

Angel v Strulovich
2020 NY Slip Op 32191(U)
July 1, 2020
Supreme Court, Kings County
Docket Number: 500827/20
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

-----x
BORUCH ANGEL, DOVID BADDIEL, HANNAH BADDIEL, ALEX BALL,
MAURICE BAMBERGER, MEIR BAMBERGER, EFRAIM BINYAMINI,
ISRAEL MEIR COHEN, BATSHEVA FRENKEL, YOSEF GLATSTEIN,
CHEZKEL GRINFELD, DAVID HALPERN, ISRAEL HIRSCH, TZIVIA
HIRSCH, YVONNE HIRSCH-GRUNWALD, PINCHOS KAHN, HAIM
SHMUEL KAHNA, ISRAEL J KAPLAN, YINON KATABI, RACHEL
BRACHA KEYAK, HINDA KOHEN, ISAAC KONINSKI, MOSHE BUNIM
KRAUS, DINA DVORA KRUSKAL, YISRAEL MEIR KRUSKAL, YECHIEL
LAVKOVITCH, ELY MERL, ELHANAN MICHAEL, HAIM MENACHEM RUBNITZ,
ABRAHAM J. SCHWARZ, ELAZAR DAVID SHLEZINGER, LIONEL
SPINGARN, MENACHEM STEIN, MOSHE STEIN, NETANEL STEIN,
DEBORA SARA STEINHAUS, ELIYAHU STERN, RACHEL STEWART,
SAMUEL STEWART, DAVID SHALOM STRASSER, YEHUDA WINEGARTEN,
DAVID YITSHAKI, and YEHOShUA NATAN ZELIVANSKY,

Plaintiffs, Index # 500827/20

- against -

July 1, 2020

YECHESKEL STRULOVICH a/k/a CHASKIEL STRULOVICH,
YECHIEL OBERLANDER, CS CONSTRUCTION GROUP LLC,
945 PARK PL LLC, 1078 DEKALB LLC, 74 VAN BUREN
LLC, 454 CENTRAL AVENUE LLC, 980 ATLANTIC HOLDINGS
LLC, 720 LIVONIA DEVELOPMENT LLC, PENN CONDOMINIUM
LLC, THROOP HOME, LLC, EIGHTEEN PROPERTIES LLC, THE
BUSHWICK PARTNERS LLC, BROOKLYN VENTURES LLC, THE
HOWARD DAY HOUSE LLC, 196 ALBANY HOLDINGS L.P., CSN
PARTNERS LP, KNICKERBOCKER LOFTS LLC, 741 LEXINGTON
LLC, 296 COOPER LLC, WILLTROUT REALTY LLC, STAGG
STUDIOS LLC, FIRST AVENUE REALTY HOLDINGS L.P., CSY
HOLDINGS LLC, CAS MANAGEMENT COMPANY BAYSHORE, INC.,
31 BROOKLYN, LLC, 1035 FLUSHING AVE LLC, VICTORY BLVD
ASSOCIATE LLC, SOI GROUP LLC, 945 WILLOUGHBY HOLDINGS
LLC, 119 HOLDINGS LLC, WALLACE HOLDINGS LLC, 1642
EQUITIES LLC, GOLD CLIFF, LLC, BNH PROPERTIES LLC,
HERMAN GREENFELD as trustee of GIVAS OLIM TRUST,
MENDEL BRACH as trustee of GIVAS OLIM TRUST, TOMPKINS
420 REALTY LLC, WILLOUGHBY EQUITIES LLC, 186 LENOX LLC,
400 SOUTH 2ND STREET REALTIES L.P., WYKOFF SP LLC, 1428
FULTON ST LLC, DIAMOND GARDEN PARTNERS LLC, PENN & MARCY
LLC, 420 TOMPKINS, LLC, 599-601 WILLOUGHBY LLC, CS YH
CONDOS LLC, LENOX 186 HOLDINGS LLC, LENOX 186 REALTY LLC,
400 SOUTH 2ND STREET HOLDINGS L.P., R.P.S. PROPERTIES LLC,
WOODBINE RESIDENCE LLC, FULTON STREET HOLDNGS LLC, 908
BERGEN STREET LLC, ISRAEL WEISS, GITTEL WEISS, 901 BUSHWICK
AVENUE LLC, GATES EQUITY HOLDINGS LLC, 853 LEXINGTON LLC,
348 ST. NICHOLAS LLC, 762 WILLOUGHBY LLC, 855 DEKALB AVENUE
LLC, THE BRIDGE TOWER LLC, 619 HOLDINGS LLC, GRAND SUITES

