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.: 602328/2013

Plaintiffs,

-against-

EUGENE SHALIK,

Defendant

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(1) and (a)(7)

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PRELIMINARY STATEMENT

Three questions are presented on this motion to dismiss.

First, was defendant Eugene Shalik, a co-guarantor with plaintiff Edward Kalikow of a loan (the "Loan") made to 7001 Brush Hollow Road LLC ("7001 BHR"), required to contribute towards a payment Mr. Kalikow voluntarily made to pay-down the principal balance of the Loan?

The answer to this question is "no" because:

- No contract obligated Mr. Shalik to contribute towards a pay down of the Loan;
- The operating agreement for 7001 BHR does not require the members to make additional capital contributions. Plaintiffs cannot make an "end run" around the operating agreement and seek to impose an obligation on Mr. Shalik to contribute additional capital;
- The obligations under the guaranty were not triggered unless the Loan was in default;
- The Loan was never in default;
- The payment was not made under the guaranty but was made to extend the maturity date of the loan.

Second, did defendant, a non-managing, passive, member of 7001 BHR, owe a fiduciary duty to disclose to the LLC: (x) that he (allegedly) acquired a building through another entity; and (ii) that an accounting firm he manages (Shalik, Morris & Co., LLP) decided not to renew a written sublease between it and 7001 BHR (the "Sublease") where the Sublease explicitly required notice of renewal 240 days before expiration of the sublease and no such notice was provided?

The answer to this question too is "no" because:

- Based on the facts alleged in the Complaint, no fiduciary relationship existed and no fiduciary duty was owed;

- Based on the facts alleged in the Complaint, there was no duty to disclose;

- A passive, non-managing member of an LLC does not owe a fiduciary duty to the LLC;

- The claim of damage based on the alleged failure to disclose is entirely speculative because it assumes that, had more notice been provided, the office space at issue would have been rented more quickly.

Third, can defendant be held personally responsible for acts allegedly taken by Shalik, Morris; specifically, claims that Shalik, Morris, the sub-tenant under the Sub-lease: (i) allegedly refused to permit 7001 BHR to show the demised premises to prospective tenants; and (ii) Shalik, Morris allegedly removed glass doors which had been installed in the office space?

The answer to this question is "no" because:

- The Sublease was between 7001 BHR and Shalik, Morris & Co., LLP. Eugene Shalik is not a party to that sublease and cannot be held liable for the alleged breach of that agreement; and

- The Sublease did not require Shalik, Morris to permit 7001 BHR access to the demised premises.

STATEMENT OF FACTS[1]

Messrs. Shalik and Kalikow

Defendant, Eugene Shalik, and the plaintiff, Edward Kalikow, were for many years, business partners.

As the plaintiff alleges in the complaint, the relationship between the parties is strained. There are and have been numerous lawsuits between the parties, in their individual capacities, as well as lawsuits by and against Mr. Shalik, in his capacity as Executor of the Estate of Pearl

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[1] The facts set forth herein are derived from the complaint and from the documents attached to the accompanying affidavit of Eugene Shalik, sworn to on October 16, 2013 (the "Shalik Aff."). Defendant does not concede that any of the facts alleged in the Complaint are true, but they are accepted as true for purposes of this motion, except to the extent that they are refuted by documentary evidence attached to the Shalik Aff.

Kalikow, Mr. Kalikow's mother. Mr. Kalikow's animus appears to arise because his mother disinherited him from her large estate and appointed Mr. Shalik as one of the Executors of her estate and one of the Trustee of various trusts.

By bringing this case Mr. Kalikow is abusing the court's resources in his on-going effort to burden and inconvenience Mr. Shalik.

7001 Brush Hollow Road LLC

Messrs. Shalik and Kalikow are the only two members of 7001 BHR. Complaint, ¶ 6. 7001 BHR owns the building and ground lease for the property located at 7001 Brush Hollow Road, Westbury, New York. Complaint, ¶ 4.

