At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 5th day of August 2022.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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PIERRE BARNARD and VAUGENS MICHEL,

Index No. 517425/2021
Cal. No. 3 MS 3

Plaintiffs,

AMENDED DECISION AND ORDER

-against-

MOSHE EICHLER, SCHMUEL HOROWITZ, MOSES GROSE AND CRG HOLDINGS LLC,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
MS 3	Docs. No. 33-42

Upon the foregoing cited papers, the decision and order on defendants' motion to dismiss, pursuant to CPLR 3211 (a) (7) and 3016 (b), is as follows:

In or about 2014-2016, plaintiffs, as representatives of the Vaugens Group, comprised of the plaintiffs and non-parties Fritz Monfluery and Mignonne Dorcely, entered into a joint venture agreement with the individual defendants (the Eichler Group) for the sole purpose of re-developing and/or renovating certain real properties and reselling them for profit. For purposes of the joint venture, the parties formed a limited liability company known as CRG Holdings LLC (CRG).

By a written amended agreement dated on or about February 18, 2016, the Eichler Group was to hold 55% of the shares of CRG while the Vaugens Group held 45%. As contribution to the joint venture, the Vaugens Group procured the following properties: 11538 231st Street, Jamaica, New York, 11411; 1404 Pitkin Avenue, Brooklyn, NY 11233; 1526 Lincoln Place, Brooklyn, NY 11213; 502A Maple Street, Brooklyn, NY 11203; 504 Maple Street, Brooklyn, NY 11203; 514/516 Maple Street, Brooklyn, NY 11203; 521 W. 150th Street, New York, NY 10031; and 77-05 Dumont Avenue, Jamaica, NY 11414.

As contribution to the joint venture, the Eichler Group claimed to have made a non-interest-bearing loan in the sum of about $3,477,711.42 to aid acquisition, renovation and re-development of the properties. Defendant Eichler allegedly appointed himself the sole manager of the joint venture, and in or about 2021, the Eichler Group informed plaintiffs that the entire portfolio of the joint venture properties had been sold.

It was alleged, according to a statement released by the Eichler Group, the total sum of $8,912,750.00 was realized from the sale, and that after all expenses, there was a net profit of $1,435,325.00. Plaintiffs alleged the purported statement of account was a farce, and a sum in the excess of $12,000,000.00 was realized from the sale of the properties. They asserted, the total expenses legitimately incurred by the joint venture, including the costs of acquisitions, was no more than $4,000,000.00, and contrary to the representations of the defendants, there remained to be shared by the joint venturers a sum not less than $8,000,000.00 in net profit. Plaintiffs asserted, the Eichler Group fraudulently engaged in self-dealing by selling the properties of the joint venture to entities controlled by themselves and their associates and failing to disclose their self-dealing to the plaintiffs.

Plaintiffs also alleged the Eichler Group did not make a loan of $3,477,711.42 to the joint venture and charged and received an interest rate above the rate slated in the agreement between the parties. Plaintiffs averred the Eichler Group received net proceeds from the sale of the joint venture assets in the sum of about $8,000.000.00, plaintiffs only received a distribution in the sum of $700,000.00, and under the parties' agreement, plaintiffs were entitled to $3,600,000.00, being 45% of the net proceeds of sale. They alleged there was an agreement amongst the individual defendants, in concert with each other, to cause the breach of contract and the other torts alleged here, and all the individual defendants benefitted financially from the breach of contract and the other torts alleged in the complaint.

Plaintiffs filed an amended complaint asserting the following eleven causes of action: 1) equitable accounting, 2) breach of fiduciary duty (only against individual defendants), 3) breach of contract, 4) conversion, 5) money had and received, 6) unjust enrichment, 7) breach of fiduciary duty (derivative), 8) constructive trust, 9) attorney's fees, 10) fraud, and 11) civil conspiracy. Defendants moved to dismiss the complaint in its entirety.

