SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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EDWARD KALIKOW and 7001 BRUSH HOLLOW ROAD LLC, Index No.: 602328/13

Plaintiffs,

- against -

EUGENE SHALIK,

Defendant.
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PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION
AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION

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PRELIMINARY STATEMENT

Plaintiffs Edward Kalikow and 7001 Brush Hollow Road LLC ("7001"), by their attorneys, Meltzer, Lippe, Goldstein & Breitstone, LLP, hereby respectfully submit this Memorandum of Law in opposition to defendant's motion to dismiss and in support of their cross-motion to convert these motions pursuant to CPLR 3211(c) into motions for summary judgment and, after affording the parties the opportunity to submit any other evidence they wish to submit, granting summary judgment to plaintiffs on the first cause of action and summary judgment as to defendant's liability on the second cause of action for his breaches of the fiduciary duty he owes to plaintiffs.

STATEMENT OF FACTS

As more fully set forth in the accompanying affidavit of Edward Kalikow as well as in the complaint at issue, the instant action seeks the recovery of a contribution claim pursuant to defendant's joint and several guaranty of the debt owed by 7001 to Capital One (the "Lender") as well as the recovery of damages caused by defendant's breaches of the fiduciary duty he owes to the plaintiffs. *See* the Complaint annexed as Exhibit "1" to the McGowan Aff. The defendant seeks to enjoy the benefit of the reduction of his liability under his unconditional guaranty of the debt of 7001 to its lender without contributing his 50% share of the $233,895 payment that was required to be made by Mr. Kalikow in order to achieve that result.

Mr. Kalikow and defendant, using funds loaned by Mr. Kalikow's mother, purchased the two story building and a long term ground lease (the "Lease") on the premises known as 7001 Brush Hollow Road, Westbury, New York (the "Premises") in 1997. Title to the Lease is held in the name of 7001. Mr. Kalikow and defendant are equal owners of and members in 7001 and have routinely discussed matters concerning 7001 throughout its existence. Mr. Kalikow and

defendant ran separate businesses from the two different floors in the Premises at all times relevant hereto.

The funds loaned by Mr. Kalikow's mother for the purpose of buying the Premises and Lease were re-paid with the proceeds of a loan extended by North Fork Bank (the "Note") in or around October 1998. The Loan was secured by, *inter alia*, a guaranty executed by Mr. Kalikow and defendant (the "Guaranty"). *See* Exhibit "A" to the Kalikow Aff. The Guaranty imposed a joint and several, unconditional obligation upon Mr. Kalikow and defendant to pay the debt due 7001's lender. North Fork Bank was subsequently acquired by Capital One (the "Lender").

The Note, as modified by a Note and Leasehold Mortgage Modification Agreement dated as of January 1, 2003, matured on January 1, 2013. *See* Exhibits "B" and "C" to the Kalikow Aff. The Note was not re-paid on January 1, 2013 when it matured according to its terms. Hence, the Note was in default under the plain terms of the Note and leasehold mortgage securing the Note as of that date.

The Note, as amended by the Modification Agreement, provides in relevant part that the "Note shall mature on January 1, 2013 (the "Maturity Date") at which time the **entire** unpaid principal indebtedness together with all accrued and unpaid interest shall be due and payable." *See* Exhibit "C" to the Kalikow Aff. at Section 2 (A) (emphasis added).

Section 2.01 of the leasehold mortgage securing the Note states that an Event of Default exists if a payment of principal or interest is not made "when and as same shall become due and payable, whether at maturity or by acceleration . . . and such default shall have continued for a period of ten (10) days . . .". *See* Exhibit "D" to the Kalikow Aff. Defendant does not, because he cannot, dispute that the Note was not repaid when it matured on January 1, 2013; nor within ten days thereof. There thus can be no genuine dispute that the Note was in default at that time

according to its plain terms.

Defendant's frivolous contention that the loan at issue was not in default (which he admits in making this motion would be an event that triggers his obligations under the Guaranty – *see* Defendant's Memo Of Law at p. 1 ["The obligations under the guaranty were not triggered unless the Loan was in default"]) is thus demonstrably false. Defendant's motion to dismiss must be denied and plaintiffs' cross-motion, after conversion to a motion for summary judgment, should be granted as to summary judgment on the first cause of action based on defendant's admission that his obligations under the Guaranty would be triggered if, as was the case, the Note was in default under the plain terms noted above.