Attached to the Shalik Aff. as Exhibit B is a copy of the operating agreement for 7001 BHR.

Extension Of The Loan From Capital One

In or around 1998 the LLC borrowed money from North Fork Bank (now Capital One, N.A.). Complaint, ¶ 10.

The LLC is the sole obligor on the Loan. Complaint, ¶ 10 and Exhibit A. *See also* Shalik Aff., Exhibits C and D.

Plaintiff and the defendant signed a limited guaranty for the Loan (the "Guaranty"), which would be triggered only upon a default on the Loan – which is not alleged to have occurred and which never occurred. *See* Complaint, ¶ 11 and Exhibit A. *See also* Shalik Aff., Exhibit E.

The Loan matured on January 1, 2013. Complaint, ¶ 14.

Capital One was willing to extend the Loan made to the LLC, but only if the LLC paid down the principal of the Loan to "establish a loan to value ratio…of no more than 75%...." *See*

Complaint, ¶ 15. *See also* February 21, 2013 letter from Capital One (the "Capital One Letter"), a copy of which is attached to the Shalik Aff. as Exhibit E. Thus, in the Capital One Letter, the bank stated, in relevant part, as follows:

> Re: Commercial Mortgage Loan made by Capital One, National Association (the "Bank") to 7001 Brush Hollow Road, LLC (the "Borrower") dated October 6, 1998 (the "Loan") encumbering the premises located at and known as 7001 Brush Hollow Road, Westbury, New York (the "Premises")
>
> * * *
>
> As you are aware, the Loan matured on January 1, 2013 (the "Maturity Date"). The Bank will consider your request for an extension of the Loan, subject to final Bank approval, subject to the following conditions:
>
> (a) The Bank receives a principal paydown of the Loan in an amount equal to the greater of (i) Two Hundred Thirty-Three Thousand Eight Hundred Ninety-Five and 00/100 ($233,895.00) Dollars, or (ii) such amount as is necessary to establish a loan to value ratio as determined by the Bank in its sole and absolute discretion of no more than 75%....

The Loan was never in default and Capital One never declared a default.

Thus, the Capital One Letter specifically stated:

> The Bank has not yet formally demanded payment in full of all sums due under the Loan (a "Demand for Payment in Full") or declared an Event of Default at this time....

Plaintiff, Edward Kalikow, made a knowing, intentional and voluntary decision to pay $233,895 to Capital One so that the Loan to 7001 BHR would be extended.[2]

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[2] The Complaint apparently intentionally does not disclose whether Mr. Kalikow made the payment directly to Capital One or whether he advanced the monies to 7001 BHR (as a capital contribution or a loan) which then made the payment to Capital One. Either way, the payment was not made pursuant to the Guaranty, it was made on behalf of the LLC to pay down the Loan.

The Sublease Between 7001 BHR and Shalik, Morris & Co., LLP

The Complaint alleges that "the money to pay the expenses incurred by 7001 to operate are generated by the rents paid to it by its subtenants." Complaint, ¶ 24.

In what can only be a knowing and intentional mis-statement of fact, the Complaint then alleges that there is a sublease between 7001 BHR and "defendant Eugene Shalik." Complaint, ¶ 25.

Attached to the Shalik Aff., as Exhibit F, is a copy of the Sublease between 7001 BHR and non-party Shalik, Morris & Co., LLP. As the Court will see, defendant Eugene Shalik is not a party to the Sublease – Shalik, Morris & Co., LLP is the only subtenant. Mr. Kalikow's willingness to mislead the Court should not be ignored.

ARGUMENT

I

THE FIRST CAUSE OF ACTION SHOULD BE DISMISSED

Mr. Kalikow claims in his First Cause of Action that Mr. Shalik is liable to him for fifty percent of $233,895.00 which Mr. Kalikow claims to have paid to Capital One in consideration for an extension of the Loan to 7001 BHR.[3] According to the Complaint, Capital One required this payment as a condition to extending the maturity date of the loan. Complaint, ¶ 15 ("The Lender demanded that the Loan be paid down...in the sum of $233,895.00 in order to extend the maturity date of the Loan.").

Mr. Shalik cannot be held liable unless he had a contractual obligation to make a payment to Capital One to extend the Loan or had some other obligation to share in a "pay down" made

[3] Mr. Shalik does not concede that Mr. Kalikow made any payment to Capital One. It is obvious that what occurred is that Capital One required that 7001 BHR pay down a portion of the Loan in consideration for an extension of the Loan – which was to 7001 BHR. While Mr. Kalikow may have written the check, the payment was for and on behalf of 7001 BHR; not Mr. Kalikow individually.

by Mr. Kalikow. As shown below, the Complaint does not allege any facts which would support such obligation. Accordingly, the First Cause of Action should be dismissed.

Further, the operating agreement for 7001 BHR specifically provides that the members are not required to make additional capital contributions. To the contrary, the operating agreement specifically provides that no additional capital contributions are required, as follows:

> 7. **Additional Contributions.**
>
> The Members are not required to make any additional contributions to the Company.

See Shalik Aff., Exhibit B at ¶ 7.

A. The Guaranty Does Not Obligate Mr. Shalik To Contribute To A Pay-Down Of The Loan

Although it is not clear from the Complaint, it appears that Mr. Kalikow may be claiming that the Guaranty obligates Mr. Shalik to reimburse Mr. Kalikow for one-half of the payment Mr. Kalikow made to extend the Loan. *See* Complaint, Exhibit A.

Any such claim, however, must be dismissed because the Guaranty is not between Mr. Shalik and Mrs. Kalikow and it does not impose any obligations on Mr. Shalik to Mr. Kalikow. Indeed, the guaranty is from Messrs. Shalik and Kalikow to Capital One. Mr. Shalik did not undertake any obligations or make any promises to Mr. Kalikow in the Guaranty.

In order to state a claim sounding in breach of contract Mr. Kalikow is required to allege facts which demonstrate that an agreement existed between himself and Mr. Shalik and that the agreement contains the obligation sought to be enforced. *See, e.g., Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dep't 1986).[4]

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[4] Mr. Kalikow also is required to allege consideration and performance of his obligations pursuant to the agreement, neither of which have been alleged.

Since the complaint does not allege any facts which support a claim sounding in breach of contract and the Guaranty does not contain any obligation from Mr. Shalik to Mr. Kalikow – let alone an obligation to share in a "pay down" of the Loan to 7001 BHR – any claim against Mr. Shalik sounding in breach of contract based on the Guaranty must be dismissed.

B. No Other Obligation To Contribute To The Pay-Down Arises From The Facts Alleged

It appears that what Mr. Kalikow is attempting to allege is a claim sounding in "equitable contribution." This claim fails too, however, because Mr. Kalikow does not allege that the Loan was in default and he does not allege (and based on the Guaranty cannot allege) that he was legally obligated to pay Capital One pursuant to the Guaranty.

Stated differently, it is apparent from the facts alleged in the Complaint that Mr. Kalikow made a voluntary payment to Capital One in order to induce it to extend the maturity date of the Loan to 7001 BHR. That payment was not required under the Guaranty and, thus, there can be no claim for equitable contribution.

Finally, even if Mr. Kalikow could otherwise state a claim, equitable contribution is applicable only where a co-guarantor pays more than its equitable share of the obligation. At most, Mr. Kalikow paid $8,895.00 more than his equitable share of the amount guaranteed. Accordingly, if not dismissed in its entirety, this claim should be dismissed to the extent that it seeks to recover more than $8,895.00.

1. The doctrine of equitable contribution

The doctrine of equitable contribution is applicable where a co-guarantor pays more than its proportionate share of a common obligation and functions to require that all obligors contribute to the joint obligation in an equitable manner. *See Mediclaim, Inc. v. Grothuis*, 38 A.D.3d 730, 834 N.Y.S.2d 200 (2d Dep't 2007)("co-guarantor who has paid more than his or her

proportionate share of the common liability is entitled to contribution from the other co-guarantors"); *Falb v. Frankel*, 73 A.d.2d 930, 423 N.Y.S.2d 683 (2d Dep't 1980)("where one joint obligor pays more than his proportionate share of the common liability, he is entitled to contribution from the other joint obligors").

Not all payments made by co-guarantors give rise to a claim for equitable contribution. For a claim to arise, the payment must have been made on account of the "common obligation" and the party making the payment must have been legally obligated to do so. *See Mediclaim*, 38 A.D.3d 730, 834 N.Y.S.2d 200 (requiring payment of "proportionate share of the common liability"); *Falb*, 73 A.D.2d 930, 423 N.Y.S.2d 683(same), *Halpern v. Rosenbloom*, 459 F.Supp. 1346 (S.D.N.Y. 1978)(applying New York law and requiring payment of a joint obligation); *Panish v. Rudolph*, 298 A.D.2d 237, 748 N.Y.S.2d 726 (1st Dep't 2002), holding that "if plaintiff's assignor paid the guaranteed loan not as a guarantor but as a volunteer, then the loan was extinguished by payment, such that no right of contribution arose against the co-guarantor....").

As discussed below, Mr. Kalikow made a payment to Capital One in order to obtain an extension of the maturity date of the Loan to 7001 BHR. The payment was not due, and was not required to be made, pursuant to the Guaranty and was not made an account of any joint obligation. Accordingly, there is no claim for equitable contribution.

2. <u>The payment alleged was not required by the Guaranty</u>

Mr. Kalikow does not allege (because he cannot allege) that he was obligated to pay Capital One $233,895 (or any other amount) pursuant to the terms of the Guaranty. Instead, he

alleges that Capital One "demanded" a "pay-down" of the principal amount of the Loan as a condition to extending the maturity date of the Loan. Complaint, ¶ 15.[5]

Even if Mr. Kalikow were to make such an allegation, it would be fruitless because the Guaranty is clear that the parties' obligations did not arise unless and until: (i) there was a "default;" and (ii) Capital One demanded payment from the guarantors. *See* Complaint, Exhibit A at ¶ 1, which provides, in relevant part, that:

> Guarantor hereby jointly and severally and unconditionally guarantees the full, prompt, complete and faithful performance, payment, observance and fulfillment by Borrower of all of the obligations, covenants and conditions contained in the Loan Documents....and by this Guaranty Guarantor does hereby promise, **in the event Borrower defaults** under any obligation under the Loan Documents or on any payment due Lender under the Documents, to promptly perform such obligation or make such payment to Lender **upon Lender's request so to do**. If any default shall occur and, after the expiration of any grace period applicable under the terms of the Note and/or the other Loan Documents, if Lender shall declare the Note to be immediately due and payable, then Guarantor shall, within five (5) days after demand in writing therefor, pay to Lender all amounts remaining unpaid under the Note and the other Loan Documents.

(Emphasis added).

Mr. Kalikow does not allege that there was any "default" and he does not allege that Capital One ever requested payment from the guarantors of any obligation due under the Loan Documents – both of which are required to trigger an obligation under the Guaranty. Nor can Mr. Kalikow make such an allegation. As the Capital One Letter makes clear "[t]he Bank has

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[5] There is a substantial difference between a payment made to obtain an extension of a loan and a payment made pursuant to the terms of a written Guaranty. Since Mr. Kalikow's payment was made in consideration of an extension of the Loan – and not pursuant to the Guaranty (which is the only possible "common obligation") – Mr. Kalikow has no right to seek recovery from Mr. Shalik, under the principals of equitable contribution or otherwise.

not yet formally demanded payment in full of all sums due under the Loan....or declared an Event of Default at this time, but may chose to do so in the future." *See* Shalik Aff., Exhibit E.