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The facts as alleged in the complaint are accepted as true. Plaintiff is accorded the benefit of every possible favorable inference, and the Court determines only whether the facts as alleged fit within any cognizable legal theory (*id.*). The court's function is to determine whether plaintiff's factual allegations fit within any cognizable theory, without regard to whether the allegations ultimately can be established (*e.g. JGK Indus., LLC v Hayes NY Bus., LLC*, 145 AD3d 979, 980 [2d Dept 2016] [citation omitted]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, [] dismissal should not eventuate' " (*Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1272 [2d Dept 2019], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Defendants made the following arguments in favor of dismissal: The first cause of action for an equitable accounting should be dismissed because (i) the plaintiffs have an adequate remedy at law, and (ii) the complaint does not demonstrate that a demand for an accounting was made. The second cause of action, which seeks damages for breach of fiduciary duty, should be dismissed because this claim, which essentially mirrors the fraud claim, is not pled with the particularity required by CPLR 3106 (b). The third cause of action, breach of contract, should be dismissed because the claim is deficiently pled. The alleged contract is not annexed. The complaint does not identify (i) whether the contract was written or oral, (ii) the material terms of the contract, or (iii) the specific provisions of the contract that were breached. The fourth cause of action, conversion, must be dismissed because a conversion claim may not be maintained where damages are merely sought for a breach of contract. Additionally, the money claimed to have been converted has not been specifically identified. The fifth (money had and received) and sixth (unjust enrichment) causes of action must be dismissed because these quasi-contract claims are barred when the complaint alleges the existence of a contract between the parties, as is the case here. The seventh cause of action, which purports to assert derivative claims on behalf of the LLC, must also be dismissed. The caption clearly reflects individual defendants, suing in their individual capacity to assert personal claims. The LLC is not named as a plaintiff and there is nothing asserted in the complaint of a derivative nature. Moreover, the complaint does not sufficiently allege, let alone establish, pre-suit demand or demand futility, as required by section 626 (c) of the Business Corporation Law. Defendants also alleged the eighth cause of action, which sought the imposition of a constructive trust over "about $4,000,000" of unidentifiable and fungible funds held in unidentified bank accounts, must also be dismissed because constructive trusts are generally imposed upon property, not fungible funds in unidentified bank accounts. The plaintiffs are using the request for a constructive trust as a pretext to secure pre-judgment attachment of the defendants' bank accounts. Defendants argued the ninth cause of action, seeking an award of attorney's fees in connection with the derivative claim, should also be dismissed on the ground plaintiffs have not properly pled a derivative claim (no pre-suit demand was made, the caption does not reflect the LLC as a derivative plaintiff and plaintiffs' claims are all individual in nature), the claim for attorneys' fees in conjunction with the derivative claim must be rejected and dismissed. They alleged plaintiffs' tenth cause of action, which sounded in fraud, must be dismissed because the fraud claim is redundant in light of the breach of contract claim and the breach of fiduciary duty claim and the fraud claim was not pled with specificity, as required by CPLR 3016 (b). Last, defendants alleged plaintiffs' eleventh cause of action, which sounded in civil conspiracy, must be dismissed because New York does not recognize civil conspiracy as an independent cause of action and all claims as against the individually named defendants should be dismissed because there is no rational basis for naming them.

The essence of this case is grounded on a breach of contract claim, which defendants alleged plaintiffs failed to properly plead and failed to attach a copy of. "The essential elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' "(*Stewart v*

Berger, 192 AD3d 940, 941 [2d Dept 2021], quoting *Liberty Equity Restoration Corp. v Maeng-Soon Yun*, 1060 Ad3d 623,626 [2d Dept 2018]). Plaintiffs have pled all the essential elements of a breach of contract claim, and indicated in paragraph 6 of the complaint, that the written agreement was made on or about February 18, 2016. Accordingly, defendants' motion to dismiss the third cause of action for breach of contract is denied.

Turning to plaintiffs' fraud claim in the tenth cause of action. Defendants alleged plaintiff may not maintain a cause of action for fraud and it is not plead with specificity. The elements of fraud are " 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' " (*Tsinias Enters.*, 172 AD3d at 1272, citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see Genger v Genger*, 152 AD3d 444, 445 [2017]). Further, "To state a [cause of action to recover damages] for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*Tsinias Enters.*, 172 AD3d at 1273, citing *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [2010]).

Noteworthy here, it has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract (*see e.g. Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). To survive a motion to dismiss for failure to state a cause of action for fraud, the complaint must allege a breach of a duty separate from a breach of contract (*Mañas*, 53 AD3d at 453). ". . . [W]here the plaintiff pleads that it was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a 'preconceived and undisclosed intention of not performing' the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud" (*Mañas*, 53 AD3d at 453-454, citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). However, no such claims were made here.

Further, fraud damages are meant to redress a different harm than damages on a cause of action for breach of contract (*Mañas*, 53 AD3d at 454). Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed (*see id.*). Fraud damages are meant to indemnify losses suffered as a result of the fraudulent inducement, such as damages for foregone opportunities, that would not be recoverable under a contract measure of damages (*see id.*). Where all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed, even where plaintiff adequately alleged the breach of an duty independent of the contract (*see id.*; *see also Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept 2014] [dismissing fraud claim seeking duplicative damages even where the plaintiff sufficiently alleged breach of an independent duty owed them independent of the contract]; *Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531, 531-532 [1st Dept 2014] [affirming dismissal of fraud claim where the damages sought on the fraud claim were duplicative, explaining that "plaintiff seeks the same compensatory damages for both claims . . . (I)ts purported fraud damages are actually contract damages"]; *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014] [fraud claim duplicative of a breach of contract claim where the fraud claim sought the same damages, namely return of the deposit paid by the plaintiff under the contract]). The breach of contract claim here encompasses plaintiffs' entire harm and resulting damages. Therefore, plaintiffs' tenth cause of action alleging fraud is dismissed, as duplicative of the contract claim.

Defendants also asserted, plaintiffs' first cause of action, which sought an equitable accounting should be dismissed because (i) the plaintiffs have an adequate remedy at law, and (ii) the complaint does not demonstrate that a demand for an accounting was made. They allege the second cause of action, which sought damages for breach of fiduciary duty, should also be dismissed because this claim, which essentially mirrored the fraud claim, is not pled with the particularity required by CPLR 3106 (b).