LLC, CATALPA DEVELOPMENT, LLC, SLOPE OFFICES LLC, 41-49
SPENCER LLC, 482-484 SENECA LLC, 1217 BEDFORD LLC,
1266 PACIFIC LLC, MYRTLINO HOLDINGS, LLC, 259 BERRY LLC,
and 261 BERRY LLC,

Defendants,

-----x

PRESENT: HON. LEON RUCHELSMAN

The defendant Yechezkel Strulovitch and forty corporate defendants have moved seeking to dismiss the Amended Complaint. Another six corporate defendants have moved seeking to dismiss the Amended Complaint. Further, another five corporate defendants have moved seeking to dismiss the Amended Complaint. Further, another two corporate defendants have moved seeking to dismiss the Amended Complaint. In addition, three corporate defendants moved separately, prior to the other defendants seeking to dismiss the complaint and is included in this decision for completeness. Papers were submitted by the parties and arguments were held. After reviewing all the arguments, this court now makes the following determination.

According to the Amended Complaint the forty three plaintiffs were approached by the individual defendant Yechezkel Strulovitch and Yechiel Oberlander about investing in real estate properties in Kings County in 2012. The plaintiffs intended to invest various sums in twenty one different investment properties throughout Brooklyn. The Amended Complaint alleges that defendant Strulovich did not invest the investment funds given to

him for the intended purposes of purchasing and renovating properties but rather used the money for other ventures unrelated to the interests of any of the plaintiffs. Specifically, the Amended Complaint alleges that Strulevitch prepared fraudulent prospectuses for each of the twenty one investment properties and that based upon the misrepresentations contained in them the plaintiffs gave such funds to Strulevitch. The Amended Complaint alleges numerous distinct categories of properties. The first category, called the 'Strulovitch Properties' are properties located at 217 Penn Street, 12 Throop Avenue, Unit 1G, 255 18th Street, 1098-1104 Bushwick Ave, 284 Sumpter Street, 16 Howard Avenue, 196 Albany Avenue, 1173 Bergen Street, 783 Knickerbocker Avenue, 741 Lexington Avenue, 296 Cooper Street, 965 Willoughby Avenue, 361 Stagg Street, 31-43 Brooklyn, Avenue, 1035 Flushing Avenue, 945 Willoughby Avenue, 119 Mckibbin Street, 1642 58th Street and 113 Clifton Place all located in Brooklyn, 2075 Wallace Avenue, Bronx, New York, Victory Boulevard, Staten Island, New York, 940 1st Avenue, New York, New York and 8 Maple Avenue, Bay Shore, New York. These properties are owned by twenty four defendants called the 'Strulovitch Holding Company' entities. They include Penn Condominium LLC, Throop Home, LLC, Eighteen Properties LLC, The Bushwick Partners LLC, Brooklyn Ventures LLC, The Howard Day House LLC, 196 Albany Holdings L.P., CSN Partners LP, Knickerbocker Lofts LLC, 741 Lexington LLC, 296

Cooper LLC, Willtrout Realty LLC, Staggs Studios LLC, First Avenue Realty Holdings L.P., CSY Holdings LLC, CAS Management Company Bayshore, Inc., 31 Brooklyn LLC, 1035 Flushing Ave LLC, Victory Blvd Associate LLC, SOI Group LLC, 945 Willoughby Holdings LLC, 119 Holdings LLC, Wallace Holdings LLC, 1642 Equities LLC, and Gold Cliff, LLC. The second category called the 'Trust Investment Properties' are located at 945 Park Place, 1078 Dekalb Avenue, 74 Van Buren Street, 454 Central Avenue, 980 Atlantic Avenue, and 720 Livonia Avenue. These properties are owned by six defendants, 945 Park PL LLC, 1078 Dekalb LLC, 74 Van Buren LLC, 454 Central Avenue LLC, 980 Atlantic Holdings LLC, and 720 Livonia Development LLC. These properties were some of the properties the defendants represented would be the subject of plaintiffs investments. Further, seven defendants, 908 Bergen Street LLC, 901 Bushwick Avenue LLC, Gates Equity Holdings LLC, 853 Lexington LLC, 348 ST. Nicholas LLC, 762 Willoughby LLC, and 855 Dekalb Avenue LLC called the 'Transferor Holding Company' defendants were all previous owners of an investment property. The third category called the 'Sham Transfer Properties' are located at 219-221 Rutledge Street, 420 Tompkins Avenue, 599 Willoughby Avenue, 186 Lenox Road, 254 Penn Street, 396 South 2nd Street, 30 Woodbine Street, 49 Wyckoff Avenue, 1426, 1428, and 1432 Fulton and 115-123 Clifton Place, all in Brooklyn, New York. Those properties are owned by eight defendants, BNH Properties

LLC, Tompkins 420 Realty LLC, Willoughby Equities LLC, 186 Lenox LLC, 400 South 2nd Street Realities L.P., Wykoff SP LLC, 1428 Fulton ST LLC, and Diamond Garden Partners LLC. Further, the Amended Complaint alleges that eleven defendants, Penn & Marcy LLC, 420 Tompkins, LLC, 599-601 Willoughby LLC, CS YH Condos LLC, Lenox 186 Holdings LLC, Lenox 186 Realty LLC, 400 South 2nd Street Holdings L.P., R.P.S. Properties LLC, Woodbine Residence LLC, Fulton Street Holdings LLC and Gold Cliff, LLC termed the 'Controlled Holding Company' defendants, were all previous owners of the sham properties.

The Amended Complaint also alleges that defendants Mendel Brach and Herman Greenfeld are the trustees of defendant Givas Olam Trust which owns 254 Penn Street and that defendants Israel and Gittel Weiss own 30 Woodbine Street. Another category is called the 'Strulovich Transfer' properties located at 72-74 South 4th Street, 619 Hancock Street, 130 Grand Street, 462 36th Street, 41-49 Spencer Street, 1217 Bedford Avenue, 1266 Pacific Street, 1086 Myrtle Avenue, 259 Berry Street, 261 Berry Street, all located in Brooklyn, New York, 482-484 Seneca Avenue, Queens, New York and 208 West 96th Street, New York, New York. Those properties are owned by twelve defendants called the 'Strulovich Transfer Company' defendants and include The Bridge Tower LLC, 619 Holdings LLC, Grand Suites LLC, Catalpa Development, LLC, Slope Offices LLC, 41-49 Spencer LLC, 482-484 Seneca LLC, 1217

Bedford LLC, 1266 Pacific LLC, Myrtlino Holdings, LLC, 259 Berry LLC and 261 Berry LLC.

Thus, the plaintiffs have asserted five causes of action seeking a constructive trust on five distinct categories of property, namely the Strulovich Properties, the Trust Investment Properties, the Sham Transfer Properties, the properties owned by the Transferor Holding Company defendants and the properties owned by the Strulovich Transfer Company defendants. In addition the Amended Complaint alleges fraud against defendants Strulovitch and Oberlander, RICO causes of action against Strulovitch and Oberlander CS Construction Group LLC and the Strulovitch Holding Company Defendants, breach of contract against Strulovitch and Oberlander, conversion against Strulovitch, Oberlander and CS Construction Group LLC , breach of fiduciary duty against Strulovitch and Oberlander, unjust enrichment against all defendants, violations of the debtor creditor law against Strulovich, Oberlander, CS Construction Group LLC, the Strulovich Holding Company defendants and the Strulovich Transfer Company defendants and an accounting against all defendants. The motions to dismiss were filed and opposed.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them

every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]).

Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The first issue that must be addressed is whether the plaintiffs maintain standing to sue in their individual capacities. The defendants argue the individual defendants invested funds into 'feeder funds' or Investor LLC's and became members of those corporations which were created expressly for the purpose of accepting the plaintiff's investments and then disbursing those investments to other corporations that owned the investment properties. Therefore, the defendants argue the plaintiffs cannot maintain direct causes of action and can only sue derivatively.

Thus, the court must now analyze whether such claims are direct or derivative. In Serino v. Lipper, 123 AD3d 34, 994 NYS2d 64 [1st Dept., 2014] the court explained that to distinguish a derivative claim from a direct claim the court must engage in two inquiries. First, whether any harm was suffered by

the corporation or an individual stockholder and whether the corporation or the individual stockholder would receive the benefit of any recovery. As the court stated "if there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action...On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand" (id). Thus, where the alleged injury affects all shareholders not just the plaintiff then the action is only derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]). The plaintiff argues that Strulovich did not invest most of the funds into the investment corporations which would give rise to derivative claims, rather, Strulovich bypassed those investor funds and simply stole the majority of the money of the plaintiffs and deposited it into corporations he controlled. The plaintiffs assert "to the extent that Strulovich and CS can show that they properly forwarded any Investment Funds to the correct Investor LLC and thereafter caused the Investor LLC to forward the Investment Funds to the proper Holding LLC, and the Holding LLC then improperly diverted the Investment Funds back to Strulovich, Moving Defendants would, at least, have a colorable argument as to Plaintiffs' standing. But that is not what the Complaint alleges. Instead, Plaintiffs forwarded the Investment Funds to

Strulovich and CS directly, and Strulovich and CS directly diverted the Investment Funds to their own purposes. This does not give the Investor LLCs or the Holding LLCs a cause of action against Strulovich and CS" (see, Plaintiff's Opposition to Strulovich's Motion to Dismiss, pages 6,7). In Reply Strulovich argues that indeed, there is documentary evidence that the plaintiffs were members of corporations established by Strulovich for the express purpose of being the repository of the plaintiffs' investment funds. Therefore, any theft alleged is a theft from the corporate entities and not the individual plaintiffs. However, membership in any corporate entities is not the proper inquiry. The proper inquiry is whether Strulovich deposited any of the investor funds into those entities foreclosing individual claims. Surely, if the corporate entities were never funded by the plaintiffs or were inadequately funded by Strulovich then those corporate entities would only have causes of action for the amount actually invested. Thus, membership in any of the corporate entities is merely the first step demanding derivative claims but cannot be the only element.

The Amended Complaint alleges that "in many instances, the Individual Defendants received Plaintiffs' Investment Funds by way of wires forwarded to the bank accounts of Strulovich's wholly owned entity, Defendant CS" (see, Amended Complaint, ¶ 53). The defendants elide this issue by explaining that

"Strulovitch allegedly accepted Plaintiffs' monies, gave the Plaintiffs their promised interest in the Feeder Funds, and then took some of the proceeds to benefit himself" (Defendant's Reply, page 7) without ever addressing if all the money was placed in any of the corporate entities, even if the plaintiffs were members of those entities. The defendants argue there is no need to address that issue since the plaintiffs have admitted they became members of the investment funds in exchange for their investments "therefore, regardless of who allegedly "stole" their Investment Funds (and we note that an entity can only act through its managers), it was the Feeder Funds who would have suffered the harm" (id at page 9). That circular arguments avoids the question whether the feeder funds were ever fully funded. If anything less than all the funds were ever placed in them they have suffered harm to the extent of the amount of the investments. Of course, the individuals have still suffered harm enabling the individual lawsuit contemplated here. Furthermore, the defendants allude to the argument that Strulovich, as a managing member of the feeder funds, accepted the investment funds from the plaintiffs in his role as that managing member and therefore a harm to the feeder funds obviously exists. However, there is no evidence supporting that contention and the Amended Complaint does not allege that fact. Therefore, since the plaintiffs invested far more money than exists in any of the

investment funds, the plaintiffs may assert individual claims against all the defendants.

For similar reasons the claims against Strulovich personally are proper. First, the Amended Complaint alleges that Strulovich was not even acting in any corporate capacity when he diverted the investment funds of the plaintiff. Even if he was acting in such capacity, to state a claim against an individual director or officer, the plaintiffs are required to present particularized allegations that the acts of the corporate officer were beyond the scope of employment or for personal gain (see, Petkanas v. Kooyman, 303 AD2d 303, 795 NYS2d 1 [1st Dept., 2003]). Clearly, the allegations against Strulovich demonstrate, at this juncture, that he acted for personal gain and consequently, the lawsuit against him personally is proper.

Next, a constructive trust has a six year statute of limitations and begins to run upon the occurrence of the wrongful act giving rise to a duty of restitution (Athanasatos v. Scarpa, 173 AD3d 817, 102 NYS3d 668 [2d Dept., 2019]). The wrongful act is triggered, for purposes of the statute of limitations, when the trustee, Strulovich in this case, wrongfully acquired the property (Auffermann v. Disti, 56 AD3d 502, 867 NYS2d 527 [2d Dept., 2008]). As the Supreme Court observed "whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of

the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust'" (Moore v. Crawford, 130 US 122 9 S.Ct 447, 32 LEd 878 [1889]). Thus, generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]).

It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration

Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id).

The defendants generally present two arguments why the constructive trust claims must be dismissed. First, they assert a constructive trust is not applicable where the defendant uses money earmarked for one investment but diverts it to a wholly different investment of which the investor was made no promise. Second, they assert a constructive trust is not available where the 'trustee' merely used the invested funds for improvements or development to property already owned. The court need not address the first argument since it is not really disputed the statute of limitations regarding the ownership of the five categories of properties has already passed and a constructive trust in that regard cannot be impressed. Concerning the second argument, the plaintiffs counter a constructive trust can be impressed based upon improvements and developments to property already owned by the defendants. Thus, if evidence would establish that Strulovich and the other defendants used the plaintiffs investment funds to develop and improve properties they already owned then the constructive claims are proper. There are no cases supporting that contention. All the cases

cited by plaintiffs do not stand for the proposition that a constructive trust can be impressed upon wholly owned property of a defendant who utilized investor funds for improvements or development. Thus, in Rafferty Sand & Gravel LLC v. Kalvaitis, 116 AD3d 1290, 984 NYS2d 462 [3rd Dept., 2014], the plaintiff was already an owner of the business and sought a constructive trust when the partner changed the locks and denied the plaintiff access to the premises. The court noted that the plaintiff's contribution of resources constituted transfers in reliance on the promises of the partner. Again, in Lester v. Zimmer, 147 AD2d 340, 542 NYS2d 855 [3rd Dept., 1989], the parties lived together for ten years on property owned by the defendant's mother who promised to give it to the plaintiff and the defendant. Plaintiff shared the cost of expenses, taxes and maintenance of the property and when the defendant married another woman and denied the plaintiff access to the property she sought a constructive trust. The court held the plaintiff's contributions toward the property satisfied the element there were transfers in reliance on the promise of ownership and imposed a constructive trust. In Ehlinger v. Ehlinger, 174 Misc2d 344, 664 NYS2d 401 [Supreme Court Albany County 1997] the defendant wife had a mortgage on certain property she owned. Upon her marriage to the plaintiff, the plaintiff paid off the entire mortgage. The marriage lasted a year and pursuant to the

divorce proceedings the court granted the husband's request for a constructive trust, again, finding that the payment of the mortgage was made in reliance upon being given half ownership in the property. The remaining cases, Cinquemani v. Lazio, 37 AD3d 882, 829 NYS2d 265 [3rd Dept., 2007] and Moak v. Raynor, 28 AD3d 900, 814 NYS2d 289 [3rd Dept., 2006] similarly held constructive trusts were applicable where the plaintiff already had a connection to the property either through contributions or actually residing there or a combination of both. Indeed, the Restatement (Third) of Restitution and Unjust Enrichment §55 Illustration 23 explicitly forecloses a constructive trust in the scenario argued by plaintiffs. It states, "Bookkeeper embezzles \$50,000 from Employer. To the extent that the funds are identifiable in Bookkeeper's bank account...they are subject to constructive trust in favor of Employer. If Employer can trace the funds into the purchase of a house for \$50,000, a court may declare that Bookkeeper holds title to the house in constructive trust for Employer. (If Employer can show that Bookkeeper bought the house using \$25,000 of Employer's funds and \$25,000 of his own funds, a court may declare that Bookkeeper holds a one-half interest in the house in constructive trust for Employer). By contrast, if the facts reveal that Bookkeeper has spent Employer's \$50,000 on improvements to a house that Bookkeeper already owned, Employer has no equitable ownership interest in

the house. (In such a case, the assertion that "Employer is entitled to a constructive trust on the house for \$50,000" is a solecism). Rather, Employer is entitled to restitution from Bookkeeper in the amount of \$50,000 plus interest (\$ 41). Employer's restitution claim is secured by an equitable lien on Bookkeeper's house (§56)" (id).

Thus, the plaintiffs cannot obtain a constructive trust in any of the five categories of property and consequently the motions seeking to dismiss the first five causes of action of the Amended Complaint are all granted. Since the constructive trust claims are dismissed the motions seeking to cancel the notices of pendency on all the properties are granted.

Turning to the claims for fraud, it is well settled that an action based on fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff... discovered the fraud, or could with reasonable diligence have discovered it" (CPLR §213[8]). The defendants assert the plaintiffs filed this lawsuit more than two years after Strulovich publicly filed the deeds to the properties that form the basis of the fraud claims thereby placing the issue on notice. The defendants assert that had the plaintiffs "scrolled through the short documents (10-20 pages), they would have found the RP-5217NYC forms that are annexed to the publicly filed deeds, which list the purchase price. Plaintiffs cannot

meet their burden that even if they exercised reasonable diligence, they could not have discovered the basis for their fraud claims" (Defendant's Memorandum in Reply, pages 20,21). Thus, defendants argue the plaintiff's failure to examine publicly disclosed information necessarily means they failed to file the within lawsuit within two years of discovery of the fraud. It is true that in Gutkin v. Siegal, 85 AD3d 687, 926 NYS2d 485 [1st Dept., 2011] cited by the defendants, the court emphasized there were circumstances that would suggest to "a person of average intelligence the probability that he has been defrauded" (id). Again in Ghandour v. Shearson Lehman Bros., 213 AD2d 304, 624 NYS2d 390 [1st Dept., 1995] the court noted that "the substantial losses sustained by the accounts under the circumstances herein was sufficient to place plaintiffs on notice of the potential fraud" (id). However, there is no obligation to examine public documents without a prior basis that fraud took place. Thus, there is no duty incumbent upon the plaintiffs to search for any fraud. Indeed, in Harding v. Noseman, 2009 WL 1953041 [S.D.N.Y. 2009] the court noted that a plaintiff "was under no obligation to search through the available public records to discover that she had been presented with a fraudulent" document. The court insisted that "the obligation to make inquiry and ascertain all the relevant facts arises only where the plaintiff possesses 'timely knowledge' that fraud might

have been committed" (id at Footnote 37). The Harding decision cited to Guedj v. Dana, 11 AD3d 368, 783 NYS2d 37 [1st Dept., 2004] which held an action for fraud was timely when filed within two years of discovery of a fraudulent conveyance. Specifically, the court noted that "the mere fact that deeds had earlier been recorded was insufficient to constitute constructive notice of the conveyances in the absence of some knowledge that would have required plaintiffs to investigate the public records" (id). However, almost all of the plaintiffs were acutely aware of possible fraud committed by Strulovich. All the plaintiffs except for Alex Ball, Haim Shmuel Kahna and Lionel Spingarn executed resolutions enabling a Federal lawsuit against Strulovich for similar claims alleged here. Those resolutions are dated more than two years before this action was commenced. Thus, all the plaintiffs had knowledge of the alleged frauds or at least had knowledge requiring further inquiry (Gutkin, supra). Therefore, the motion seeking to dismiss the fraud claims except as to plaintiff's Ball, Spingarn and Kahna is granted.

Concerning the actual fraud allegations that remain viable as to plaintiffs Ball, Kahna and Spingarn, the defendants argue that in any event the Amended Complaint fails to adequately plead fraud. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce

reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Regarding plaintiff Ball, he invested in property located at 73 Empire Boulevard in Kings County. The Amended Complaint alleges that the prospectus stated one million dollars was required to purchase a 49 year lease and that two million dollars was required to renovate the property. The Amended Complaint specifically alleges that those misrepresentations were knowingly made and were relied upon by the plaintiff (see, Amended Complaint ¶¶ 222-230). Regarding plaintiff Spingarn, he invested in property located at 980 Atlantic Avenue in Kings County. The Amended Complaint alleges that the prospectus stated one million, two hundred and fifty thousand dollars was required to purchase a 45 year lease and that four million and seven hundred and twenty five thousand dollars was required to renovate the property. The Amended Complaint specifically alleges that those misrepresentations were knowingly made and were relied upon by the plaintiff (see, Amended Complaint ¶¶ 231-239). Regarding plaintiff Kahna, he invested in property located at 853 Lexington Avenue in Kings County. The Amended Complaint alleges that the prospectus stated

one million four hundred and eighty five thousand dollars was required to purchase the property and that six hundred thousand dollars was required to renovate the property. The Amended Complaint specifically alleges that those misrepresentations were knowingly made and were relied upon by the plaintiff (see, Amended Complaint ¶¶ 130-138). The misrepresentations made induced reliance because of Strulovich's position as a real estate investing specialist and the expectation he would only act in the interests of the investors. The plaintiffs had no basis to suspect otherwise (see, Epiphany Community Nursery School v. Levey, 171 AD3d 1, 94 NYS3d 1 [1st Dept., 2019]). Therefore, the Amended Complaint adequately alleges claims for fraud and the motions seeking to dismiss those causes of action as to Ball, Spingarn and Kahna are denied.

Turning to the RICO claims against all defendants, to succeed on a RICO claim, the moving party must demonstrate three elements: (1) a violation of the RICO statute, 18 U.S.C. §1962; (2) an injury to business or property; and (3) the injury was caused by the violation of section 1962 (Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 [2d. Cir. 2008]). Under 18 U.S.C. §1962(c) it is unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined as any activity included within 18 USC §1961(1). That statute includes within racketeering activity "wire fraud" (id).

