

**Slifka v Paul, Weiss, Rifkind, Wharton & Garrison,
LLP**

2024 NY Slip Op 32788(U)

August 9, 2024

Supreme Court, New York County

Docket Number: Index No. 155742/2023

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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RANDOLPH W. SLIFKA and DAVID DOVE (as Trustees of
and on behalf of a trust created under Article Eleventh of
the Will of Alan B. Slifka f/b/o Randolph W. Slifka),
derivatively on behalf of Nominal Defendants,

Plaintiffs,

- v -

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
and PETER FISCH,

Defendants,

and

477 MADAVE ASSOCIATES and 477 MADAVE
HOLDINGS, LLC,

Nominal Defendants.

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INDEX NO. 155742/2023

MOTION DATE 11/30/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. MELISSA A. CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 38

were read on this motion to/for

DISMISS

This is the latest of several actions related to the sale of a commercial office building located at 477 Madison Avenue, New York, New York. Defendants Paul, Weiss, Rifkind, Wharton & Garrison, LLP (Paul Weiss) and Peter Fisch (Fisch) (together, defendants) move, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint asserting claims for, inter alia, legal malpractice brought by plaintiffs Randolph W. Slifka (Randy) and David Dove (Dove) (together, plaintiffs), as Trustees of and on behalf of a trust created under Article Eleventh of the Will of Alan B. Slifka f/b/o Randolph W. Slifka (Randy's Trust), and on behalf of nominal defendants 477 Madave Associates and 477 Madave Holdings, LLC. For the reasons set forth below, the motion is granted, and the complaint is dismissed.

Factual Background

The following facts are drawn from the complaint unless noted otherwise and are assumed to be true for the purposes of this pre-answer motion (*see Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]). Plaintiffs are the trustees of Randy's Trust (NY St Cts Elec Filing [NYSCEF] Doc Filing No. 1, complaint ¶ 38). Randy's grandparents are Joseph Slifka (Joseph) and Sylvia Slifka, deceased (*id.*, ¶¶ 74-75). Their children are Alan B. Slifka (Alan), deceased, and Barbara Slifka (Barbara) (*id.*). Alan was the beneficiary of a trust created in 1949 for his benefit (Alan's Trust) (*id.*, ¶ 7). Barbara is the beneficiary of a trust created in 1949 for her benefit (Barbara's Trust) (together with Alan's Trust, the 1949 Trusts) (*id.*). Alan's children are Randy, Michael Slifka (Michael) and David Slifka (David) (*id.*, ¶ 50). Article Eleventh of Alan's Will created trusts for their benefit – Randy's Trust, Michael's Trust and David's Trust (*id.*).

Joseph constructed a commercial office building on land at 477 Madison Avenue (the Property), and in 1954, he divided the property interests in two – the Fee, comprised of the land and the building, and the Leasehold, which is the ground lease (*id.*, ¶ 45). Prior to June 2019, nominal defendant 477 Madave Holdings, LLC (Madave Holdings), a New York limited liability company, held title to the Fee (*id.*, ¶¶ 10, 40 and 48; NYSCEF Doc No. 19, Bardavid affirmation, exhibit 10). 477 Madave Management Corp. (Madave Management), a Delaware corporation (NYSCEF Doc No. 20, Bardavid affirmation, exhibit 11), owns a 0.5% membership interest in Madave Holdings (NYSCEF Doc No. 1, ¶ 10). Nominal defendant 477 Madave Associates (Madave Associates) (together with Madave Holdings, the Nominal Defendants) (the Nominal Defendants with Madave Management, collectively, the Madave Entities), a New York general partnership, owns a 99.5% interest in Madave Holdings and was the ground lessor for the Property (*id.*, ¶¶ 39 and 49). Joseph, Sylvia, Alan and Barbara were Madave Associates' original partners

(*id.*, ¶ 74). Upon his death, Alan's partnership interest transferred to his children's trusts and to Alan's Trust (*id.*, ¶ 76). Madave Associates' present partners and their ownership interests are as follows: Barbara, individually (33.5%); Barbara's Trust (16.5%); Alan's Trust (16.5%); Randy's Trust (11.1667%); Michael's Trust (11.1667%); and, David's Trust (11.1667%)¹ (*id.*, ¶ 50). The partnership agreement dated November 5, 1984, provides that the managing partner shall make the decisions affecting the partnership, including the sale of any assets, the proceeds of which would be distributed in accordance with each partner's proportionate share (*id.*, ¶¶ 39, 69 and 77). Barbara is Madave Associates' sole managing partner (*id.*, ¶¶ 2-3 and 70).

Prior to June 2019, J.A.B. Madison Holdings, LLC (JAB Holdings) held the Leasehold, that was set to expire on August 16, 2039, without a right to renewal (*id.*, ¶¶ 5, 47 and 51). J.A.B. Madison Associates LLC (JAB Associates), of which Barbara is the managing member, owns a 99.5% interest in JAB Holdings (*id.*, ¶¶ 5 and 52). In 2013, Shorenstein Properties LLC (Shorenstein), through two affiliates, acquired a 47.5% membership interest in JAB Holdings for \$32.8 million (*id.*, ¶¶ 55-56). In addition to Shorenstein, JAB Holding's other members are Barbara, individually, with a 47.5% interest, and Barbara's and Alan's Trusts, each with a 2.5% interest² (*id.*). J.A.B. Management Corp. (JAB Management) (with JAB Holdings and JAB Associates, collectively, the JAB Entities), of which Barbara is president, is JAB Holding's manager (*id.*, ¶¶ 53 and 68). Shorenstein, the Property's asset manager, hired Newmark Grubb Knight Frank (Newmark) as the building's property manager (*id.*, ¶¶ 59-60). During Shorenstein's tenure as asset manager, the building's occupancy rate fell from 88% in 2013 to below 60% in 2019 (*id.*, ¶ 61).

¹ Randy's, Michael's and David's Trusts each own an additional 5.5% interest as beneficiaries of Alan's Trust and its 16.5% interest in the partnership (*id.*, ¶ 38).

² Randy's Trust, Michael's Trust and David's Trust each own 0.833% of JAB Holdings as beneficiaries of Alan's Trust and its 2.5% ownership interest.

Law firm Paul Weiss is a limited liability partnership (*id.*, ¶ 41). Fisch is a partner specializing in commercial real estate law in Paul Weiss' New York City office (*id.*, ¶ 42).

A. The Sale of the Property

By letter dated April 14, 2017, Fisch, for Barbara as Madave Associates' managing partner, informed the other partners that she intended to consolidate the Fee and Leasehold interests and sell the Property as a unified whole (*id.*, ¶ 79; NYSCEF Doc No. 10, Bardavid affirmation, exhibit 1 at 1). The letter stated that Barbara was commissioning appraisals to determine the allocation of the sale proceeds between the Fee and the Leasehold interests and would keep the parties informed (NYSCEF Doc No. 10 at 2). It is alleged that Barbara was not involved in commissioning the appraisals (NYSCEF Doc No. 1, ¶ 85). Instead, defendants, “[w]ithout receiving any meaningful input from Barbara,” retained two firms with longstanding ties to Shorenstein – Landauer, a Newmark division, and Cushman & Wakefield, Inc. (Cushman) – to perform the appraisals (*id.*, ¶¶ 15 and 86).

Defendants purportedly allowed Shorenstein to skew the appraisal process in favor of JAB Holdings, the Leasehold owner in which Shorenstein was a member, over Madave Holdings, the Fee owner, for three reasons: (1) personal animosity towards Randy after he had commenced litigation to halt Barbara's decision to sell the Property, *infra*; (2) Barbara had a greater personal interest in the JAB Entities than the Madave Entities; and, (3) defendants “coveted Shorenstein as a potential client” (*id.*, ¶¶ 27-29). Shorenstein commented on each of the appraisals from Newmark and Cushman to increase the proceeds allocated to the Leasehold over the Fee. Defendants are alleged to have actively encouraged Shorenstein's involvement while defendants, together with Barbara, excluded Randy and Michael from the process (*id.*, ¶¶ 92-93 and 96).

Newmark and Cushman complied by decreasing their valuations for the Fee and increasing their valuations for the Leasehold (*id.*, ¶¶ 99-100, 105 and 109).

Meanwhile, on April 18, 2017, Randy and Michael, as beneficiaries of Randy's and Michael's Trusts and as testamentary beneficiaries of Alan's Trust, commenced an action against Barbara, David, the Madave and JAB Entities, SRI Ten 477 Madison LLC, and SRI Ten 477 Madison TRS challenging Barbara's authority to sell the Property (*Slifka v Slifka*, Sup Ct, NY County, index No. 652058/2017) (*Slifka I*)³ (*id.*, ¶ 80; NYSCEF Doc No. 2, complaint, in *Slifka I*). Paul Weiss represented Barbara and the Madave and JAB Entities in the action (NYSCEF Doc No. 56, notice of motion, in *Slifka I*). In a decision dated April 18, 2019, the court (Cohen, J.) declared that "following the death of Alan Slifka, Barbara Slifka solely held and continues to hold the authority of the Managing Partner over [Madave Associates]" (NYSCEF Doc Nos. 707-709, decision, in *Slifka I*). The Appellate Division, First Department, affirmed Justice Cohen's decision (*Slifka v Slifka*, 177 AD3d 418, 419 [1st Dept 2019]).

Defendants represented Barbara, personally, and the Madave and JAB Entities in connection with the allocation of the sale proceeds (NYSCEF Doc No. 1, ¶ 10). Defendants, acting pursuant to Barbara's authority as Madave Associates' managing partner and JAB Holding's president, allegedly devised and implemented a method to distribute the proceeds that was contrary to the Nominal Defendants' interests (*id.*, ¶¶ 110-111). With Shorenstein's approval, defendants purportedly resolved that Newmark and Cushman would furnish updated appraisals, after which defendants would "(a) average the relative values of the Fee and Leasehold interests from each set of biased appraisals; and (b) use those averages to calculate the ratio of Sales Proceeds attributable

³ SRI Ten 477 Madison LLC owns a 47.5% interest in JAB Associates, and SRI Ten 477 Madison TRS LLC owns a 47.5% interest in JAB Management (NYSCEF Doc No. 51, mem of law at 3, in *Slifka I*). The court may take judicial notice of court records and files (*see RGH Liquidating Trust v Deloitte & Touche LLP*, 71 AD3d 198, 207 [2009]).

the Fee interest and Leasehold interest” (*id.*, ¶¶ 125-126). Paul Weiss and Shorenstein allegedly excluded Randy from the appraisal and allocation processes pursuant to a “common interest agreement” (*id.*, ¶ 120). According to the updated appraisals, Cushman appraised the Fee at \$50 million and the Leasehold at \$74 million, while Newmark appraised the Fee at \$84 million and the Leasehold at \$110 million (*id.*, ¶¶ 128-129). Shorenstein allegedly prevailed upon Cushman and Newmark to revise these amounts to favor the Leasehold over the Fee (*id.*, ¶ 130). Cushman and Newmark are alleged to have complied with Shorenstein’s request (*id.*, ¶ 131-132). Paul Weiss allegedly never objected to the downward revisions of the Fee’s value before circulating the revised appraisals to Shorenstein for approval (*id.*, ¶¶ 133-134).

On June 4, 2019, the Fee and Leasehold owners, represented by Paul Weiss, entered into a purchase agreement to sell the Property to RFR Holdings, LLC for \$258.25 million (*id.*, ¶ 82). The sale closed on June 27, 2019 (*id.*). Barbara, upon defendants’ advice, authorized the allocation, and Shorenstein, tasked with distributing the funds, split the proceeds based on the updated appraisals as follows: 60.43%, or \$143,508,532.70, to the Leasehold owner, and 39.57%, or \$95,148,455.58, to the Fee owner (*id.*, ¶¶ 17 and 146-147). After payment of a post-escrow holdback, the Fee owner received \$97,206,095.58 and the Leasehold owner received \$146,650,892.70 from the net proceeds (*id.*, ¶ 17). This resulted in a payment of more than \$68 million to Shorenstein based on its 47.5% interest in JAB Holdings (*id.*, ¶ 148).

Shorenstein and Barbara then entered a “contribution agreement,” drafted by Paul Weiss under which Barbara, the 1949 Trusts, and Shorenstein agreed to reimburse JAB Holdings its expenses in defending itself against claims arising out of the allocation (*id.*, ¶ 151). Defendants purportedly allowed the contribution agreement to lapse before Barbara could resolve the breach of fiduciary claims of all of Madave Associates’ partners related to the allocation (*id.*, ¶ 153).

Defendants also “engineered a settlement with Shorenstein that purposefully released the claims of Madave Associates and Madave Holdings against Shorenstein in exchange for a payment made solely to Barbara personally” (*id.*, ¶ 154).

Plaintiffs complain that allocating more proceeds to the Leasehold owner over the Fee owner because of the Leasehold’s higher appraisal value was erroneous because the Leasehold was due to expire in 20 years (*id.*, ¶ 143). Plaintiffs allege that Barbara, defendants, and real estate professionals acknowledged that, in view of the short time remaining on the ground lease, it was not profitable for a ground tenant to borrow funds to upgrade the Property to attract tenants and reverse the building’s declining occupancy rate (*id.*, ¶¶ 61, 63 and 144). The ground lease also was not structured to allow for mortgage financing (*id.*, ¶ 66).

B. The Arbitration Proceeding

On July 3, 2019, plaintiffs, as trustees for Randy’s Trust, delivered a notice of intent to arbitrate and demand for arbitration to Barbara regarding the alleged misallocation of the sale proceeds⁴ (*id.*, ¶ 157). Barbara, David, the Madave and JAB Entities, SRI Ten 477 Madison LLC, and SRI Ten 477 Madison TRS LLC petitioned to stay the arbitration (NYSCEF Doc No. 1, petition, in *Slifka v Slifka*, Sup Ct, NY County, index No. 654274/2019) (*Slifka II*). Paul Weiss represented Barbara and the Madave and JAB Entities in the special proceeding (*id.*). The court (Cohen, J.) denied the petition on June 29, 2020 (NYSCEF Doc No. 33, decision, in *Slifka II*).

On September 12, 2022, a three-member AAA panel (the Panel) issued a partial final award in plaintiffs’ favor (NYSCEF Doc No. 1, ¶ 167). In a 62-page decision, the Panel concluded that Barbara had breached her fiduciary duties as Madave Associates’ managing partner and the implied covenant of good faith and fair dealing on the partnership agreement (NYSCEF Doc No.

⁴ Madave Associates’ partnership agreement provides that disputes among the partners would be resolved in arbitration before the American Arbitration Association (AAA) (NYSCEF Doc No. 1, ¶ 78).

2, complaint, exhibit A at 1). The Panel determined that Barbara had “improperly allocated to herself and affiliates of Shorenstein ... approximately three times the value of their respective interests in the Property’s economically unviable leasehold estate ... while wrongfully and unfairly limiting Barbara’s disfavored nephew, Randolph W. Slifka (‘Randy’), to roughly one-half the value of his beneficial interests in the Property’s highly valuable fee estate” (*id.*).

The Panel observed that Paul Weiss represented Barbara in the arbitration, had represented the entities owning the Fee and the Leasehold, and “was intimately involved in the allocation process at issue” (*id.* at 2 and 19). The Panel determined that Barbara’s interests on both sides were not equal (*id.* at 20) because any decision favoring one would negatively impact the other (*id.* at 23). Consequently, “Fisch, who testified that he acted as Barbara’s agent in the allocation process, was tainted by all her conflicts [of interest]” (*id.*). The Panel wrote:

“Fisch and Paul Weiss had conflicts of interests of their own because they served as counsel to Barbara, indisputably owed duties to act in her best interest, and simultaneously represented the Fee Partnership and other entities involved in the ownership structure of both the Fee and Leasehold which had diametrically opposed interests vis-à-vis the allocation...As a result, Fisch and Paul Weiss had a duty ‘to act in the best interest of the partnerships’ with respect to the allocation, but those were conflicting interests” (*id.*).

Despite its awareness of these conflicts, Paul Weiss did not obtain a conflict waiver which the Panel, citing rule 1.4 (a) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0), reasoned “was clearly improper” (*id.* at 37). The Panel observed, “it appears that Barbara permitted Fisch to structure and staff the allocation process as he saw fit; that he engaged appraisers having economic ties to Shorenstein; that he actively and eagerly supported Shorenstein’s efforts to influence the appraisers’ valuations in 2017; and that he did so again in 2019” (*id.* at 40). The Panel wrote that “Fisch knew or should have known, too, that he and his law firm could not represent the directly competing interests of the Fee and Leasehold entities while strongly favoring

the Leasehold to the detriment of the Fee, as the evidence clearly establishes was done in the allocation process at issue” (*id.* at 41 n 14).

The Panel valued the Leasehold at \$50 million and the Fee at \$208.25 million (*id.* at 49). Less post-closing costs and fees, the Fee owner should have received \$198,336,782.95 (*id.*). Based on its combined 16.67% interest, Randy’s Trust should have received \$33,435,465.53 from the net proceeds, which was \$16,012,358.83 more than the \$17,423,106.70 that had been distributed to it (*id.* at 48-50). The Panel awarded Randy’s Trust \$16,012,358.83 in damages, with interest at the statutory rate of 9% from June 27, 2019, and expert fees and costs to be determined later (the Arbitration Award) (*id.* at 60). The Panel denied plaintiffs’ request for legal fees (*id.* at 55).

In 2022, after arbitration had commenced, defendants secured releases from the Nominal Defendants releasing them from liability, for which the Nominal Defendants allegedly received no consideration (NYSCEF Doc No. 1, ¶¶ 36 and 174-175). It is also claimed that Paul Weiss “caused Barbara to sign [the releases] without the benefit of any independent counsel,” and that Barbara, who “was almost 93 years old, of diminished capacity and incapable of understanding the impact of those releases,” lacked full knowledge of Paul Weiss’s alleged malpractice, that has caused the Nominal Defendants to suffer \$101,130,687.37 in losses, excluding interest (*id.*, ¶¶ 175-176, 179 and 181). Barbara later reached post-arbitration settlements with Michael and David with respect to the allocation of the sale proceeds, and she has “spent her personal funds or other assets held in trust to compensate” Randy and his brothers (*id.*, ¶¶ 182-184).

C. Other Actions or Proceedings

On February 21, 2023, Randy, as a beneficiary of the 1949 Trusts, commenced an action captioned *Slifka v Hecht* (Sup Ct, NY County, index No. 650936/2023) (*Slifka III*) against Michael

Hecht (Hecht)⁵ alleging that Hecht had breached his fiduciary duty to the 1949 Trusts with respect to the misallocation of the proceeds from the Property's sale, and sought damages of not less than \$14,158,296.23 (NYSCEF Doc No. 15, Bardavid affirmation, exhibit 6). The court (Ostrager, J.) dismissed the complaint without prejudice to amendment (NYSCEF Doc No. 16, Bardavid affirmation, exhibit 7). Justice Ostrager later dismissed the amended complaint on the ground that Randy lacked standing to sue without the consent of Dove, the co-trustee of Randy's Trust (NYSCEF Doc No. 88, decision, in *Slifka III*). The court also concluded that Randy could not sue on behalf of Barbara's Trust because "Randy is not a beneficiary of Barbara Slifka's Trust, and there is no evidence that Randy will ever be named a beneficiary" (*id.* at 2). Notably, Randy admitted that the Arbitration Award had been fully paid (NYSCEF Doc No. 12, Bardavid affirmation, exhibit 3, ¶ 174). After the action was restored (NYSCEF Doc No. 105, decision, in *Slifka III*), plaintiffs filed a second amended complaint (NYSCEF Doc No. 108, second amended complaint, in *Slifka III*). The action has been stayed on consent until the resolution of plaintiffs' second arbitration against Barbara (NYSCEF Doc No. 117, stipulation, in *Slifka III*).

On September 6, 2023, Randy, as a contingent beneficiary of Barbara's Trust and as a beneficiary of Alan's Trust, and Dove, as a trustee, issued another demand for arbitration against Barbara related to the misallocation (NYSCEF Doc No. 1, verified petition, in *Slifka v Slifka*, Sup Ct, NY County, index No. 656184/2023) (*Slifka IV*). This court denied Barbara's petition to stay this second arbitration (NYSCEF Doc No. 46, decision, in *Slifka IV*).

D. This Action

Plaintiffs commenced this derivative action on behalf of the Nominal Defendants on June 27, 2023, by filing a summons and complaint asserting five causes of action against defendants

⁵ Hecht is a trustee of the 1949 Trusts, is Barbara's longtime accountant and financial advisor, and holds Barbara's power of attorney.

for: (1) professional malpractice; (2) breach of fiduciary duty; (3) aiding and abetting breach of fiduciary duty; (4) unjust enrichment; and, (5) common-law fraud. Plaintiffs seek more than \$100 million in compensatory damages, punitive damages, and attorneys' fees (NYSCEF Doc No. 1, ¶¶ 217 and at 49). Defendants now move, pre-answer, to dismiss the complaint. Plaintiffs oppose.

Legal Standards

On a motion to dismiss brought under CPLR 3211 (a) (7), “the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must “accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Dismissal is warranted if “the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). “When documentary evidence is submitted by a defendant ‘the standard morphs from whether the plaintiff stated a cause of action to whether it has one’” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citation omitted]). The complaint will be dismissed if the evidence demonstrates that the plaintiff has no cause of action (*id.*; see also *Holder v Jacob*, — AD3d —, 2024 NY Slip Op 03864, *6-7 [1st Dept 2024]).

Under CPLR 3211 (a) (1), dismissal is appropriate where the documentary evidence utterly refutes the plaintiff's claims and conclusively establishes a defense as a matter of law (*Audthan LLC v Nick & Duke, LLC*, — NY3d —, 2024 NY Slip Op 02223, *5 [2024]). To qualify as documentary evidence, the evidence must be “unambiguous[,] ... of undisputed authenticity ... [and] its contents ... essentially undeniable” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted]).

A party moving for dismissal under CPLR 3211 (a) (5) “bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017] [internal quotation marks and citation omitted]). The opposing party must then demonstrate “whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period ... [and] must aver evidentiary facts establishing that the action was timely or ... raise an issue of fact as to whether the action was timely” (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019] [internal quotation marks and citations omitted]).

Discussion

Defendants contend that plaintiffs are not proper derivative plaintiffs for three reasons. First, defendants assert that Randy is motivated by personal animus. Randy has repeatedly sued, or threatened to sue, Barbara related to the sale of the Property and the allocation of the proceeds. After having recovered the Arbitration Award, Randy has now sued Hecht with respect to the allocation (NYSCEF Doc No. 12 at 40-45). As recently as July 14, 2023, Randy, through counsel, demanded that Barbara transfer \$19,307,649.58 to Barbara’s Trust and \$12,871,766.10 to Alan’s Trust to make them “whole” and urged her to “retain counsel ... so that we can resolve this amicably without the need for further proceedings” (NYSCEF Doc No. 18, Bardavid affirmation, exhibit 9 at 2). Second, defendants contend that plaintiffs are situated differently from the Nominal Defendants’ other owners because Randy’s Trust has been made whole, and therefore, plaintiffs lack an incentive to pursue claims on behalf of the other owners. Third, those other owners have settled their claims with respect to the allocation and have released defendants from liability.

Plaintiffs counter that defendants have failed to show this action is not being maintained for the benefit of the partners because all partners will share in any recovery. Plaintiffs insist that

they are seeking to recover: (1) the \$46 million windfall Shorenstein received from the Property's sale and (2) the legal fees paid to defendants in connection with that transaction (NYSCEF Doc No. 36, oral argument tr at 4 and 10). At oral argument, plaintiffs explained that "no one has ever recovered this \$46 million and the legal fees" (*id.* at 6).

A derivative action is "a remedy designed to vindicate rights of the corporation and the other shareholders ... and takes on the attributes of a class action" (*Steinberg v Steinberg*, 106 Misc 2d 720, 721 [Sup Ct, NY County 1980]). Because a plaintiff suing derivatively on behalf of a partnership or corporation acts in a fiduciary capacity (*see Tenney v Rosenthal*, 6 NY2d 204, 209 [1959]; *Steinberg*, 106 Misc 2d at 721), the plaintiff's relationship with the other partners or shareholders cannot "be so acrimonious or emotional as to demonstrate that plaintiff cannot act as an adequate representative for the partnership" (*Oliver v Boone*, 194 AD3d 525, 526 [1st Dept 2021]). "[A] major consideration is whether the plaintiff can fulfill his or her fiduciary duty to the corporation and other shareholders" (*Hubshman v 1010 Tenants Corp.*, 2012 NY Slip Op 32448[U], *10 [Sup Ct, NY County 2012]). Thus, a plaintiff who can fairly and adequately represent the interests of a company is a proper derivative plaintiff (*see Gilbert v Kalikow*, 272 AD2d 63, 69 [1st Dept 2000], *lv denied* 95 NY2d 761 [2000]). Conversely, a plaintiff who "was not interested in anything beyond what was due to [plaintiff] personally" is not a suitable plaintiff in a derivative action (*Cialeo v Mehlman*, 210 AD2d 67, 68 [1st Dept 1994]; *see also James v Bernhard*, 106 AD3d 435, 435 [1st Dept 2013] [removing the plaintiff in a derivative action due to a conflict of interest]; *Sigfeld Realty v Landsman*, 234 AD2d 148, 148 [1st Dept 1996] [dismissing action where plaintiff's conflict of interest rendered it an "improper party to commence a shareholder's derivative action"]]). The court must consider the "totality of the relationship"

between the owners in determining whether the plaintiff is a suitable derivative plaintiff (*Gilbert*, 272 AD2d at 63 [internal quotation marks and citation omitted]).

Defendants assert that plaintiffs are “driven by Randy’s personal animus and an appetite for vengeance” based on his having embarked on a “serial litigation campaign” against Barbara and anyone connected to her regarding the allocation (NYSCEF Doc No. 8, defendants’ mem of law at 9). The only proof furnished thus far with respect to personal animus on anyone’s part appears in the Panel’s decision. There, the Panel concluded that Barbara “neither trusted or liked” Randy and identified several of her statements evincing her dislike of him (NYSCEF Doc No. 2 at 20). The Panel, however, did not discuss whether Randy had either expressed or exhibited any personal hostility towards his aunt. In addition, a history of prior lawsuits, does not, by itself, constitute conclusive proof of personal animus (*see Pokoik v Pokoik*, 146 AD3d 474, 475 [1st Dept 2017] [prior litigation between the parties not shown “to be so acrimonious or emotional as to demonstrate that plaintiff cannot act as an adequate representative for the companies”]). That said, prior litigation is just one factor to consider, and plaintiffs have in fact commenced at least four other actions or proceedings and two arbitrations against Barbara or the 1949 Trusts under which Randy claims to be a beneficiary related to the Property and the allocation.

Here, viewing the totality of the relationship between the Nominal Defendants’ owners, plaintiffs’ interests conflict with those of Barbara, Michael, and David, who either individually or through trusts of which they are beneficiaries own the Nominal Defendants, such that plaintiffs cannot fairly and adequately represent those other owners’ interests. The causes of action here all concern defendants’ actions during the allocation process. The Nominal Defendants’ other owners have settled and released their claims arising out of that process and, on behalf of the entities over which they exert control, have agreed to indemnify defendants from any losses incurred in any

action related to the allocation process and the Property. Additionally, plaintiffs have not adequately pled damages. Thus, pursuing this derivative action would not benefit the Nominal Defendants' other owners (*compare NWM Capital, LLC v Scharfman*, 144 AD3d 414, 416 [1st Dept 2016] [denying a motion to disqualify where the defendants "failed to show 'a substantial likelihood that the derivative action is not being maintained for the benefit of the [limited partners]'" [citation omitted]).

To begin, "[t]he 'fundamental purpose' of compensatory damages is to have the wrongdoer 'make the victim whole'" (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 448 [2018] [citation omitted]; *see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 [2007] ["[d]amages in a legal malpractice case are designed 'to make the injured client whole'" [citation omitted]). Generally, "[j]udicial policy forestalls a double recovery for an injury" (*Zarcone v Perry*, 78 AD2d 70, 79 [2d Dept 1980], *appeal withdrawn* 54 NY2d 1028 [1981], *affd* 55 NY2d 782 [1981], *cert denied* 456 US 979 [1982], citing *Derby v Prewitt*, 12 NY2d 100, 107 [1962]), particularly in derivative actions (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 272 [2010] [granting dismissal because the plaintiffs could not recover their pro rata share under a partnership agreement and damages in a direct action]; *Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014] [stating that the plaintiff pursuing a derivative action "may not obtain a recovery that otherwise duplicates or belongs to the corporation"])).

In this case, plaintiffs are pursuing the same damages for which plaintiffs, Michael and David have already been compensated. Madave Associates' partnership agreement provides that distributions shall be made in accordance with each partner's pro rata interest (NYSCEF Doc No. 26, Bonner affirmation, exhibit 6 at 3 [Article 7, § 7.1]). Plaintiffs readily admit that "[Randy's] direct claims [have been] satisfied" (NYSCEF Doc No. 36, oral argument

tr at 50), and they cannot dispute that Michael and David have settled their claims regarding the Property and the allocation of the sale proceeds. In 2022, Michael and David executed separate agreements resolving to settle:

“a claim against Barbara (in her capacity as President and sole Director of 477 Madave Management Corp., as sole managing partner of 477 Madave Associates, as sole Director and President of J.A.B. Madison Management Corp., and/or as sole Manager of J.A.B. Madison Associates, LLC) and against the persons or entities that ultimately owned the leasehold interest in the Property that received an arguably greater share of the Net Sale Proceeds than they were otherwise entitled (the ‘**Potential Allocation Claim**’)” (NYSCEF Doc Nos. 13-14, Bardavid affirmation, exhibits 4 and 5 at 3).

Each having received \$8 million in the settlements (NYSCEF Doc No. 36 at 6), Michael and David have recovered the monies due to them from the allocation. Thus, not only have plaintiffs have failed to adequately plead their damages, but they are seeking an impermissible double recovery for the same injury by pursuing this derivative action (*see Continental Cas. Co.*, 15 NY3d at 272).

To the extent that plaintiffs seek to recover the legal fees paid to defendants (NYSCEF Doc No. 36 at 6), those claims, whether they be direct or derivative, have been released. Each settlement agreement contains a mutual release. The “Releasing Parties” include Barbara, the Madave and JAB Entities, and Michael or David, and the “Released Parties” include Barbara, the Madave and JAB Entities and “each of their respective present and former ... attorneys” (NYSCEF Doc Nos. 13 at 6-7; NYSCEF Doc No. 14 at 4-5). The Releasing Parties agreed to release the Released Parties:

“from any and all claims, actions, causes of action ... attorneys’ fees ... of whatever kind or nature in law, equity, derivative or otherwise ... and whether now known or unknown, suspected or unsuspected, discovered or undiscovered, that may exist at law, in admiralty or in equity, in contract or in tort, class action or derivative action: from the beginning of the world until the Effective Date of this Agreement that arise out of, relate to, or result in any way from the Potential Allocation Claim, the Property (including but not limited to the Allocation of the Net Sale Proceeds), 477 Madave Holdings, LLC, 477 Madave Management Corp., 477 Madave Associates, J.A.B. Madison Holdings, LLC, J.A.B. Madison Management Corp.,

J.A.B. Madison Associates, LLC, Alan's Trust, and Barbara's Trust (collectively, the '**Released Claims**') (NYSCEF Doc Nos. 13 at 6-7 [¶ 6(a)]; NYSCEF Doc No. 14 at 4-5 [¶ 6(a)]).

The releases state that Barbara, Michael and David, on behalf of themselves and the Releasing Parties over which they exert control, "shall not ... directly or indirectly (including derivatively) assert any Released Claim against any Released Parties" (NYSCEF Doc No. 13 at 7 [¶ 6(b)]; NYSCEF Doc No. 14 at 6 [¶ 6 (b)]). Barbara, Michael and David agreed they would not "facilitate, cooperate in, induce, incite, commence, prosecute or cause to be prosecuted any Released Claim" (NYSCEF Doc No. 13 at 8 [¶ 6(b)]; NYSCEF Doc No. 14 at 6-7 [¶ 6(c)]). Barbara, Michael and David agreed to "indemnify and hold harmless the Released Parties for any losses incurred by any Released Party ... in connection with any of the Released Claims pursued by or on behalf" of Barbara, Michael and David or the Released Parties they controlled, including costs, expenses and attorneys' fees (NYSCEF Doc No. 13 at 8 [¶ 6(g)]; NYSCEF Doc No. 14 at 7 [¶ 6(f)]).

It is well settled that "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks and citation omitted]). The broad language in the releases clearly and expressly release defendants, as the Nominal Defendants' attorneys, from any and all direct or derivative claims arising out of or related to the Property and the allocation of the proceeds. Barbara executed the agreements containing the releases on behalf of all the Madave Entities (NYSCEF Doc Nos. 13 at 18-19; NYSCEF Doc No. 14 at 17). As has already been litigated, Barbara is Madave Associates' sole managing partner (*Slifka*, 177 AD3d at 419), and section 8.1 of the partnership agreement states, in relevant part, that "all decisions affecting the Partnership shall be made by the Managing Partner in his sole and absolute discretion" (NYSCEF Doc No. 26 at 4 [Article 8, § 8.1]). The releases also identify Barbara as

the sole director and president of Madave Management, the entity with a 0.5% ownership interest in Madave Holdings (NYSCEF Doc Nos. 13-14 at 1). Consequently, the Nominal Defendants have released any claims, whether they be direct or derivative, against defendants.

More importantly, not only have the Nominal Defendants' other owners agreed they would not assist anyone in prosecuting a Released Claim, but in the event plaintiffs prevail in this derivative action, Barbara, Michael and David, individually or through their trusts, would not receive the benefit of any recovery. Instead, under the releases, each of them would be responsible for indemnifying defendants as Released Parties. Based on these facts, plaintiffs are not suitable derivative plaintiffs who can fairly and adequately represent the interests of the Nominal Defendants' other owners (*see Gilbert*, 272 AD2d at 69 [dismissing derivative causes of action where "plaintiff has failed to demonstrate that he will fairly and adequately represent the interests of the limited partnership"]); *Cialeo*, 210 AD2d at 68 [granting dismissal where the plaintiff was not seeking to vindicate the other partners' rights]). Moving forward with a derivative action runs counter to the interests of the other owners whose claims have been satisfied and would adversely impact them if plaintiffs were to prevail.

Jakob v Gershwin Partners, Inc. (2011 NY Slip Op 33873[U], Sup Ct, NY County 2011)), cited by defendants, is factually similar. The plaintiff in *Jakob* brought a shareholder derivative action for an accounting and other claims stemming from the corporation's settlement of a prior lawsuit, the terms of which plaintiff alleged were "unfair to him personally" (*id.* at 4). Six of the eight shareholders in the corporation voted to approve the settlement (*id.* at 7). The court (Kapnick, J.) found that the plaintiff lacked standing to assert claims on behalf of the corporation because "the position taken by Jakob in this action is not shared by the other shareholders" (*id.*). The court reasoned that the relief sought in the complaint "will inure to [plaintiff's] own benefit, while

adversely impacting the other shareholders or seeking to reverse the express will of the shareholders” (*id.* at 9). The court concluded plaintiff lacked standing to pursue a derivative action (*id.* at 11). In this case, Michael and David have settled and released all claims related to the sale of the Property and the allocation of the sale proceeds, and by doing so, they have recovered their damages, even if they have not been “fully compensate[d] ... for their individual losses” as has been alleged (NYSCEF Doc No. 1, ¶ 183). Similarly, Barbara has released all claims that she and the Nominal Defendants may have had related to the Property and the allocation.

Nevertheless, plaintiffs maintain that the releases are invalid. A release may be set aside “for any of ‘the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake’” (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276 [citation omitted]). Plaintiffs bear the burden of setting aside the releases (*see LMM Capital Partners, LLC v Mill Point Capital, LLC*, 224 AD3d 504, 506 [1st Dept 2024]). Plaintiffs argue that neither release expressly refers to defendants and buries the term “‘attorneys’ ... deep in a tangle of legalese” (NYSCEF Doc No. 27, plaintiff mem of law at 8). The fact the releases do not specifically name the defendants, though, does not render them invalid (*see Coby Group, LLC v Kriss*, 63 AD3d 569, 570 [1st Dept 2009] [granting dismissal where release unambiguously released attorneys from all direct and derivative liability]). Given the broad language in the releases, plaintiffs’ assertion that the releases are not enforceable because they failed to expressly define legal malpractice as a Released Claim is unpersuasive (*see Argyle Capital Mgt. Corp. v Lowenthal, Landau, Fischer & Bring*, 261 AD2d 282, 282 [1st Dept 1999], *lv denied* 93 NY2d [1999] [legal malpractice claim barred by broad language in release]). In any event, Barbara and the Nominal Defendants would have been aware of a potential legal malpractice claim once the Panel issued the partial final award in September 2022. Barbara, for the Nominal Defendants,

executed the first release in June 2022 and the second release in November 2022, after the Panel issued its decision and the Arbitration Award (NYSCEF Doc Nos. 13-14 at 1).

Plaintiffs' argument regarding a lack of consideration paid to the Nominal Defendants is equally unpersuasive (*see Mergler v Crystal Props. Assoc.*, 179 AD2d 177, 180 [1st Dept 1992]). A general release is valid even in the absence of consideration (*see WDF, Inc. v City of New York*, 104 AD3d 557, 557 [1st Dept 2013], citing General Obligations Law § 15-303).

Next, plaintiffs maintain that Barbara lacked capacity to execute the releases. Barbara's competency to contract must be measured at the time of the transaction (*see Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). Plaintiffs bear the burden of tendering proof on the issue of her incapacity (*see Fleming v Ponziani*, 24 NY2d 105, 112 [1969]; *Prude v County of Erie*, 47 AD2d 111, 113 [4th Dept 1975] ["while the proof of mental incapacity need not be of the most convincing quality, there still must be some proof"]). Here, plaintiffs have failed to tender competent evidence of Barbara's alleged impaired capacity. They rely solely on the complaint's allegation that Barbara "was almost 93 years old, of diminished capacity and incapable of understanding the impact of those releases" (NYSCEF Doc No. 1, ¶ 175). The complaint, however, is not verified (*see CPLR* 105 [u]), and plaintiffs fail to proffer any other, nonconclusory evidence of Barbara's diminished capacity. That defendants had argued before the Panel that Barbara lacked the physical and mental ability to testify in the first arbitration (NYSCEF Doc No. 1, ¶ 175), likewise, is inadequate proof of her incapacity at the time she executed the releases. Moreover, the Panel wrote that "Barbara testified in a recorded videoconference evidentiary hearing requested by Claimants and before the Panel's Chair on behalf of the Panel on January 28, 2022" in its decision (NYSCEF Doc No. 2 at 3), and the decision contains multiple excerpts of her testimony. To the extent plaintiffs complain that Hecht, who holds Barbara's power of attorney, lacked authority to act for her in her capacity

as Madave Associates' managing partner (NYSCEF Doc No. 27 at 9), it should be noted that Barbara personally executed each release on behalf of the Madave and JAB Entities. Additionally, plaintiffs, after oral argument, informed this court that Barbara's petition to stay the second arbitration had been brought by Robert Fagenson, the Temporary Guardian appointed for her under Article 81 of the Mental Hygiene Law, and that this appointment plainly makes clear that Barbara lacked the mental capacity to execute the releases (NYSCEF Doc No. 38, letter from plaintiffs' counsel dated January 25, 2024). However, the Temporary Guardian was appointed for Barbara on November 20, 2023 (NYSCEF Doc No. 1, petition, ¶ 3, in *Slifka IV*), more than one year after Barbara executed the second release. Moreover, there is no evidence that the releases have been revoked (*see* Mental Hygiene Law § 81.29 [d]).

Plaintiffs also contend that the releases are invalid under rule 1.8 (h) (2) of the Rules of Professional Conduct (22 NYCRR 1200.0),⁶ but they have not raised a factual issue on the rule's applicability. Rule 1.8 (h) (2) provides that “[a] lawyer shall not ... settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith” (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.8 [h] 2]). Plaintiffs assert that defendants caused an unrepresented and uninformed Barbara to sign the release without the benefit of independent counsel (NYSCEF Doc No. 1, ¶¶ 175-176), but they have not offered any evidence to support this conclusory allegation so as to satisfy their burden of establishing that the releases were obtained in violation of this rule (*see David v Hack*,

⁶ The complaint alleges a violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.8 (h) (1) [“A lawyer shall not ... make an agreement prospectively limiting the lawyer's liability to a client for malpractice”]. Plaintiffs did not address defendants' arguments concerning this rule in their opposition, relying instead on rule 1.8 (h) (2). Thus, plaintiffs have abandoned any reliance on rule 1.8 (h) (1) (*see Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]).

2011 NY Slip Op 32443[U], *3-4 [Sup Ct, NY County 2011], *rev on other grounds* 97 AD3d 437 [1st Dept 2012] [denying a pre-answer motion to dismiss where the plaintiff acknowledged signing a release but “contends that he was unrepresented at the time he signed it, and was under the impression that the release was limited to his fee dispute, and not a malpractice action”). In addition, the releases both state that each Releasing Party had the opportunity to discuss the effect of the release with counsel (NYSCEF Doc No. 13 at 7 [¶ 6 (c)]; NYSCEF Doc No. 14 at 6 [¶ 6 (d)]). *Swift v Ki Young Choe* (242 AD2d 188 [1st Dept 1998]), referenced by plaintiffs, is inapposite. The attorneys in *Swift* required their clients to sign a release in their favor before they would proceed with closing on a one-sided property transaction, which favored one of defendants’ clients (*id.* at 190-191). Here, defendants did not represent the Nominal Defendants in the first arbitration, that had been commenced against Barbara, only (NYSCEF Doc No. 2 at 1). Additionally, Barbara executed the releases in 2022, two years after defendants last represented the Nominal Defendants in any action or proceeding related to the Property or the allocation.

In view of the foregoing, the court need not address the other arguments advanced by the parties in support of or in opposition to the motion.

Accordingly, it is

ORDERED that the motion brought by defendants Paul, Weiss, Rifkind, Wharton & Garrison, LLP and Peter Fisch to dismiss the complaint is granted, and the complaint is dismissed in its entirety with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

8/9/2024
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

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