SHORT FORM ORDER ORIGINAL

INDEX No. 002685/2020
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12-14-2020
SUBMIT DATE 6-28-2021
Mot. Seq. # 01 - MD

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CITY OF LONG BEACH,

Plaintiff,

- against -

JACK SCHNIRMAN,

Defendant.

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Upon the following papers numbered 1 to 97 read on this motion to dismiss; ; Notice of Motion/ Order to Show Cause and supporting papers 1- 34 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 35-83 ; Replying Affidavits and supporting papers 84-97 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

By motion dated December 14, 2020, the defendant moves for an order pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) dismissing the complaint. The plaintiff opposes the application in all respects.

The plaintiff City of Long Beach, (hereinafter the City), has commenced this action against the defendant, former City Manager for the City, seeking to recover money damages for breach of fiduciary duty, breach of duty of loyalty, fraud, conspiracy to commit fraud and constructive fraud. In addition, the City seeks an accounting of all expenses paid out of the City funds for his benefit or for the benefit of City employees for the years 2012 through 2018.

The City alleges, in brief, that the defendant took advantage of his position of trust and authority and misappropriated public funds for his own benefit which he later returned. In addition, it is alleged that the defendant approved separation payments to exempt employees that were not authorized by the City Personnel Code and relevant collective bargaining agreements. The city claims that the defendant knew or should have known of the illegality of the separation payments made to the exempt employees. The city also seeks to recover damages in connection with an alleged agreement and supplemental agreement between the defendant and Robert Agostisi, (the former City corporation Counsel and Acting City Manager). The City alleges that

the agreements and payments made to Agostisi in accordance therewith were illegal and violative of the City Charter and Personnel Code.

To succeed on a motion to dismiss pursuant to CPLR 3211(a) for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (***Sokoloff v Harriman Estates Dev. Corp.,*** 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; *see also* ***Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC,*** 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], ***Bartlett v Konner,*** 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*see* ***Wayne S. v County of Nassau Dept. of Social Services,*** 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see* ***Estate of Menon v Menon,*** 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing ***Leon v Martinez,*** 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, ***Roth v Goldman,*** 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (***Wall Street Assocs. v Brodsky,*** 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing ***Guggenheimer v Ginzburg,*** 43 NY2d 268, 275; ***Rovello v Orofino Realty Co.,*** 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to "remedy defects in the complaint" (*see* ***Dana v Shopping Time Corp.,*** 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting ***Rovello v Orofino Realty Co.,*** *supra* at 40 NY2d at 636).

Further, a motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence proffered utterly refutes the complaint's factual allegations, thereby conclusively establishing a defense as a matter of law (*see, generally,* ***Goshen v Mutual Life Ins. Co. Of N.Y.***, 98 NY2d 314 326; ***Leon v Martinez***, *supra*).

Preliminarily the Court concludes that the "documentary evidence" submitted by the defendant does not "utterly refute" the allegations set forth in any of the causes of action in the complaint or "conclusively establish[ ] a defense as a matter of law ". Therefore the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is in all respects denied.

The Court has reviewed the causes of action in the complaint in accordance with the law governing motions to dismiss pursuant to CPLR 3211(a)(5) and (a)(7) and decides the motion as follows:

THE FIRST CAUSE OF ACTION:
BREACH OF FIDUCIARY DUTY/DUTY OF LOYALTY

> 'The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct' (***Litvinoff v Wright***, 150 A.D.3d 714; *see*, ***Smallwood v Lupoli***, 107 A.D,3d 782, 784)

(***Celauro v 4C Foods Corp.***, 187 A.D.3d 836, 837 [2d Dept. 2020]).

In support of his motion to dismiss the cause of action the defendant argues that any claims related to payments made prior to July 17, 2014, are barred by the six year statute of limitations. In opposition the City contends that a statute of limitations may be tolled while a relationship of trust and confidence exists between the parties. Since the defendant was employed as the City Manager from January 2, 2012, until January 1, 2018, the statute of limitations period did not begin to run until January 2, 2018. In reply, the defendant argues that the fiduciary tolling rule applies only to claims for accounting or equitable relief.

As correctly noted by the defendant, the fiduciary tolling rule does not apply where the plaintiff's claims are solely at law (*see, In re Clark*, 146 A.D.3d495 [1st Dept. 2017]; *Stern v Morgan Stanley Smith Barney*, 129 A.D.3d 619 [1st Dept. 2015]). Therefore any claims related to payments made prior to July 17, 2014, are dismissed.

As to that part of the cause of action which is not time barred, the Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for breach of fiduciary duty. Therefore the defendant's motion to dismiss the first cause of action is granted to the extent heretofore stated and is otherwise denied.

THE SECOND CAUSE OF ACTION: FRAUD

In ***Eurycleia Partner, LP v Seward & Kissel, LLP***, 12 N.Y.3d 553, the Court of Appeals addressed the pleading requirements of a fraud cause of action stating:

> The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see* ***Ross v Louise Wise Servs., Inc.***, 8 N.Y.3d 478, 488, 836 N.Y.S.2d 509, 868 N.E.2d 189 [2007]; ***Lama Holding Co. v Smith Barney***, 88 N.Y.2d 413, 421, 646

> N.Y.S.2d 76, 668 N.E.2d 1370 [1996]). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).
>
> We recently explored the pleading requirements of CPLR 3016(b) in ***Pludeman v Northern Leasing Sys., Inc.***, 10 N.Y.3d 486, 860 N.Y.S.2d 422, 890 N.E.2d 184 [2008]. In that case, we noted that the purpose underlying the statute is to inform a defendant of the complained-of incidents. We cautioned that the statute "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*id at* 491, 860 N.Y.S.2d 422, 890 N.E.2d 184 [internal quotation marks and citation omitted]). Although there is certainly no requirement of "unassailable proof" at the pleading stage, the complaint must "allege the basic facts to establish the elements of the cause of action" (*id.* at 492, 860 N.Y.S.2d 422, 890 N.E.2d 184). We therefore held that CPLR 3016(b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (*id.*). And, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*id* at 493, 860 N.Y.S.2d 422, 890 N.E.2d 184).

