SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART** 32
Justice

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DAVID GOLDBERG

Plaintiff,

- v -

SHLOIME TORIM,

Defendant.

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INDEX NO. 151425/2018

MOTION DATE

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, the motion is determined as follows:

This action has its origin in an oral real estate transaction between close friends that went awry. Despite concerning alleged damages of just $175,000.00[1], the parties have verily litigated this matter for over four years engaging in vigorous discovery which included interrogatories, hundreds of pages of depositions, repeated discovery demands and four motions related to discovery. The within motion is the fifth with the Plaintiff leading the charge 3 to 2.

Plaintiff, David Goldberg ("Goldberg"), alleged in his original complaint against Defendant Shloime Torim ("Shloime") three causes of action, breach of fiduciary duty, conversion and fraud. By order of Justice Arlene Bluth dated January 3, 2019, the causes of action for breach of fiduciary duty and fraud were dismissed for failure to state a claim pursuant to CPLR §3211[a][7]. The conversion claim was determined to be sufficiently pled and Justice Bluth rejected Defendant's attempt to recast this claim as a breach of contract cause of action. Plaintiff's appeal of that order was denied and the Appellate Division found the breach of fiduciary claim conclusory and the fraud claim unsupported by the facts alleged (*see Goldberg v Torim*, 181 AD3d 443 [1st Dept 2020]).

Plaintiff's original fraud cause of action was dismissed because the complaint was "devoid of any allegation that defendant represented how much, in addition to the 10%, if any, defendant agreed to remit to plaintiff after the sale" (*Goldberg v Torim*, supra at 444). This was because, according to the Appellate Division, "defendant did precisely what he represented he would do, specifically that he would be purchasing real estate that would turn a 10% profit to plaintiff within a year." (*id.*).

Now, Plaintiff moves to amend the complaint and yet again for discovery sanctions. Concerning the motion to amend, Plaintiff wishes to not only reassert the dismissed claims but also to bring

[1] Not including the claims for punitive damages, interest and attorney's fees.

Shloime's wife, Leah Torim ("Leah"), and son, Sholom Torim ("Sholom") into the mix. Plaintiff seeks to add new factual allegations to support the repleaded breach of fiduciary and fraud claims against both Shloime and Leah as well as to add Leah as a defendant on the conversion cause of action. Further, Plaintiff requests to add an "aiding and abetting" claim against Sholom. Defendant opposes the motion.

Leave to amend a pleading under CPLR §3025[b] is to be freely given "absent prejudice or surprise resulting directly from the delay" (*see e.g. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party "must overcome a heavy presumption of validity in favor of [allowing amendment]" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

As to the amended breach of fiduciary duty claim, arm's-length business transactions and dealings between family members generally do not, in and of themselves, establish confidential relationships (*see Castellotti v Free*, 138 AD3d 198, 209-210 [1st Dept 2016]; *DiTolla v Doral Dental IPA of N.Y., LLC*, 100 AD3d 586 [2d Dept 2012]). Finding a fiduciary relationship is a fact-specific inquiry and the essential elements are reliance, de facto control and dominance (*see Marmelstein v Kehillat*, 11 NY3d 15, 21 [2008]; *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158 [2008]). In other words, "'[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other'" (*id.*).

In the proposed amended complaint, Plaintiff now posits the subject transaction was a purchase and flip by Plaintiff, that Shloime was acting as his broker who would negotiate the transaction in his stead and that Shloime undertook the endeavor "in appreciation" for Plaintiff's prior largesse, all facts that were not proffered before. Plaintiff further alleges Shloime was a real estate broker with years of prior experience acting in that capacity for others and that he had knowledge and experience which Plaintiff trusted. Plaintiff's proposed pleading omits the allegation in paragraph 12 of the original complaint that Shloime thought Plaintiff could realize a 10% profit in a year and seeks to posit he was promised "at least 10% profit" by Shloime. Many of the new and salient allegations sought to be pled are based on Plaintiff's assumptions, understanding and beliefs (NYSCEF Doc No. 139, Paragraphs 48, 50, 51, 53 – 55).

Unlike the prior pleading, which was conclusory and devoid of specifics, the proposed amendments sufficiently support a claim of a fiduciary relationship between Plaintiff and Shloime (*see Toobian v Golzad*, 193 AD3d 784, 789 [2d Dept 2021]; *Benjamin v Yeroushalmi*, 178 AD3d 654 [2d Dept 2019]; *see also Carbon Capital Mgt., LLC v American Express Co.*, 88 AD3d 933 [2d Dept 2011]; *Mei Yun Chen v Mei Wan Kao*, 97 AD3d 730 [2d Dept 2012]). Indeed, a real estate broker stands in an agency relationship with their principal and, therefore, is fiduciary in nature with a duty of loyalty requiring the agent to act in the best interests of the principal (*see eg Dubbs v Stribling & Assocs.*, 96 NY2d 337, 340 [2001]; *NRT N.Y., LLC v Morin,* 147 AD3d 589 [1st Dept 2017]).

Shloime's assertion that these new allegations are contradicted as a matter of law by documentary evidence is unavailing. Contrary to Defendant's assertion, the alleged "note" or "heter iska" does not decisively refute plaintiff's allegations or conclusively establishes a defense to the asserted claims as a matter of law (*see Burnett v Pourgol,* 83 AD3d 756, 758 [2d Dept 2011]). The document was signed only by Shloime and Plaintiff denied at his deposition seeing it before the action

was commenced (NYSCEF Doc No 147). Moreover, unlike *Arnav Industries, Inc. v. Westside Realty Assoc.*, 180 AD2d 463 [1st Dept 1992], a case cited by Defendant as authority, the alleged "heter iska" here does not explicitly disavow an intent to create a partnership thereby. However, as to Leah, the amended complaint is entirely deficient. There is no allegation of any direct relationship between Plaintiff and Leah of any kind, that Plaintiff relied on her advice or placed his trust and repose in her expertise.

Concerning the proposed conversion claim against Leah, "a conversion takes place when someone, (1) intentionally and without authority, (2) assumes or exercises control over personal property belonging to someone else, (3) interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). "Where the property [alleged to have been converted] is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner. Thus, conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose." (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012][citations omitted]). Here, Plaintiff's proposed pleading asserts that Leah was involved in the transactions that facilitated the sale of the disputed property, including executing certain documents, and created the purported profits that Plaintiff claims were converted. These allegations are sufficient, for pleading purposes, to demonstrate this proffered amendment is not palpably insufficient or clearly devoid of merit (*id.*).

As to the amended fraud claim, it suffers from the same defect as the original claim, that Plaintiff fails to plead cognizable damages. Damages for fraud are strictly limited to pecuniary loss or out-of-pocket damages (*see Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 [1996]). "Under that rule, '[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . . [T]here can be no recovery of profits which would have been realized in the absence of fraud'" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142, *citing Lama Holding Co. v. Smith Barney Inc.*, supra). Moreover, as to Leah, there is no stated contact between the two parties, much less any allegations of what misrepresentations she made to Plaintiff.

The proposed cause of action against Shalom for aiding and abetting his parents' alleged tortious conduct is insufficiently pled. This cause of action is pled in an entirely conclusory manner, is based on nothing more than supposition, and does not come anywhere close to properly pleading Shalom offered "substantial assistance" which facilitated his parents alleged acts (*see Oster v Kirschner*, 77 AD3d 5 [1st Dept 2010]; *see also National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]).

The branches of Plaintiff's motion for discovery penalties and the imposition of sanctions is denied. "The nature and degree of the penalty to be imposed pursuant to CPLR §3126 lies within the sound discretion of the Supreme Court" (*Kihl v Pfeffer*, 94 NY2d 118, 122–123 [1999]; *see also Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). The striking of a pleading may be an appropriate sanction, but only upon a clear showing that the non-compliance was willful or contumacious (*see eg Ewa v City of New York*, 186 AD3d 1195 [2d Dept 2020]). Here, the Court does not find the existence of any acts outside the realm of ordinary discovery in an action between former friends who have entirely lost their perspective as to the matter at hand.

Accordingly, it is

ORDERED that the branch Plaintiff's motion to amend is granted only to the extent that Plaintiff may file and serve an amended complaint restoring the breach of fiduciary duty against Defendant Shloime Torim and adding a conversion cause of action against Defendant Leah Torim, and it is

ORDERED that the branches of Plaintiff's motion for discovery penalties and imposition of sanctions is denied.

3/8/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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