SHIR Capital, LLC v Fortress Credit Advisors LLC
2020 NY Slip Op 31825(U)
June 11, 2020
Supreme Court, New York County
Docket Number: 160069/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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SHIR CAPITAL, LLC,

Plaintiff,

- v -

FORTRESS CREDIT ADVISORS LLC, CREF3 COPPER CREEK OWNER LLC, CBRE CAPITAL MARKETS, INC.

Defendants.

INDEX NO. 160069/2019

MOTION DATE 12/06/2019, 12/06/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 24, 26, 27, 28, 33

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 25, 29, 30, 31, 32

were read on this motion to DISMISS.

This case arises from an aborted joint venture to purchase an apartment building in Austin, Texas. Plaintiff SHIR Capital, LLC ("SHIR Capital") initially reconnoitered the potential transaction and entered into a contract with the seller, but needed a co-investor to close the deal. To that end, SHIR Capital was introduced to Defendant Fortress Credit Advisors LLC ("Fortress") by an intermediary, Defendant CBRE Capital Markets, Inc. ("CBRE"). SHIR Capital and Fortress then entered into a letter agreement, which set out the framework for further discussions of a joint venture. But the joint venture never materialized. SHIR Capital decided to terminate its contract with the seller – the entire basis for the letter agreement – rather than pay an additional fee and lose its deposit. Then a few weeks later, SHIR Capital learned that Fortress, with the aid of CBRE, had purchased the property for itself.

Now, SHIR Capital claims that Fortress never intended to partner with it, but feigned interest in order to steal SHIR Capital's business strategy and close the deal for itself. And CBRE, while purporting to act in SHIR Capital's interest as "broker", allegedly concealed its connections to Fortress and helped orchestrate the fraud against SHIR Capital.[1] SHIR Capital's Complaint alleges six causes of action, including fraud, breach of fiduciary duty, and misappropriation of trade secrets. Fortress (with CREF3) and CBRE move to dismiss the Complaint in its entirety, and the two motions are consolidated for purposes of this decision and order.

For the reasons set forth below, the motions are granted.

BACKGROUND[2]

SHIR Capital Looks to Acquire the Hendrix Property

In October 2018, SHIR Capital, a Texas corporation, approached the owner of a property in Austin known as The Hendrix Apartment Homes (the "Property"), to discuss SHIR Capital's potential acquisition of the Property (NYSCEF 2 ¶ 11 [Compl.]). The owner of the Property, an entity called FPA Multifamily (hereinafter, the "Seller"), had not publicly listed it for sale when SHIR Capital made its approach (*id.*). Over the next several months, SHIR Capital conducted due diligence into the Property's condition, value, and other financial information bearing on a potential investment (*id.* ¶ 12). In doing so, SHIR Capital developed a "unique business model,"

[1] The other Defendant, CREF3 Copper Creek Owner LLC ("CREF3"), was the entity that Fortress allegedly created for purposes of the acquisition. As discussed *infra*, the allegations against CREF3 are undifferentiated from the allegations against Fortress.

[2] The recitation of facts is based on the factual allegations of the Complaint, which are accepted as true solely for the purposes of this motion.

which involved subdividing the Property's "oversized" apartment units "using methodologies that would maximize the Property's value" (*id.* ¶¶ 13-14).

On April 10, 2019, after months of negotiations, SHIR Capital entered into a Purchase and Sale Agreement ("PSA") with Seller to acquire the Property (*id.* ¶¶ 12, 13, 16). As relevant here, the PSA provided SHIR Capital with a 30-day period to conduct further due diligence into the Property and the right to terminate the PSA within that period without forfeiting its $400,000 deposit (the "Due Diligence Period") (*id.* ¶16).

Next, SHIR Capital needed an equity investor with whom it could partner to purchase the Property, and was soon introduced to Warwick Olney of CBRE, who in turn indicated that Fortress would be interested in the transaction (*id.* ¶¶ 17-18). Unbeknownst to SHIR Capital at the time, Olney used to work for a private equity firm "that solely partner[ed] with Fortress" (*id.* ¶19). Although Olney represented to SHIR Capital that he was representing its interests, SHIR Capital alleges that "his interests lay with Fortress, not SHIR Capital," and that "[h]ad SHIR Capital known of Olney's affiliation with Fortress . . . SHIR Capital would have not relied on Olney to negotiate a deal between it and Fortress on its behalf" (*id.* ¶20). In the event, SHIR Capital proceeded to discuss a potential partnership with Fortress.

