Zwebner v Strulovitch
2022 NY Slip Op 30478(U)
January 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 530498/2021
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8
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YONA ZEVE ZWEBNER, NEHAMA ZWEBNER, JOSEPH SILBERMAN, RAZIEL AVISHI, NISIM OHAYON, MOSHE OHAYON, ESTHER OHAYON, ELI HASKAL, REUVEN ANKRI, YITZCHAK BLAS, YEHUDA LANDAU, YEHUDA TZADKA, SHEMUEL ELGRABLI, CHANI ELGRABLI, DAVID FODOR, MOSHE GERSHUNI, TZVI YAKOVE, YEHUDA GANTZ, ELI KIRSHANBOUM, JOSEPH CHARVIT, AVRUMI VAKNIN, NATAN FELDMAN, AVRAHAM MISHKOVSKY, RAPHAEL KESSLER, ISRAEL MEIR PERETZ, YITZCHAK CHAIM ARIE, BEZALEL SCHWAB, SHMUEL VAKNIN, LEVI ITZCHAK HELLER, SHIMON VAKNIN,

Plaintiffs, Index # 530498/2021

- against - January 27, 2022

YECHEZKEL STRULOVITCH A/K/A CHASKIEL MR. STRULOVITCH , CS CONSTRUCTION GROUP LLC, GLAUBERS CHASIDISHA CLOTHING LLC, GLAUBERS CLOTHING LLC, GLAUBERS QUALITY CLOTHING LLC, GLAUBERS TRADITIONAL CLOTHING LLC, 945 PARK PL LLC, 1078 DEKALB LLC, 74 VAN BUREN LLC, 454 CENTRAL AVENUE LLC, 980 ATLANTIC HOLDINGS 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, 1301 PUTNAM 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, 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, 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, FULTON STREET HOLDNGS LLC, 908 BERGEN STREET LLC, 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,

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PRESENT: HON. LEON RUCHELSMAN

The defendants CSN Partners LP, 196 Albany Holdings LP, 400 South 2nd Street Realties LP, 400 South 2nd Street Holdings LP, First Avenue Realty Holdings LP, 186 Lenox LLC, Lenox 186 Holdings LLC and Lenox 186 Realty LLC have moved seeking to dismiss various allegations of the Amended Complaint and to cancel the notices of pendency filed. 1428 Fulton St LLC and Fulton Street Holdings LLC have also moved seeking to dismiss causes of action of the Amended Complaint and to cancel the notices of pendency filed. 31 Brooklyn LLC has also moved seeking to dismiss causes of action of the Amended Complaint and to cancel the notices of pendency filed. Eighteen Properties LLC, Knickerbocker Lofts LLC, 296 Cooper LLC, Willtrout Realty LLC, Stagg Studios LLC, Tompkins 420 Realty LLC and 420 Tompkins, LLC have also moved seeking to dismiss causes of action of the Amended Complaint and to cancel the notices of pendency filed.

The plaintiffs have opposed the motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Amended Complaint the plaintiffs were approached by the individual defendants Yechezkel Strulovitch and Yechiel Oberlander (now deceased) about investing in real estate properties in Kings County in 2012. The plaintiffs intended to invest various sums in 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 engaged in six fraudulent schemes.

The first scheme involved purchasing property located at 945 Park Place with investment funds given by the plaintiffs for the purchase of properties located at 1078 Dekalb Avenue, 8 Maple Avenue, 74 Van Buren Street, 454 Central Avenue and 980 Atlantic Avenue. The Defendants 945 Park PL LLC, 1078 Dekalb LLC, 74 Van Buren LLC, 454 Central Avenue LLC, 980 Atlantic Holdings LLC, and CSY Holdings, LLC are alleged to be the owners of the Scheme 1 properties.

The second scheme involved utilizing funds given by the plaintiffs for investment properties whereby the defendants utilized those funds to purchase and renovate and develop other properties. Those other properties are 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, all located in Kings County, 2212 Victory Boulevard, Staten Island, New York, 2075 Wallace Avenue, Bronx, New York and 940 1st Avenue, New York, New York. The defendants 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., 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, and 1642 Equities LLC are alleged to be the owners of the Scheme 2 properties. Further, the complaint alleges the defendants purchased businesses, namely two medical facilities and a clothing store known as the scheme 2 businesses.