However, in addition, to establishing racketeering, the plaintiff must demonstrate the defendants engaged in an enterprise. A RICO enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (see, 18 USC §1961(4)). Thus, the 'enterprise' must be an entity "separate and apart from the pattern of activity in which it engages" (United States v. Turkette, 452 US 576, 101 S.Ct 2524 [1981]). Thus, in Goldfine v. Sichenzia, 118 F.Supp2d 392 [S.D.N.Y. 2002] the court held that "in a fraud-based RICO claim, if the sole purpose of the alleged enterprise is to perpetuate the alleged fraud, there can be no enterprise for RICO purposes" (id). This does not conflict with Second Circuit precedent concerning the definition of an enterprise which does not really address the narrow issue raised here, namely that the sole purpose of the enterprise is to perpetrate the fraud (see, Pavlov v. Bank of New York Co., Inc., 25 Fed. Appx. 70 [2d Cir. 2002], cf., Sands Harbor Marina Corp., v. Wells Fargo Insurance Services of Oregon Inc., 2013 WL 12368689 [E.D.N.Y. 2013]).

In this case the entire purpose of the enterprise was to

defraud the plaintiffs. There has been no evidence presented the enterprise served a purpose other than to engage in the alleged fraud (Goldfine, supra). Indeed, the Amended Complaint asserts that "the entire purpose of the Enterprise was to extract monies from would be investors through the promotion of illusory real estate deals, by way fraud and deceit, and convert those monies for the benefit of the RICO Defendants" (see, Amended Complaint, ¶256). The Amended Complaint further asserts the promises made to the plaintiffs were false when made and that the defendants never had any intention of honoring them (see, Amended Complaint, ¶¶268-269). Further, the Amended Complaint alleges that the defendants "knew the essential nature and scope of the Enterprise and the RICO Defendants intended to participate in the affairs of the Enterprise" (Amended Complaint ¶262).

Thus, according to the Amended Complaint the entire enterprise was created merely to defraud the plaintiffs. Upon those representations the plaintiff has failed to demonstrate the existence of an enterprise. Consequently, the motion seeking to dismiss the RICO cause of action is granted.

Turning to the claims for breach of contract, it is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913

NYS2d 161 [1st Dept., 2010]). The plaintiff's base their breach of contract claims upon oral agreements entered into between the parties. While the precise terms of the agreements are not fully recounted in the Amended Complaint, nevertheless, the existence of an oral agreement is generally a question of fact which cannot be summarily determined on a motion to dismiss (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]).

In Chester v. Dickerson, 54 NY 1, 9 Sickles 1 [1873] the Court of Appeals held that the formation of a partnership or other association for the express purpose of buying and selling land did not require a writing pursuant to the Statute of Frauds and was valid even if the agreement was oral. While there were jurisdictions that held a contrary position (see, e.g., Morrison v. Meister, 212 Mich. 516, 180 NW 395 [Supreme Court of Michigan 1920] New York adopted this approach (see, Buckley v. Doig, 188 NY 238, 26 Bedell 238 [1907], Pounds v. Egbert, 117 AD 756, 102 NYS 1079 [2d Dept., 1907])). That remains the law in New York today. Thus, recently in Malaty v. Malaty, 95 AD3d 961, 944 NYS2d 591 [2d Dept., 2012] the court held that "the statute of frauds does not render void oral joint venture agreements to deal in real property, as the interest of each joint venturer in a joint venture is deemed personalty" (id). This is especially true where the plaintiffs are not seeking any interests in real

property but rather, are merely seeking interests in joint venture assets or a return of their investment funds (see, Plumitallo v. Hudson Atlantic Land Company LLC, 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). Therefore, the statute of frauds is not a bar to the validity of any contract. Further, the allegations of breach of contract assert continuing duties and obligations upon Strulevich and Oberlander that were ongoing and which were allegedly committed within the statutory time frame. Consequently, the motion to dismiss the breach of contract claim against Strulovich and Oberlander is denied.

It is well settled that to establish a claim for conversion the plaintiff must show the legal right to an identifiable item or items and that the defendant has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). Clearly, the allegations support the existence of claims based upon conversion. As already explained most of the funds were never allegedly deposited into any investment funds. Thus, the plaintiffs maintain a legal right to the funds they invested directly to Strulovich which he allegedly stole. Consequently, the motion seeking to dismiss the conversion claim is denied.

Concerning the cause of action alleging a breach of fiduciary duty, it is well settled that when a claim for breach

of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the cause of action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the defendants failed to honor the terms of the agreements entered into between the parties. Consequently, the motion seeking to dismiss the breach of fiduciary duty cause of action is granted.

Next, "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). The plaintiffs do not maintain a fiduciary relationship with any of the corporate defendants. Therefore, the motions seeking to dismiss this cause of action as to all the corporate defendants is granted. The motions of Strulovich and Oberlader seeking to dismiss this claim are denied.

It is well settled that pursuant to §273 of the Debtor Creditor Law every conveyance made by a person which then renders the person insolvent is fraudulent without regard to intent if the conveyance is made without fair consideration (Paragon v.

Paragon, 164 AD3d 1460, 84 NYS3d 582 [2d Dept., 2018]). Thus, the statute requires a two pronged inquiry namely, whether the conveyance rendered the person insolvent and whether the conveyance was accompanied with fair consideration (Epstein v. Nieves, 258 AD2d 436, 682 NYS2d 917 [2d Dept., 1999]). Further, such transfers are fraudulent if the transferor had unreasonable small capital to operate the business (Debtor Creditor Law §274) or intended or believed the transferor would incur debts beyond his or her ability to pay them when they matured (Debtor Creditor Law §275) or even if fair consideration was present the transfer was made with the intent to defraud (Debtor Creditor Law §276). Debtor Creditor Law §276-a provides that where a plaintiff successfully establishes actual intent to defraud then such plaintiff may be entitled to reasonable attorney's fees (5706 Fifth Avenue LLC v. Louzieh, 108 AD3d 589, 969 NYS2d 141 [2d Dept., 2013]). Preliminarily, it must be demonstrated that the plaintiffs were 'creditors' of the defendants. A creditor is "a person that has a claim" (see, Debtor and Creditor Law §270(d)). Thus, "it has long been the rule that parties who fraudulently dissipate corporate assets when the corporation is either insolvent or in imminent danger of becoming so, as well as parties who receive such property without giving valuable consideration therefor, must restore it to the corporation for the benefit of creditors who have been defrauded" (see, Meyer,

Connor & Co., v. United Founders' Corp., 238 AD 642, 265 NYS 289 [1st Dept., 1933]). These definitions aptly apply to Strulovich and CS Construction Group LLC and indeed the plaintiffs could be considered creditors of Strulovich and CS Construction Group LLC. However, the fraudulent conveyance causes of action fail to adequately allege sufficient facts as to Strulovich to survive a motion to dismiss. According to the Amended Complaint the investment funds were transferred from CS Construction Group LLC to the individual defendants (Strulovich and Oberlander) and then to the Strulovich Holding Company defendants and the Strulovich Transfer Company defendants. However, in pursuing individualized claims the plaintiffs insisted that almost all the investment funds were transferred directly to Strulovich raising claims that are distinct from claims on behalf of corporations of which they were members. Notably, the Amended Complaint does not raise any fraudulent conveyance claims wherein funds were transferred directly to Strulovich which were then conveyed elsewhere. Therefore, all the fraudulent conveyance claims as to Strulovich are consequently dismissed. However, the plaintiffs raise viable claims of fraudulent conveyances against CS Construction Group LLC. The Amended Complaint asserted that the plaintiffs invested funds with CS Construction Group LLC, an entity solely owned by Strulovich. Thus, the motions seeking to dismiss all the fraudulent conveyance claims against CS Construction Group LLC

are denied.

Lastly, concerning unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Consequently, the motion seeking to dismiss the claim of unjust enrichment is granted as to all defendants.


Thus, in conclusion the motions seeking to dismiss all the corporate defendants as well as Israel and Gittel Weiss are hereby granted with the exception of CS Construction Group LLC. The only remaining defendants in this action are Strulovich and Oberlander and CS Construction Group LLC. The allegations which pervade the Amended Complaint are that Strulovich and Oberlander defrauded the plaintiffs out of their investment funds. The remaining claims include fraud (as to three plaintiffs), breach of contract as to all plaintiffs, an accounting as to all plaintiffs and conversion as to all plaintiffs and fraudulent conveyances against CS Construction Group LLC. The plaintiffs may pursue those claims. The defendant's motion seeking reargument is now rendered moot.

So ordered.

ENTER:

Dated: July 1 2020
Brooklyn, N.Y.

28 of 28


Hon. Leon Ruchelsman