half of the cost of the Gettry Report, $111,983, was credited to the Estate's share of the RE Entities (*id.* at 14-15).

To the extent that Maria here seeks relief in her remaining derivative claims for issues that she could and should have timely raised, but did not, in the SC Action, or issues that she did raise but were resolved by the SC Decision, the derivative claims are now barred by the doctrine of res judicata. Specifically, Maria alleges in her derivative cause of action that defendants breached their fiduciary duties by "(i) selling the properties owned by the Real Estate Entities for less than fair market value; [and] (ii) engaging in self-dealing by overpaying management fees to themselves" (NYSCEF 210, ¶ 83). Those claims are barred by res judicata as they were resolved on the merits by the Surrogate's Court in the SC Decision and, to the extent those alleged breaches of fiduciary duty were not resolved in the SC Decision, it is because Maria failed to timely submit any amended objections (*see Matter of Otto*, 2015 WL 1289847; NYSCEF 209 [2015 SC Decision] [reaching the merits of and denying Maria's cross motion to amend her original Objection, filed after failing to object to either the Amended or Supplemental Accounts]). Further, counsel informed the court that funds overpaid to Jonathan and Metro as distributions and management fees were to be repaid to the executors and applied to the Estate's accounts, and Maria's counsel did not dispute that such payments had been made (*see* NYSCEF 259 at 28-29).

In the March 18, 2015 SC Action decision and order (2015 Decision), the court addressed the executors' motion to strike Maria's counterstatement of issue for trial, in which Maria sought to include various matters overlapping with this action to the SC Action's trial. In particular, Maria sought to challenge the following in Counterstatement Issues 8-12: (1) the propriety of the 2006 Settlement Agreement involving Jonathan and Metro; (2) whether the executors breached their fiduciary duties in not requiring Jonathan to repay more than $500,000 in excess distributions he received from the proceeds of sales of RE Entity properties; (3) and "whether the executors have required Jonathan or companies he controls to satisfy certain obligations allegedly due the estate" (NYSCEF 209 at 7-9). The Surrogate's Court struck the above first and third issues on the grounds that they were untimely raised, as Maria did not include them in the original Objection or file new objections to the Amended or Supplemental Accounts (*id.*). As to the second issue, whether the executors breached their fiduciary duty in connection with Jonathan's excess distributions, the court noted that Maria had raised the matter of Jonathan's distributions in her original Objection but had not asserted that issue as a breach of the executors' fiduciary duties; thus, that issue was also stricken (*id.* at 7-8).

Having concluded the Estate's accounting in the SC Action, the Surrogate's Court has resolved certain issues that Maria raises in this action and, in raising or failing to properly raise certain issues in the SC Action, such as the alleged undervaluation of the RE Entity sales, distributions to Jonathan, and overpayment of management fees to Metro, Maria is precluded from now pursuing those matters here in the context of her derivative breach of fiduciary duty against the defendants.

In particular, the derivative issues relating to Jonathan's extra distributions to himself and overpayment of fees to Metro were before the Surrogate's Court and those matters were resolved, as to the estate and the RE Entitles, through the 2006 Settlement Agreement, which was accepted by the Surrogate's Court as incorporated into the Amended Account. While those issues were resolved by the 2006 Settlement Agreement between most of the beneficiaries of the Estate and limited partners of the RE Entities and the executors on behalf of the Estate, as well as Jonathan and Metro, Maria did not sign that agreement. The 2006 Settlement Agreement relieved Jonathan and Metro of their obligations to repay certain funds to the Estate/RE Entities and provided for the discontinuance of claims brought by Jonathan and entities he controlled against the RE Entities. Nonetheless, the issues relating to derivative breaches of fiduciary duty arising from Jonathan's excessive distributions to himself and overpayments of management fees to Metro are, accordingly, precluded by the SC Decision under the doctrines of res judicata and collateral estoppel.

Likewise, those issues are also precluded in the context of Maria's derivative prong of the unjust enrichment claim. As the alleged wrongs discussed above for the fiduciary duty claim were or should have been timely raised in the SC Action, Maria is barred from now pursuing relief for those claims here. This is especially the case where the derivative relief sought for the allegedly improper sales of the properties, Jonathan's distributions to himself, and the overpayment of management fees to Metro would inure to the Estate, not to Maria directly, and the Estate's affairs and accountings were precisely the subject of the SC Action.

The court rejects Maria's argument in opposition that the fiduciary duty claims asserted in this action are not precluded by the SC Action as the First Department has previously ruled that "the contested issues to be tried by the Surrogate's Court were limited to professional fees, where the claims relating to the [RE] Entities and breaches of fiduciary duty were not matters before the Surrogate's Court" (*Otto v Otto*, 110 AD3d 620, 620 [1st Dep't 2013]). The First Department addressed that issue at the outset of this action, before the scope of the SC Action was expanded by Maria, when it heard the appeals of the prior motions to dismiss and stay this action in favor of the SC Action. As this court noted in its order reinstating the Note of Issue: "While the Appellate Division found no reason to stay this action since the remaining issues here were not before the Surrogate's Court, . . . the parties were . . . awaiting a decision from [the Surrogate's Court long after the First Department's 2013 decision] which went beyond the attorneys' fees identified by the Appellate Division as the only issue before the Surrogate's Court" (NYSCEF 195 at 2).

The Appellate Division's reasoning, in 2013, that a stay was not warranted because the issues before the Surrogate's Court were, at that time, limited to professional fees does not raise a triable issue of fact with regard to the issues that ultimately were and/or should have been raised before the Surrogate's Court. The SC Action grew to encompass more than only professional fees and, in fact, Maria sought to address nearly every aspect of the fiduciary duty claims raised in this action in Surrogate's Court.

b. The remaining breaches of fiduciary duty alleged are not derivative

Even if the remaining issues underlying the breach of fiduciary duty and aiding and abetting claims, such as Jonathan's allegedly wrongful withholding of Maria's distributions in an attempt to force her to sign a release, were not and need not have been raised in the SC Action, defendants have established entitlement to summary judgment dismissing those prongs of the fiduciary duty claims.

Specifically, Maria alleges that Jonathan, the GP Entities, and/or Metro violated their fiduciary duties in failing to make the requisite distributions to Maria following the sales of the RE Entities' properties and in demanding that Maria sign an agreement releasing Jonathan and defendants from all claims before receiving her distributions. These portions of Maria's fiduciary duty claims, each of which are raised derivatively against Jonathan and the defendants in the SAC, are not derivative. Rather, they are claims which the RE Entities could, under the appropriate circumstances, assert against the defendants, generally, as the relief for a fiduciary's harm to the RE Entity and its limited partners/members would belong to the RE Entity itself, not to the individual herself. Maria's claims asserted on behalf of the Delaware LPs and LLCs were previously dismissed for lack of capacity and the remaining claims, to the extent that they are not precluded by the doctrines of res judicata and collateral estoppel, seek relief that necessarily would have inured to the dissolved RE Entities and/or to the Estate (*see Serino v Lipper*, 123 AD3d 34, 39-40 [1st Dep't 2014] [explaining that a stakeholder "has no individual cause of action against a person or entity that has injured the (entity) . . . notwithstanding . . . that the wrongdoer may ultimately share in the recovery in a derivative action if the wrongdoer owns shares in the" entity (internal

citations omitted)]). An individual claim, however, can stand "where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation," though the plaintiff "may not obtain a recovery that otherwise duplicates or belongs to the" entity (*id.* [internal citations omitted]).

Maria's submissions raise no triable issue of fact precluding summary judgment dismissing her fiduciary duty claims. Accordingly, plaintiff's derivative claims for breach of fiduciary duty and her corresponding aiding and abetting fiduciary duty claims must be dismissed at this summary judgment stage. The court has considered the parties' remaining arguments and finds that they are without merit, unpersuasive, or otherwise do not necessitate an alternate result.

2. Indemnification

Defendants concede that, as of December 31, 2012, Maria was owed $815,226.51 in distributions from various sales of the RE Entities and underlying properties. They contend, however, that the retained funds due to Maria have been applied by Jonathan to the defense of this action pursuant to each of the dissolved RE Entities' partnership or operating agreements provided for indemnification of each entity's general partner, officers, principals, and/or agents for all claims arising from the performance of the general partner's obligations. Defendants contend that the fees and costs and incurred in defending this action have eclipsed that $815,226.51 amount owed to Maria and "[t]here is nothing left for Maria, and therefore no remaining claim" (Defs' mem at 19).

Maria responds, among other things, that: the GP Entities, not Jonathan/Metro, are entitled to indemnification under the RE Entities' operative documents; the

provisions and relevant authorities provide for indemnification, not advancing defense costs as Jonathan has done without first succeeding in this action; defendants are not entitled to indemnification as they have asserted no counterclaim for that relief; indemnification is precluded by defendants' breaches of fiduciary duty and Jonathan's bad faith in applying only Maria's undistributed shares of the sale proceeds to defend this action, without having retained, as required, other funds from which the GP Entities (or successors) to draw for the purpose of indemnifying an appropriate party; and, even if indemnification is warranted, Maria's liability for indemnification costs would correspond and be limited to her pro-rata share of each of the underlying entities pursuant to each entities' operative documents.