The third scheme involved utilizing funds given by the plaintiffs for investment properties whereby the defendants utilized those funds to purchase other properties located at 219-221 Rutledge Street, 420 Tompkins Avenue, 599 Willoughby Avenue, 186 Lenox Road, 254 Penn Street, 396 South 2nd Street, 49 Wyckoff Avenue, 1426, 1428, and 1432 Fulton Street, all in Kings County. The Defendants BNH Properties LLC, Tompkins 420 REALTY LLC, Willoughby Equities LLC, 186 Lenox LLC, 400 South 2ND Street Realties L.P., Wykoff SP LLC and 1428 Fulton St LLC are alleged to be the owners of the Scheme 3 properties after transferring them from 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, Fulton Street Holdings LLC.

The fourth scheme alleges the defendants sold investment properties located at 908 Bergen Avenue, 901 Bushwick Avenue, 1285 Bushwick Avenue, 369 Gates Avenue, 853 Lexington Avenue, 762 Willoughby Ave, and 1301 Putnam Ave, all located in Kings County and 348 St. Nicholas Avenue, in New York County.

The fifth scheme alleges the defendants sold various properties they purchased using the plaintiff's investment funds owned by 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.

The sixth scheme alleges the defendants fraudulently represented to the investors they were not able to purchase investment property located at 1173 Bergen Street when in fact the defendants purchased that property for themselves.

The Amended Complaint alleges numerous causes of action including the imposition of a constructive trust on the Scheme 1, 2 and 3 properties and businesses of scheme 2, an equitable lien upon such properties and businesses, a constructive trust on the proceeds of the scheme 4 and scheme 5 properties sold, a claim for racketeering, fraud, conversion, unjust enrichment, an accounting, breach of contract and for fraudulent conveyances. As noted, the moving defendants have filed motions seeking to dismiss many of the causes of action and to cancel notices of pendency filed.

<u>Conclusions of Law</u>

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (<u>Strujan v. Kaufman & Kahn, LLP</u>, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (<u>Weiss v. Lowenberg</u>, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). 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, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

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]). Thus, a constructive trust may be imposed where property has been acquired and the holder of the title may not in good conscience retain the benefit of the property.

To establish such trust "it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed, and that this interest was parted with in reliance on the promise" (Bontecou v. Goldman, 103 AD2d 732, 477 NYS2d 192 [2d Dept., 1984]). The case of Edwards v. Walsh, 169 AD3d 865, 94 NYS3d 629 [2d Dept., 2019] is instructive. In that case the defendant, a real estate broker, was hired by the plaintiff to purchase certain property in Queens. The plaintiff sued defendant when plaintiff discovered the defendant purchased the property for herself. The court dismissed a claim for a constructive trust holding that a constructive trust is not available where the party seeking the trust had no interest in the property "prior to obtaining a promise that such an interest will be given to him" (id). Again, in Mazzei v. Kyriacou, 139 AD3d 823, 33 NYS3d 291 [2d Dept., 2016] the plaintiff loaned the defendant money and instead of repaying the loan the defendant, bought property. The court denied the request to impress a constructive trust finding that there was no "promise, either express or implied, relating to the subject property, or any transfer in reliance on any promise relating to the property" (id). Further, in Burns v. Burns, 174 AD3d 570, 106 NYS3d 167 [2d Dept., 2019] the plaintiff promised to transfer two properties to the defendant, and to retain a life estate in them, and the defendant promised he would not sell the properties. The defendant breached the agreement, sold the properties and purchased another property. The court held the plaintiff could not impress a constructive trust on that other property because "the plaintiff never had any interest in that property" (id).

The complaint alleges the plaintiff's provided investment funds to the defendants and that the defendants utilized the funds "at least in part" and "purchased/built/developed/paid the mortgage on" Scheme 1 Properties, Scheme 2 Properties, Scheme 3 Properties and Scheme 2 Businesses (see, Amended Complaint,

¶111). The following paragraph states that "where a party acquires/develops or pays the mortgage of a property, with the funds of another, equity will impress a trust upon such property for the benefit of the one whose funds were used to purchase the property" (see, Amended Complaint, ¶112). There are two reasons why the plaintiffs cannot impress any constructive trusts upon any of the properties. While one of the reasons really highlights pleading infirmities which could potentially be corrected the second is fatal.