On April 26, SHIR Capital and Fortress entered into a Letter Agreement that gave Fortress a 30-day exclusivity period in which to conduct due diligence into the Property and to finalize the terms of a joint venture with SHIR Capital for the purpose of acquiring the Property (*id.* ¶¶ 22-23). The exclusivity period under the Letter Agreement ended fifteen days after the Due Diligence Period under the PSA (NYSCEF 21 ¶ 3 [Letter Agreement]).[3] During the

[3] The Letter Agreement is attached to Fortress's motion to dismiss (NYSCEF 12 [Major Aff. Ex. 5]). The PSA between SHIR Capital and Seller was not entered into the record.

exclusivity period, SHIR Capital shared all of the information it had gathered with Fortress, disclosing the details of its business plan and other analyses performed by SHIR Capital (*id.* ¶ 24). CBRE was not a party to the Letter Agreement, but the Letter Agreement did provide that, if the joint venture were consummated, CBRE would be paid a two percent commission by the joint venture (Letter Agreement Ex. A-2). Olney, the CBRE broker, assured SHIR Capital that Fortress would convince the Seller to extend the Due Diligence Period if Fortress was not ready to contribute the equity required for the transaction by the cut-off (Compl. ¶ 27).

In the end, however, the deal between SHIR Capital and Seller fell apart. When the Due Diligence Period was coming to a close, Fortress was not willing to commit to the deal, claiming that it still required certain third-party reports, a process it had not yet initiated. And when the Seller would not agree to extend the Due Diligence Period, Fortress did not attempt to help facilitate a short extension of time (*id.* ¶ 29). Facing the forfeiture of its $400,000 deposit, and a further contribution of $600,000 to keep the deal afloat, SHIR Capital elected to terminate the PSA on May 9, 2019 (*id.* ¶ 30).

The next day, on May 10, SHIR Capital contacted Fortress by email to request that they reconnect and, together, contact the Seller to resuscitate the deal. Fortress responded that it would follow up with SHIR Capital; it did not (*id.* ¶ 31).

Fortress Closes the Deal with Seller

After SHIR Capital terminated the PSA, CBRE brokered a transaction between Seller and Fortress (*id.* ¶ 34). By the time SHIR Capital learned about this, a few weeks after it terminated the PSA, Fortress had already entered into a contract of its own with Seller. And on September 18, 2019, Fortress closed on the deal and acquired the Property, through an entity it created specifically for the transaction, CFEF3 (*id.* ¶ 34).

In this case, SHIR Capital claims that Fortress and CBRE had intended all along to sabotage SHIR Capital and usurp the business opportunity for themselves. According to SHIR Capital, Fortress and CBRE's plan was to place SHIR Capital in a position in which it was left without sufficient capital to close on the deal prior to the expiration of the Due Diligence Period, resulting in the termination of the PSA and, in turn, opening the door for Fortress to close on the transaction by itself (*id.* ¶ 28).

SHIR Capital initiated this action on October 16, 2019, by filing a Summons and Complaint asserting six causes of action against the various Defendants: (1) fraud against all Defendants; (2) breach of fiduciary duty against CBRE; (3) breach of the covenant of good faith and fair dealing against Fortress and CREF3; (4) unfair competition against Fortress and CREF3; (5) misappropriation of trade secrets against Fortress and CREF3; and (6) unjust enrichment against Fortress and CREF3.

DISCUSSION

On a motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (7), the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 367, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

A. Claims Against CREF3

As an initial matter, all claims against CREF3 are dismissed because the Complaint contains no specific allegations of wrongdoing by CREF3, and instead "impermissibly lump[s]" CREF3 together with Fortress (*see* Compl. ¶¶ 3, 45 [noting that "Fortress – through its affiliated entity, CREF3 – closed the transaction to purchase the property"]; *RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678, 678 [1st Dept 2019] ["The SAC did not attribute specific misrepresentations or wrongdoing to most defendants, but rather, impermissibly lumped those defendants together with the others against whom specific acts had been pleaded."]; *see Abrahami v UPC Const. Co.*, 176 AD2d 180, 180 [1st Dept 1991]). As Fortress points out, there are no allegations about misrepresentation made by CREF3, any contract to which CREF3 was a party that could give rise to breach of the duty of good faith and fair dealing, nor any misappropriation by CREF3 of confidential information.[4]

Therefore, the branch of Fortress and CREF3's motion seeking to dismiss all claims against CREF3 is granted.

