SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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DAVID STORPER, DAVID WAX, PAMELA WILSON, DERIVATIVELY ON BEHALF OF WLR RECOVERY ASSOCIATES II, LLC, WLR RECOVERY ASSOCIATES III, LLC, and WLR RECOVERY ASSOCIATES IV, LLC

Plaintiffs,

- v -

WL ROSS & CO., LLC, WL ROSS GROUP, L.P., and WILBUR ROSS,

Defendants.

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INDEX NO. 656932/2017

MOTION DATE 01/30/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, it is

Derivative plaintiffs David H. Storper, David L. Wax, and Pamela K. Wilson move, pursuant to CPLR 2221, for leave to renew the court's decision and order dated September 5, 2018 (the Prior Decision), which dismissed their claims for an equitable accounting.

Familiarity with the court's Prior Decision is presumed. Defendant WL Ross & Co., LLC (WL Ross) is an investment management business, which raises, manages, and ultimately liquidates individual private equity funds (NYSCEF Doc. No. [NYSCEF], first amended complaint, ¶ 26). According to plaintiffs, these funds are structured as Delaware limited partnerships, which are composed of general partners (GPs) and limited partners (id., ¶ 27). The GP for each private equity fund is formed by investment managers employed by WL Ross, who become members of the GP entity (id., ¶ 28). Plaintiffs allege that investment managers at WL Ross, including the named plaintiffs, were required to fund

the GP entities; in return, they received a share of the profits and carried interest earned by the GPs (id., ¶¶28, 32). Plaintiffs allegedly discovered in the fall of 2017 that millions of dollars had been deducted from the capital accounts of the GP entities under the guise of "management fees" (id., ¶ 56). As alleged by plaintiffs, WL Ross received and benefited from the management fees (id., ¶ 65). Plaintiffs allege that WL Ross is the managing member of the GP entities, and that defendants WL Ross Group, L.P. (WL Ross Group) and Wilbur L. Ross are former managing members of the GP entities (id., ¶¶ 20-22, 24-25, 36, 43, 49). In the first amended complaint, plaintiffs assert three causes of action for an equitable accounting of the GPs' finances, and seek restitution or disgorgement of the alleged improper management fees, in addition to an order restraining and enjoining WL Ross from allowing these fees to be charged to the GP entities (id., ¶¶ 82-95, 96-109, 110-123).

Defendants moved to dismiss the first amended complaint, arguing that plaintiffs had an adequate remedy at law, and that the alleged misconduct did not constitute a breach of fiduciary duty.

In the Prior Decision, the court granted defendants' motion and dismissed the first amended complaint in its entirety. The court reasoned that plaintiffs were not entitled to an accounting, explaining that:

> "Plaintiffs have failed to plead facts sufficient to support a legally viable claim for an equitable accounting. 'To be entitled to an accounting, a claimant must demonstrate that he or she has no adequate remedy at law' (Unitel Telecard Distrib. Corp. v Nunez, 90 AD3d 568, 569 [1st Dept 2011]; Soley v Wasserman, 639 Fed Appx 670, 674 [2d Cir 2016] . . . . [P]laintiffs' factual allegations, if proven, demonstrate that plaintiffs have an adequate remedy at law, and, therefore, are not entitled to an equitable accounting.
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> Contrary to plaintiffs' contention, the mere allegation of the existence of a fiduciary duty, without more, does not entitle them to an equitable accounting. A plaintiff must also demonstrate that he or she has no adequate remedy at law before a court may award an equitable accounting (Soley v Wasserman, 639 Fed Appx at 674)"

(*Storper v WL Ross & Co., LLC*, 2018 NY Slip Op 32235[U], **4, **5, 2018 WL 4334218, *2, *3 [Sup Ct, NY County 2018]). Additionally, the court held that the complaint failed to plead a breach of fiduciary duty because: (1) plaintiffs' fiduciary duty allegations were entirely based on contractual rights; (2) plaintiffs' claims were barred by the exculpation clauses in the GP entities' operative limited liability company agreements; and (3) plaintiffs' allegations failed to overcome the business judgment rule under Delaware law (Storper, 2018 NY Slip Op 32235[U], **5-**8).

In addition, the court determined that:

> "plaintiffs' factual allegations demonstrate that WL Ross did not owe any fiduciary duties to the GPs or their members until February 27, 2017, when it became the GPs' managing member, well after the Funds ceased paying management fees in 2010. Therefore, WL Ross could not have breached any fiduciary duty to the GPs or their members, or received management fees as a result of such breach, at any relevant time"

(*Storper*, 2018 NY Slip Op 32235[U], **9).

Finally, the court held that the "equitable accounting claims asserted against Ross or WL Ross Group are also fatally defective on the ground that, inasmuch as there is no dispute that neither remains a managing member of any GP, neither has the authority to provide the requested accounting," and that "plaintiffs' claims against Ross or WL Ross Group are fatally defective on the ground that plaintiffs do not allege that either received any management fees from the GPs" (Storper, 2018 NY Slip Op 32235[U], **8, **9).

On October 11, 2018, plaintiffs filed a notice of appeal to the First Department. However, plaintiffs' appeal was dismissed for failure to perfect the appeal within six months (see 22 NYCRR 1250.9 [a]; 22 NYCRR 1250.10 [a]).

On July 10, 2019, plaintiffs filed a motion before the First Department seeking to vacate their default and to enlarge the time to appeal by 60 days. On September 24, 2019, the First Department denied plaintiffs' motion (NYSCEF 78).

Plaintiffs now argue that there has been a change in the law that would change the prior determination. Specifically, plaintiffs contend that, in *Mullin v WL Ross & Co. LLC* (173 AD3d 520, 522 [1st Dept 2019]), the First Department held that a party can always seek an accounting from its fiduciary, regardless of the availability of an adequate remedy at law. According to plaintiffs, Mullin changed the critical holding on which the court based its decision to grant defendants' motion to dismiss the first amended complaint. Further, plaintiffs contend that they are entitled to an equitable accounting. In this regard, plaintiffs argue that, as the managing member of the three derivative-plaintiff LLCs, defendants owed fiduciary duties to non-managing members, including plaintiffs. In addition, as argued by plaintiffs, plaintiffs are entitled to accountings from WL Ross Group and Ross for the time period that they were fiduciaries.

In opposition, defendants first contend that the First Department dismissed their appeal for failure to perfect the appeal. Therefore, plaintiffs cannot reopen the merits of the issues previously noticed for appeal. Second, defendants maintain that plaintiffs' motion is untimely because this action is no longer pending in any court. Third, defendants contend that Mullin does not constitute a "change in the law" for purposes of CPLR 2221 (e) (2). Defendants assert that Mullin does not address the court's conclusion that the complaint fails because plaintiffs do not allege a viable breach of fiduciary duty. Furthermore, according to defendants, Mullin does not discuss whether plaintiffs could recover from former managing members such as WL Ross Group or Ross.

A motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" or must show that "there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). "A clarification of the decisional law is a sufficient change in the law to support renewal" (*Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]; *accord Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272 [1st Dept 2003] ["defendants' motion to renew was properly based on an intervening clarification of the law"]).

Contrary to defendants' contention, the dismissal of plaintiffs' appeal does not preclude plaintiffs from bringing their motion to renew (*compare Bray v Cox*, 38 NY2d 350, 353 [1976] ["a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal"] [emphasis added]; *see also Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 755 [1999] [plaintiff did not have the "right to pursue the second appeal after allowing the first to die on the vine"]). CPLR 2221 (e) (2) expressly permits a party to move to renew based upon a "change in the law that would change the prior determination."

CPLR 2221 (e) (2) does not provide for a specific time period within which to make a motion to renew. Nevertheless, "a motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired" (*Dinallo*, 60 AD3d at 621; *see also Matter of Eagle Ins. Co. v Persaud*, 1 AD3d 356, 357 [2d Dept 2003] ["After entry of a final judgment, a motion for leave to renew pursuant to CPLR 2221 (e) (2) based upon 'a change in the law that would change the prior determination' must be made, absent circumstances set forth in CPLR 5015, before the time to appeal the final judgment has expired"]). "Allowing a motion for renewal in these circumstances would provide an end run around the time period for taking an appeal and

upset the rule of finality applicable to final dispositions" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2221:9A).

Here, a judgment has not been entered in this action.[1] In addition, the time to appeal the First Department's decision denying vacatur of the default has not expired, as it is undisputed that defendants did not serve a copy of this decision with notice of entry[2] (see CPLR 5513 [b] ["The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry . . ."]). Thus, plaintiffs' motion to renew is timely (*see Dinallo*, 60 AD3d at 621 [motion to renew was timely since it was made prior to trial and prior to the entry of a final judgment]; *cf. Glicksman v Board of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364, 366 [2d Dept 2000] ["because the plaintiffs' motion was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely"]).

Defendants reliance on *Aspen Specialty Ins. Co. v Ironshore Indem. Co.* (167 AD3d 420, 420 [1st Dept 2018], *lv dismissed* 33 NY3d 1049 [2019]), is misplaced since it is distinguishable. There, the Court held that a motion to renew was untimely where a prior appellate decision "conclusively adjudicated" "the parties' rights and responsibilities under the respective insurance contracts," and the time to appeal had expired (id.). CPLR 3001 provides that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable

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[1] Defendants concede that the Clerk has not entered a final judgment in this action (NYSCEF 76 at 8, Defendants' Opposition to Plaintiffs' Motion for Leave to Amend).

[2] Defendants argue that the First Department's decision denying their motion to vacate is unreviewable by the Court of Appeals (NYSCEF 82, Defendants' Sur Reply by letter, at 3). However, this does not affect the time to appeal.

controversy whether or not further relief is or could be claimed." Here, by contrast, a judgment has not been entered, and the time to appeal has not expired.

"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" (*Zohar v LaRock*, 185 AD3d 987, 2020 NY Slip Op 04202, *3 [2d Dept 2020] [internal quotation marks and citations omitted]). "The purpose of an equitable accounting is to require a fiduciary to show what he [or she] did with the principal's property" (*Soley v Wasserman*, 823 F Supp 2d 221, 237 [SD NY 2011]). "If a plaintiff is successful in an accounting claim, in addition to returning the property, a fiduciary must return any profits generated by the use of the property" (id.).

In Mullin, the First Department held that "[n]otwithstanding that there is no cause of action for breach of fiduciary duty against any defendant except WL Ross & Co. LLC, the mere existence of a fiduciary relationship otherwise gives rise to a claim for an accounting" (*Mullin*, 173 AD3d at 522, citing *Koppel v Wien, Lane & Malkin,* 125 AD2d 230, 234 [1st Dept 1986]). The Court made clear that:

> "[t]his right, as distinguished from a claim for an accounting in which there is no fiduciary relationship, does not require a showing that there is no adequate remedy at law. It is automatic and springs from the fiduciary relationship itself. The plaintiff has alleged that all defendants have a fiduciary obligation to him"

(*id.; see also Webster v Forest Hills Care Ctr., LLC*, 164 AD3d 1499, 1501 [2d Dept 2018] ["where, as here, there is a fiduciary relationship between the parties, there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law"]).

Thus, Mullin represents a sufficient clarification of case law to support a motion for renewal. Mullin holds that a party is not required to demonstrate that it has an adequate remedy at law where there is a fiduciary relationship between the parties. Stated otherwise,

"[t]he mere existence of a fiduciary relationship gives rise to a claim for an accounting" (*Dawes v J. Muller & Co.*, 176 AD3d 473, 474 [1st Dept 2019]). Therefore, a plaintiff is not required to have a valid breach of fiduciary duty claim against a defendant where the plaintiff alleges a fiduciary relationship (*see Mullin*, 173 AD3d at 522). As a result, Mullin requires that the Prior Decision be modified to the extent of denying dismissal of plaintiffs' accounting claims against WL Ross (*see Mullin*, 173 AD3d at 521-522 [denying motion to dismiss on all causes of action for accountings]). Here, plaintiffs allege that WL Ross, as the managing member of the three derivative-plaintiff LLCs, owes a fiduciary duty to the LLCs and the non-managing members, including plaintiffs. Under Delaware law, "the managers of an LLC owe fiduciary duties." (*Feeley v NHAOCG, LLC*, 62 A3d 649, 660 [Del Ch 2012]).[3] Therefore, defendants' motion to dismiss is denied as to WL Ross & Co.

However, *Mullin* does not represent a "change in the law that would change the prior [decision]" with respect to the court's dismissal of plaintiffs' claims against Ross and WL Ross Group (see CPLR 2221 [e] [2]). *Mullin* does not address whether plaintiffs could recover from former managing members such as WL Ross Group or Ross (*see Mullin*, 173 AD3d at 522 ["The plaintiff has alleged that all defendants have a fiduciary obligation to him. . . The bona fides of an underlying fiduciary obligation relationship against the other defendants have not been raised on this appeal"]). Although plaintiffs request, in reply, that the court grant renewal against these defendants in the interest of justice, plaintiffs do not offer "newly discovered facts that could not be offered on the prior motion" (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]).

Accordingly, it is

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[3] As noted in the Prior Decision, the fiduciary duty issues are governed by Delaware law under the internal affairs doctrine (*Storper*, 2018 NY Slip Op 32235[U], *3).

ORDERED that the motion (sequence number 005) of derivative plaintiffs David H. Storper, David L. Wax, and Pamela K. Wilson for leave to renew their opposition to defendants' motion to dismiss is granted, and upon renewal, the motion to dismiss of defendants WL Ross & Co., LLC, WL Ross Group, L.P., and Wilbur L. Ross is denied as to defendant WL Ross & Co., LLC only; and it is further

ORDERED that the action is restored and continued against the remaining defendant WL Ross & Co LLC; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – www.nycourts.gov/supctmanh), who are directed to mark the court's records to reflect the change in the caption herein.

Motion Seq. No. 5:

8/20/2020
DATE

ANDREA MASLEY, J.S.C.

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