

**Blue Jay Way Hospitality LLC v Twiggy Partners
LLC**

2024 NY Slip Op 34129(U)

November 15, 2024

Supreme Court, New York County

Docket Number: Index No. 655233/2023

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

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BLUE JAY WAY HOSPITALITY LLC,SHR VENTURES
LLC,CROSSROADS ADK LLC,CROSSROADS PRESERVE
LLC,

Plaintiffs,

- v -

TWIGGY PARTNERS LLC,GREGORY PECK, SUSAN
CRONIN,

Defendants.

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TWIGGY PARTNERS LLC , individually and derivatively on
behalf of BLUE JAY WAY HOSPITALITY LLC

Plaintiff,

-against-

STANLEY RUMBOUGH, SHR VENTURES, LLC,
CROSSROADS ADK, LLC, CROSSROADS PRESERVE, LLC,
SIMOS DIMAS, DIMAS LAW GROUP

Defendants.

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INDEX NO. 655233/2023

MOTION DATE 8/2/24, 8/1/24

MOTION SEQ. NO. 003 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596150/2023

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 175, 176, 177

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 170, 171, 172, 173, 174, 178, 180, 181, 182, 183, 184

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action between members of a limited liability company, the defendants, Twiggy Partners, LLC (“Twiggy”), and its principals, Gregory Peck, and Susan Cronin move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the fifth and sixth causes of action, breach of fiduciary

duty and fraudulent inducement, respectively, alleged by the plaintiffs SHR Ventures LLC, Crossroads ADK LLC, and Crossroads Preserve LLC (collectively, the “Rumbough Plaintiffs”) (MOT SEQ 003). Furthermore, third-party defendants Simos Dimas and Dimas Law Group (collectively, the “Dimas Parties”) move pursuant to CPLR 3211(a)(7) to dismiss the second third-party claim asserted against them by Twiggy for aiding and abetting breach of fiduciary duty (MOT SEQ 005). MOT SEQ 003 is granted in part. MOT SEQ 005 is granted to the extent of dismissing Twiggy’s claim against the Dimas Parties.

I. BACKGROUND

SHR Ventures, Crossroads ADK, are entities owned and controlled by third-party defendant Stanley Rumbough as sole member. The members of Crossroads Preserve are Rumbough and non-party Michael McNally. Twiggy, a project developer, is an entity whose membership includes Otis Ventures, LLC of which Peck and Cronin are members.

Rumbough was interested in developing two projects in upstate New York: (1) the Campground Project - the property was acquired by SHR Ventures; and (2) the ACR Project – on which Crossroads ADK held a mortgage. Crossroads Preserve funded capital improvements on the land making up the ACR Project. The Rumbough Plaintiffs and Twiggy formed Blue Jay Way Hospitality, LLC, to develop and operate the Campground Project and possibly develop the ACR Project. Twiggy was the managing member of Blue Jay Way, with a 20% membership interest. The Rumbough Plaintiffs held the remaining 80% membership interest.

Under Blue Jay Way’s Operating Agreement, Twiggy was obligated to make an initial capital contribution of \$30,000 in cash. Twiggy was also credited with \$3.5 million to reflect the value of its past and anticipated future value of effort for both projects. Twiggy was also obligated to arrange for a loan to cover approximately 50-75% of the costs for developing the Campground Project and to make additional capital contributions if needed. The Rumbough Parties were to make the following capital contributions: SHR Ventures was to contribute the property for the Campground Project; Crossroads ADK was to execute an assignment of its mortgage on the ACR Project property; and Crossroads Preserve was to contribute the value of its capital improvements made on the ACR Project Property.

Twiggy allegedly failed to take the steps necessary to initiate any work on the projects, such as, among other things, paying the required \$30,000 capital contribution, failing to open a

bank account in Blue Jay Way's name, and never seeking approval for "Major Actions" as required under Section 5.2 of the Operating Agreement. After no work had commenced for the Campground Project, the Rumbough Plaintiffs removed Twiggy as managing member of Blue Jay Way under Section 5.1 of the Operating Agreement "for cause" due to "willful or intentional misconduct". SHR Ventures also withdrew its capital contribution, the Campground Project property, pursuant to Section 3.1.6 of the Operating Agreement.

