SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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LOMBARDY 711 INC.

Plaintiff,

- v -

111 EAST 56TH STREET, INC.

Defendant.

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INDEX NO. 654046/2019

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130

were read on this motion to/for DISMISSAL.

Melissa Crane, J.,

In motion sequence number 004 (NYSCEF Doc. No. 108), defendant 111 East 56 Street, Inc. seeks an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the causes of action in the complaint (NYSCEF Doc. No. 002) that plaintiff Lombardy 711 Inc. filed.

Background and Procedural History

Defendant is a cooperative corporation that owns and operates a cooperative apartment building and hotel (i.e. The Lombardy Hotel) located at 111 East 56th Street, New York City (Complaint, ¶¶ 1, 2). Plaintiff is a shareholder of the cooperative corporation and proprietary lessee of apartment unit #711 in the building (*id.*, ¶¶ 3, 4). On November 28, 2000, plaintiff purchased shares appurtenant to the unit and, simultaneously therewith, entered into a proprietary lease agreement and a rental pool agreement with defendant (*id.*, ¶¶ 7, 8). The proprietary lease agreement provides, among other things, that plaintiff (1) has the right to possess its apartment unit; (2) must pay monthly maintenance fees for the unit to defendant; and (3) defendant must make books and records available to plaintiff (*id.*, ¶ 9).

The rental pool agreement provides that defendant can sublet the unit to hotel guests when plaintiff is not using the unit. Under this arrangement, defendant collects rents from guests, as an agent of plaintiff; pays the hotel fees out of the rents collected from these guests; and remits any surplus funds to plaintiff (*id.*, ¶ 10). Plaintiff claims, through the rental pool program, its unit "has generated substantial income over the last 20 years." According to plaintiff, from 2012 to 2017, the unit generated "$9,000 per month in revenue" from hotel guests (*id.*, ¶¶ 13, 14). Defendant "received this income, applied some of it towards [the unit's] maintenance and other fees, and retained the remaining surplus, in trust for [plaintiff]" (*id.*, ¶ 15). Since inception of the program, and at least from 2008 through 2017, defendant allegedly "falsely asserted tens of thousands of dollars in deduction against [the unit's] revenue in its monthly statements," and defendant "concealed these misrepresentations for decades" (*id.*, ¶¶ 16-21). Plaintiff contends in the past 20 years, defendant "never once remitted any of the surplus." Despite repeated requests, defendant only provided "in a piecemeal fashion incomplete portions of the [unit's financial] records from 2008 to 2018" (*id.*, ¶¶ 23-28). The Complaint, dated July 15, 2019, asserts six causes of action and seeks monetary damages: specific performance - breach of proprietary lease agreement (first); breach of rental pool agreement (second); production of books of account (third); accounting (fourth); breach of fiduciary duty (fifth); and fraud (sixth) (*id.*, ¶¶ 30-60).

In August 2018, defendant commenced a nonpayment proceeding against plaintiff in the Civil Court seeking to recover more than $136,000 in unpaid maintenance charges (Def. Brief at 9-10). Plaintiff responded to the proceeding by filing an answer with counterclaims (*id.* at 10). Plaintiff then moved for leave to conduct discovery. The Civil Court granted plaintiff limited discovery, and defendant provided plaintiff with "the documents that it had to produce pursuant to the discovery order" dated June 12, 2019 (*id.*). After discovery was complete "and knowing

that it could no longer delay adjudication of the Proceeding," plaintiff commenced this action in this court on July 15, 2019 and simultaneously "moved to have the Proceeding removed from the Civil Court and consolidated with this action" (*id.*; motion to remove and consolidate was designated in this action's docket as sequence number 001).[1] By order dated September 11, 2019 (NYSCEF Doc. No. 32), this court "ordered the Proceeding removed and consolidated with this action" (*id.*). At defendant's request, the court also issued an order (NYSCEF Doc. No. 33) directing plaintiff to pay defendant "use and occupancy, *pendite lite*" at a monthly rate of $5,532 (*id.*). Thereafter, on October 25, 2019, this court issued a preliminary conference order (NYSCEF Doc. No. 59), setting forth, among other things, a discovery schedule for the parties and directing defendant to answer or move with respect to the Complaint (*id.* at 14). On November 7, 2019, defendant filed this motion seeking dismissal of the causes of action in the Complaint (NYSCEF Doc. No. 108).