B. Fraud

1. Fraud Claim Against Fortress

SHIR Capital's fraud claim against Fortress is dismissed for failure to state a cause of action. A fraud claim requires "a misrepresentation or a material omission of fact which was

[4] In response, SHIR Capital repeats the conclusory allegation that "CREF3 is the single-purpose entity affiliated with Fortress that acquired the Property, and it therefore was a participant in CBRE's and Fortress' scheme" (NYSCEF 26 at 21 n.9 [Pl.'s Opp. Br.]). Again, SHIR Capital fails to specify CREF3's role in the alleged scheme, or even that CREF3 existed at the time Fortress and CBRE were allegedly misleading SHIR Capital (*see* Compl. ¶ 9 ["CREF3 . . . is the entity that Fortress formed for the purposes of acquiring the Hendrix from the seller."]). Neither does SHIR Capital allege that CREF3 is liable as an alter ego.

false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). Importantly, "[t]o fulfill the element of misrepresentation of material fact, the party advancing the claim must allege a misrepresentation of present fact rather than of future intent" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]). "General allegations of lack of intent to perform are insufficient; rather, facts must be alleged establishing that the adverse party, at the time of making the promissory representation, never intended to honor the promise" (*id.*; *Meiterman v Corp. Habitat*, 173 AD3d 593, 594 [1st Dept 2019] [dismissing fraud claim because "the vague and general allegations . . . that defendants misled plaintiffs about defendant's financial abilities and defendant's intent to consummate the transaction being negotiated are conclusory"]).

"A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). If "sufficient factual allegations of even a single element are lacking," the claim must be dismissed (*RKA Film Fin., LLC v Kavanaugh*, 2018 WL 3973391, at *3 [Sup Ct, New York County 2018] [quoting *Shea v Hambros PLC*, 244 AD2d 39, 46 [1st Dept 1998]).

Here, SHIR Capital fails to allege, with the requisite particularity, any actionable misrepresentations of fact attributable to Fortress. The fraud claim against Fortress hinges on Fortress's alleged misrepresentation that it "was interested in partnering with SHIR Capital" (Compl. ¶ 38). SHIR Capital surmises that because Fortress ultimately did not partner with it, and promptly purchased the Property without it, Fortress must have been misleading SHIR Capital all along. This line of reasoning, premised on a "conclusory statement of intent", is

insufficient to support a fraud claim as a matter of law (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]). Fortress's interest in partnering with SHIR Capital was memorialized in the Letter Agreement, and Fortress is not alleged to have breached any of the terms in that Agreement. When SHIR Capital terminated the PSA, moreover, Fortress was free to pursue its own transaction with Seller. The speed with which it exercised that right, without more, does not evince "a present intent to deceive" (*Perella*, 153 AD3d at 449 [finding facts insufficient to allege present intent to deceive where "[n]one of the misconduct alleged occurred until . . . years later"]).

In opposition to Fortress's motion to dismiss, SHIR Capital submits an affidavit from its principal, Elan Gordon, which recounts additional misrepresentations allegedly made by Fortress – (1) that "Fortress was conducting its due diligence as quickly as possible," and (2) that Fortress "would assist [SHIR Capital] with obtaining an extension of the due diligence period under the PSA, if necessary" (NYSCEF 27 ¶ 7 [Gordon Aff.]).[5] Neither of these allegations salvage the fraud claim against Fortress. Both reflect vague promises about future intentions (*see Lincoln Place LLC v RVP Consulting, Inc.*, 16 AD3d 123, 124 [1st Dept 2005] [dismissing counterclaims because "Defendants' claim for fraudulent inducement cites nothing more than statements of future intentions or expressions of hope, which are not actionable"]; *Cronos Grp. Ltd. v XCOMIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]). What's more, the promise to conduct due diligence "as quickly as possible" contradicts the terms of the Letter Agreement, which gave Fortress 30 days to do so, while the promise to facilitate an extension is contingent on future

[5] Originally, in the Complaint, it was "CBRE, through Olney," who "assured SHIR Capital that Fortress would convince the Seller to extend the Due Diligence Period" (Compl. ¶ 43).

events outside of Fortress's control[6] (*see e.g.*, *Albert Apartment Corp. v Corbo Co.*, 182 AD2d 500, 501 [1st Dept 1992] [dismissing fraud claims based on alleged representations "that were neither within the defendants' control nor their ability to predict with certainty …"]; *Naturopathic Labs. Int'l, Inc. v SSL Americas, Inc.*, 18 AD3d 404, 404 [1st Dept 2005] [finding "statements of prediction or expectation . . . not actionable"]).

In addition, the fraud claim includes distinct allegations of fraudulent *concealment*, which center on CBRE's failure to disclose a prior relationship with Fortress. Those allegations fail to state a cause of action against Fortress because SHIR Capital does not allege any duty on Fortress's part to disclose that information (*see P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]; *see also Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [1st Dept 2010] ["lack of a fiduciary relationship between the parties is fatal to plaintiff's claim[] for . . . fraudulent concealment"]).

Therefore, the branch of Fortress's motion seeking to dismiss SHIR Capital's fraud claim is granted.

2. Fraud Claim Against CBRE

For similar reasons, the fraud claim against CBRE is also dismissed: the alleged misrepresentations ascribed to CBRE consist of statements about future intent and events outside the control of the Defendants, none of which are actionable.

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[6] It is unclear what Fortress's "assist[ance]" would have looked like here. As the Complaint indicates, and as Fortress's own submissions confirm, Seller had already refused SHIR Capital's request for an extension of the Due Diligence Period. There is no allegation that SHIR Capital sought any specific act of assistance from Fortress, or that Fortress could have secured what SHIR Capital could not.

The fraud claim against CBRE is also duplicative of the breach of fiduciary duty claim asserted against it (*Interventure 77 Hudson LLC v Falcon Real Estate Inv. Co., LP*, 172 AD3d 481, 481–82 [1st Dept 2019]; *Pai v Blue Man Grp. Pub., LLC*, 151 AD3d 456 [1st Dept 2017]). Both claims arise from the same factual allegations and seek the same damages (Compl. ¶¶ 47, 53-54; *Frydman & Co. v Credit Suisse First Bos. Corp.*, 272 AD2d 236, 238 [1st Dept 2000] ["The fifth and sixth causes of action, for fraud and negligent misrepresentation, respectively, simply duplicate the causes of action for breach of fiduciary duty and breach of contract, and are therefore legally insufficient"]; *Voutsas v Hochberg*, 103 AD3d 445, 445 [1st Dept 2013] [dismissing fraud claim as duplicative where it "arose from the same facts" and "alleged similar damages"]; *Financial Guaranty Ins. Co. v Morgan Stanley ABS Capital I Inc.*, 164 AD3d 1126, 1127 [1st Dept 2018] [dismissing fraud claim as duplicative where it sought the same damages as plaintiff's breach of contract claim]).

Therefore, the branch of CBRE's motion seeking to dismiss the fraud claim is granted.[7]

C. Breach of Fiduciary Duty Against CBRE

SHIR Capital fails to state a cause of action for breach of fiduciary duty against CBRE. To plead such a claim, "a plaintiff must allege that the defendant owed him a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct" (*NRT N.Y., L.L.C. v Morin*, 147 AD3d 589, 589 [1st Dept 2017]). SHIR Capital's factual allegations, taken as true, do not support a claim that CBRE owed it a fiduciary duty.

[7] For this claim and others that are dismissed for failure to state a cause of action, the Court does not reach Defendants' alternative grounds for dismissal based on documentary evidence.

As the Court of Appeals has explained, a fiduciary relationship is fundamentally different than the typical commercial relationship between parties in arm's-length transactions, in which each party is free to act in its own economic interest:

> A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. . . . If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them. However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation

(*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]; *see Meinhard v Salmon*, 249 NY 458, 464 [1928] [explaining that "[m]any forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties"] [Cardozo, J.]; *Northeast Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d 158, 164 [1993] [finding that relationship between plaintiff and "finder" was not fiduciary in nature]).

Here, the Complaint fails to set forth adequate factual allegations to plead that CBRE owed a fiduciary duty to SHIR Capital. While SHIR Capital characterizes CBRE as its "broker" (*see, e.g.*, Compl. ¶¶ 49, 51), the factual allegations state only that CBRE introduced it to other potential investors and promised to "act in its best interests" and "use [CBRE's] best efforts" to secure a joint venture (*id.* ¶ 50). There are no allegations, however, that SHIR Capital ever retained CBRE to act as a broker or to provide expert knowledge or advice in negotiating the joint venture. Taking the allegations as true, CBRE was brought in to identify potential investors in return (ultimately) for a fee if the transaction were successful. That is the prototypical role of a "finder," which generally does not create a "relationship of higher trust" (*compare with EBC I*,

5 NY3d at 20). Placing the label "broker" on CBRE's alleged functions does not change the result.

In that regard, the Court of Appeals' decision in *Northeast Gen. Corp.* is instructive. There, the Court declined to "ascribe[ ] inordinate weight to the titles . . . 'investment banker and business consultant'" (82 NY2d at 162), and instead probed the functional relationship between the parties. In doing so, the Court found that the defendant's "sole function" was as a "finder", not a "broker", and therefore did not take on fiduciary duties:

> [A] finder is not a broker, although they perform some related functions. Distinguishing between a broker and finder involves an evaluation of the quality and quantity of services rendered. The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee. While a broker performs that same introduction task, the broker must ordinarily also bring the parties to an agreement. . . . In this regard, defendants' effort at analogizing whatever fiduciary-like obligation brokers may have to a finder's role fails. . . . A finder is not transformed into a broker or fiduciary because the finder is informed of the special needs of the client so the finder can perform the finder service.

(82 NY2d at 162-164). Similarly here, SHIR Capital's bare allegations do not support elevating CBRE's role into that of a fiduciary.

To be sure, the existence of a fiduciary relationship can in some cases pose fact questions that are premature to resolve at the motion to dismiss stage. But the cases on which SHIR Capital relies are distinguishable because the specific allegations in those cases evinced an advisory or agent relationship (*see Carbon Capital Mgt., L.L.C. v Am. Express Co.*, 88 AD3d 933, 938 [2d Dept 2011] [finding evidence of fiduciary relationship in "the details of [the parties'] business relationship leading up to the consummation of the [deal]", including defendant's representation that he was plaintiff's "financial teacher"]; *EBC I*, 5 NY3d at 20 [alleging "an advisory relationship" in connection with IPO pricing]; *Solomon Capital, L.L.C. v Lion Biotechnologies, Inc.*, 171 AD3d 467, 469 [1st Dept 2019] [finding allegations sufficient to

plead a broker-principal relationship]). There are no allegations here that would elevate CBRE's limited role as a finder/intermediary into a "relationship of higher trust" sufficient to obligate it to act as a fiduciary for one of the parties to the proposed transaction.

Therefore, the branch of CBRE's motion seeking to dismiss the claim for breach of fiduciary duty is granted.

D. Breach of the Implied Covenant of Good Faith and Fair Dealing Against Fortress

The claim for breach of the implied covenant of good faith and fair dealing is dismissed. The covenant of good faith and fair dealing "cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights" (*Fesseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268, 268 [1st Dept 2003]; *see also 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004] ["[T]he covenant of good faith and fair dealing cannot negate defendants' express contractual right"]). Here, the Letter Agreement expressly granted Fortress a 30-day period to conduct due diligence, which expired on May 25, 2019 (*see* NYSCEF 21 ¶ 3 [Siqueira Aff. Ex. B]). Accordingly, Fortress was under no contractual obligation to complete its process by an earlier date, nor did the contract bar Fortress from subsequently pursuing its own transaction. As an additional basis for dismissal, the implied-covenant claim is also duplicative of the fraud claim (*Permasteelisa, S.p.A. v Lincolnshire Mgmt., Inc.*, 16 AD3d 352, 352 [1st Dept 2005] [dismissing implied covenant claim as duplicative of breach of contract which was itself duplicative of fraud]).

Therefore, the branch of Fortress's motion seeking to dismiss the claim for breach of the implied covenant of good faith and fair dealing is granted.

E. Trade Secret Misappropriation Against Fortress

The claim for misappropriation of trade secrets is also dismissed. "To prevail on a claim for misappropriation of trade secrets, a plaintiff must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015] [hereinafter, "*Pinterest*"]; *Faiveley Transp. Malmo AB v Wabtec Corp.*, 559 F.3d 110, 117 [2d Cir 2009]; *accord Hyperlync Tech., Inc. v Verizon Sourcing LLC*, 2016 N.Y. Slip Op. 30288[U] [Sup Ct, New York County 2016] [Scarpulla, J.]; *Mitzvah Inc. v Powers*, 2011 N.Y. Slip Op. 33931[U] [Sup Ct, New York County 2011] [Kornreich, J.]). For at least two reasons, SHIR Capital fails to allege a cause of action here.

First, the allegations in the Complaint "fail[ ] to describe the allegedly misappropriated ideas" – that is, the trade secrets – "with sufficient specificity" (*Schroeder v Cohen*, 169 AD3d 412, 412-13 [1st Dept 2019] [dismissing trade secret misappropriation claim] [hereinafter, "*Cohen*"]; *see Big Vision Private Ltd. v E.I. DuPont De Nemours & Co.*, 1 F Supp 3d 224, 266 [SDNY 2014], affd sub nom. *Big Vision Private Ltd. v E.I. du Pont de Nemours and Co.*, 610 Fed Appx 69 [2d Cir 2015] [dismissing claim where plaintiff "failed to identify . . . trade secret with sufficient particularity"]). The Complaint vaguely alludes to "a unique business model . . . [to] make the investment lucrative" (Compl. ¶ 72), "extensive market research" (*id.* ¶ 71), "economic projections and forecasts" (*id.*), and a "strategy" to subdivide "oversized" apartment units into smaller apartment units (*id.* ¶ 14). Absent from the pleadings is a description of any specific concept or strategy that elevates these routine due diligence materials to the status of trade secrets (*see Cohen*, 169 AD3d at 412-13 ["Plaintiffs' ideas amount to nothing more than a

collection of broad concepts"]; *Pinterest*, 133 AD3d at 29 ["[I]nformation that is readily available from public sources is not entitled to trade secret protection."]).

Second, and in a similar vein, SHIR Capital fails to allege the requisite novelty or originality that would qualify for trade secret protection. "A trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Schroeder v Pinterest Inc.*, 133 AD3d at 27 [citing *Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). But "a combination of pre-existing elements is not considered 'novel'" (*Schroeder v Cohen*, 169 AD3d at 413 ["dismiss[ing] [claim] because plaintiffs' ideas were not sufficiently novel to merit protection"]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 [1st Dept 1998] [while detailed information about a building "placed [plaintiff] in an advantageous position . . . [and] the possession of the data by another party would deprive plaintiffs of this advantage, the data did not thereby acquire 'trade secret' status"]; *see Broughel v Battery Conservancy*, 2010 WL 1028171, at *4 [SDNY 2010] ["The test for novelty is rather stringent, the idea must show true invention and not a mere adaptation of existing knowledge."]). As noted above, SHIR Capital's claim is premised on such concepts as a business plan to "make the investment lucrative," and the subdivision of apartment units. Based on these (relatively bare) allegations, the work performed by SHIR Capital may have been laborious, but it was not novel.

Therefore, the branch of Fortress's motion seeking to dismiss SHIR Capital's claim for misappropriation of trade secrets is granted.

F. <u>Unfair Competition Against Fortress</u>

The unfair competition claim is also dismissed. "Under New York law, [a]n unfair competition claim involving misappropriation usually concerns the taking and use of the

plaintiff's property" – a term used "interchangeably" with "commercial advantage" – "to compete against the plaintiff's own use of the same property" (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007]). "[T]he primary concern in unfair competition is the protection of a business from another's misappropriation of the business organization [or its] expenditure of labor, skill, and money" (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015] [sustaining claim involving misappropriation of confidential and proprietary information]).

Although an unfair competition claim can, in some cases, survive apart from a trade-secret claim (*see, e.g.*, *Sit-Up Ltd. v IAC/InterActiveCorp.*, 05 CIV. 9292 (DLC), 2008 WL 463884, at *19 [SDNY 2008]), in this case SHIR Capital fails to set forth adequate factual allegations to support a claim for unfair competition. The Complaint does not allege any specific acts of misappropriation, or commercial bad faith, on the part of Fortress. SHIR Capital grounds its claim, instead, in the supposition than Fortress's subsequent deal with Seller must have implicated SHIR Capital's work product. Not only is it unclear which work product Fortress supposedly misused, but the Letter Agreement imposed no bar on Fortress's actions once the PSA was terminated – by SHIR Capital, no less. And "[i]mposing any restrictions broader than those imposed by the [parties' agreement] on [Fortress's] commercial activity through the doctrine of unfair competition is unwarranted" (*id.*, at *20; *see Berman v Sugo LLC*, 580 F Supp 2d 191, 209 [SDNY 2008] [dismissing claim where plaintiff "fail[ed] adequately to allege the bad faith acts by which [defendants] misappropriated" information to its advantage]). Moreover,"a claim [for unfair competition] also requires 'either a confidential relation between the parties or a valid agreement to refrain from the alleged unfair competition'", and SHIR Capital alleges neither (*Quadriad Realty Partners, LLC v Wilbee Corp.*, 2018 N.Y. Slip Op.

33297[U], at *19 [Sup Ct, New York County 2018] [dismissing unfair competition claim] [citing *V. Ponte & Sons v. Am. Fibers Intl.*, 222 A.D.2d 271, 271 [1st Dept 1995] [denying leave to interpose counterclaim for unfair competition]]; *Am. Can Co. v Grey Intercontinent Ltd.*, 3 AD2d 908, 908 [1st Dept 1957] ["The allegations do not establish the necessary confidential relation between the parties carrying with it, on the part of the plaintiff, the obligation to refrain from the unfair competition complained of."]).[8]

Therefore, the branch of Fortress's motion seeking to dismiss SHIR Capital's claim for unfair competition is granted.

G. Unjust Enrichment Against Fortress

The unjust enrichment claim against Fortress is dismissed. To plead an unjust enrichment claim, "[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]; *Philips Int'l Invs., LLC v Pektor*, 117 AD3d 1, 7 [1st Dept 2014]).

As a threshold matter, SHIR Capital "fails to state a cause of action for unjust enrichment as the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). Here, the allegations underlying the claim relate to the terms of the parties' proposed joint venture, governed by the Letter Agreement (*see* Compl. ¶ 80-82).

[8] Fortress asserts that SHIR Capital would not be able to show that it suffered damages because SHIR Capital had already lost its exclusive Due Diligence Period with Seller by the time Fortress allegedly used its work product (*see E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018]). Given the Court's finding that SHIR Capital has not stated a viable claim for unfair competition, the Court need not address whether obstacles to establishing damages would be sufficient, independently, to warrant dismissing that claim.

Moreover, courts have found that it is not inequitable to purchase a property unilaterally after an attempted joint investment is terminated (*see RXR WWP Owner LLC v WWP Sponsor, LLC*, 132 AD3d 467, 468 [1st Dept 2015] ["[I]t is not against equity and good conscience to permit [the seller's] sale of an interest . . . to [the party formerly contemplating a joint venture with plaintiff] after plaintiff terminated the . . . agreement."); *J.E. Capital, Inc. v Karp Family Assocs.*, 285 AD2d 361, 364 [1st Dept 2001] [holding that after plaintiff "made th[e] decision" not to purchase a certain property "there was nothing unjust or inequitable in defendants' purchase of the property thereafter"]).

Therefore, the branch of Fortress's motion seeking to dismiss the unjust enrichment claim is granted.

* * * *

Accordingly, it is

ORDERED that CBRE's motion to dismiss (Mot. Seq. No. 001) is **Granted**; it is further

ORDERED that Fortress and CREF3's motion to dismiss (Mot. Seq. No. 002) is **Granted**; and it is further

ORDERED that the Complaint is dismissed.

This constitutes the Decision and Order of the Court.

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6/11/2020
DATE

JOEL M. COHEN, J.S.C.

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