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| Crestview SPV, LLC v Crestview Fin., LLC. |
| 2022 NY Slip Op 31354(U) |
| April 22, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 651277/2020 |
| Judge: Andrea Masley |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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| <p>CRESTVIEW SPV, LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>CRESTVIEW FINANCIAL, LLC., and SHALOM AUERBACH</p> <p style="text-align: center;">Defendants.</p> | <p>INDEX NO. <u>651277/2020</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>004</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p> |
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 93, 94, 95, 96, 100
were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

For the reasons stated on the record on April 12, 2022, defendant Auerbach’s motion to dismiss is granted. Auerbach shall submit the transcript to be so ordered.

This was a breach of contract case against Crestview Financial, LLC, for amounts due under the March 20, 2017, asset purchase agreement. (NYSCEF 2, Complaint (Amended); see also NYSCEF 46, 10/19/2020 Transcript 19:5-10.) However, plaintiff amended the complaint and removed the breach of contract claim. Instead, plaintiff alleges (1) aiding and abetting breach of fiduciary duty against defendants Nason, Auerbach, and Gravagna; (2) unjust enrichment against Nason, Auerbach and Gravagna; (3) conversion against Nason, Auerbach and Gravagna; and

(4) accounting against defendant Crestview Financial, LLC (Crestview). (NYSCEF 87, Second Amended Complaint.)¹

The aiding and abetting claim is dismissed because Crestview had no fiduciary duty to plaintiff. An aiding and abetting a breach of fiduciary duty claim requires: a breach by a fiduciary of obligations to another; defendant knowingly induced or participated in the breach; and plaintiff suffered damage as a result. (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015].) “An essential prerequisite to proving this cause of action is that the defendant must have known of the fiduciary duty”. (*Id.*, citations omitted.) Auerbach could not have aided and abetted a breach of a nonexistent duty. Plaintiff cannot substitute aiding and abetting breach of fiduciary duty for breach of contract.

Unjust enrichment is a quasi-contract claim that contemplates an imposed obligation in the absence of an actual agreement. (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [citations omitted].) Plaintiff’s unjust enrichment claim fails because the claim is governed by the agreements. Further, the limited liability agreement contains an exculpation provision precluding Auerbach’s personal liability. (See NYSCEF 62, LLC Agreement, § 6(g).) Plaintiff failed to address the exculpation provision raised in Auerbach’s Memorandum of Law; not in the Reply as counsel claimed at argument.

¹ Gravagna and Nason are no longer parties to this action. Gravagna’s motion to dismiss was previously granted and the actions against Nason were discontinued. NYSCEF 47, 10/30/2021 Decision and Order on Motion; NYSCEF 92, Stipulation of Discontinuance with Prejudice.)

Conversion is the unauthorized assumption and control over goods belonging to another at the expense of the true owner's rights. (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [2002] [citations omitted].) The property allegedly converted must be identifiable. (*Payne v White*, 101 AD2d 975, 976 [3d Dept 1984].) A conversion claim cannot be predicated on a breach of contract claim. (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008] [citations omitted].) There must be independent facts to allege tort liability. (*Fesseha v TD Waterhouse Inv. Services, Inc.*, 305 AD2d 268, 269 [1st Dept 2003] [citations omitted].) Plaintiff's conversion claim is dismissed because it is based on the same factual allegations as the breach of contract claim and same contractual duty. Further, plaintiff failed to identify a specific fund.

That leaves the accounting claim against Crestview. Crestview has not moved to dismiss this claim. All other causes of action against the individual defendants have been dismissed. Therefore, discovery must proceed against Crestview.

Members of an LLC may inspect the records related to their own interest at their expense. (Limited Liability Company Law § 1102 (b).) Further, members of an LLC may request an equitable accounting under common law. (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009].) Section 3.01(g) of the Servicing Agreement provides:

- (i) The Servicer will maintain and implement administrative and operating procedures (including, without limitation, an ability to recreate Records evidencing the Purchased Assets in the event of the destruction of the originals thereof), and keep and maintain all Records and other information reasonably necessary or advisable for the collection of all Purchased Assets (including, without limitation, Records adequate to permit the daily identification of each new Purchased Asset and all Collections of and adjustments to each existing Purchased Asset).

- (ii) The Servicer will, from time to time during regular business hours as requested by the Owner, permit the Owner and/or its agents or representatives (including the Administrative Agent), (A) to examine and make copies of and abstracts from all Records relating to any Purchased Asset (including any related Collateral or Related Security) and (B) to visit the offices and properties of the Servicer for the purpose of examining such Records, and to discuss matters, relating to the Purchased Assets or the Servicer's performance hereunder with any of the officers or employees of the Servicer having knowledge of such matters. (NYSCEF 95, Servicing Agreement, § 3.01(g).)

Thus, under the Servicing Agreement, plaintiff shall have access to Crestview Financial LLC's books and records.

The court wishes to thank counsel for Auerbach for agreeing to adjourn the argument scheduled for the April 1, 2022, when plaintiff's counsel failed to appear for argument. No apology or explanation was offered at the rescheduled argument on April 12, 2022.

Accordingly, it is

ORDERED that motion of defendant Shalom Auerbach's to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against remaining defendant Crestview Financial, 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 counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

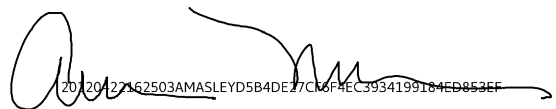
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that defendant are directed to provide plaintiff with copies and reasonable access to all books and records of Crestview Financial, LLC, by May 6, 2022; and it is further

ORDERED that both parties are to complete all depositions by May 20, 2022; and it is further

ORDERED that the note of issue/certificate of readiness shall be filed by May 31, 2022; and it is further

ORDERED that counsel are directed to update the Court via email to sfc-part48@nycourts.gov on May 10, 2022, regarding the progress on the books and records, and deposition schedule.



4/22/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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| <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED |
| <input checked="" type="checkbox"/> | GRANTED | | |
| <input type="checkbox"/> | SETTLE ORDER | | |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | |

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| <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| <input type="checkbox"/> | GRANTED IN PART | | |
| <input type="checkbox"/> | SUBMIT ORDER | | |
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |

APPLICATION:

CHECK IF APPROPRIATE:

651277/2020 CRESTVIEW SPV, LLC vs. CRESTVIEW FINANCIAL, L.L.C.
Motion No. 004

Page 5 of 5