Discussion

Attaching copies of the proprietary lease agreement (Lease) and the rental pool agreement (Agreement) as documentary exhibits (NYSCEF Doc. Nos. 21 and 22, respectively), defendant argues that many of plaintiff's claims "are time barred by the applicable statutes of limitation and/or are legally deficient on their face" (Def. Brief at 2).

When considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether the pleading states a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept

[1] During oral argument on the remove and consolidate motion, defendant's counsel stated that Mr. Jeffrey Kosow, a former friend of one of plaintiff's principals, failed to pay rent from July 2017 to July 2018 while occupying plaintiff's unit. This prompted defendant to commence the nonpayment proceedings against plaintiff in the Civil Court on account of the significant rental arrearage (hearing transcript, NYSCEF Doc. No. 45, at 9-12).

2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are afforded a liberal construction, and the courts are to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). While factual allegations are given a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential treatment (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Where the movant seeks dismissal pursuant to CPLR 3211 (a) (1) and offers evidentiary or documentary material, the court must determine whether the complaint has a cause of action, not whether it has stated one (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]). Where the allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]). The party asserting the statute of limitations defense under CPLR 3211 (a) (5) bears the burden of establishing that the time to sue has expired, and is required to establish when the plaintiff's cause of action accrued (*Bank of Am., N.A. v Gulnick*, 170 AD3d 1365, 1365 [3d Dept 2019]).

With respect to the second cause of action (breach of the Agreement), defendant argues that plaintiff is barred from recovering for any alleged breach that occurred prior to the six-year period that preceded the commencement date of this action on July 15, 2019.

Defendant makes a similar argument as to the fourth cause of action (accounting). Specifically, defendant argues that, under CPLR 213 (7), a claim for accounting must be commenced within six years from when an accounting is due (Def. Brief at 15; citing *Knobel v Shaw*, 90 AD3d 493 [1st Dept 2011]). Thus, defendant asserts that, even though plaintiff seeks an accounting dating as far back as to November 28, 2000 (when it entered into the Agreement),

any accounting claim that accrued prior to July 15, 2013 is barred under CPLR 3211 (a) (5) (*id.* at 16). Defendant also asserts that "any permitted accounting is pursuant to the Agreement and not the Lease," because its duty to account for "the Fees, the Deductions and the Funds" arises "solely" from paragraph 5 (b) of the Agreement (*id.*).

With respect to the fifth cause of action (breach of fiduciary duty), defendant argues that this claim is duplicative of the breach of contract claim. Both these claims stem from the same facts, (*id.* at 17; citing, among other cases, *Kassover v Prism Venture Partners, LLC*, 53 AD3d 444 [1st Dept 2008]). Defendant also argues that, if the court does not dismiss this claim, it must be limited to the three-year period that preceded the commencement of this action, because CPLR 214 (4) provides a three-year limitations period for a breach of fiduciary duty claim that seeks money damages (*id.* at 17; citing *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]).

With respect to the sixth cause of action (fraud), defendant argues that, to sustain this claim, there must be a breach of the duty separate from the duties the contract imposes (*id.* at 18, citing *Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382 [1987]). Defendant argues that, assuming the deductions defendant made under the Agreement were not justified or accurate, "such conduct does not arise to [an] actionable fraud but merely amounts to a simple breach of contract" (*id.* at 19). Defendant also argues the fraud claim fails to satisfy CPLR 3016 (b), that requires the claimant to plead: (1) a legal duty separate from the duty to perform under the contract; (2) a fraudulent misrepresentation collateral or extraneous to the contract; and (3) special damages that are unrecoverable as contract damages (*id.*; citations omitted). Alternatively, defendant argues that, if this claim is not dismissed, it must be limited to the six-year period preceding commencement of this action pursuant to CPLR 213 (8) (*id.* at 20).

