SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

----------X

EAGLE CAL SC, INC.,

Plaintiff,

-against-

SIYOUN MAHFAR & ASSOCIATES, INC. and SMA EQUITIES, LLC,

Defendants.

----------X

TRIAL/IAS PART 16

Index No.: 600178/17

Mot. Seq. 002
Mot. Date: 6-8-17

Submit Date: 6-22-17

The following papers have been read on this motion:

Notice of Motion, dated 5-19-17.....1
Defendants' Memorandum of Law in Support, dated 5-19-17.....2
Plaintiff's Memorandum of Law in Opposition, dated 6-8-17.....3
Defendants' Reply Memorandum of Law, dated 6-21-17.....4

This motion by the defendants pursuant to CPLR 3211(a)(1) and (a)(7) for an order dismissing the amended complaint is granted to the extent that the Third, Fourth, Fifth, and Sixth causes of action as alleged against defendant Siyoun Mahfar & Associates, Inc. are dismissed, and the Eighth cause of action as alleged against defendant SMA Equities, LLC is dismissed. The motion is otherwise denied.

The amended complaint in this action sounds in breach of contract, breach of fiduciary duty, conversion, fraud, unjust enrichment, and also asserts a right to an accounting. It is based on the alleged malfeasance of the defendants in the handling of settlement proceeds of a lawsuit, in which the plaintiff Eagle Cal SC, Inc. (Eagle Cal) has an interest.

The undisputed factual background is not complex. In 1994 plaintiff's predecessor in interest, Jack Mahfar, formed with two other parties a limited partnership named Hillel Associates, L.P. (Hillel), whose business was real estate investment. The other partners were Siyoun Mahfar and SM & Associates (SM). Siyoun Mhafar had a 49% interest, and SM had a 1% interest. Jack Mahfar held a 50% interest in Hillel. In 1995 Jack Mahfar transferred his interest to plaintiff.

Under the partnership agreement, SM was appointed the general partner, and under section 10, subsections A nd B, was granted, to the extent relevant here,

> "ultimate control of the business... and shall make all decisions affecting the business and... shall have the power to : Authorize or approve all actions with respect to (a) distributions out of the partnership; (b) the acquisition, encumbering or disposition of properties... provided, however, that (x) [1] the written consent of a majority of percent of the limited partnership interest shall be required before the partnership may enter into a binding agreement for the sale, exchange, leasing... or other disposition of substantially all of the assets of the partnership ...
>
> Under subsection C of section 10, the general partner was to
> "Render periodic reports to all partners with respect to the operations of the partnership on at least an annual basis... Deposit all funds of the partnership in one or more separate bank accounts in the name of the partnership... Maintain complete and accurate records... and make such records and books of account available for inspection and audit by any partner..."
>
> Subsection D of section 10 provides that
> "In carrying out it duties hereunder, the general partner shall not be liable to the partnership or to any other partner for any actions taken in good faith and reasonably believed to be in the best interests of the partnership, or for errors of judgment, but shall be liable for wilful misconduct, breach of the general partner's fiduciary duties or breach of this Agreement."
>
> Finally, profits were to be distributed according to the interest held by each

---

[1] So in original. The "x" appears to be a typographical error as the next point in a series, as it is preceded only by "c".

partner as described in a Schedule A, and as Jack Mahfar had a 50% interest, his successor in interest, plaintiff Eagle Cal, was entitled thereto.

Hillel purchased a property in Manhattan. In 2010 it commenced suit against a third party, 265 East Houston, LLC (apparently, the owner of an abutting building), for damage done to the property by this defendant. Plaintiff alleges that SM as general partner did not provide any annual or periodic reports to Eagle Cal regarding developments in the law suit. It does not allege, however, that it was not aware of the litigation at all until the suit settled, as described below. In April, 2015, while the suit was pending, plaintiff sold its interest in the property that was the subject of the suit; the amended complaint does not allege to whom. It did not sell its interest in Hillel, the plaintiff in the suit against 265 East Houston, LLC.