In addition, Messrs. Shalik and Kalikow did not guaranty a "pay down" of the Loan. What they guaranteed was the "performance, payment, observance and fulfillment by Borrower of all of the obligations, covenants and conditions contained in the Loan Documents." *Id.* Mr. Kalikow does not allege that the "Borrower" had an obligation – pursuant to the Loan Documents – to make a "pay down." Accordingly, his payment could not have been made pursuant to the Guaranty.

Because Mr. Kalikow does not allege that the payment he made was on account of a "common obligation," because he does not allege that there ever was a default, because he does not that Capital One ever requested payment under the Guaranty, and because he does not allege that the payment he made was required pursuant to the Guaranty, the First Cause of Action in the Complaint does not state a claim for relief against Mr. Shalik and should be dismissed. *See Mediclaim*, 38 A.D.3d 730, 834 N.Y.S.2d 200; *Falb*, 73 A.D.2d 930, 423 N.Y.S.2d 683, *Halpern v. Rosenbloom*, 459 F.Supp. 1346; *Panish v. Rudolph*, 298 A.D.2d 237, 748 N.Y.S.2d 726.

3. **Even if Mr. Kalikow could state a claim for equitable contribution, his claim must be limited to $8,895, which is the most he can allege he paid in excess of his proportionate share**

Even where a claim for equitable contribution exists, the party asserting the claim is limited to recovering that portion paid which is more than its proportionate share of the obligation. Thus, in *Falb*, the Court held that:

> A part payment which does not exceed a surety's pro rata share of the indebtedness does not entitled him to contribution from his cosurety.

73 A.D.2d 930, 423 N.Y.S.2d 683. In *Beltrone v. General Schuyler & Company*, 229 A.D.2d 857, 645 N.Y.S.2d 914 (3d Dep't 1996), the Court held that:

> plaintiffs right to recovery from [defendant] is dependent upon plaintiff's payment of an amount in excess of the money which, as between him and [defendant], it was his duty to pay.

The Guaranty recites that 7001 BHR LLC borrowed $1,300,000. It further recites that Messrs. Kalikow and Shalik, jointly and severally, guaranteed payment of $450,000 of that amount. Complaint, Exhibit A, Guaranty, Whereas clause, page 1, and ¶ 1.

Accordingly, while each of Mr. Shalik and Mr. Kalikow might have been liable to Capital One for $450,000 pursuant to the Guaranty, as between themselves each is liable for only $225,000 (one-half of the common obligation).

Mr. Kalikow alleges that he paid Capital One $233,895. Complaint, ¶ 18. Since $233,895 is just $8,895 more than Mr. Kalikow's "share" of $225,000, Mr. Kalikow's claim against Mr. Shalik cannot exceed $8,895 and the First Cause of Action should be dismissed to the extent that it seeks to recover a greater amount.

II

THE SECOND CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION AGAINST MR. SHALIK

In their Second Cause of Action, the plaintiffs claim that Mr. Shalik owed them a fiduciary duty and breached that duty when he failed to inform them that: (i) Crossways Realty Associates, LLC ("Crossways"), an entity allegedly owned by Mr. Shalik, signed a contract to purchase a building in Woodbury, New York; and (ii) "he intended to not renew his sublease and to instead vacate the space his business had subleased in the Premises upon the termination of the sublease." Complaint, ¶¶ 27 and 28. Plaintiffs claim that these omissions deprived them of "as

much time as possible to seek a new subtenant for the space occupied by defendants' business in the Premises." Complaint, ¶ 30.

Plaintiffs also claim that Mr. Shalik damaged 7001 BHR LLC because he "failed to allow plaintiffs to show the space his business occupied in the Premises to potential tenants" and because he removed "a set of glass double-doors leading into the portion of the Premises being leased by his business from 7001 prior to vacating the space, by replacing those doors with a single wooden door and by failing to fix damage caused to the Premises when doing so." Complaint, ¶¶ 31 and 35.

As shown below, each of these claims should be dismissed for failure to state a cause of action.

A. The Facts Alleged In The Complaint Demonstrate That No Fiduciary Duty Was Owed And That There Could Not Have Been Any Reasonable Reliance On a Duty To Disclose

The plaintiffs' Second Cause of Action is based on, and relies entirely on, the claim that "Defendant owes a fiduciary duty to the plaintiffs as a 50% owner and/or member of 7001." Complaint, ¶ 22.

But the plaintiffs allege in the very next paragraph that "Defendant...despised plaintiff Edward Kalikow and the fact that defendant was not a managing member of 7001, having lost two separate lawsuits relating to 7001 that defendant had commenced, and having engaged in extensive litigation with plaintiff Edward Kalikow relating to other matters." Complaint, ¶ 23.

The existence of a fiduciary duty is not an immutable fact which exists in a vacuum. The particular facts and circumstances which pertain to the parties involved must be considered when deciding whether a fiduciary duty exists and whether it has been breached. *See, e.g., Pappas v.*

Tzolis, 20 N.Y.3d 228, 958 N.Y.S.2d 656 (2012). Indeed, in *Mandelblatt v. Devon Stores, Inc.*, 132 A.D.2d 162, 521 N.Y.S.2d 672 (1st Dep't 1987), the Court stated that:

> A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.

Given the contentious nature of the relationship between the parties as alleged in the Complaint, plaintiff cannot also allege that there was a relationship of trust and confidence. Stated different, the claims that Mr. Shalik "despised" Mr. Kalikow, that the parties had been involved in extensive litigation, and that Mr. Shalik was upset because he was "not a managing member" of the plaintiff LLC, belie any claim that a fiduciary duty was owed to the plaintiffs and belie any claim that the plaintiffs reasonably relied on the existence of such a duty when they were deciding how to act. *Pappas*, 20 N.Y.3d 228, 958 N.Y.S.2d 656. According to the Court in *Pappas*, "[t]he test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that would make reliance on the fiduciary unreasonable."

Here, the plaintiffs themselves have alleged facts which rendered unreasonable any belief that Mr. Shalik owed them a fiduciary duty or that he had an obligation to disclose. Accordingly, they cannot argue that they relied on Mr. Shalik's alleged duty to disclose.

B. Any Fiduciary Duty Was Owed To Mr. Kalikow, Not 7001 BHR. Since Mr. Kalikow Was Not Injured, In <u>His Individual Capacity, There Is No Claim Against Mr. Shalik</u>

The Complaint alleges that Mr. Shalik is a "member" of 7001 BHR LLC, Complaint ¶ 6 and that Mr. Kalikow is the "managing member" of the LLC Complaint, ¶ 7.

No case has been found which holds that a passive, non-managing member of an LLC owes a "fiduciary duty" to the LLC.

This distinction is crucial because the Complaint does not allege that Mr. Kalikow, individually, suffered any injury as a result of the alleged breach of fiduciary duty. All that is alleged is that 7001 BHR was not able to re-let the office space occupied by Shalik, Morris as quickly as it would have if it was given more notice of non-renewal.

Because no fiduciary duty was owed to 7001 BHR, no claim for breach of fiduciary duty based on alleged non-disclosure can be stated.

C. Mr. Shalik Did Not Have Any Duty To Inform 7001 BHR LLC That Crossways Realty Associates, LLC Signed A Contract To Purchase A Building Or That Shalik, Morris & Co., LLP Did Not Intend To Renew Its Sublease

If the Court nonetheless considers the breach of a fiduciary duty claim, the Complaint still fails to state a cause of action.

Case law recognizes that members of an LLC can owe each other a fiduciary duty with respect to the affairs of the company, but even where such duty is owed the scope of the duty is not unlimited.

Here, the plaintiffs are attempting to stretch any possible duty well-past its breaking point by claiming that Mr. Shalik had a duty to tell 7001 BHR that: (i) Crossways had signed a contract to purchase a building; and (ii) that Shalik, Morris had decided not to exercise a written, contractual right of renewal.