On October 23, 2023, the Rumbough Plaintiffs, along with Blue Jay Way, commenced this action against Twiggy only, alleging two causes of action seeking judgments declaring (1) that Twiggy breached the Operating Agreement and (2) that the plaintiffs were justified in removing Twiggy as managing member.¹

In the meantime, on November 28, 2023, Twiggy answered and filed a third-party complaint against Crossroads ADK and SHR Ventures LLC asserting counterclaims sounding in breach of the contract (Operating Agreement), breach of fiduciary duty, unjust enrichment, and fraudulent transfer. Twiggy also asserted a separate third-party claim against Rumbough personally for tortious interference with contract and aiding and abetting a breach of fiduciary duty.

On February 19, 2024, the plaintiffs filed an amended complaint, adding a third cause of action seeking declaratory relief, fourth cause of action seeking damages for breach of the contract (Operating Agreement), and fifth cause of action for breach of fiduciary duty against Twiggy. The plaintiffs also added a sixth cause of action for fraudulent inducement against Twiggy, and adding Peck and Cronin to the litigation as defendants on that cause of action. The defendants now move to dismiss the plaintiffs' fifth and sixth causes action (MOT SEQ 003). The plaintiffs oppose the motion.

On March 20, 2024, defendants Twiggy, Peck and Cronin filed an amended answer to the amended complaint and asserted eight counterclaims against the Rumbough Plaintiffs and

¹ In an Order to Show Cause dated November 27, 2023, the court (Ostrager, J. [Ret.]) granted Twiggy a temporary restraining order restraining the plaintiffs from taking any action as the managing member of Blue Jay Way. Twiggy posted an undertaking in the sum of \$1 million. By an order dated February 1, 2024, the court (Crane, J.) denied Twiggy's application for a preliminary injunction and vacated the TRO.

three third-party claims against Rumbough personally and one against Rumbough's attorneys, Simos Dimas and Dimas Law Group (the "Dimas Parties"). Among other allegations, Twiggy alleges that Crossroads ADK breached its fiduciary duty to Twiggy by transferring ownership of the Campground Project property from Blue Jay Way to SHR Ventures for less than fair market value. Specifically, Twiggy's second third-party claim alleges that Rumbough and the Dimas Parties aided and abetted Crossroads ADK's breach of fiduciary duty. The Dimas Parties now move to dismiss Twiggy's claim against them in the third-party action on the ground of failure to state a cause of action (CPLR 3211[a][7]) (MOT SEQ 005). Twiggy opposes the motion.

All of Blue Jay Way's claims against the defendants were discontinued without prejudice by a stipulation of the parties dated May 31, 2024; all other claims continued.

II. DISCUSSION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a pleading adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory (see Hurrell-Harring v State of New York, 15 NY3d 8 [2010]; Leon v Martinez, 84 NY2d 83 [1994]).

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXi Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) (quoting Fontanetta v John Doe 1, supra).

A. MOT SEQ 003

As an initial matter, the court notes that the defendants' notice of motion does not specify under which CPLR provision it seeks to dismiss the Rumbough Plaintiffs' fifth (breach of fiduciary duty) and sixth (fraudulent inducement) causes of action, and inexplicably seeks to dismiss "the Defendants' counterclaims". However, In their memorandum of law, the defendants argue for dismissal of the plaintiff's fifth and sixth causes of action pursuant to CPLR 3211(a)(7).

1. Rumbough Plaintiffs' Fifth Cause of Action: Breach of Fiduciary Duty

The Rumbough Plaintiffs fifth cause of action of the amended complaint, alleging that Twiggy breach a fiduciary duty, is not dismissed. To plead a cause of action for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. See Burry v Madison Park Owner LLC, 84 AD3d 699 (1st Dept. 2011); Rut v Young Adult Inst., Inc., 74 AD3d 776 (2nd Dept. 2010). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." Swartz v Swartz, 145 AD3d 818, 823 (2nd Dept. 2016); see also Burry v Madison Park Owner LLC, *supra*.

The Rumbough Plaintiffs' breach of fiduciary duty cause of action is largely duplicative of its' breach of contract claim. The amended complaint alleges that Twiggy failed to make its required Capital Contribution, failed to open accounts and pay for expenses under the name of Blue Jay Way, failed to properly perform its duties as Managing Member, and failed to perform various services enumerated under the Operating Agreement. These allegations are all covered by the Operating Agreement. A breach of fiduciary duty is duplicative of a breach of contract claim where, as here, the plaintiff fails to allege a breach of any duty independent of the parties' contract. Ho v Star Contractors, Inc., 226 AD3d 511 (1st Dept. 2024), Soames v 2LS Consulting Eng'g, D.P.C., 187 AD3d 490 (1st Dept. 2020). However, the same cause of action also alleges that Twiggy engaged in self-interested transactions between Blue Jay Way and Twiggy's principals, Peck and Cronin. Twiggy argues that this allegation is not pleaded with particularity as required by CPLR 3016(b). In response, the Rumbough Plaintiffs submit an affidavit of Jerelyn Creutz, manager of Crossroads ADK and SHR Ventures. Creutz details several instances of Cronin and Peck using Blue Jay Way's funds for self-interested transactions, including using the Campground Property for a personal family vacation and categorizing the travel expenses as cash contributions made to Blue Jay Way, and listing assets purchased from Cronin's mother as capital contributions to Blue Jay Way. In assessing a motion under CPLR 3211(a)(7) a court may freely consider affidavits submitted by the plaintiff to remedy any defects

in the complaint (Rovello v Orofino Realty Co., *supra*, 40 NY2d at 636).” Leon v Martinez, 84 NY2d 83, 88 (1994); see Amaro v Gani Realty Corp., 60 AD3d 491 (1st Dept.2009). “[U]nless 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.” Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). Here, the defendants offer nothing to dispute these allegations made by Creutz in his affidavit.

The defendants’ argument that Section 5.6.3 of the Operating Agreement authorized the defendants to engage in such self-interested transactions despite the conflict of interest is unavailing. This section merely states that each member acknowledges that Blue Jay Way’s business may involve dealings with Blue Jay Way’s members and the members’ affiliates. The same section goes on to state that these dealings must be at arm’s length and on commercially reasonable terms. The defendants offer no proof that the self-interested transactions alleged by Creutz were made at arm’s length and on commercially reasonable terms under Section 5.6.3. Finally, the defendants’ reliance on the business judgment rule is also unavailing, as the business judgment rule does not protect members who are alleged to have engaged in fraud or self-dealing. See Wolf v Rand, 258 AD2d 401 (1st Dept. 1999). In any event, the issue of whether the self-interested acts of the defendants are protected by the business judgment rule cannot be determined as a matter of law at this juncture of the litigation. See ALP, Inc. v Moskowitz, 204 AD3d 454, 458 (1st Dept. 2022); Gochberg v Sovereign Apartments, Inc., 119 AD3d 431, 432 (1st Dept. 2014).

2. Rumbough Plaintiffs’ Sixth Cause of Action: Fraudulent Inducement

“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has also recognized that “a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract.” North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see 37 E. 50th St. Corp. v Rest. Grp. Mgmt. Servs., L.L.C., 156 AD3d 569 (1st Dept. 2017). Thus, in actions involving parties to a contract, a plaintiff states a cause of action sounding in fraudulent inducement where he pleads that the defendant misrepresented a present fact extraneous to the contract with knowledge of its falsity, the plaintiff justifiably relied on the misrepresentation, and the plaintiff suffered damages. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st

Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999); see generally Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 (2009). CPLR 3016(b) requires that fraudulent inducement be pleaded with particularity.

First, the court notes once again that part of the Rumbough Plaintiffs' fraudulent inducement claim is duplicative of its breach of contract claim. Particularly, the Rumbough Plaintiffs' allegation that the defendants represented that they would be responsible for completing the Campground Project and fund 25 to 50 percent of the total project budget is based on the defendants' expression of a future expectation or intent to perform under the Operating Agreement. See Pate v BNY Mellon-Alcentra Mezzanine III, LP, 163 AD3d 429 (1st Dept. 2018), Cronos Group Ltd. v XComIP, LLC, 156 AD3d 54 (1st Dept. 2017).

The amended complaint also alleges that the defendants falsely represented their experience in project development and hospitality management and failed to mention their past failures in convincing the Rumbough Plaintiffs to enter into the Operating Agreement. However, these allegations fail to state a cause of action for fraudulent inducement for several reasons. First, the amended complaint does not identify any affirmative misrepresentations made by Peck and Cronin about their role in the Crescent Hotel in Beverly Hills, California, other than that they were responsible for the Crescent Hotel's success. Furthermore, the Rumbough Plaintiffs fail to plead that they justifiably relied on Peck and Cronin's failure to mention their past failures in projects including the Cooper Square Hotel, the Friars Club, and the Woodstock 50 Project. Indeed, Creutz's own affirmation and attached exhibits detail the legal and financial problems surrounding these projects, and even mention Peck and Cronin by name. Peck and Cronin's role in these projects, and their subsequent problems including foreclosure and litigation, were public knowledge that was readily available to the Rumbough Plaintiffs through ordinary diligence. See Tall Tower Capital, LLC v Stonepeak Partners LP, 174 AD3d 441 (1st Dept. 2019). Therefore, the Rumbough Plaintiffs' sixth cause of action for fraudulent inducement must be dismissed.

The court notes that the Rumbough Plaintiffs purportedly seek alternative relief to replead their amended complaint under CPLR 3211(e) if the court grants the defendants' motion. The Rumbough Plaintiffs also submit a proposed second amended complaint attached to an attorney affirmation of Edward P. Grosz. This request is denied, as the Rumbough Plaintiffs' breach of fiduciary duty claim survives and amending the fraudulent inducement claim

is futile given that it is duplicative of the breach of contract claim and fails to plead justifiable reliance. See Triad Intern. Corp. v Cameron Indus., Inc., 122 AD3d 531 (1st Dept. 2014).

B. MOT SEQ 005

Twiggy's second third-party claim as against the Dimas Parties is dismissed pursuant to CPLR 3211(a)(7). A cause of action for aiding and abetting breach of fiduciary duty "requires a *prima facie* showing of a fiduciary duty owed to plaintiff, ... a breach of that duty, and defendant's substantial assistance ... in effecting the breach, together with resulting damages" Yuko Ito v Suzuki, 57 AD3d 205 (1st Dept. 2008), quoting Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 11 (1st Dept. 2008). "A defendant knowingly participates in the breach of fiduciary duty when he or she provides substantial assistance to the fiduciary" and "affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." Schroeder v Pinterest Inc., 133 AD3d 12, 25 (1st Dept. 2015) (internal quotations omitted). This cause of action must be pleaded with particularity under CPLR 3016(b). "[A] plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty". Glob. Mins. & Metals Corp. v. Holme, 35 AD3d 93, 101-102 (1st Dept. 2006).

Here, the crux of Twiggy's aiding and abetting claim is that the Dimas Parties, in their role as Rumbough's attorneys, aided and abetted Crossroads ADK's breach by transferring ownership of the property of the Campground Project from Blue Jay Way to SHR Ventures at less than fair market value. Twiggy fails to allege, with any particularity, any substantial assistance that the Dimas Parties provided Crossroads ADK in transferring the property. The affirmation of Gregory Peck, submitted by Twiggy in opposition to this motion, does little to allege any specific conduct by the Dimas Parties in aiding and abetting any breach by Crossroads ADK. Peck merely states that the Dimas Parties are Rumbough's long-time attorneys, and that the Dimas Parties helped draft the Operating Agreement. Moreover, most of Twiggy's allegations are based only "upon information and belief, without the slightest reference to the source of the information or the grounds for the belief." Zelnic v Bidermann Indus. U.S.A., 242 AD2d 227, 228 (1st Dept. 1997). This is wholly insufficient to state a cause of action for aiding and abetting a breach of fiduciary duty. See Cimen v HQ Capital Real Estate L.P., 227 AD3d 587 (1st Dept. 2024) [fraud]; Elmrock Opp. Master Fund I, L.P. v Citicorp North Am., 155 AD3d 411 (1st Dept. 2017) [fraud in the inducement].

The Dimas Parties also seek a stay of discovery pending the outcome of this motion. See CPLR 3211(g). As this motion is granted and the action is dismissed as against the Dimas Parties, that request for relief is denied as moot.

Any relief not expressly granted herein is denied.

III. CONCLUSION

Accordingly, upon the foregoing papers, it is


ORDERED that the motion of the defendants Twiggy Partners LLC, Gregory Peck, and Susan Cronin to dismiss the amended complaint (MOT SEQ 003) is granted to the extent that the complaint is dismissed in its entirety as against defendants Gregory Peck and Susan Cronin, and the sixth cause of action is dismissed as against Twiggy Partners LLC, and the motion is otherwise denied, and it is further

ORDERED that the motion of third-party defendants Simos Dimas and Dimas Law Group to dismiss the third-party complaint as against them (MOT SEQ 005) is granted and the third-party complaint is dismissed in its entirety as against third-party defendants Simos Dimas and Dimas Law Group, and the motion is otherwise denied, and it is further,

ORDERED that the Clerk shall mark the file accordingly, and it is further

ORDERED that counsel for all remaining parties shall appear for a status conference on December 12, 2024, at 11:30 a.m., as previously scheduled.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/15/2024

 DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER
 GRANTED GRANTED IN PART