Faced with the fact that: (i) 7001's loan was maturing on January 1, 2013 and thus the entire balance of approximately $950,000 was due and owing to the Lender on that date (see Exhibit "G" – email to the Kalikow Aff.); and (ii) 7001 only had $58,000 in its bank account as at December 31, 2012 (*see* Exhibit "E" to the Kalikow Aff.), Mr. Kalikow first requested that the Lender extend 7001's loan for five years. That request was denied on the specific ground that defendant had finally disclosed that he was not renewing his lease in the subject premises. *See* Exhibit "F" to the Kalikow Aff.

Mr. Kalikow was therefore forced to request that the Lender extend the maturity date of 7001's Note for nine months to allow 7001 the time to find alternate financing (although Mr. Kalikow hoped to convince the Lender to further extend the loan if it became necessary to do so). The Lender agreed to the nine month extension but only on condition that the loan principal be paid down pursuant to Mr. Kalikow's and defendant's obligations under their joint and several guaranty of 7001's Note, to bring that loan in compliance with the Lender's requirement that the Note have no more than a 75% loan to value ratio at the time of any extension request.

See Exhibit "G" to the Kalikow Aff.

Although the Lender demanded that the Note be paid down in the sum of $233,895.00 by Mr. Kalikow and defendant pursuant to their unconditional obligations under the Guaranty in order to extend the maturity date of the Note for nine months, defendant refused to pay his 50% share of this joint and several obligation.

Mr. Kalikow was thus compelled to and did pay the entire pay down of $233,895[1] required by the Lender in order to extend the maturity date of the Note by nine months. The alternative was to pay the entire $950,000 due the Lender on January 1, 2013; which sum 7001 did not have.[2] The Court will note that the Lender expressly acknowledged that this payment reduced the amount of exposure for both Mr. Kalikow and defendant under the Guaranty by the amount of the pay down. *See* Exhibit "G" to the Kalikow Aff.

As if defendant's refusal to pay his share due the Lender under the Guaranty was not bad enough, defendant also engaged in multiple, intentional breaches of the fiduciary duty he owed to plaintiffs in an attempt to inflict as much damage as he could upon them. Defendant (and his counsel) made a series of misstatements designed to cause plaintiffs to believe that defendant was interested in renewing his lease at the Premises after defendant had closed title on a building into which he moved his businesses at the end of his lease at the Premises. As evidenced by the memorandum sent to Mr. Kalikow by the defendant dated September 27, 2012, the defendant was inquiring as to the renewal of his lease. *See* Exhibit "H" to Kalikow Aff.

Defendant's counsel also asserted in an email dated November 27, 2012 that "**we reject**

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[1] Mr. Kalikow actually paid the sum of $233,900 to the bank as a pay down.

[2] Defendant's contention that the pay down was "voluntary" on Mr. Kalikow's part is ludicrous. If the payment was not made, defendant and Mr. Kalikow would have had to pay the **entire** amount due under their guaranty (i.e. $450,000) and then 7001's building and lease would have had to have been sold at a forced sale to pay the balance due the Lender on January 1, 2013 since 7001 only had $58,000 in its bank account at that time. *See* Exhibit "E" to the Kalikow Aff.

the statement that Shalik, Morris has failed to exercise its renewal right . . . Shalik, Morris' time to determine whether or not to renew the lease has not expired." *See* Exhibit "4" to McGowan Aff. (emphasis added). Discussions between plaintiffs and defendant as to the renewal of his lease continued until sometime after January 19, 2013 when he finally disclosed to plaintiffs that he would not be renewing his lease.

All of the foregoing was after November 13, 2012 when, unknown to plaintiffs at the time, defendant closed on the sale of a building at 80 Crossways Park Drive West, Woodbury where he subsequently moved his businesses. *See* Exhibit "I" to Kalikow Aff. Defendant obviously had to be in negotiation for, and then in contract on this property for months before the closing on November 13, 2012 (yet he never disclosed to plaintiffs that he would be moving out and thus had no genuine interest in renewing his lease until months later in an irrefutable attempt to cause damage to plaintiffs).