As to the first cause of action, the court will assume plaintiffs seek an accounting, although the complaint incorrectly labels the claim as an equitable accounting. Moreover, plaintiff properly plead that an accounting was sought and denied, contrary to defendants' assertions. Accordingly, the request to dismiss the first cause of action is denied.

Regarding plaintiffs' second cause of action, titled, breach of fiduciary duty, " 'Implicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included' " (*25 Bay Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 144 AD3d 665, 667 [2d Dept 2016], quoting *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]; [citations omitted]). "The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct" and even if a party is not in breach of its express contractual terms (*25 Bay Terrace*, 144 AD3d at 667, quoting *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]; [citations omitted]; *Elmhurst Dairy*, 97 AD3d at 784). "The covenant is breached 'where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other' " (*Michaan v Gazebo Horticultural, Inc.*, 117 AD3d 692, 693 [2d Dept 2014]). "Such a cause of action is not necessarily duplicative of a cause of action alleging breach of contract" (*25 Bay Terrace*, 144 AD3d at 667, quoting *Gutierrez*, 136 AD3d at 976; *Elmhurst Dairy*, 97 AD3d at 784).

Here, plaintiffs alleged, in part, in paragraphs 24 and 25,

> 24. By virtue and nature of plaintiffs' relationship with defendants, a fiduciary relationship was created between the parties, including, duties of care, loyalty, honesty, good faith, fair dealing, and obligation to act in the best interest of both parties. The Eichler group, represented by Moshe Eichler, was the sole manager of the joint venture.
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> 25. Eichler group breached this duty by failing to act in the best interest of the parties; dishonesty; self-dealing and secrecy. Defendants' conduct are evinced in their failure to notify plaintiffs of the full and true amount realized from the disposition of the assets of the joint venture; in failing to disclose the interest rate on the alleged loan; failing to account for the actual loan made to the joint venture; by selling the assets of the joint venture to other entities controlled by them, and turning to re-sell same to third parties at higher margins, without crediting the joint venture with the profits realized from the subsequent sale and by looting the bank accounts of the joint venture.

Accordingly, although titled breach of fiduciary duty, plaintiffs have properly plead a cause of action for breach of the covenant of good faith. Further, the court at this stage is unable to determine what additional damages, if any, plaintiff suffered as a result of the alleged breach, and therefore is unable to determine if this claim is duplicative of the breach of contract claim. Accordingly, the request to dismiss the second cause of action is denied.

Regarding plaintiffs' fourth cause of action for conversion, the Second Department has held, " Two key elements of conversion are the plaintiff's possessory right or interest in the property and the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights (*Siegler v Lippe*, 189 AD3d 903 [2d Dept 2020]). Here, plaintiffs alleged defendants received $8,000,000.00 as proceeds of the sale of the aforementioned properties of which $3.6 million belongs to plaintiffs, and that defendants have taken possession and refused to turn over to plaintiffs, despite demand, causing damages to plaintiffs. Thus, plaintiffs have plead a prima facie case of conversion (*id.*).

Plaintiffs' fifth cause of action for money had and received is dismissed as duplicative of the fourth cause of action for conversion. Plaintiffs' sixth cause of action for unjust enrichment is dismissed as duplicative of the breach of contract cause of action. Plaintiffs' seventh cause of action for breach of fiduciary duty is premature since no alleged corporate entity is a plaintiff and there are no allegations that the demand futility requirement has been met (*see* Business Corporation Law § 626 [c]). Plaintiffs' eighth cause of action for constructive trust, or prejudgment attachment, on defendants' undisclosed bank accounts, is also dismissed. Plaintiffs' ninth cause of action seeking attorney's fees for commencement of a derivative action is also dismissed on the ground no derivative action has been properly commenced. Rather, the instant action was commenced solely by plaintiffs in their individual capacity.

Regarding the eleventh cause of action for civil conspiracy, New York does not recognize civil conspiracy to commit a tort as an independent cause of action (*McSpedon v Levine*, 158 AD3d 618, 621 [2d Dept 2018]). 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 (*id.*). However, in that case, "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' " (*id.* at 621, quoting *Perez v Lopez*, 97 AD3d 558, 560 [2012]). In *McSpedon*, the Court held that the underlying tort of fraud was properly dismissed because the cause of action alleging civil conspiracy to commit fraud was also determined to be properly dismissed, "since it stands or falls with the underlying tort" (*id.* at 621 [citations omitted]). Here too, the claim of civil conspiracy is dismissed. The dismissal of the fraud claim is duplicative of the contract cause of action and warrants dismissal of the civil conspiracy claim.

Finally, defendants moved to dismiss the claims against the individual defendants since the complaint lacked any allegations seeking to pierce the corporate veil. The motion is granted (*see Hart v Jassem*, 43 AD3d 997 [2d Dept 2007]).

Accordingly, defendants' motion to dismiss is granted to the extent as set forth here.

ENTER:

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.