First, the plaintiffs do not provide any basis impressing a trust upon properties to which no promise had been made and to which they maintained no interest (*cf.*, Finley v. Hughes, 106 F.Supp. 355 [Eastern District of South Carolina, Columbia Division 1955]). The case cited by the plaintiff, Jiang v. Hu, 2018 WL 1609508 [Supreme Court New York County 2018] does not stand for the proposition that a constructive trust can be impressed upon property to which the plaintiff's assert no ownership interest. In Jiang, the plaintiff purchased an apartment for her daughter and son-in-law. The three of them signed the contract, however, the mother provided all the funds. When the daughter and son-in-law commenced divorce proceedings the mother moved seeking to impress a constructive trust on the grounds she was really the owner of the apartment. The court rejected the son-in-law's argument that "since the Mother did not hold an interest in Apt. 29E prior to the conveyance to the Defendants, a constructive trust cannot lie" holding that "a prior interest in the property is not a prerequisite to finding a constructive trust" (id). That conclusion has no relevance to this case where the defendants made absolutely no promise to the plaintiffs concerning other properties. Further, Urr v. Tesalona, 2011 WL 13302231 [Eastern District of New York 2011] did note that a constructive trust can be impressed upon property where the party had no prior interest. However, the court was quick to qualify that such rule only applied where the party did "contribute funds, time or effort to the property in reliance on a promise to share in some interest in it" (id). Thus, there are no cases that squarely hold that where funds are afforded for one property but are improperly utilized to purchase other property for which no promise or reliance exists, that a constructive trust can be impressed upon the other property. Indeed, the cases indicate no such trust is possible.

Moreover, it is improper to seek a constructive trust and a notice of pendency merely to secure business debt (Deane v. Superior Court, 164 Cal.App.3d 292, 210 Cal. Rptr. 406 [Court of Appeal, Fourth District, Division 3 California]). As noted, there is no dispute that none of the properties purchased with plaintiff's funds were ever promised to them or that they had any interest in them at the time the investment funds were transferred to the defendants. Indeed, the plaintiff's concede the entire purpose of impressing any constructive trusts is to secure the properties to recover any of the investment funds that were misappropriated. Thus, plaintiff's admit that "without the imposition of a constructive trust, Defendants would find a way to ensure an inability to pay any monetary judgment" (see, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss/Cancel Notice of Pendency, page 8 [NYSCEF #98]). Thus, the whole basis seeking to impose constructive trusts and notices of pendency are merely to try and freeze defendant's properties to secure recovery of the funds without the need to endure the uncertain success of a money judgement. That is an improper basis upon which to impress any constructive trust.

Second, even if the above fatal reasons would not be present, in order to impress a constructive trust "it is necessary to trace one's equitable interest to identifiable property in the hands of the purported constructive trustee" (Rogers v. Rogers, 63 NY2d 582, 483 NYS2d 976 [1984]). The Amended Complaint does not even attempt to trace any of plaintiff's funds to any specific property and merely asserts a constructive trust upon scores of properties merely because defendant Strulovitch owns entities that own those properties. Surely, this is an improper way in which to impress a constructive trust over any property. This infirmity applies equally to the funds sought based upon schemes 4 and 5. In any event, based on the foregoing it is clear that there is no basis upon which to impress any constructive trust.