The failure of defendant and his counsel to contemporaneously disclose that defendant had bought another building to move into on November 13, 2012 and would not be renewing his lease, and their affirmative misstatements after that date indicating that defendant was interested in renewing his lease, were patently designed to deliberately mislead and cause as much damage as possible to plaintiffs. Their misconduct was morally culpable and warrants the imposition of punitive damages therefor.

ARGUMENT

DEFENDANT'S MOTION TO DISMISS MUST BE DENIED

A. The Standards Applicable To Defendant's Motion To Dismiss

Defendant has moved pursuant to CPLR 3211(a) (1) and/or (7) to dismiss plaintiffs' complaint herein. Defendant's motion must be denied.

The standards in determining a motion to dismiss are well settled. The complaint must be liberally construed with the Court accepting all facts plead as true and with the Court according plaintiff the benefit of every possible inference flowing from those facts. See, e.g., Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46, 735 N.Y.S.2d 479, 483 (2001)("accepting the allegations as true, our 'sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail")(cite omitted); Sokoloff v. Harriman Estates Development, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 428 (2001); Arnav Retirement Trust v. Brown, 96 N.Y.2d 300, 727 N.Y.S.2d 688, 690 (2001); Bell v. Slepakoff, 224 A.D.2d 567, 639 N.Y.S.2d 406, 407 (2d Dep't 1996).

As held by the Court of Appeals, the criterion for determining a motion to dismiss pursuant to CPLR 3211(a)(7) "is whether the proponent of the pleading has a cause of action, not whether he has stated one". Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972 (1994). Moreover, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint *(Rovello v Orofino Realty Co.,* [40 NY2d 633, 635])". Id. Questions of fact cannot be considered in determining a defendant's motion to dismiss pursuant to CPLR 3211(a)(7). Grand Realty Co. v. City of White Plains, 125 A.D.2d 639, 510 N.Y.S.2d 172, 174 (2d Dep't 1986).

Moreover, since defendant has failed and refused to comply with plaintiffs' document demand that was served upon defendant with the summons and complaint, his motion must be denied on this ground in addition to the other legally independent grounds noted herein. See, e.g., Nodelman v. L.C.V. Realty Corp., 143A.D.2d 122, 531 N.Y.S.2d 362, 364 (2d Dep't 1988)(motion should be denied where, as here, the defendant has failed to comply with discovery

requests); Kaminester v. Weintraub, 131 A.D.2d 440, 516 N.Y.S.2d 234 (2d Dep't 1987) (Nonmovant is entitled to discovery before motion to dismiss is determined).

To explain, defendant was served with a document demand along with the summons and complaint as authorized by CPLR 3120 on September 7, 2013. *See* Exhibits "2" and "3" to McGowan Aff. Although responses to the demand were due on October 7, 2013, defendant failed to produce any documents in response to that demand nor make any objections to that demand. Documents to be produced pursuant to that demand will undoubtedly evidence that defendant knew for many months that he would not be renewing his lease at the Premises and, instead of informing plaintiffs of this fact, chose to instead inflict as much damage as possible upon plaintiffs by engaging in a planned course of conduct designed to mislead plaintiffs by making it appear as long as possible that defendant was interested in renewing his lease.

Defendant's failure to produce documents responsive to the document demand served upon him mandates denial of that portion of defendant's motion which is based on CPLR 3211(a)(7). See, e.g., Kaminester v. Weintraub, supra.

With respect to that portion of defendant's motion which is based on CPLR 3211(a)(1), the Court must find that "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." See, e.g., Teitler v. Max J. Pollack & Sons, 288 A.D.2d 302, 733 N.Y.S.2d 122, 122-123 (2d Dep't 2001)(emphasis added). As the Court of Appeals has held, a motion to dismiss pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law". Goshen v. Mut. Life Ins. Co. of New York, 98 N.Y.2d 314, 326,

746 N.Y.S.2d 858 (2002). The documents submitted by defendant in support of his motion do not satisfy this standard.

B. Plaintiffs' First Cause Of Action May Not Be Dismissed

Defendant's request that plaintiffs' first cause of action for contribution be dismissed is frivolous. This portion of defendant's motion is based on his incorrect contentions that: (i) plaintiff's first cause of action is for a breach of contract (which it is not); (ii) defendant only has an obligation to contribute funds under his Guaranty if the loan extended to 7001 was in default (which it was under its plain terms); (iii) defendant only guaranteed payments that 7001 was obligated to make under the terms of the Note; and (iv) that defendant would only be obligated for approximately $9,000 under any contribution claim (which issue is irrelevant on a motion to dismiss that cause of action)[3].