In January, 2016 the suit settled. A letter dated February 3, 2016 (the February 3 letter) concerning the settlement was thereafter sent by a law firm to a corporation in California named McComb Inc., which the amended complaint states provides services to plaintiff Eagle Cal, and which forwarded that letter to Eagle Cal. The amended complaint alleges that the law firm sending that correspondence represented defendant SMA Equities (SMAE). It further alleges that this entity is "owned and operated by any combination of Siyoun, Sina Nahfar ("Sina") and Sassan Mahfar ("Samy"). Amended Complaint, at ¶ 17. Because it is critical to the allegations and legal theories that are the subject of the present action and motion, its contents are reproduced in their entirety here:

"Re: Closing Adjustments for 255 East Houston Street

> "The lawsuit entitled *Hillel Associates L.P. v. 265 East Houston LLC,* New York County Index No. 0108209/2010 has been resolved, with a settlement balance to plaintiff in the amount of $647,859.00 after payment of legal fees, costs and disbursements of the lawsuit and the outstanding management fee.
>
> As you know, Eagle Cal SC, Inc, has not yet satisfied its post-closing obligation payment of $1,250,000 to SMA Equities.
>
> It is proposed that the Eagle Cal's share of the settlement (i.e. $323, 929.93) be credited toward its post-closing obligation. Unless we hear from you otherwise, we will so instruct our clients. The balance of Eagle Cal's post-closing obligation will be reduced to $926,070.07."

As noted above, plaintiff alleges that the law firm represented SMA Equities.

Plaintiff in its pleading denies that its has any obligation to SMAE, and even if it did, that is irrelevant to its right to its share of the settlement proceeds. Plaintiff therefore claims that SMAE has admitted that this share belongs to it, yet has refused to turn over that share after repeated demands, or to provide answers to reasonable requests for information about the settlement. This law suit followed.

"In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criterion is whether from the complaint's 'four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law' " *Nasca v. Sgro,* 101 AD3d 963, 964 (2d Dept 2012), quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977). "[T]he court must afford the complaint a liberal construction, 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (citations omitted) ' " *Woss, LLC v 218 Eckford, LLC,* 102 AD3d 860, 860 (2d Dept 2013), quoting *Leon v. Martinez,* 84 NY2d 83, 87–88 (1994); see also, *Tanenbaum v.*

Molinoff, 118 AD3d 774 (2d Dept 2014); *Schiller v. Bender, Burrows and Rosenthal, LLP*, 116 AD3d 756, 756 (2d Dept 2014); *Baron v. Galasso*, 83 AD3d 626, 628 (2d Dept 2011); *Salazar v. Sacco & Fillas, LLP*, 114 AD3d 745 (2d Dept 2014).

This does not extend to mere legal conclusions, however, which are not entitled to the presumption of truth and are not to be accorded every favorable inference. *Morris v Morris,* 306 AD2d 449, 451 (2d Dept. 2003). Nevertheless, inartfully drawn complaints may be supplemented by affidavits on such a motion in order to sustain a claim. *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 (1976). The question then becomes not whether a cause of action is stated, but rather whether the pleader has one. *Guggenheimer v. Ginzburg, supra.*

A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." *Fontanetta v John Doe 1*, 73 AD3d 78, 83 (2d Dept. 2010). "In order for evidence to qualify as documentary, it must be unambiguous, authenticated and undeniable (citations omitted)." *Granada Condominium III Assn v Palomino*, 78 AD3d 996, 997 (2d Dept. 2010). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case." *Fontanetta v. John Doe 1, supra, Cives Corp., v George A. Fuller Co., Inc.*, 99 AD3d 713, 714 (2d Dept. 2012).

In this case, neither side has submitted any evidence other than the partnership agreement and certain correspondence, including the February 3, 2016 letter

reproduced above. Accordingly, and because there is no dispute about the authentic nature of those letters, they become the sole basis for analyzing the vitality of the amended complaint, and their weight under CPLR 3211(a)(1).

Given the liberal approach to be taken with regard to pleadings and the well-established authority set forth above, the motion must be denied as to certain claims, but others are subject to dismissal.

As an initial matter, the Court finds that for purposes of this motion an agency relationship existed between SM, the general partner of Hillel, and SMAE, whose attorney proposed the disposition of the settlement proceeds. This is based on the pled overlapping ownership of the two corporate defendants, and the February 3 letter, alleged to have been authored by the attorney for SMAE [2] but acknowledging, by clear implication, SMAE's obligation to pay plaintiff its share of the settlement monies because it was owed the same by SM as general partner of Hillel.

Further, the attorney author of the letter stated that unless it heard otherwise, "we will so instruct our clients" (SMAE, as pled) to apply plaintiff's share of the proceeds to a separate debt the writer asserts was owed by plaintiff to his clients. The Court is not required to pass on the *bona fides* of that debt, or whether SM could properly dispose of plaintiff's share in this manner, to conclude that in granting the plaintiff "every possible favorable inference" (*Leon v. Martinez,, supra*) the amended

---

[2] In their Memorandum of Law submitted in support of this motion, the defendants state that the attorney represented both SM and SMAE, which certainly strengthens the allegations of the close relationship alleged by the plaintiff. However, for purposes of this motion the Court addresses this relationship solely on the pleading and the documents submitted. Factual descriptions found in the Memorandum (such as certain details regarding plaintiff's sale of its interest in the Manhattan property, and the origin of the debt defendants assert is owed to SMAE) carry no weight, as they are not found in affidavits – insufficient in any event to support a CPLR 3211(a)(1) dismissal – and are not pled in the amended complaint.

complaint alleges facts indicating that SMAE had the authority to act on behalf of SM, the general partner, with regard to plaintiff's share of the settlement proceeds. *See, generally, Faith Assembly v Titledge of New York York Abstract, LLC,* 106 AD3d 47, 58 (2d Dept. 2013). This would render SM as principal liable for the acts of SMEA, its disclosed agent, as acting within the scope of its authority. *Id.*

As noted, the February 3 letter acknowledges that plaintiff is entitled to half the settlement proceeds. The amended complaint asserts that SMAE failed to deliver plaintiff's share, despite demand therefor, and to which it was entitled under the Hillel partnership agreement. The first three causes of action sound in breach of contract and are directed to SM. To state a claim for breach of contract, the plaintiff must allege the existence of a contract, performance by the plaintiff, breach by the defendant, and damages caused by the breach. *See., e.g., Canzona v Atanasio,* 118 AD3d 841 (2d Dept. 2014); *Furia v Furia,* 116 AD2d 694 (2d Dept. 1986). There is no dispute about the parties and terms of the Hillel agreement, and plaintiff's predecessor's performance by way of payment of his share of capital, described on the last page thereof.

Given the agency relationship, the facts alleged are sufficient to sustain the First cause of action, pled against SM, which alleges a breach of the Hillel agreement for failure to pay over the settlement funds and/or to deposit them in a Hillel account. The Second cause of action, also against SM, cannot be dismissed at this juncture because it alleges a transfer to SMAE of the proceeds instead of to plaintiff, also a breach of the Hillel agreement. This latter claim is factually supported by the February 3 letter, which stated, as set forth above, that unless SMAE heard otherwise

it would simply credit the funds to the debt it stated was owed to it. The Court rejects defendants' assertion that this letter must lead to dismissal of these two claims because it was merely a proposal. The letter contained a trigger mechanism that would eventuate in the credit only, not payment to the plaintiff, in the event of silence from the plaintiff, and plaintiff alleges that it made demands for payment that went unanswered.

However, the Third cause of action, breach of contract against SM based on failure to render periodic reports, should be dismissed. There are no facts alleged that this breach, assuming it occurred, led to any damages, especially since SM had full authority under the Hillel agreement to make all the decisions required during the litigation. Thus plaintiff, even if it had been made aware of everything that occurred, had no authority to alter the course of the litigation or to influence the settlement. Relatedly, there is no allegation that periodic updates might have resulted in an outcome more favorable to Hillel, and thus to plaintiff. than the one that ultimately ensued.

The Fourth cause of action alleges a breach of fiduciary duty against SM. It is dismissed because no factual allegations are made that would point to a fiduciary duty that is independent of what was created by the Hillel agreement, rendering such a claim duplicative of a breach of contract claim (*see Canzona v Atanasio,* 118 AD3d 841 [2d Dept. 2014]), and there is no dispute about the validity and relevance of the Hillel agreement. *Cf., Woodcare Intl., Inc. v Kay,* 119 AD3d 554(2d Dept. 2014).

The Fifth cause of action is also directed to SM and sounds in fraudulent concealment. In order to state a claim in fraud, a plaintiff must allege 1) a

misrepresentation or an omission of material fact which was false and known to be false by the defendant, 2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, 3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and 4) injury resulting from said reliance. *See New York Univ. v Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *Channel Master Corp. v Aluminum Ltd. Sales*, 4 N.Y.2d 403 (1958). Where fraudulent concealment is alleged the pleader must also allege that the defendant had a duty to disclose material information and that it did not do so. *See High Tide, LLC v DeMichele,* 88 AD3d 954 (2d Dept. 2011).

The claim essentially is based on allegations that SM deceived plaintiff "by leading it to believe that SM. was representing Eagle Cal's interests... when in fact... SM used the Hillel lawsuit for its own personal gain by settling the lawsuit and diverting *Eagle Cal's Share* to SMA Equities". This is duplicative of the Fourth cause of action, as it alleges a breach of fiduciary duties, which is itself dismissed as duplicative of a breach of contract claim, as stated above. Plaintiff also alleges, as supporting factual allegations, the alleged failure to keep it informed of the status of the suit, which is duplicative of the claims made in support of the Third cause of action, and is insufficient for want of damages, also as stated above. As no separate basis exists for this Fifth cause of action, it therefore is dismissed as well.

The Sixth cause of action is directed to both defendants, and sounds in conversion. It is dismissed as to SM but is sustained as to SMAE. In view of 1) the contents of the February 3 letter, which acknowledges plaintiff's right to its share of the settlement proceeds, 2) the undisputed fact that SMAE is not a party to the Hillel

agreement and thus had no right to dispose or exercise control over partnership assets, and 3) the allegations that there has been no response to demands that defendants, including SMAE, turn over these funds, a claim in conversion is stated against SMAE. *See Goldberger v Rudnicki,* 94 AD3d 1047 (2d Dept. 2012). Its status as SM's agent does not protect it from liability for its own torts. *Brumbaugh v CEJJ, Inc.,* 152 AD2d 69 (3d Dept. 1989). However, as SM had the authority under the Hillel agreement to exercise control over partnership assets, a key element of the claim, absence of such authority, is missing. The conversion claim thus fails against SM (*Goldberger v Rudnicki, supra*) and, in any event, is essentially duplicative of the First breach of contract claim.

The Seventh cause of action sounds in unjust enrichment and is pled against SMAE alone. To state such a claim, a plaintiff must establish that 1) the other party was enriched, 2) at the complaining party's expense, and 3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *Dee v Rakower,* 112 AD3d 204 (2d Dept. 2013). Here, it is alleged, in effect, that SMAE came into the settlement proceeds as a result of its relationship with SM, and that it had no separate right to those proceeds. As alleged in the amended complaint, and even if plaintiff owed a separate debt to SMAE, there was no basis for the latter to take those settlement funds in partial satisfaction of the debt. Assuming, as it must, the truth of the allegations made in the pleading, the Court should not endorse what amounts to self-help by SMAE in retaining/applying the settlement proceeds to the preexisting debt before any judicial determination or agreement is made. The allegations that the money has not been turned over despite demand is sufficient for

the claim, and it is thus sustained.

Finally, the Eighth cause of action, sounding in accounting against both defendants is dismissed as to SMAE, but is sustained as to SM. As there is no fiduciary relationship between SMAE and plaintiff, the claim for an accounting against this defendant does not lie. *Dee v Rackowner, supra.* However, under subsection C of section 10 of the Hillel agreement, SM as the general partner is obligated to permit an audit of the books and records by any partner. Accordingly, the motion to dismiss the Eighth cause of action is denied as to SM.

Accordingly, the action shall continue against SM as to the First, Second and Eighth causes of action, and against SMAE as to the Sixth and Seventh causes of action.

An answer to the amended complaint shall be served pursuant to CPLR 3211(f), or by agreement of counsel.

The parties are to appear for a Preliminary Conference on **September 25, 2017,** at 9:30 a.m. at the Courthouse, Lower Level. Failure to appear for that conference may result in the imposition of sanctions pursuant to 22 NYCRR § 130-1.1 and/or 22 NUYCRR § 202.27.

All contentions not discussed either are unnecessary to the results reached here or are without merit. All requests for relief not addressed are denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: August 10, 2017
Mineola, NY

HON. DANIEL PALMIERI
Supreme Court Justice

ENTERED

AUG 16 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorneys for Plaintiff
Business Law Firm LLC
Peter Papagianakis, Esq.
100 Jericho Quadrangle, Suite 208
Jericho, NY 11753

Attorneys for Defendants
Silverman Acampora, LLP
Robert J. Ansell, Esq.
100 Jericho Quadrangle, Suite 300
Jericho, NY 11753