SHORT FORM ORDER

INDEX NO.: 608516-17

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 5-3-18
SUBMITTED: 5-3-18
MOTION NO.: 002-MOT D
003-XMOT D

WALDORF INVESTMENTS, L.P., AND CHRISTOPHER V. WALDORF, JR. INDIVIDUALLY AND DERIVATIVELY AS A PARTNER OF WALDORF INVESTMENTS, L.P.,

Plaintiffs,

-against-

KATHLEEN WALDORF, WILLIAM WALDORF, STEPHEN WALDORF, WALDORF RISK SOLUTIONS, LLC. AND JOHN DOE 1-2,

Defendants,

AND WALDORF INVESTMENTS, L.P.,

Nominal Defendant.

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Upon the following papers read on this motion to dismiss and cross-motion for summary judgment ; Notice of Motion and supporting papers 31-37 ; Notice of Cross Motion and supporting papers 39-44 ; Answering Affidavits and supporting papers 45-52 ; Replying Affidavits and supporting papers 54 ; it is,

ORDERED that this motion by the defendants Kathleen Waldorf, William Waldorf, Stephen Waldorf, and Waldorf Risk Solutions, LLC, for an order partially dismissing the complaint is granted to the extent that causes of action one through fourteen, seventeen, eighteen, nineteen, and twenty are dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiffs for partial summary judgment is granted as to the fifteenth cause of action for an accounting; and it is further

ORDERED that the defendants Kathleen Waldorf, William Waldorf, and Stephen Waldorf are directed to provide the plaintiff Christopher Waldorf with an accounting of Waldorf Investments, L.P., within 90 days after service upon them of a copy of this order with notice of entry; and it is further

ORDERED that the cross motion is otherwise denied; and it is further

ORDERED that the conference calendared for October 10, 2018, is adjourned; and it is further

ORDERED that the parties are directed to appear for a preliminary conference, which shall be held on February 6, 2019, at 10:30 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

The plaintiff Waldorf Investments, L.P. ("Waldorf Investments" or the "Partnership"), is a limited partnership that owns a parcel of real property located at 30 Prospect Street, Huntington, New York (the "Premises"). The plaintiff Christopher Waldorf and the defendants William and Stephen Waldorf are the general partners. Christopher Waldorf is also a limited partner along with the defendant Kathleen Waldorf. Christopher has a 40% interest in Waldorf Investments (20% as a general partner and 20% as a limited partner). William, Stephen, and Kathleen each have a 20% interest.

The plaintiffs allege that the property owned by Waldorf Investments was destroyed by a fire in 2014 and that the Partnership received insurance proceeds in the amount of approximately $600,000 in connection with the loss. The plaintiffs allege that the insurance proceeds were not used for legitimate business purposes and that the individual defendants, William, Stephen, and Kathleen, distributed the proceeds to themselves and used them for their own personal benefit. The plaintiffs also allege that the individual defendants engaged in waste and self-dealing by permitting the defendant Waldorf Risk Solutions, LLC ("Waldorf Risk Solutions" or the "LLC"), an entity owned and controlled by them, to use and occupy the Premises without paying rent and by not collecting rent from other, unidentified tenants.

The plaintiffs commenced this action for breach of fiduciary duty, conversion, money had and received, breach of contract, unjust enrichment, an accounting, and dissolution of the Partnership. The first seven causes of action are direct claims by Waldorf Investments. Causes of action eight through fourteen are derivative in nature, and the remaining causes of action are individual claims by Christopher Waldorf. Waldorf Risk Solutions and the individual defendants move to dismiss the direct claims by Waldorf Investments, the derivative claims, and the individual claims by Christopher Waldorf for unjust enrichment, conversion, and breach of fiduciary duty.

The Derivative Claims

The defendants seek dismissal of the derivative claims on the ground that Christopher, as a general partner, may not maintain a derivative action on behalf of the Partnership. The plaintiffs contend that, since Christopher is also a limited partner, he may sue derivatively.

As both a limited and general partner of Waldorf Investments, Christopher Waldorf has all of the rights and powers of a general partner and is subject to all of the restrictions of a general partner, except as to the valuation of his interest as a limited partner (**Stark v Goldberg**, 297 AD2d 203, 204, *citing* **Partnership Law** § 101 [2]). One of the restrictions of a general partner is that he may not maintain a derivative action on behalf of the partnership. The law

requires that a derivative action be brought by at least one person who is a limited partner, both at the commencement of the action and at the time of the transaction complained of (**Stark v Goldberg**, *supra*, *citing* **Partnership Law** § 115-a [1], [2]; *see also*, **Revised Limited Partnership Act** § 121-1002). A derivative action may not be maintained when, as here, the plaintiff is both a general and limited partner and none of other limited partners has joined him as a plaintiff (**Stark v Goldberg**, *supra*). Since Christopher Waldorf does not have standing to maintain the derivative claims (**Id.**), the eighth through fourteenth causes of action are dismissed.