As fully set forth in the accompanying affidavits and the Commercial Rule 19-a Statement, the Note matured on January 1, 2013. 7001 was obligated to pay its lender the "entire" amount then due under the Note, to wit, approximately $950,000. 7001 did not have $950,000 on that date and thus did not pay its lender the monies due it on that day and that default in payment continued for more than 10 days thereafter. As provided in the Mortgage, an Event of Default exists under the Note if 7001 did not pay the entire amount due the lender on the date the Note matured and that default continued for ten days. Defendant's contention that no default existed is thus demonstrably incorrect. Since defendant admits that his obligation to pay

[3] Defendant is wrong on this point in any event since the amount that 7001's lender required the guarantors to pay was $233,895; which is the amount plaintiff Edward Kalikow was forced to pay by himself when defendant inequitably refused to pay his 50% share of the amount demanded by the lender. Plaintiff is only seeking to recoup what defendant was obligated to but refused to pay.

under the unconditional Guaranty is triggered if the Note was in default, not only should defendant's motion to dismiss based on this ground be denied but the Court should grant summary judgment to plaintiffs on the first cause of action after granting plaintiffs' cross-motion pursuant to CPLR 3211(c) to convert these motions. 7001 was obligated under the terms of the Note and Mortgage as modified, to pay the entire loan on January 1, 2013 under the plain terms of those documents. When it irrefutably did not, defendant's obligation under the Guaranty to 7001's lender was triggered. Defendant's request to dismiss Plaintiffs' first cause of action must therefore be denied.

C. Plaintiffs' Second Cause Of Action May Not Be Dismissed

Defendant incorrectly contends that plaintiffs' second cause of action against him for the damage he caused when he repeatedly breached the fiduciary duty he owes to plaintiffs must be dismissed because he allegedly owes no fiduciary duty to plaintiffs. Defendant's contention is frivolous given that Justice Warshawsky of this Court, as defendant and his counsel are well aware, previously held that the parties herein owe fiduciary duties to each other. See Exhibit "5" to McGowan Aff. In short, the issue of whether defendant owes a fiduciary duty to plaintiffs was previously resolved against the position that defendant is now asserting.

It is black letter law that members in a Limited Liability Company such as 7001 owe fiduciary duties to each other and the entity. See, e.g., Marciano v. Champion Motor Group, Inc., 2007 WL 4473342 (Sup. Ct. Nassau Co. 2007 Hon. Ira B. Warshawsky)("It is settled that 'a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company . . .'" quoting Willoughby Rehabilitation and Health Care Center, LLC v. Webster, 13 Misc.3d 1230(A) (Sup. Ct. Nassau 2006 Hon. Leonard B. Austin); see also Salm

v. Feldstein, 20 A.D.3d 469, 799 N.Y.S.2d 104 (2d Dep't 2005)(defendant owed plaintiff a fiduciary duty as " the managing member of the [LLC] and as a co-member with the plaintiff").

Defendant's attempt to evade the consequences of this settled law by contending that he is only a "passive" member of 7001 is belied by his repeated representations to this Court, as evidenced in the decision of Justice Warshawsky, that he acted as a co-managing member of 7001 along with plaintiff Edward Kalikow since its creation and signed tax returns on 7001's behalf as its tax matters partner. *See* Exhibit "L" to the Kalikow Aff. As attested to by plaintiff Edward Kalikow, he and defendant also regularly consulted as to the affairs of 7001. See Kalikow Aff. at para. 3. Defendant's contention that he was only a passive member of 7001 could not be more knowingly false. It is also important to keep in mind that defendant is a 50% owner of 7001 and thus is not a minority member of 7001.

Based on the foregoing, defendant's motion to dismiss the second cause of action for breach of fiduciary duty must be denied.

