SUPREME COURT OF THE STATE OFNEW YORK
COUNTY OF NEW YORK

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STEVE PAPPAS,

Plaintiff,

-against-

LARRY H. SCHATZ and GRUBMAN, INDURSKY, SHIRE & MEISLAS, P.C.

Defendants.

AFFIDAVIT IN OPPOSITION TO MOTION

Index # 650157/13

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STATE OF NEW YORK )

COUNTY OF KINGS ) SS.:

STEVE PAPPAS, being duly sworn, deposes and says.

1. I am the Plaintiff in this action. I make this affidavit in opposition to Defendants' motion to dismiss my Complaint. I make this affidavit based upon personal knowledge.

2. My Complaint in this action arises out of misrepresentations made to me by Defendant Schatz, and derivatively his employer, the Defendant Grubman law firm. These misrepresentations were made prior to and during a transaction involving the sale of my interest in an LLC. The misrepresentations made by defendants induced me into selling my interest.

3. Defendants' engage in wishful thinking when they want to point to as dispositive the prior litigation I had with my former LLC member, Steve Tzolis. To be sure, the Tzolis litigation reached the Court of appeals and I lost, but the facts in the present Complaint are in conformance with the facts recited by the Court of Appeals. There is one caveat, however, the facts related to the defendants' misrepresentations were not litigated in the Tzolis suit and there is independent liability for defendants outside of Tzolis's duties (or lack thereof according to the Court of Appeals. In this forum, I am not litigating Tzolis's actions, bur rather the independent actions of these defendants.

## FACTS

4. Constantine Ifantopoulos, Steve Tzolis and I formed and managed a limited liability company Vrahos LLC (hereinafter referred to as "Vrahos") in late 2005, for the purpose of entering into a long-term lease on a building in Lower Manhattan at 68-74 Charlton Street, which deal was consummated thereafter.

5. Tzolis and I each contributed $50,000 and Ifantopoulos $25,000, in exchange for proportionate shares in the company.

6. Pursuant to a January 2006 Operating Agreement, Tzolis agreed to post and maintain in effect a security deposit of $1,192,500, and was

permitted to sublet the property. The Agreement further provided at paragraph 11 that any of the three members of the LLC could "engage in business ventures and investments of any nature whatsoever, whether or not in competition with the LLC, without obligation of any kind to the LLC or to the other Members."

7. Disputes among the Vrahos members ensued. In June 2006, Tzolis took sole possession of the property, which was subleased by Vrahos to a company owned by a company owned by Tzolis for $20,000 per month in addition to rent payable by the LLC under the lease. Ifantopoulos and I reluctantly agreed to do this, because we were looking to lease the building to a third party tenant and Tzolis was obstructing this from happening. Tzolis not only blocked my efforts, he also did not cooperate in listing the Property for sale or lease with any New York real estate brokers.

8. Moreover, Tzolis had not made, and was not diligently preparing to make, the improvements required to be made under the Lease. Tzolis was also refusing to cooperate in my efforts to develop the Property. Further, Tzolis's company did not pay the rent due.

9. On January 18, 2007, Tzolis bought my and Ifantopoulos' membership interests in the LLC for $1,000,000 and $500,000, respectively. At closing, in addition to an Agreement of Assignment and Assumption, the

parties executed a Certificate in which Ifantopoulos and I represented that, as sellers, we had "performed their own due diligence in connection with [the] assignments . . . engaged [our] own legal counsel, and [were] not relying on any representation by Steve Tzolis [.] or any of his agents or representatives, except as set forth in the assignments & other documents delivered to the undersigned Sellers today," and that "Steve Tzolis has no fiduciary duty to the undersigned Sellers in connection with [the] assignments." Tzolis made reciprocal representations as the buyer.

10. In August 2007, Vrahos now owned entirely by Tzolis, assigned/sold the lease to a subsidiary of Extell Development Company for $17,500,000.

11. In 2009 and since, Ifantopoulos and I came to believe that Tzolis had surreptitiously negotiated the sale with the development company before he bought their interests in the LLC.

12. Extell and Tzolis initially met and outlined the parameters of a deal in principal in the Fall of 2006, before Tzolis made overtures to buyout the other Vrahos members. Defendants Schatz and Grubman were a part of said negotiation.

13. At that time, Extell informed Tzolis that it wanted both Ifantopoulos and me out before it would agree to purchase the lease, as well as an additional 50 year extension on the lease from the building's owner.

14. Upon information and belief, the building's landlord was solicited for an additional 50-year extension in the Fall of 2006 and prior to Tzolis making overtures to buyout his Vrahos partners. Defendants solicited the building's landlord and were involved in said negotiation.

15. Tzolis' scheme was aided and abetted by Defendants, who misrepresented Tzolis' motives to Plaintiff in person and in telephone conversations wherein they convinced and persuaded me to sell our interest in Vrahos ostensibly for Tzolis to fulfill his life-long "dream" of creating the best catering hall in New York City (to be named "Talk of the Town"), while knowing of and specifically working on either the brokerage of and/or legal aspects of Extell deal. The misrepresentations about Tzolis' motivations were untrue and known by defendants to be untrue and made to me by defendants on a number of occasions throughout November 2006, December 2006 and up through and including on January 18, 2007.

16. In making such mispresentations, Defendants held themselves out as counsel for Vrahos and provided advice to me, as well, as they had on other

occasions, while actually acting as counsel for Tzolis for the concealed transaction with Extell.

## MY CAUSES OF ACTION

17. My Complaint states three causes of action: breach of fiduciary duty, fraud (based on misrepresentation) and negligent misrepresentation.

a. **Breach of Fiduciary Duty Claim.**

18. The basis for this claim is the attorney client relationship that existed between Defendants and me and/or Vrahos, wherein Defendants owed certain fiduciary duties the LLC and its members, including, but not limited to a duty to act and give advice for our benefit, to act in good faith and in our best interest, to exercise independent professional judgment and undivided loyalty on our behalf, to pursue our lawful objectives, to represent no adverse interests and to make **full disclosure** to us of all known information that was important and material to our affairs.

19. Defendants also had a duty to comply with the rules of professional and ethical conduct applicable to the practice of law in the State of New York, including, but not limited to:

i. DR 5-105- Conflict of Interest- Simultaneous Representation;

ii. DR 5-108- Conflict of interest- Former Client; and

iii. DR 5-109- Organization as Client.

20. Defendants breached their fiduciary duty to me, as a member of the LLC by:

i.. knowingly representing clients having conflicting interests;

ii. knowingly representing clients with conflicting interests in the same transaction;

iii. failing to exercise independent judgment and undivided loyalty on behalf of me and/or Vrahos;

iv. failing to deal honestly with me and/or Vrahos;

v. failing to disclose to me facts and information sufficient to permit PLAINTIFF to appreciate the nature and possible consequences of Defendants' conflict of interest; and

21. Defendants' conduct violated, among other things, DR 5-105, DR 5-108 and DR 5-109 of the New York Code of Professional Conduct.

22. Defendants' knowing concealment from me of their conflicts of interest was malicious, oppressive, despicable, fraudulent and done with a willful disregard of my rights.

23. Defendants understood the impact and were aware of the grave financial and economic consequences of their concealment and in balancing the interests of Tzolis with those of other members and/or Vrahos.

24. Despite this understanding and awareness, Defendants failed to avoid those potential consequences through prompt and full disclosure to me and such breach of fiduciary duty was and is a substantial factor causing me to suffer damages, directly and proximately due to Defendants' breach of their fiduciary duty to me, wherein I have been damaged in amount equal to the value of the loss, which is in excess of $6,000,000.00.

b. **Fraud (Misrepresentation) Claim**

25. Defendants made representations of fact to me as to the motivation of Tzolis in purchasing the leasehold in order to persuade me to sell my interest to Tzolis on a number of occasions throughout November 2006, December 2006 and up through and including on January 18, 2007. Said representations were false and known by defendants to be false and intentionally made to induce me to sell my interest to Tzolis.

26 .I relied on said knowingly false representations in deciding to sell my interest to Tzolis and, as direct and proximate result of Defendants' misrepresentation and fraud, I have been damaged in amount equal to the value of the loss, which is in excess of $6,000,000.00.

c. **Negligent Misrepresentation**

27. An attorney client relationship existed between Defendants and members of Vrahos, including me, and Vrahos, such attorney-client relationship being a special relationship and/or based on privity, imposing a duty on Defendants requiring them to impart correct information to the members and me.

28. The information Defendants imparted to me that Tzolis' motives in purchasing the lease from me was to fulfill Tzolis' life-long "dream" of creating the best catering hall in New York City (to be named "Talk of the Town"), was incorrect and a breach of duty, as Tzolis' motive was to sell the lease to Extell for more money.

29. I relied on this incorrect representation, which reliance direct and proximately caused me damage in the sum of $6,000,000.00.

**DEFENDANTS' ARGUMENTS**

30. Defendants make a number of arguments, which I will address now. None of these arguments are dispositive.

a. **Res Judicata.**

31. Defendants assert that my claims are precluded based on the doctrine of res judicata. They point to the *Tzolis* Court of Appeals case and assert that, since they were Tzolis's agents, the issue of fiduciary

responsibility has already been litigated. This is wishful thinking primarily because their liability in this case is **not dependent** on the culpability of Tzolis. Defendants wore many hats in this transaction and during the life of the LLC. The duties Defendants had under my claims are based on the nature of their relationship with me, individually and as a member of the LLC and not derived from Tzolis's duty as a member or manager of the LLC. This distinction differentiates the Tzolis case and this case, so res judicata is not applicable.

b. **Collateral Estoppel.**

32. Defendants assert that my claims are precluded based on the doctrine of collateral estoppel. First, they allege the *Tzolis* case purportedly determined "reasonable reliance" was waived because of the Estoppel certificate that was executed at the closing. Second, that I purportedly alleged in my *Tzolis* Complaint that defendants were Tzolis's attorneys.

33. First, the issue of the Estoppel certificate is a non-issue because the duties here are based on independent relationships. Defendants rendered advice and counsel in the past to the LLC and its members. The formation of that on-going relationship and its use in asserting a misrepresentation to induce me to enter and go through with a transaction has nothing to due with the agency relationship Defendants had with Tzolis. In other words, their

independent relationship with the LLC and duty to its members because they were counsel to the LLC is in no way waived by an estoppel certificate that insulates agents for Tzolis. It cannot do that because the defendants are wearing multiple hats in multiple relationships. Collateral Estoppel does not apply here.

34. Second, the fact that a pleading in *Tzolis* asserted Defendants acted as counsel to Tzolis in the transaction does not preclude the assertion that defendants may have been wearing multiple hats in Vrahos LLC business and in interacting with its members on legal matters established independent duties. Collateral Estoppel does not apply here.

c. **Failure to State a Claim.**

35. Once again, based on the Estoppel Certificate argument, defendants assert that a claim is not stated on any of the three causes of action because "reasonable reliance" is precluded according to the *Tzolis* decision. As indicated above under paragraphs 32-33, reasonable reliance has not been decided because the agency relationships are independent. Clearly, the claims state recognized causes of action.

36. However, I wish to note something that caught my eye in defendants' Memorandum of Law at the bottom of page 19, wherein they assert that the Attorney Professional Responsibility Rules allow consent to

conflicting representations. This is asserted to somehow show that conflicting representations are allowable. Of course, this is true, but only with a consent or waiver. Neither of which was executed here.

d. **Particularity of the Fraud Complaint.**

37. Defendants assert that the fraud cause of action is not particularized enough to meet the requirements of CPLR 3016(b). This assertion is absolutely untrue. The operative (and oft-repeated) misrepresentation is clearly asserted at paragraph 15 of the Complaint, as integrated through paragraphs 27 and 28 of the Complaint. The dates and fact that the defendants uttered the misrepresentations are also clearly asserted at paragraph 15 of the Complaint, as integrated through paragraphs 27 through 33 of the Complaint.

38. Defendants also argue that there is no proof asserted of a fiduciary relationship. I am not sure what they are looking for. Defendants were counsel to the LLC. I interacted with them on Vrahos business for approximately six months. They rendered advice and counsel to the members. What more do they want? I have seen them assert all sorts of technical reasons they should get out this lawsuit, with one glaring exception- a denial of these facts. That speaks for itself.

### e. Statute of Limitations

39. It is undisputed that the filing of a Summons with Notice in this action occurred within six years of the closing date in the Tzolis transaction, wherein the last misrepresentation by defendants was made and when I detrimentally relied on same (see paragraphs 15, 27 and 28 to 33 of the Complaint). Therefore, any claim sounding in fraud would be timely, despite defendants' efforts to confuse the issue.

40. Defendants once again are engaged in wishful thinking when they work on the assumption that this is a disguised legal malpractice action. Make no mistake about it, the claim here is fraud, as perpetrated by these defendants in their wearing multiple hats. The legal relationship is how the trust was built and the means to their end. The misrepresentation is where the trust was betrayed. The closing is when I paid the price. The gravamen of these claims is the misrepresentations of the defendants.

## CONCLUSION

41. For all of the above facts, arguments and reasons, as well as the Complaint and all favorable inferences that may be drawn from it, Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss the Complaint in its entirety.

WHEREFORE, Plaintiff respectfully demands an Order denying Defendants' motion to dismiss the Complaint and for such other and further relief the Court deems just and appropriate under the circumstances.

STEVE PAPPAS

Sworn to before me this

16 day of January, 2014

NOTARY PUBLIC

YESENIA GUTIERREZ
NOTARY PUBLIC STATE OF NEW YORK
KINGS COUNTY
LIC. #01GU6125935
COMM. EXP. 04/25/~~2013~~ 2017