Traditionally, a "breach of fiduciary duty" occurs where a fiduciary "wrongfully enriches" itself at the expense of the entity to which it owes the duty, *Donovan v. Ficus Investments, Inc.*, 20 Misc.3d 1139(A), 872 N.Y.S.2d 690 (Sup. Ct. N.Y. Co. 2008), or engages in some sort of "self dealing," *Nathanson v. Nathanson*, 20 A.D.3d 403, 799 N.Y.S.2d 83 (2d Dep't 2005), or enters into a transaction with the party to which the duty is owed, but fails to make full disclosure. *Salm v. Feldstein*, 20 A.D.3d 469, 799 N.Y.S.2d 104 (2d Dep't 2005)

There is no claim here that Mr. Shalik enriched himself or otherwise obtained (or even sought to obtain) any benefit at the expense of the plaintiffs. And plaintiffs do not allege that 7001 BHR is in the business of buying and selling buildings. Nor do they allege that 7001 BHR had any interest in the building Crossways purchased (or had the means or ability to purchase the property).

Simply asserting a claim based on alleged non-disclosure does not salvage the claim because plaintiffs have not alleged any facts which support a claim that Mr. Shalik had a duty to disclose that Shalik, Morris (allegedly) had determined that it would not renew the Sublease. And they cannot make such an allegation. And, as shown above, plaintiffs cannot alleged that they relied on any alleged duty to disclose.

As discussed below, 7001 BHR bargained for, and obtained in the Sublease, an agreement that Shalik Morris would provide 240 days notice if it intended to renew the Sublease. If 7001 BHR wanted more notice, it should have bargained for that in the Sublease. Plaintiffs cannot seek through litigation that which they did not obtain through negotiation.

1. <u>The Sublease provided for 240 days notice of intent to renew</u>

The Sublease contains a rider, which provides at paragraph 17 (Renewal Right), as follows:

> Subtenant shall have the right to renew its sublease for two additional five (5) year terms at the current market rent at time of renewal subject to annual adjustments for increases in reasonable operating expenses. Prior to the conclusion of the second renewal term, if applicable, Overtenant and Undertenant, shall engage in good faith discussions regarding additional renewal(s). Subtenant shall advise of its intent to renew at least two hundred forty (240) days prior to the expiration of the current term.

See Shalik Aff., Exhibit F.

The Sublease states the extent – and the full extent – of the information 7001 BHR was entitled to receive concerning renewal of the Sublease.

What the plaintiffs' are attempting to do here is manufacture an extra-contractual obligation to disclose, to impose that obligation on Mr. Shalik after-the-fact, and to claim damages because Mr. Shalik did not comply with the obligation they have concocted.

Simply put, if 7001 BHR did not receive notice that Shalik, Morris intended to renew the Sublease "at least two hundred forty (240) days prior to the expiration of the current term," then it should have understood that the Sublease was not going to be renewed. 7001 BHR was not entitled to receive any other notice, or information, about Shalik, Morris' intent and the alleged failure to provide the notice is not actionable.

2. 7001 BHR's claim that it was damaged is speculative

In order to state a cause of action for breach of fiduciary duty, the plaintiffs must allege that they were damage and that the damage was caused by the alleged breach. *See Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 38 A.D.3d 737, 832 N.Y.S.2d 280 (2d Dep't 2007) (plaintiff must prove damages were the "direct end proximate cause" of the misconduct claimed). It is equally clear that remote, contingent or speculative damages cannot be recovered in tort actions." *See Steitz v. Gifford*, 280 N.Y. 15 (1939).

The plaintiffs' claim here is that, if 7001 BHR had been given more than the 240 days notice that was bargained for in the Sublease, 7001 BHR would have been able to rent the space earlier than it otherwise could.

This claim should be rejected because 7001 BHR agreed to accept 240 days notice of renewal. If that amount of time was sufficient to allow it to market the space if Shalik, Morris

chose not to renew, it must be sufficient time to market the space in the context of a lawsuit for breach of fiduciary duty.