D. Plaintiffs' Claim For Punitive Damages Due To Defendant's Morally Culpable Affirmative Misrepresentations to Them As To His Alleged Interest In Renewing His Lease After He Contracted For And Then Closed Title On The Building To Which He Moved His Businesses In Order To Cause Damage To Plaintiffs May Not Be Dismissed Prior To Discovery Which Will Undoubtedly Further Buttress The Reasons For Assessing Punitive Damages Against Defendant

The request by defendant that this Court dismiss plaintiffs' request for punitive damages prior to discovery in this action should be denied. As noted in the Complaint, defendant and his counsel made affirmative misrepresentations to plaintiffs as to defendant's alleged interest in renewing his lease in the Premises after defendant had contracted for and closed title on the building to which he moved his businesses. Defendant closed title on that building on November 13, 2012. As attested to by plaintiff Edward Kalikow, it was not until after January 19, 2013

when defendant finally disclosed that he would not renew his lease when it expired. Defendant thereafter refused for some time to allow 7001 to show the space he occupied to entities interested in potentially leasing that space.

In short, it is clear from these facts alone that defendant was willfully, wantonly and recklessly attempting, without justification, to inflict damage upon plaintiffs. If defendant had complied with the document demand served upon him with the summons and complaint (*see* Ex. "3" to McGowan Aff.), plaintiffs would likely have even more evidence of the intent of defendant to cause damage to plaintiffs by his course of conduct. Hence, while the known facts noted above and in the complaint evidence the moral culpability of defendant upon which an award of punitive damages can be made, discovery of defendant will undoubtedly further strengthen the basis for such an award. Defendant's pre-discovery, pre-answer motion seeking to dismiss the punitive damages sought by plaintiffs is premature and must be denied.

THE MOTION AND CROSS-MOTION SHOULD BE CONVERTED TO MOTIONS FOR SUMMARY JUDGMENT PURSUANT TO CPLR 3211(c)

CPLR 3211(c) provides in relevant part that "[u]pon the hearing of a motion made under [3211] (a) or (b) . . . [and] [w]hether or not issue had been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment."

Given: (i) defendant's admission that his obligation to pay under the Guaranty is triggered if the Note was in default (*see* Defendant's Memo of Law at p. 2); (ii) the plain language of the Note and Mortgage as amended establishes that the entire amount of principal and interest due on the Note was due when it matured on January 1, 2013; (iii) that the approximately $950,000 due 7001's lender on January 1, 2013 was not paid on that date nor within ten days thereof; (iv) that 7001's lender demanded a pay down of $233,895 from defendant and plaintiff Edward Kalikow pursuant to their Guaranty of the loan to bring the loan

to the required 75% loan to value ratio needed before it would consider extending the maturity date of the Note by nine months; (v) that defendant's refusal to pay his 50% share of the pay down forced plaintiff Edward Kalikow to pay the whole pay down by himself; and (vi) the pay down reduced the amount of liability under defendant's Guaranty by the amount of the pay down (*see* Ex. "6" to the Kalikow Aff.), there is no genuine issue that defendant is liable to reimburse plaintiff Edward Kalikow for one half of the pay down demanded by and made to 7001's lender. The Court should therefore exercise its discretion to convert these motions into motions for summary judgment and, upon doing so and affording the parties the opportunity to submit anything further they want the Court to consider on summary judgment, grant summary judgment to plaintiffs on the first cause of action for contribution.

In addition, given the settled caselaw noted above, the Court should also grant summary judgment to plaintiffs as to defendant's breaches of the fiduciary duty he owes to plaintiffs with the damages to be awarded therefor to follow discovery herein.

CONCLUSION

In light of the foregoing, this Court should issue an Order pursuant to CPLR § 3211(c) converting defendant's motion and the instant motion to motions for summary judgment and, upon doing so and allowing the parties to supplement the record if they choose to do so, (i) deny defendant's motion to dismiss; (ii) grant plaintiffs summary judgment under the first cause of

action for contribution and summary judgment as to a declaration of defendant's liability under the second cause of action with damages under that claim to be determined separately; and (iii) grant such other and further relief as to the Court seems just and proper in the circumstances.

Dated: Mineola, New York
November 7, 2013

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