The underlying agreements (*see* NYSCEF 215-226), such as the limited partnership agreement for Bayonne Broadway Partners, LP (BBP), provides:

> "The General Partner and its shareholders, directors, officers and agents shall not be liable, in damages or otherwise, to the Partnership or to the Limited Partners for any act or omission performed or omitted by any of them pursuant to the authority granted by this Agreement, except if such act or omission results from the fraud of any such person. The Partnership shall indemnify, defend and hold harmless the General Partner and its shareholders, directors, officers and agents from and against any and all claims or liabilities of any nature whatsoever arising out of or in connection with the assets or business of the Partnership, except where attributable to the fraud of any such person"

(NYSCEF 215, § 2.5).

The General Partner for BBP is Baybroad, Inc., for which Jonathan signed (*see id.* at 39).

Similarly, the amended and restated LLC agreement for Parkchester RB Assoc., LLC (PRBA) states: "The Company shall indemnify and hold harmless the Managing Member and its officers, directors and shareholders from and against all claims and

demands to the maximum extent permitted under the Delaware Act" (NYSCEF 225, § 4.7). The Managing Member of PRBA is Parkchester RB Corp., the majority shareholder of which was Jonathan (*id.* at 18).

Another of the 12 submitted operative agreements states:

> "(a) The General Partner, its employees and agents shall not be liable, in damages or otherwise, to the Partnership or to the Limited Partners for any act or omission performed or omitted by any of them pursuant to the authority granted by this Agreement, except if such act or omission results from the fraud of any such person. The Partnership shall indemnify, defend and hold harmless the General Partner and its employees and agents from and against any and all claims or liabilities of any nature whatsoever arising out of or in connection with the assets or business of the Partnership, except where attributable to the fraud of any such person. The General Partner shall be entitled to reimbursement for the costs and any legal fees of enforcing the indemnity"

(NYSCEF 224, § 2.05 [Maspeth LP]).

Even assuming defendants, including Jonathan, are entitled to indemnification under the pertinent agreements and/or applicable authority, given the absence of allegations of fraud that could render the indemnification provisions inoperative, it is the RE Entities that are required to indemnify, not individual limited partners in isolation. As such, even if defendants are entitled to recover legal costs incurred defending this action, they are not entitled to recover those costs from only one limited partner. Rather, the indemnification costs must necessarily be distributed pro rata amongst the partners and members of the RE Entities (*see* NYSCEF 229 [Jonathan's 10/25/2007 letter identifying the RE Entities' maintenance of cash reserves for defense costs, et cetera, as "cumbersome" and expensive]).

Accordingly, Jonathan has not demonstrated prima facie entitlement to summary dismissal of Maria's remaining claims on the basis that the funds owed to her from the

sales of the underlying properties have been properly converted and rightfully expended to cover Jonathan and the defendants' litigation costs. Defendants' theory of indemnification is illogical and unsupported. Defendants concede that the RE Entities owed Maria $815,000 in distributions but deposited those funds into a Metro trust then applied those funds to cover the defense costs incurred by defendants, with no demonstration of the amounts to be covered by each of the RE Entities for the corresponding GP Entities, if any are entitled to indemnification under applicable law and governing agreements, or analyzing the ownership percentages in the RE Entities actually held by Maria for which she may be liable for indemnification. Defendants' position regarding Maria's sole bearing of indemnification costs for RE Entities in which she held, at most, 10% to 16% interests, is without support and unreasonable here.

Accordingly, the issue of indemnification is severed and referred to a special referee to hear and report (or hear and determine, should the parties so agree) to determine whether indemnification is appropriate for each of the RE Entities and GP Entities and what amounts, if any, Maria is liable to cover given her ownership stake in the relevant entities and the nature of the claims and decisions issued in this action to date. The indemnification provisions clearly provide that the RE Entities, not any particular limited partner or member of those entities, are liable to indemnify certain associates persons/entities and the parties' submissions are flatly insufficient to permit the court to make any formal ruling on those issues on this record.