The Direct Claims by Waldorf Investments

The direct claims by Waldorf Investments are duplicative of the derivative claims. The court finds that, since Christopher Waldorf does not have standing to maintain derivative claims on behalf of Waldorf Investments, he does not have standing to maintain direct claims on its behalf of either. Accordingly, the first through seventh causes of action are dismissed.

The Individual Claims by Christopher Waldorf

The defendants seek dismissal of the seventeenth cause of action for unjust enrichment, the eighteenth cause of action for conversion, and the nineteenth and twentieth causes of action breach of fiduciary duty on the ground that they are duplicative of the sixteenth cause of action for breach of contract and the fifteenth cause of action for an accounting.

When, as here, there is no dispute about the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed under a quasi-contract theory as well as seek to recover damages for breach of contract (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R. R.** Co., 70 NY2d 382, 388-389; **Alamo Contract Bldrs. v CTF Hotel Co.**, 242 AD2d 643). Accordingly, the seventeenth cause of action for unjust enrichment is dismissed.

For a cause of action in conversion to lie, the duty breached must spring from circumstances extraneous to the contract. Wrongfully withholding money due pursuant to a contractual relationship constitutes a breach of the contractual relationship, not conversion (**Kante v All Taxi**, 28 Misc 3d 133 (A) at *2 [App Term 2nd , 11th, & 13th Jud Dists]). The eighteenth cause of action for conversion merely restates the allegations of the plaintiffs' breach-of-contract claim. Accordingly, it is dismissed.

A claim for breach of fiduciary duty cannot be based on the same facts and theories as a breach-of-contract claim (**Mandel Airplane Funding and Leasing Corp. v Laserline Properties II, LLC**, 33 Misc 3d 1204[A] at *4 [and cases cited therein]). In order to be actionable, the claim for breach of fiduciary duty must be separate, distinct, and independent of the contract itself (**Id.**). Like the previous cause of action, the nineteenth cause of action for breach of fiduciary duty merely restates the allegations of the plaintiffs' breach-of-contract claim. Accordingly, it is dismissed.

The twentieth cause of action, is denominated as a claim for breach of fiduciary duty, but actually seeks production of the Partnership's books and records. While Christopher Waldorf clearly has the right to inspect the Partnership books (*see*, **Partnership Law** §§ 41-42), this cause of action has been rendered academic by the court's decision to grant the plaintiffs' cross

motion for partial summary judgment on the fifteenth cause of action for an accounting (*see infra*). Any information that is not included in the accounting and that is material and necessary to this litigation may be obtained through the discovery process. Accordingly, the twentieth cause of action is dismissed as academic.

The twenty-second cause of action is also denominated as a claim for breach of fiduciary duty. It actually seeks an order directing the defendants William and Stephen Waldorf to hold quarterly Partnership meetings, to notify the plaintiff Christopher Waldorf of such meetings, to copy him on all communications about the Partnership business, and to include him in the management of the Partnership business. The court declines to dismiss this cause of action, but notes that the relief requested therein is inconsistent with other relief requested in the complaint.

The Cross Motion

The plaintiffs cross move, pursuant to CPLR 3211 (c), for summary judgment in their favor on the fifteenth cause of action for an accounting and on the twentieth cause of action for production of the Partnership's books and records. The cross motion is granted as to the fifteenth cause of action and denied as to the twentieth cause of action, which has already been dismissed.

Contrary to the defendants' contentions, the plaintiff Christopher Waldorf is entitled to an accounting as a matter of law. It is well settled that, as a general rule, a partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting and a balance struck or an express agreement to pay (*see*, **Wisenthal v Wisenthal**, 40 AD3d 1078, 1080 [and cases cited therein]). Exceptions to the general rule have been recognized when the alleged wrong concerns a partnership transaction that may be determined without an examination of partnership accounts, when no complex accounting is required, or when only one transaction is involved that is fully closed but unadjusted (**Id.**). Those exceptions do not apply here, where resolution of the plaintiff's claim for breach of contract will involve an examination of the partnership's books and records covering a period of several years (**Id.**). That claim is premature until an accounting is completed (**Id.**). However, the interest of judicial economy would not be served by dismissing it and requiring the plaintiffs to assert it in a separate action once the accounting has been completed (**Id.**). Accordingly, the court grants summary judgment on the fifteenth cause of action for an accounting and directs the defendants Kathleen Waldorf, William Waldorf, and Stephen Waldorf to provide Christopher Waldorf with an accounting of Waldorf Investments, within 90 days after service upon them of a copy of this order with notice of entry.

In view of the foregoing, the conference calendared for October 10, 2018, is adjourned until February 6, 2019 at 10:30 a.m. A preliminary conference will be held at that time.

DATED: **September 28, 2018**

J.S.C.

HON. ELIZABETH HAZLITT EMERSON