With respect to the first and third causes of action (breach of the Lease; and production of books and accounts of the cooperative corporation; respectively), defendant argues that while section 634 of the Business Corporation Law (BCL) affords a *shareholder* the right to inspect books and records of the corporation, plaintiff seeks the books and records pursuant to the Agreement. This does not afford plaintiff "the statutory or common-law right to obtain and review" books and records, because the Agreement does not "relate to or invoke the corporation-shareholder relationship between the parties." Nor does it modify the Lease and the parties' relationship thereunder (*id.* at 21-22; citing *Retirement Plan for Gen. Empls. of the City of N. Miami Beach v The McGraw-Hill Cos*., Inc., 120 AD3d 1052 [1st Dept 2014]). Alternatively, defendant argues that if these two claims are not dismissed, the production and inspection of its books and records should be limited to the six-year period that preceded the commencement date of this action, because all claims stem from the alleged breach of the Agreement are subject to CPLR 213 (2)'s six-year limitations period (*id.* at 22).

In its opposition to the motion (Plf. Opp.; NYSCEF Doc. No. 126), plaintiff contends that its rights to inspect defendant's books and records exist "independent of any claims" under the Agreement, and even if its claims under the Agreement "did affect its rights" under the BCL and the Lease, "they only strengthen those rights" because plaintiff is entitled to inspect books and records as a shareholder under the Lease (Plf. Opp. at 6-7). Notably, plaintiff also contends that defendant has a "fiduciary duty" to plaintiff under the Agreement, and that defendant must account for the income and expenses related to plaintiff's account and to hold the surplus from its account "in trust" to pay for its "future maintenance obligations" under the Lease (*id.* at 1-3). In this regard, plaintiff contends that it is entitled to a "full accounting" for the past 20 years" and that it is not "limited temporally in scope to income earned and expenses incurred within six

years of this Complaint" (*id.* at 7-11; citing, among other cases, *Matter of Meyer*, 303 AD2d 682, 683 [2d Dept 2003] [trust beneficiary entitled to accounting three decades after the trust was created]; *Kohan v Nehmadi*, 130 AD3d 429, 430 [1st Dept 2015] [accounting claim accrued when defendant trustee wrongfully withheld property from plaintiff]). Plaintiff further contends that, because its claims for an accounting (fourth cause of action) and breach of the Agreement (second cause of action) accrued in 2018, (when defendant refused plaintiff's demand for an accounting and to turn over funds held in the account), these claims are timely (*id*. at 10-12; citing *Knobel v Shaw*, 90 AD3d 493 [1st Dept 2011] [accounting claim accrued when defendants repudiated their obligations to plaintiff]; *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979] ["in contract cases, the cause of action accrues and the Statute of Limitations begins to run from the time of breach"). Indeed, plaintiff contends that a claim for breach of contract prior to defendant's refusal to account and to turn over funds in the account "would have been premature" (*id*. at 12).

In reply to plaintiff's opposition (Def. Reply; NYSCEF Doc. No. 128), defendant asserts that, while paragraph one of the Agreement states a "principal-agent" relationship between the parties, it does not establish a "trust" relationship as plaintiff described, and recites to paragraph 5 (b) of the Agreement for support (Def. Reply, ¶ 8). In relevant part, paragraph 5 (b) states that defendant "will have the exclusive right to collect the rents from all sublessees . . . will account for the same, and after deduction of the sublet fee and all other proper charges . . . will remit the balance" to plaintiff (*id*., ¶ 10; quoting Agreement). Relying on this language, defendant asserts that "on its face, the Agreement did not and does not provide for [defendant to hold] the funds in 'trust' to offset future maintenance obligations and expenses for the Apartment, as [plaintiff] now claims in its attempt to avert the applicable statue of limitations." Defendant further argues

that plaintiff "cannot be countenanced" to "unilaterally rewrite the Agreement and turn it upside down simply to avert the applicable six-year statute of limitations" (*id*., ¶¶ 11-15). Additionally, defendant asserts that the "repudiation doctrine" plaintiff invokes is inapplicable to the facts of this case and does not toll the statute of limitations (*id.*, ¶¶ 38-42). Defendant relies upon *Access Point Med., LLC v Mandell* (106 AD3d 40 [1st Dept 2013] [*Mandell*]) to support its assertion that the repudiation doctrine tolls "in extremely-limited circumstances the six-year statute of limitations that applies to accounting claims." Defendant contends that the doctrine is used "sparingly" to protect only "beneficiaries in the event of breaches of duty by fiduciaries" (such as estate administrators, trustees, corporate officers and receivers) where the beneficiary "has reason to know that the fiduciary relationship has unequivocally ended." In this case the "principal-agent relationship created by the Agreement does not fall under the category of fiduciaries" *Mandell* discusses (*id*., ¶¶ 38-39; referencing *Mandell*, 106 AD3d at 44-45, noting the similarity of the "open repudiation rule" and "fiduciary tolling rule"). Also, defendant asserts that plaintiff should have been aware of any breach "by virtue of the monthly statements that [plaintiff] admittedly received from [defendant] since at least 2008," and that plaintiff is "not the type of beneficiary" who would be "blind" or "oblivious" to defendant's purported breach of its alleged fiduciary duties under the Agreement.

Defendant's assertions are persuasive. Evidently, pursuant to paragraph 5 (b) of the Agreement, defendant must remit to plaintiff any surplus funds in the account after deducting the hotel's fees from the rents received from the hotel guests/sublessees. Therefore, plaintiff's contention that defendant (as the purported trustee) is required to hold the surplus funds "in trust" for plaintiff to offset "future maintenance charges" for its apartment unit contradicts the express language of the Agreement and overstates the principal-agent relationship between the

parties as a trustee-beneficiary relationship. Also, the *Mandell* case appears to protect only beneficiaries that are "estate administrators, trustees, corporate officers and receivers." Defendant's principal-agent relationship with plaintiff does not fall within those categories.

Accordingly, with respect to the second and fourth causes of action in the Complaint, defendant's motion is granted to the extent of barring plaintiff from recovering money damages for any purported breach of the Agreement that arose prior to the six-year period that preceded the commencement of this action on July 15, 2019.

Plaintiff contends that its fiduciary duty and contract claims in the Complaint are not duplicative because the former claim relies on acts and omissions that are separate from its contractual duties (Plf. Opp. at 14). Specifically, plaintiff contends that while defendant's refusal to account for and to remit surplus funds to plaintiff was a breach of both contractual and fiduciary duties, defendant's "deduction against the rental income" was "unlawful and deliberately concealed." This constituted a "breach of fiduciary duties of honesty and loyalty," and is "sufficient to create an independent cause of action" (*id.* at 14-15; citing, among other cases, *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]). To confound matters, plaintiff further contends that, because "these allegations sound in misrepresentation and fraud," the fiduciary duty claim is "not limited in whole or in part by the statute of limitations" (*id.* at 15; apparently discussing whether a three- or six-year limitations period apply where the relief sought by plaintiff is monetary damages).

Plaintiff's contention is unpersuasive. In *Bullmore*, the First Department stated that professionals such as investment advisors owe fiduciary duties to their clients, and thus "may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties," because "it is policy, not the parties' contract, that gives rise to a duty of due care"

(*Bullmore*, 45 AD3d at 463; citing *Sommer v Federal Signal Corp.* 79 NY2d 450 [1992]). In this case, the Complaint does not allege that defendant is an investment advisor, nor that the "policy"[2] or defendant's activities are subject to applicable laws and regulations. Thus, *Bullmore* is inapplicable. The parties' relationship is that of "principal-agent." Defendant has no other relationship with plaintiff. Nor does plaintiff allege a duty that is independent of the Agreement. Plaintiff's allegation that defendant's deduction of certain fees against rental income was "unlawful and deliberately concealed", when stripped to its essence, is simply a breach of contract claim that defendant improperly deducted expenses from rental income in violation of the Agreement. Accordingly, the breach of fiduciary duty claim is duplicative of the breach of contract claim and the court dismisses it. (*Kassover*, 53 AD3d at 449 [affirming dismissal of the breach of fiduciary duty claim because it "duplicates" the breach of contract claim]).

Plaintiff contends that the fraud claim should not be dismissed as duplicative, because the Complaint pleads a "breach of duty separate from, or in addition to, a breach of contract" (Plf. Opp. at 16; citing *First Bank of Ams. v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). Plaintiff contends that defendant's misrepresentation of its actual expenses to induce plaintiff to give up money in the account was tantamount to "defrauding of a beneficiary by a trustee, a tort that is independent of the terms of the parties' contract" (*id*. at 16). It further contends that, because defendant refused to furnish account statements until 2018, the fraud claim is not time-barred. (*id.* at 17, referencing CPLR 213 [8] [fraud claim is timely when

[2] The word "policy," as explained in *Sommer*, refers to "[a] legal duty independent of contractual obligations [that] may be *imposed by law as an incident to the parties' relationship*. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*id*. at 551-552 [emphasis added]). Here, plaintiff does not state the legal duty that is imposed by law upon defendant that is independent of the Agreement itself.

brought within the greater of six years from the date the claim accrued or two years from the date when plaintiff could have discovered it with reasonable diligence]).

Plaintiff's contentions in support the fraud claim are unpersuasive. Again, paragraph 5 (b) of the Agreement sets forth the contractual duty defendant owed to plaintiff in terms of deducting expenses from rental income and remitting the surplus to plaintiff. While paragraph one of the Agreement creates a principal-agent relationship between the parties, it does not rise to the level of a trustee-beneficiary relationship, as discussed above. Indeed, the fraud claim is "inextricably intertwined with and stems from the Agreement." This renders the fraud claim duplicative of the breach of contract claim (*Clark-Fitzpatrick*, 70 NY2d at 389 ["It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"]). Accordingly, the fraud claim is dismissed as duplicative.

As to the first (breach of the Lease) and the third (production of defendant's books and records) causes of action, plaintiff's opposition to this motion contains little discussion other than a short contention that as a shareholder, it is entitled to inspect books and records under section 624 of the BCL and as a tenant under the Lease (Plf. Opp. at 6-7). Notably, neither the Complaint nor the plaintiff's opposition point to a specific provision of the Lease that defendant breached. Indeed, even though the Complaint alleges that plaintiff "has performed all of its obligations under the proprietary lease agreement" (Complaint, ¶ 32), plaintiff failed to address defendant's assertion that plaintiff had defaulted under the Lease, leading to the commencement of the nonpayment proceedings in the Civil Court against plaintiff in August 2018. Accordingly, the first cause of action should be dismissed because it fails to state a valid claim. Also, the third cause of action is moot, because the first cause of action is unsustainable, and because that this

court issued an order on October 25, 2019 that set forth, among other things, a discovery schedule for the parties (NYSCEF Doc. No. 59).

Conclusion

For all of the foregoing reasons, it is hereby

ORDERED that, with respect to the second and fourth causes of action of the complaint, defendant's motion to dismiss (motion sequence number 004) is granted to the extent of barring plaintiff from the recovery of money damages for any purported breach by defendant of the Agreement that arose prior to the six-year period that preceded the commencement of this action on July 15, 2019; and it is further

ORDERED that the court dismisses the first, third, fifth and sixth causes of action of the complaint, and it is further

ORDERED that defendant shall file an answer as to the surviving causes of action in the complaint within 20 days after the e-filed date of this decision and order; and it is further

ORDERED that the parties shall appear before this court for a status conference on January 5, 2020 at ten am.

THERE SHALL BE NO FURTHER MOTION PRACTICE WITHOUT PRIOR CONFERENCE WITH THE COURT.

10/1/2020
DATE

MELISSA ANNE CRANE, 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