3. Unjust Enrichment and an Accounting

While Maria's derivative claims are precluded as lacking capacity or under the doctrines of res judicata and/or collateral estoppel, her individual claims for unjust

enrichment are not barred. The court, having searched the record on this Motion 008, finds that Maria is entitled to summary judgment for her individual unjust enrichment claim for the approximately $815 thousand in unpaid distributions, which defendants concede and which Maria did not receive. The submissions of defendants and Maria demonstrate that the proceeds of the sales of the RE Entities' properties generated, at least, $815 thousand in distributions for Maria, as the owner of 10-16% of each of the underlying RE Entities, establishing prima facie entitlement to those distributions of the proceeds of the RE Entities' sales to Maria (*see* NYSCEF 230 [02/17/2010 letter of Jonathan, on Metro letterhead, conceding that Maria was then owed $815,104.07 following dissolution of the RE Entities], 916 [09/16/2010 letter confirming the same]); *see also* NSYCEF 210, ¶¶ 88-97; 211 [2013 letter], 215-229 [RE Entity operative agreements]; 229 [10/25/2007 letter]).

> "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered . . . . A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered"

(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal citations and quotation marks omitted]).

"[F]or an unjust enrichment claim to succeed, the party making the claim 'need not be in privity' with the party claimed against, but 'there must exist a relationship or connection between the parties that is not too attenuated' " (*Board of Managers of 28 Cliff St. Condominium v Maguire*, 65 Misc 3d 737, 745 [Sup Ct, NY County 2019], quoting *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

There is no dispute that Maria was entitled to receive the distributions from the RE Entities of which she was a limited partner or member, that the RE Entities had a relationship of privity with the GP Entities, and that Jonathan and Metro managed and controlled the operations of the GP Entities, sold the assets underlying the RE Entities, dissolved the RE Entities, and managed the RE Entities and their finances after dissolution through Metro (*see e.g.* NYSCEF 212 [Jonathan's aff in support]; *see* NYSCEF 213-231 [operative agreements and letters indicating Maria's entitlement to distributions]; *see generally* NYSCEF 239 [Jonathan's deposition tr]). Thus, the GP Entities, and Metro, to which Jonathan transferred Maria's distributions to be held "in trust" after the RE Entities were dissolved, have been unjustly enriched in the amount of unpaid distributions owed to Maria.

Further, to the extent that other distributions apart from the $815,000 from proceeds of the sales are owed to Maria by the RE Entities, she is entitled to those sums as well. Specifically, should Jonathan's overpayment of distributions to himself or management fees to Metro have resulted in under distributions to not only the Estate but to Maria as well, those sums must be paid to Maria under her individual theory of unjust enrichment. These sums are unknown as an accounting was provided for only the purposes of the SC Action in the Gettry Report; however, Maria is entitled to an accounting of the RE Entities, as a limited partner or member of those entities who demanded, but was not provided with, an accounting and is entitled to an accounting under the applicable LP and LLC laws. Accordingly, Maria's request for an accounting is granted only to the extent that she seeks from Metro an accounting of "the profits, losses, expenses, and revenues of Defendants' management of all [RE Entities] in

which Maria . . . own[s] (or owned) an interest, for the period 1997 to the present," though in no event does the accounting alter the court's determination that the derivative claims are barred as set forth above.

Defendants' arguments that they tried to make distributions to Maria, but she refused, do not raise a triable issue of fact. The submissions demonstrate that the distributions to Maria under the applicable agreements did not require Maria to sign a waiver/release in favor of Jonathan and the defendant entities before receiving her share of the proceeds. Further, even if the court were to accept defendants' argument that the RE Entities' underlying agreements with the GP Entities preclude claims for unjust enrichment, as opposed to claims for breach of contract, Maria's distributions were transferred to Metro, with which neither she nor the RE Entities had a contractual relationship and her unjust enrichment claim would, then, still proceed as against Metro. In any event, the underlying agreements between the RE and GP Entities were canceled in defendants' dissolution of the RE Entities years before this action was commenced.

The court has considered the parties remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that Motion 008 is granted in part; and it is further

OREDERD that plaintiff Maria Otto's derivative breach of fiduciary duty are dismissed; and it is further

ORDERED that summary judgment is granted to plaintiff Maria Otto for her individual unjust enrichment claims to the extent that they encompass claims related to only unpaid distributions owed to her by defendants; and it is further

ORDERED that defendants shall provide plaintiff Maria Otto with an accounting as set forth in the above decision; and it is further

ORDERED that the portions of defendants' motion that seek indemnification is severed, and the issues of whether indemnification is appropriate for each of the relevant defendants and, if so, in what amounts plaintiff Maria Otto is liable, are referred to a Special Referee to hear and report (or, if the parties so stipulate, to hear and determine); and it is further

ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

4/7/2020
DATE

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☒	REFERENCE