In any event, the plaintiffs' claim that 7001 BHR would have re-let the space earlier, if only it had been given more notice, is entirely speculative. As such, the claim is insufficient and should be dismissed.

D. The Claim That Mr. Shalik Refused To Allow Plaintiffs To "Show The Space" fails to State A Cause Of Action Because No Facts Are Alleged Which Support A Claim That Mr. Shalik Had Any Duty To Do So

A claim of "breach of fiduciary" duty cannot be used like a talisman to imbue with the sound of wrongdoing every act or omission which may occur. Shalik, Morris and 7001 BHR had a written Sublease. The parties' rights, duties, and obligations must be found in that document.

Stated differently, regardless of whether the plaintiffs' claim sounds in contract or tort, Mr. Shalik cannot be held liable for the alleged failure to permit 7001 BHR LLC to "show the space" unless he had a duty to allow a showing. Just because he was a non-managing member of 7001 BHR does not mean that he was not permitted to follow the terms of the Sublease.

The Complaint is bereft of any allegations which would support a claim that Mr. Shalik had any duty to allow 7001 BHR to show the office space subleased to Shalik, Morris. The Complaint should be dismissed on that ground alone.

If the Court considers the claim further, it should be dismissed because documentary evidence demonstrates that there was no such duty.

The Sublease does not contain any provision which obligated Shalik Morris to allow its 7001 BHR to access the premises or to show it to prospective tenants during the term of the Sublease.

The law is clear that a tenant has no obligation to permit its landlord to show the leased premises to prospective tenants unless such right is specifically reserved in the lease. *See Camatron Sewing Machine, Inc. v. F.M. Ring Associates, Inc.*, 179 A.D.2d 165, 582 N.Y.S.2d 396 (1st Dep't 1992); *Thorn v. Stephens*, 169 Misc.2d 832, 646 N.Y.S.2d 597 (Sup. Ct. Westchester Co. 1995). Accordingly, Mr. Shalik could not have committed any wrong when Shalik, Morris simply stood by its legal rights.

E. The Claim That Mr. Shalik Removed Glass Doors Should Be Dismissed Because The Tenant Of The Office Space Was Shalik, Morris, Not Mr. Shalik

The claim that Mr. Shalik removed a "set of glass double-doors leading into a portion of the Premises being leased by his business from 7001" states, at most, a claim against Shalik, Morris for breach of the Sublease because Shalik, Morris, not Mr. Shalik, was the sub-tenant. Plaintiffs have not alleged any facts which would permit them to impose personal liability on Mr. Shalik for an act allegedly committed by Shalik, Morris. Moreover, such a claim is precluded by the law governing limited liability partnerships, which insulates partners in an LLP from personal liability for claims sounding in breach of contract. *See* Partnership Law, § 26 (b).

III

THE CLAIM FOR PUNITIVE DAMAGES SHOULD BE DISMISSED

The plaintiffs request an award of punitive damages against Mr. Shalik in the sum of $500,000 based on the alleged breach of fiduciary duty. Complaint, ¶ 43.

The law is well-settled that punitive damages may be awarded "in tort cases...so long as the very high threshold of moral culpability is satisfied." *Giblin v. Murphy*, 73 N.Y.2d 769, 536 N.Y.S.2d 54 (1988). In *Giblin*, the Court of Appeals found that punitive damages were appropriate based on the defendants' "wrongful diversion and squandering of corporate assets,

granting of excessive credit, payments of salaries to themselves, and other acts constituting willful, wanton and reckless misconduct."

The facts alleged in the Complaint do not even come close to this standard. At most, the plaintiffs allege that Mr. Shalik did not tell them – earlier than 240 days before expiration of the Sublease – that Shalik, Morris did not intend to renew its lease. This conduct, even if accepted as true, does not rise to the level of moral culpability.

CONCLUSION

For the foregoing reasons, it is respectfully requested that both the First and Second Causes of Action in the Complaint be dismissed.

Dated: Garden City, New York
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Respectfully,

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