

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of February, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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RAQUEL WOLF, as Executrix of the Estate of
HIRSCH WOLF, Deceased,

Plaintiff,

- against -

NATHANIEL SHAPIRO,

Defendant.
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DECISION AND ORDER

Index No. 503553/17

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion, Affirmation (Affidavit), and Exhibits Annexed _____
Memorandum of Law in Opposition _____
Reply Affirmation _____

23-28 _____
30 _____
31 _____

Plaintiff Raquel Wolf, as executrix of the estate of Hirsch Wolf, deceased (plaintiff), moves for leave, pursuant to CPLR 2221 (d), to reargue the preanswer motion of defendant Nathaniel Shapiro (defendant) to dismiss plaintiff's complaint, pursuant to, inter alia, CPLR 3211 (a) (7) (the prior motion), which was granted by order, dated June 30, 2017 (NYSCEF #19) (the prior order), and, upon reargument, denying the prior motion. By prior order, the Court dismissed plaintiff's entire complaint and, in doing so, explicitly held that plaintiff's causes of action sounding in fraud and breach of fiduciary duty failed to state a claim pursuant to CPLR 3211 (a) (7). The prior order, however, did not explicitly address

plaintiff's remaining causes of action sounding in (1) aiding and abetting breach of fiduciary duty, and (2) violation of attorneys' rules of ethics. This omission renders the prior order incomplete. Accordingly, leave to reargue is granted and, upon reargument, the Court explicitly addresses these causes of action.

A Cause of Action for Aiding and Abetting Breach of Fiduciary Duty

To recover damages for aiding and abetting breach of fiduciary duty, "a plaintiff must plead and prove that a fiduciary duty owed to the plaintiff was breached, that the defendant knowingly . . . participated in the breach, and that the plaintiff was damaged as a result of the breach" (*Smallberg v Raich Ende Malter & Co., LLP*, 140 AD3d 942, 944 [2d Dept 2016]). "Knowing participation in a breach of fiduciary duty occurs when the defendant provides substantial assistance to the primary violator" (*id.*). "Substantial assistance occurs when a defendant affirmatively assists . . . , thereby enabling the breach to occur" (*Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2d Dept 2010] [internal quotation marks omitted]).

Accepting the allegations of the complaint as true and according plaintiff the benefit of every favorable inference (*see Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]), defendant knew or should have known that the substantial assistance he affirmatively provided to the alleged primary violators – nonparties Sol Wahba (Sol) and his son, Michael Wahba, individually and Michael's wholly owned entity Sigula 1145 Broadway LLC (collectively, Michael) – was harmful to plaintiff's interests. Defendant was engaged by Sol and Michael in their purchase and resale at a profit of plaintiff's 49% ownership of Richmond Properties

LLC (the LLC). Sol, as the 51% owner of the LLC, and Michael, as the alleged de facto manager of the LLC, are alleged to have owed fiduciary duties to plaintiff as the 49% owner of the LLC. According the allegations of the complaint their most favorable intendment, the Court, upon reargument, finds that the complaint sufficiently pleads that to the extent defendant knowingly assisted Sol and Michael in consummating a series of interconnected transactions in a manner that was detrimental to plaintiff's interests, defendant may be held liable for aiding and abetting breaches of Sol's and Michael's fiduciary duties to plaintiff (*see Yuko Ito v Suzuki*, 57 AD3d 205, 207-208 [1st Dept 2008]; *see also Smallberg*, 140 AD3d at 944; *Monaghan*, 71 AD3d at 850; *State v Grecco*, 43 AD3d 397, 400 [2d Dept 2007]). Therefore, plaintiff's cause of action for aiding and abetting breach of fiduciary duty should *not* have been implicitly dismissed by the prior order.

A Cause of Action for Violation of Attorneys' Rules of Ethics

It is well established that a violation of attorneys' rules of ethics, standing alone, is insufficient to create a duty giving rise to a cause of action that would otherwise not exist at law (*see Shapiro v McNeill*, 92 NY2d 91, 97 [1998]; *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010]). Therefore, the prior order properly dismissed, albeit sub silentio, plaintiff's cause of action premised on the alleged violation of attorneys' rules of ethics.

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that leave to reargue the prior motion is *granted*; and it is further

ORDERED that, upon reargument, the Court *adheres* to the prior order to the extent that it (1) explicitly dismissed plaintiff's causes of action sounding in fraud and breach of fiduciary duty, and (2) implicitly dismissed plaintiff's cause of action sounding in violation of attorneys' rules of ethics, in each instance, for failure to state a claim pursuant to CPLR 3211 (a) (7); and it is further

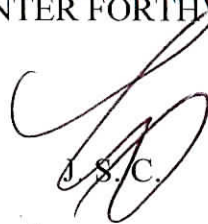
ORDERED that, upon reargument, the Court *modifies* the prior order to the extent of reinstating plaintiff's cause of action sounding in aiding and abetting breach of fiduciary duty; and it is further

ORDERED that, pursuant to CPLR 3211 (f), defendant shall have ten days after electronic service of a copy of this decision and order with notice of entry on his counsel within which to answer the extant portion of plaintiff's complaint which, by virtue of the prior order as modified by this decision and order, is limited to the cause of action sounding in aiding and abetting breach of fiduciary duty; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry on defendant's counsel and shall electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



Justice Lawrence Knipel