Equitable liens grants the plaintiff a security interest in property and are generally imposed to prevent unjust enrichment (Department of Army v. Blue Fox Inc., 525 U.S. 255, 119 S.Ct. 687 [1999]). "The traditional distinction between a constructive trust and an equitable lien is that the beneficiary of a constructive trust receives complete title to the asset whereas the holder of an equitable lien receives only a lien on the asset through which it may satisfy a money claim" (In Re Flanagan, 503 F.3d. 171 [2d Cir. 2007]). Thus, an equitable lien is proper in favor of a plaintiff "where due to the nature of his or her relationship with a property owner, has relied upon that owner's unfulfilled promise to convey the property, and as a result has expended funds to preserve or improve it in anticipation of the conveyance" (see, Keane v. Keane, 193 AD3d 838, 148 NYS3d 145 [2d Dept., 2021]). However, an equitable lien requires an express or implied contract "concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation" (Datlof v. Turetsky, 111 AD2d 364, 489 NYS2d 353 [2d Dept., 1985]). In Datlof, the plaintiff sought an equitable lien on defendant's property since defendant bought the home with funds loaned by the plaintiff which were never repaid. The court held no such equitable lien was possible because even if the defendant had promised to repay the loan from the proceeds of the sale of the home "an agreement to pay a debt out of a designated fund does not operate to create an equitable lien upon the fund" (id). Again, in Liselli v. Liselli, 263 AD2d 468, 693 NHYS2d 195 [2d Dept., 1999] the plaintiff sought to impose an equitable lien upon property purchased by the defendant with funds loaned by the plaintiff. The court concluded that a failure to pay money owed does not give rise to an equitable lien. The court explained that "the Court of Appeals has observed that, 'an equitable lien 'is dependent upon some agreement express or implied that there shall be a lien on specific property'"" and that an equitable lien "'requires an express or implied contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation'" (id). Of course, where the evidence demonstrates that funds were expended in anticipation of future ownership based upon a promise then an equitable lien would be proper (see, Rock v. Rock, 100 AD3d 614, 953 NYS2d 165 [2d Dept., 2012]). In this case, clearly, no such promises were made and no expectations exist concerning any of the defendant properties. It is true that in a decision rendered by this court in Angel v. Strulovitch, (Index #500827/20 dated December 2, 2020) the court entertained the possible existence of another type of equitable lien where a debt is owed and equity demands certain property stand as security for payment for the debt. However, further and greater analysis reveals there are no cases in New York that have espoused the existence of such a broad definition of an equitable lien. Notwithstanding Schwartz v. Schwartz, 2014 WL 6390316 [E.D.N.Y. 2014] which seems to have adopted the existence of this other type of equitable lien, clearly, the guidance of the Second Department, which directly binds this court, has not embraced any other type of equitable lien. Therefore, based on the foregoing, the motion seeking to dismiss the constructive trust and equitable lien claims are granted. Consequently, the notices of pendency on all the properties are hereby vacated.

Next, 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 (Giardini v. Settanni, 159 AD3d 874, 70 NYS3d 57 [2d Dept., 2018]). Further, conversion carries a three year statute of limitations which accrues when the conversion takes place (Siegler v. Lippe, 189 AD3d 903, 137 NYS3d 429 [2d Dept., 2020]). There is no dispute the conversion accrued more than three years before the commencement of the lawsuit. The plaintiff's argue that the "defendants continued to use Plaintiffs' investment funds to develop these properties and to make mortgage payments on these properties within three years from when this action was filed" (see, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, page 13 [NYSCEF #72]). However, there is no such doctrine that allows the statute of limitations to extend beyond three years merely because the funds remain converted. Therefore, the motion seeking to dismiss the conversion claim 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, J-K Apparel Sales Company Inc., v. Jacobs, 189 AD3d 1011, 138 NYS3d 80 [2d Dept., 2020]). 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 moving corporate defendants is granted.

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 moving defendants.

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]). Further, 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]). Thus, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain fact that "are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]).

However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie"

(McKernin v.Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]). It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case any misrepresentations made were surely also contractual obligations. The misrepresentations are found in Paragraph 184 of the Amended Complaint. That list of misrepresentations are all matters that are contained within the contracts entered between the parties. Therefore, the motion seeking to dismiss the fraud claim is granted.

The cause of action for breach of contract remains viable and any motion seeking to dismiss any breach of contract claim is 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).

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 Enterprise was organized through, inter alia, a series of legally created entities that were manipulated by Mr. Strulovitch and Mr. Oberlander, in order to illegally obtain vast sums of money from the Plaintiffs through fraudulent misrepresentations" (see, Amended Complaint, ¶149).

Thus, according to the Amended Complaint the enterprise was created merely to defraud the plaintiffs. Upon those representations the plaintiff has failed to demonstrate the existence of an enterprise. In opposition, the plaintiff's merely assert that "plaintiffs alleged that Defendants initially used funds they stole from Plaintiffs to purchase property for their own property portfolio instead of using it to purchase/develop the agreed investment properties and that they then exacerbated the injury to Plaintiffs by spending millions of dollars developing their own property portfolio and paying the mortgage on their own portfolio while neglecting the investment properties and allowing the investment properties to fall into foreclosure" (see, Plaintiffs' Memorandum of Law in Opposition to Defendant 31 Brooklyn LLC's Motion to Dismiss, page 17). While that allegation may prove true it does not satisfy the RICO statute. Consequently, the motion seeking to dismiss the RICO causes of action is granted.

So ordered.

ENTER:

Dated: January 27, 2022
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC