| **EVUNP Holdings LLC v Frydman** |
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| 2022 NY Slip Op 32374(U) |
| July 20, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 650841/2014 |
| Judge: Joel M. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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EVUNP HOLDINGS LLC, EVURTI LLC, ELI VERSCHLEISER,

Plaintiff,

- v -

JACOB FRYDMAN, JFURTI LLC, SUMMER INVESTORS LLC, WINTER 866 UN LLC, SUNEET SINGAL, FIRST CAPITAL REAL ESTATE INVESTMENTS, LLC, FIRST CAPITAL REAL ESTATE TRUST, INC., JOHN DOES #1-10,

Defendant.

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| **INDEX NO.** | 650841/2014 |
| **MOTION DATE** | 06/24/2022 |
| **MOTION SEQ. NO.** | 014 |

**DECISION + ORDER ON MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 389, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 426, 427, 428, 440, 441, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464

were read on this motion for SUMMARY JUDGMENT.

This is one of several cases involving the parties to a failed real estate venture. At issue here is the validity of the parties' Membership Interest Sale and Purchase Agreement ("PSA") (NYSCEF 355).

Defendants Jacob Frydman, JFURTI, LLC, Summer Investors, LLC and Winter 866 UN LLC ("Defendants") move pursuant to CPLR § 3212 for summary judgment dismissing Plaintiffs EVUNP Holdings, LLC, EVURTI, LLC, EVE, LLC and Eli Verschleiser ("Plaintiffs") Amended Complaint's ("Am. Cplt.") (NYSCEF 128) remaining causes of action for fraudulent

inducement of the PSA (count 1); declaratory judgment (count 2); conversion of computer server equipment (count 3); and, in the alterative, breach of the PSA (count 4). Plaintiffs oppose and cross-move for summary judgement.

For the following reasons, Defendants' motion for summary judgment is GRANTED IN PART and counts 1, 2 and 3 are dismissed and count 4 is dismissed insofar as it seeks damages for the termination of Ms. Ahuva Slomovitz. Defendants' motion is DENIED with respect to count 4 insofar as it alleges a failure to make distributions, an unauthorized change in the ownership structure, and breach of the PSA's confidentiality provision. Plaintiffs' cross-motion is DENIED. As set forth below, the Court will hold a hearing to determine whether this case should be stayed pending the federal case among the parties or whether the issues for trial can be further limited.

**BACKGROUND**

Defendant Frydman and Plaintiff Verschleiser partnered to form a multi-entity real estate business that, among other things, unsuccessfully sought to acquire a property known as 866 UN Plaza. (NYSCEF 376 [Defendants' Rule 19-a Statement] and NYSCEF 413 [Plaintiffs' Rule 19-a Counterstatement] ¶¶2-6). The relationship soured and, in December of 2013, the PSA was entered pursuant to which Defendants acquired certain of Plaintiffs' interests. (NYSCEF 355, NYSCEF 376 ¶2, NYSCEF 413 ¶2). Multiple proceedings between these parties involving, among other things, the PSA have ensued.

In this case, Plaintiffs contend that the PSA was fraudulently induced or that, in the alternative, Defendants breached the PSA. (Am. Cplt. Counts 1 and 4). Specifically, Plaintiffs allege that non-party attorney Martin Bell, Esq. – who had worked as counsel for the parties'

businesses (Am. Cplt. ¶4) – was providing confidential information to Defendant Frydman despite representing Plaintiff Verschleiser in the negotiations (Am. Cplt. ¶¶ 99-103).

Plaintiffs separately contend that their interest in United 866 Management, LLC ("866 Management") was not transferred under the PSA, warranting declaratory relief to that effect. (Am. Cplt. Count 2). Finally, Plaintiffs assert that their computer servers and emails were converted by Defendants. (Am. Cplt. Count 3).

**DISCUSSION**

A party moving for summary judgment pursuant to CPLR 3212 must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence "sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562; *see Leumi Fin. Corp. v Richter*, 24 AD2d 855, 855 [1st Dept 1965] ["To require a trial such fact issue must be genuine, bona fide and substantial."] [affirming summary judgment in plaintiff's favor], affd, 17 NY2d 166 [1966]).

**A. Plaintiffs Offer No Evidence of Fraudulent Inducement**

Plaintiffs' fraudulent inducement claim is premised on allegations that Defendant Frydman colluded with attorney Martin Bell vis-à-vis the PSA and did not disclose this fact to Plaintiff Verschleiser. (Am. Cplt. ¶99-103). Defendants' motion to dismiss Plaintiff's fraudulent inducement claim was denied because the parties disputed whether Mr. Bell was

Plaintiffs' lawyer and whether Mr. Frydman colluded with Mr. Bell. (NYSCEF Doc. 86 [September 30, 2015 Order at 7-8]). On the motion to dismiss, of course, the truth of Plaintiffs' factual allegations was assumed (*id.* at 6).

Plaintiff's opposition and cross-moving papers *on summary judgment* focus almost entirely on Bell's alleged conduct – not Defendants' alleged conduct. The Court holds that, following discovery, Defendants have established that dismissal of Plaintiffs' fraudulent inducement claim is warranted, and that Plaintiffs have failed to establish the existence of a triable issue of material fact.

In their moving papers, the Defendants argue that estoppel and waiver apply based on other decisions enforcing the PSA and efforts by Plaintiffs to enforce the PSA.[1] However, at oral argument counsel for Defendants argued primarily that the facts alleged – even if proven – would not constitute a fraudulent inducement claim because there is no evidence of any actionable conduct by Defendants. (NYSCEF 437 [Tr. At 6-11]). The Court agrees. Because the Court's determination is consistent with the determinations made in the other proceedings, there is no need to address the estoppel and waiver arguments.

The parties do not dispute that Mr. Bell served as counsel to their businesses and counsel to the two individuals, Messrs. Frydman and Verschleiser, on other occasions. (NYSCEF 437

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[1] Specifically, Defendants point to an October 16, 2018, Decision and Order of the Hon. W. Franc Perry confirming an arbitration award in favor of Mr. Frydman and his entities as against EVNUP Holdings and Mr. Verschleiser and holding that "[i]ntrinsic in the panel's denial of Respondent's claims was a finding that the PSA was valid and enforceable." (NYSCEF 369). Plaintiffs respond that an unsigned stipulation to the effect that the validity of the PSA would not be determined in the arbitration is evidence of the fact that this Court is to make the determination. Plaintiffs' counsel represented at oral argument that he did not have a signed copy of the stipulation but was working to get a copy. (NYSCEF 437 [Tr. At 24]). However, no signed copy has been furnished to the Court in the more than a year-and-a-half since oral argument took place.

[Tr. 10, 33-340]). Verschleiser claims in his affidavit that he engaged Mr. Bell to represent him in connection with the PSA negotiations and that Mr. Bell confirmed that he was representing Mr. Verschleiser but offers no documentary evidence in support of his testimony. (NYSCEF 407 [Verschleiser Aff. ¶¶14-18], NYSCEF 412 [Plaintiffs' Rule 19-a Statement ¶¶12-15]). Verschleiser also claims that "[h]ad I known that Bell was working together with Frydman, I would never have entered into the PSA" (Verschleiser Aff. ¶22) but does not offer any specific statements he relied on – by Frydman or Bell or any combination thereof – or any other evidence of fraud.

At his deposition, Mr. Verschleiser was asked "[d]o you have a retainer" with Mr. Bell and replied "[n]ot to my knowledge." (NYSCEF 456 [Verschleiser Tr. At 374-375)]. When asked "[w]hen did you retain [Mr. Bell]" Verschleiser replied "I don't recall the date." (NYSCEF 456 [Verschleiser Tr. At 375)]. When asked "[w]hat did you retain [Mr. Bell] for" Verschleiser replied "[t]o work on different matters for me." (*Id.*). In sum, Verschleiser has not produced any testamentary or documentary evidence from which a reasonable fact finder could conclude that he retained Mr. Bell to represent him, or any of his entities, in connection with the PSA.

Mr. Bell was subpoenaed, produced documents, sat for a deposition and testified at the JAMS arbitration. (NYSCEF 396 [Bell Dep. Tr.], NYSCEF 397 [JAMS Tr.], NYSCEF 459-461 [subpoena and related correspondence]). Mr. Bell testified at deposition that he did not provide any legal advice to or consult with Mr. Verschleiser concerning his individual interests in the PSA. (NYSCEF 457 [Bell Depo. Excerpts]). Similarly, the emails produced in discovery and highlighted by Plaintiffs do not show attorney Bell engaging in any collusion with Frydman vis-à-vis the PSA and, to the contrary, show Bell emailing both Frydman and Verschleiser on

November 29, 2013 – shortly before the entry of the PSA – concerning an amendment to the Operating Agreement of 866 Management. (NYSCEF 411 [Verschleiser Aff. Ex. D]).

The JAMS panel also determined that Mr. Bell communicated with both Frydman and Verschleiser concerning the PSA during negotiations and again in connection with Verschleiser's efforts to amend it. (NYSCEF 367 [JAMS Award at 5-8]). The JAMS panel determined that Mr. Verschleiser's testimony pertaining to the execution of the PSA was not credible. (*Id.* at 5-6). In particular, the panel noted that the PSA was negotiated in a late-night meeting and that the record included emails from Mr. Bell to both Mr. Verschleiser and Mr. Frydman. (*Id.* at 5). The panel also referred to Paragraph 18 of the PSA, which provides that the Verschleiser Parties were advised to consult with an attorney but does not represent that they did consult with an attorney, before signing the PSA. (*Id.* at 5-6). in "To state a legally cognizable claim of fraudulent inducement based on a misrepresentation or omission, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result." (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 [1st Dept 2016], affd, 29 NY3d 137 [2017]). Dismissal is warranted where there is a lack of evidence to support a fraudulent inducement claim. (*Endothelix, Inc. v Vasomedical, Inc.*, 202 AD3d 620, 622 [1st Dept 2022] [affirming directed verdict dismissing fraudulent inducement claim absent "any evidence showing that defendant's alleged misrepresentations were intentional. . ."]). Similarly, a fraudulent inducement claim may be dismissed at the summary judgment stage where the evidence shows that reliance on an alleged misrepresentation was unreasonable. (*Glob. Minerals and Metals Corp. v Holme,* 35 AD3d 93, 99 [1st Dept 2006]). In *Global Minerals*, the First Department noted that New York law imposes an affirmative duty on

sophisticated businesspeople to exercise proper due diligence in complex transactions such as the PSA. *Id.* at 100.

As stated above, Plaintiffs briefing on the issue of fraudulent inducement is limited to alleged conduct by Bell, not Defendants. Plaintiffs acknowledged at oral argument that Bell's alleged misconduct would need to be imputed to Defendants in order to establish liability (NYSCEF 437 [Tr. At 33-37]) but have not in their supplemental submissions or otherwise pointed to an actionable representation or omission by Defendants let alone reasonable reliance or associated damages. Therefore, summary judgment is warranted in Defendants' favor on Plaintiffs' fraudulent inducement claim.

Plaintiffs belated and non-specific allegations of spoliation against Bell – a non-party – are not adequate to oppose summary judgment with respect to the claims asserted against the Defendants. (*Id.*). Spoliation claims may only be made against a party. (*Golan v N. Shore Long Is. Jewish Health Sys., Inc.,* 147 AD3d 1031, 1032 [2d Dept 2017]). New York does not recognize a cause of action for spoliation of evidence by a non-party; in part because it would require courts to engage in speculation about what the evidence may have shown. (*Ortega v City of New York*, 9 NY3d 69, 81-83 [2007]). Plaintiffs never made a motion to compel or for any other relief vis-à-vis Mr. Bell during discovery. Moreover, Defendants do not indicate (or even speculate) what would be located exclusively on Mr. Bell's hard drive and not accessible from Defendants or another source.

**B. There Is No Justiciable Controversy Warranting a Declaratory Judgment**

Plaintiffs contend that there is a justiciable controversy regarding the ownership of United 866 Management, LLC and "seek a declaratory judgment stating that they have not transferred or assigned their interest in United 866 Management LLC to Defendants." (Am.

Cplt. ¶¶ 104-108). The JAMS arbitration panel held in its Final Award that the PSA "did not extinguish Mr. Verschleiser's membership in United 866 Management, LLC." (NYSCEF 367 [JAMS Award at 6-7]). The Final Award was confirmed by Justice Perry in an Article 75 proceeding under Index No. 652796/2018 and that Decision and Order is part of the record in this case. (NYSCEF 369). The parties did not object to this point at oral argument (NYSCEF 437 [Tr. at 12]) and did not present any further argument in the supplemental briefing submitted to the Court. Therefore, summary judgment dismissing Plaintiffs' claim for a declaratory judgment is warranted because there is no justiciable controversy as to the ownership of 866 Management, LLC. (*Touro Coll. v Novus Univ. Corp.,* 146 AD3d 679, 679 [1st Dept 2017] [collecting cases]).

**C. Plaintiffs' Unsupported Claim for Conversion and Civil Theft Fails and Defendants' Motion Is Granted as Unopposed**

The Amended Complaint generally alleges that Defendants improperly possess or retain Verschleiser's e-mails and server equipment. (Am. Cplt. ¶¶109-115). Defendants' moving papers argue that, in addition to Plaintiffs' failure to specify any property wrongfully detained, the broad release in paragraph 5 of the PSA – which the Court has found to be valid – and in the alternative paragraph 6(a) of the PSA concerning contributions – require summary judgment dismissing the claim for conversion and civil theft. None of Plaintiffs' initial or supplemental submissions to the Court address its claim for conversion and civil theft or dispute Defendants' motion on this point. Accordingly, Defendants' motion for summary judgment dismissing Plaintiffs' claim for conversion and civil theft is granted. (*Mut. Benefits Offshore Fund, Ltd. v Zeltser*, 172 AD3d 648, 651 [1st Dept 2019] [granting summary judgment where evidence did not show defendant's exercise of control over defendant's funds]).

**D. Plaintiffs Breach of Contract Claim Survives Summary Judgment in Part**

The Amended Complaint alleges, in the alternative, that Defendants breached the PSA by "failing to make required distributions to Plaintiffs, changing the ownership structure so as to deprive Plaintiffs of their full distributions, violating the Agreement's confidentiality provisions, and by terminating and/or causing individuals to be terminated from their employment." Based on the record, the Court cannot dismiss the breach of contract claim in its entirety and instead dismisses the claim only insofar as it seeks damages for the termination of Ahuva Slomovitz.

First, Defendants' primary contention is that Verschleiser's cyber misconduct after the entry of the PSA forecloses any recovery by Plaintiffs. Defendants contend that Verschleiser accessed the administrative control dashboard for the United Realty email account, locked Mr. Frydman out of his email, and took other adverse actions. (NYSCEF 376 ¶¶9-11). The record before the Court includes references to a federal litigation known as *United Realty Advisors, LP v. Verschleiser,* S.D.N.Y. Index No. 14-cv-05903 ("Federal Action") in which the "hacking" issue is being litigated. The Court's declines to dismiss the breach of contract claims because the issue of whether Verschleiser is foreclosed from recovering under the PSA is contested in this case and may be resolved in the Federal Action.

Second, Defendants argue without citation to any evidence that there was no event triggering a distribution to Plaintiff under the PSA's "waterfall" and that changing the ownership structure was not specifically proscribed by the PSA. Plaintiffs allege that Defendant Frydman sold his interests in the REIT and the broker dealer for millions of dollars and that Plaintiffs are either entitled to a distribution or were wrongfully deprived of a distribution due to a change in the structure of the entities that would frustrate the purpose of the PSA and in particular Paragraph 6(b). (Am. Cplt. ¶¶68-71, NYSCEF 394 at 22). On this record, the Court concludes

that there are factual disputes that foreclose granting summary judgment dismissing Plaintiffs' breach of contract claims other than for the termination of Ms. Slomovitz.

Third, Defendants argue that Verschleiser was the first to disclose the PSA in December of 2013 by filing it in a litigation and that he cannot prove damages. Defendants have not made a *prima facie* showing that they are entitled to judgment on this point and the Court declines to award summary judgment.

Fourth, Defendants argue that Plaintiffs cannot recover based on the alleged termination of Ahuva Slomovitz in violation of paragraph 21 of the PSA because there is no basis for an award of damages. Defendants contend in their moving brief that the assertion that Ms. Slomovitz was improperly terminated is false, however, this is insufficient at the summary judgment stage. That said, Plaintiffs allege that damages accrued to Ms. Slomovitz only and do not challenge Defendants' argument that they suffered no damage on account of her termination. (Am. Cplt. ¶74). Thus, the breach of contract claim is dismissed to the extent it seeks to recover damages based on the termination of Ms. Slomovitz.

The foregoing notwithstanding, it remains Plaintiffs' obligation to establish a breach of the PSA and resulting damages on each of its surviving theories. The Court will hold a hearing to determine whether this matter should be stayed pursuant to CPLR § 2201 pending the Federal Action or whether the issues for trial can be limited pursuant to CPLR § 3212(g) including but not limited to whether any monies recovered by Defendants are included in the PSA's "waterfall" or whether Plaintiffs suffered damages as a result of the alleged hacking or as a result of the publicizing of the PSA.

* * * *

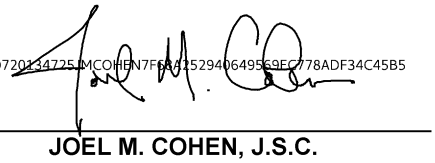
Accordingly, it is

**ORDERED** that Defendants' motion for summary judgment is **GRANTED IN PART** and counts, 1, 2 and 3 of the Amended Complaint are dismissed and count 4 is dismissed to the extent it seeks damages for wrongful termination and otherwise **DENIED** with respect to count 4; it is further

**ORDERED** that Plaintiffs' cross-motion for summary judgment is **DENIED;** it is further

**ORDERED** that the parties shall appear for a pre-trial conference on **August 10, 2022** at **11:00 AM** to discuss next steps.

This constitutes the Decision and Order of the Court.




**7/20/2022**
**DATE**

**JOEL M. COHEN, J.S.C.**

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|---|---|---|---|---|---|---|---|
| **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** |