The defendant urges that the fraud cause of action should be dismissed because the City has not pled the elements with the requisite particularity. More specifically, the defendant argues that:

> (1) there was no material misrepresentation of fact;
> (2) the City has not adequately pled knowledge of the alleged illegality or intent to defraud; and
> (3) the City has not pled any facts to support an inference that the City had a justifiable expectation that the defendant, rather than the City attorneys, would advise it about the Charter's requirements.

In opposition, the City contends that the fraud cause of action has been satisfactorily pled with sufficient particularity.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City

has pled a cause of action cognizable at law against the defendant for fraud. Therefore, the defendant's motion to dismiss the second cause of action is denied.

THE THIRD CAUSE OF ACTION:
CONSPIRACY TO COMMIT FRAUD

> New York does not recognize civil conspiracy to commit a tort as an independent cause of action (*see, **Alexander & Alexander of N.Y. v Fritzen***, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102; ***Brackett v Griswold***, 112 N.Y. 454, 466-467, 20 N.E. 376; ***Blanco v Polanco***, 116 A.D.3d 892, 895-896, 986 N.Y.S.2d 151; ***Dickinson v Igoni***, 76 A.D.3d 943, 945, 908 N.Y.S.2d 85). However, a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme (*see, **Alexander & Alexander of N.Y. v Fritzen***, 68 N.Y.2d at 969, 510 N.Y.S.2d 546, 503 N.E.2d 102; ***Blanco v Polanco***, 116 A.D.3d at 896, 986 N.Y.S.2d 151). Under New York law, "[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (***Perez v Lopez***, 97 A.D.3d 558, 560, 948 N.Y.S.2d 312; *see, **1766-68 Assoc., LP v City of New York***, 91 A.D.3d 519, 520, 937 NY.S.2d 33; ***Abacus Fed. Sav. Bank v Lim***, 75 A.D.3d 472, 474, 905 N.Y.S.2d 585).

(***McSpedon v Levine***, 158 A.D.3d 618, 621 [2d dept. 2018]).

Here, since the motion to dismiss the fraud cause of action was denied and the cause of action remains viable, the Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for conspiracy to commit fraud. Therefore the defendant's motion to dismiss the third cause of action is denied.

THE FOURTH CAUSE OF ACTION:
CONSTRUCTIVE FRAUD

> "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the

> crucial exception that the element of scienter upon the part of the defendant, his [or her] knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his [or her] confidence in the defendant and therefore to relax the care and vigilance he [or she] would ordinarily exercise in the circumstances" (***Brown v Lockwood***, 76 A.D.2d 721, 731, 432 N.Y.S.2d 186; *see* ***Leone v Sabbatino***, 235 A.D.2d 460, 461, 652 N.Y.S.2d 628; ***DelVecchio v Nassau County***, 118 A.D.2d 615, 617-618, 499 N.Y.S.2d 765).

(***Levin v Kitsis***, 82 A.D.3d 1051, 1054 [2d Dept 2011]).

> A fiduciary relationship arises "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" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005] [internal quotation marks and citation omitted]). Put differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (***AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.***, 11 N.Y.3d 146, 158, 866 N.Y.S.2d 578, 896 N.E.2d 61 [2008] [internal quotation marks and citation omitted]). Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry.

(***Eurycleia Partners LP v Seward & Kissel, LLP***, *supra* at p. 561).

Here, the City has alleged facts demonstrating that a fiduciary relationship existed between the City and the defendant.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has pled a cause of action cognizable at law against the defendant for constructive fraud. Therefore, the defendant's motion to dismiss the fourth cause of action is denied.

THE FIFTH CAUSE OF ACTION (SET FORTH AS THE SIXTH CAUSE OF ACTION IN THE COMPLAINT): AN ACCOUNTING:

> "'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'" (***Lawrence v Kennedy***, 95 A.D.3d 955, 958, 944 N.Y.S.2d 577, quoting ***Palazzo v Palazzo***, 121 A.D.261, 265, 503 N.Y.S.2d 381).

(***Dee v Rakower***, 112 A.D.3d 204, 214 [2d Dept. 2013]).

The defendant stepped down from his position as City Manager over three years ago. He asserts that the City is not alleging that he is in possession of any financial records of the City or any "pilfered funds". Moreover, the City has in its possession all the payment records about which it demands an accounting.

In opposition the City urges that the conduct of the defendant warrants the remedy of an accounting.

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the City has not pled a cause of action cognizable at law against the defendant for an accounting. Therefore the defendant's motion to dismiss the fifth cause of action is granted.

The defendant's remaining contentions, to the extent not specifically addressed herein, have been considered and found to be unavailing.

ORDERED that a copy of this order shall be served by the plaintiff on the defendant's attorney by regular mail within twenty (20) days of the date of this order; and it is further

ORDERED that the defendant shall serve his answer within twenty (20) days from service of a copy of this order; and it is further

ORDERED that a preliminary conference is hereby scheduled to be held on **Thursday, September 23, 2021 at 10:00 a.m.**, in the DCM courtroom 338 of the Hon. Alan D. Oshrin Supreme Court Building, One Court Street, Riverhead, New York. Counsel for the respective parties in this action are directed to appear at that time.

The foregoing shall constitute the decision and order of this Court.

Dated: July 26, 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION