SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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RAQUEL WOLF, as Executrix of the
ESTATE OF HIRSCH WOLF, Index No.: 500661/2016

Plaintiff,

-against-

SOL WAHBA, MICHAEL WAHBA and
SIGULA 1145 BROADWAY LLC

Defendants.
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DEFENDANTS' PRE-TRIAL MEMORANDUM OF LAW

Defendants Sol Wahba ("Sol"), Michael Wahba ("Michael") and Sigula 1145 Broadway LLC ("Sigula") submits this trial memorandum in support of their position that Plaintiff Raquel Wolf as Executrix of the Estate of Hirsch Wolf ("Plaintiff") fails to establish its claims for 1) fraudulent inducement; 2) breach of fiduciary duty/aiding and abetting; 3) breach of contract/inducement thereof; and 4) unjust enrichment. For the following reasons, Plaintiff is not entitled to the relief sought:

1) Plaintiff cannot maintain its fraudulent inducement and breach of fiduciary duty claims, as they are duplicative of Plaintiff's breach of contract claim;

2) Plaintiff's count two for breach of fiduciary duty and count three for breach of contract/inducement thereof both contain two distinct causes of action under one count: breach of fiduciary duty and aiding and abetting in a breach of fiduciary duty; and breach of contract and tortious interference with a contract. It is improper, especially at this late stage of the Action, for separate causes of action to appear under the same count. Therefore, such claims should be dismissed at this time;

3) Plaintiff cannot set forth by clear and convincing evidence the elements of its fraudulent inducement cause of action against Sol or Michael. Sol did not omit any material information

in negotiating the membership interest purchase price with Plaintiff as there was no offer for the purchase of the Property that Sol was aware of when Plaintiff agreed to the purchase price. Michael did not negotiate the membership interest purchase price with Plaintiff, negotiations of the membership interest purchase price were between Plaintiff and Sol;

4) The Jury cannot find Michael or Sol liable for breaching a fiduciary duty due to Plaintiff. Michael did not owe a fiduciary duty to Plaintiff as he was not a party to the Richmond Properties, LLC (the "LLC") Op Agreement ("Op Agreement")(Defendants' Ex. A) nor a manager of the LLC; Nor can the Plaintiff establish by a preponderance of the evidence that Sol breached a fiduciary duty owed to Plaintiff. Under the terms of the Op. Agreement §14.1.3, without the written consent of the Members, the LLC was dissolved upon the death of a Member. The LLC was in dissolution since the death of member, Hirsch Wolf, and no fiduciary obligations were owed by Sol to the Plaintiff.

5) Further, Sol followed the procedures set forth in the Op Agreement with respect to a sale of membership interest and a sale of the property (Defendants' Ex. A Op Agreement at Article 12 and §§13.1- 13.2) The obligation to inform Plaintiff of a new offer ceased upon an agreement to purchase Plaintiff's membership interest in the Property. The Parties contractually agreed to a buy-sell procedure. The buy-sell procedure was followed. Plaintiff cannot retrofit a fiduciary duty claim where the terms and procedures of the contract govern. To accept Plaintiff's argument that the duty is a continuing duty, this Court must accept a never-ending spiral of offers and counter-offer through to closing;

6) The unjust enrichment claim is not viable as two contracts governing the subject matter of the Action, namely the Op. Agreement and Membership Interest Purchase Agreement ("MIPA")(Defendants' Ex. AC) exist; and

7) Plaintiff fails to set forth any facts reflective of any morally culpable conduct, or evil and reprehensible motives, so as to recover punitive damages.

Accordingly, Plaintiff cannot prevail on any of its claims and judgment must be found in Defendants' favor.

I. APPLICABLE LAW AND SUPPORTING AUTHORITY

1. Improperly Plead Claims Must be Dismissed at This Juncture

Plaintiff's cannot maintain its fraud and breach of fiduciary duty claims as they are duplicative as Plaintiff's breach of contract claims. "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Organization, Ltd. v. Graham & James LLP*, 703 N.Y.S. 2d 439, 442 (Sup. Ct. 2000).

Where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties' agreement a cause of action sounding in fraud does not lie." *McKernin v. Fanny Farmer Candy Shops Inc*., 176 AD2d 233, 574 NYS2d 58 [2nd Dept., 1991] See also *Raytheon Co. v. AES Red Oak, LLC*, 37 A.D.3d 364, 365 (1st Dept. 2007).

In this Action all the fraud and breach of fiduciary duty allegations are further elaborations of the contract claim. Therefore, the claims must be dismissed prior to trial.

Additionally, CPLR 3014 makes clear that "[s]eparate causes of action . . . shall be separately stated and numbered . . . ." This rule is sensible to make pleadings coherent, especially when the different causes of action have different elements and pleading requirements.

Plaintiff's causes of action two and three are subject of dismissal because they improperly combine disparate claims into one cause of action in violation of CPLR 3014. Plaintiff has made it impossible Defendants to coherently defend against those purported causes of action.

Accordingly, Causes of Action Two and Three and/or the addition of aiding and abetting breach of fiduciary duty and inducement of breach of contract should be dismissed. See *Payrolls & Tabulating, Inc. v. Sperry Rand Corp.*, 257 N.Y.S. 2d 884 (N.Y. Sup. Ct. 1965) (dismissing complaint for improperly combining causes of action in violation of CPLR 3014).

2. <u>Plaintiff Cannot Prove Its Claim for Fraud in the Inducement</u>

As set forth in III(A) above, Plaintiffs' fraud claim is duplicative of Plaintiff's breach of contract claim and must therefore be dismissed.

The fraud claim is also unsuccessful on its merits. The elements of a claim for fraudulent inducement are: 1) a false representation of material fact, 2) known by the utterer to be untrue, 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) results in damages. *MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC* 32 Misc.3d 758 927 N.Y.S.2d 517 Sup Ct June 01, 2011) If the fraud claim is based on a fraudulent omission, the plaintiff must also prove that the "defendant had a duty to disclose material information based upon a confidential, special or fiduciary relationship, and failed to fulfill that duty." see *Dembeck v 220 Cent. Park S. LLC*, 33 AD3d 491, 492 (1st Dept 2006)

Plaintiff must prove the Defendants had a duty to disclose the later Pan Brothers offer to Plaintiff. Plaintiff failed to do so with respect to Michael and Sigula. Michael and Sigula were not parties to the Op Agreement (Defendants' Ex A). Defendants will demonstrate at trial that Michael was not the manager of the Property (Defendants' Ex. A) Nor was Sigula. Defendants will demonstrate that no fiduciary obligation exists when parties engage in an arm's length business transaction as Plaintiff and Michael, through Sigula, did (Defendants' Ex. AC). *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]).

Accordingly, Plaintiff's fraud claim is unsuccessful against Michael and Sigula.

Additionally, Plaintiff cannot prove each element of its fraudulent inducement claim against Sol by clear and convincing evidence. To start, Plaintiff cannot portray that there were any false representations made in order to reach the MIPA purchase price of $2,750,000.00. The evidence reflects that the MIPA purchase price was negotiated and agreed to in advance of Defendants' receiving the Pan Brothers offer for the purchase of the property (Defendants' Ex U and V).

Nor can Plaintiff prove that when Defendants' agreed to purchase Plaintiff's membership interest in the LLC Defendants' intended to defraud Plaintiff. *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 [1st Dept 2005].

Plaintiff was a sophisticated party who was aware of the risk it was taking when entering the MIPA. "…we have held that "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." *Ventur Group LLC v. Finnerty*, 68 A.D.3d 638, 892 N.Y.S.2d 69 (1st Dept. 2009) "Sophisticated parties have a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they are assuming" *Lipton v Green,* 51 Misc 3d 1210(A) [Sup Ct 2016] citing *HSH Nordbank AG v. UBS AG,* 95 AD3d 185, 195 [1st Dept 2012] . Plaintiff cannot claim to have been induced to sell its interest in Richmond at an unfair price. (See *Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 278 [2011] where Plaintiffs were sophisticated entities, and negotiated and determined the sale "with their eyes wide open."

The Estates' controller, Brian Penn, was trusted with all details of the proposed sale and reviewed all proposed offers. Plaintiff received an outside appraisal for the Property from an

appraiser Plaintiff selected (Defendants Ex T). Plaintiff's was satisfied to enter into a transaction for the sale of its shares for less than the appraisal value. (Defendants' Ex. U) Plaintiff cannot claim to have justifiably relied on Defendants' omission when entering the MIPA.

Accordingly, Plaintiffs cannot prove its fraudulent inducement claim by clear and convincing evidence and the jury must find in Defendants' favor.

3. Plaintiff Cannot Prove Its Claim for Breach of Fiduciary Duty/Aiding and Abetting

As set forth in III(A) above, the breach of fiduciary duty claim is duplicative of Plaintiff's breach of contract claim and must therefore be dismissed. The breach of fiduciary duty claim must also be dismissed because the cause of action improperly combines two causes of action (breach of fiduciary duty and aiding and abetting) under one cause of action. Therefore, both claims must be dismissed.

Moreover, Defendants intend to prove at trial that the express terms of the Op Agreement, eliminated all fiduciary obligations by and between the LLC's Members. Pursuant the Op Agreement, the death of any member terminated the existence of the Company and the Company was to be wound up and dissolved. Continuation of the LLC required the written consent of 51% Membership Interest received within 90 days of the dissolution event (Op Agreement §§14 and 16). No such written consent exists. Accordingly, Hirsch's passing was a dissolution event terminating the fiduciary relationship between Sol and Hirsch. See *Morris v Crawford*, 304 AD2d 1018, 1021 [3d Dept 2003](a fiduciary relationship between partners terminates upon dissolution of the company). See also *Wynne v Gruber*, 237 AD2d 284, 285 [2d Dept 1997](fiduciary relationship ends upon notice of dissolution). No fiduciary relationship between Sol and Plaintiff ever existed.

Accordingly, Defendants will prove that the death of Hirsch Wolf caused the dissolution of the LLC and eliminated Sol's fiduciary obligations to Plaintiffs. Thus, no breach of fiduciary duty claim lies.

i. No Aiding and Abetting Present

Nor can Plaintiff prove that Michael or Sigula are liable for aiding and abetting in the alleged fraud and breach of fiduciary duty. A necessary element of aiding and abetting, "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. . . *However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff*") See *Monaghan v. Ford Motor Co*., 2010 NY Slip Op 2110, ¶ 2, 71 A.D.3d 848, 850, 897 N.Y.S.2d 482, 485 (2d Dep't 2010) *citing Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003).

Even if Michael's omission did constitute "substantial assistance," which it does not, it is undisputed that Michael and Sigula did not owe a fiduciary duty to Plaintiff or Richmond. Michael was the principal of an adverse party, Sigula, in negotiations to purchase Plaintiff's membership interest in Richmond. (Defendants' Ex U, AB, AC) The membership interest purchase agreement was an arms-length transaction. (Defendants' Ex U, AB, AC) Michael and Sigula therefore owed no fiduciary duty to Plaintiff and cannot be found liable for aiding and abetting in a breach of fiduciary duty. See *Monaghan v. Ford Motor Co*., 2010 NY Slip Op 2110, ¶ 2, 71 A.D.3d 848, 850, 897 N.Y.S.2d 482, 485 (2d Dep't 2010) citing *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003)

Plaintiff cannot prevail on its second cause of action.

4. Plaintiff Cannot Prove its Breach of Contract/ Inducement Thereof Claim by a Preponderance of the Evidence

The breach of contract claim must also be dismissed because the cause of action improperly combines two causes of action (breach of contract and inducement thereof) under one cause of action. Therefore, both claims must be dismissed.

A cause of action for breach of contract under New York law contains four elements: "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park House. Corp.*, 79 AD3d 425, 426 (1st Dept 2010).

Here, Plaintiffs cannot prove that Defendant Sol Wahba breach the contract by not disclosing the Pan Brother's offer to Plaintiff after the MIPA purchase price had been reached.

Pursuant to Op Agreement §12.4 Ownership Interest in the LLC of any Member may be transferred in whole or in part to any other Member.

In or about August 28, 2013, Plaintiff agreed to market the Property in order to sell the Property. (Defendants Ex I, Defendants Ex. J) Offers to buy the Property were exchanged. (Defendants Ex M, N, P, T) The Estate (through its controller Brian Penn ("Penn") and various family members) and Michael, and Sol, received letters of intent for the purchase of the Property.

On or about July 23, 2014 decided to have the Property appraised. (Defendants Ex S) Plaintiff chose the appraiser. In or about August 28, 2014 (Defendants Ex T) Plaintiff advised Sol that the appraisal for the Property was $6,000,000.00. Pursuant to §13.2 of the Richmond Op Agreement Plaintiff also advised Michael of an offer, in the amount of $6,100,000.00 from a third party buyer for the purchase of the Property. Plaintiff either wanted to pursue the third party purchaser sale or discuss arrangements for the sale of its interest in Richmond. Michael rejected the $6,100,000.00 offer. Moreover, Sol offered that Plaintiff buy his interest in the Property for $3,000,000.00. Plaintiff rejected such offer and requested that Sol buy Plaintiff's interest in the Property from it. Discussions for Michael's purchase of Plaintiff's membership interest ensued.

In or about October 2014, based on Plaintiff's appraisal of the Property, and after extensive negotiations, Plaintiff offered and Michael agreed to purchase Plaintiff's membership interest in the Property for $2,750,000.00 (Defendants Ex U)

Of Plaintiff's own free will and considered judgment, Plaintiff and Michael reached an agreement for Plaintiff to sell its shares in the LLC no later than December 9, 2014 (Defendants Ex Y) and prior to Richmond agreeing to sell the Property to Pan Brothers.

It was not until after the agreement to purchase Plaintiff's interest, that Michael received an acceptable offer and contract from Pan Brothers Associates, Inc. (Defendants' Ex V).

However, nothing in the Op Agreement provides that if an offer for the purchase of the Property arises after the parties' agreement to sell one's membership interests in Richmond, the purchasing member must renege on the membership interest agreement in favor of another deal. (Op Agreement Article 12 and 13).

Plaintiff's interpretation creates a cyclical acceptance and reneging of contracts that is unsound. Pursuant to Article 12 and/or 13, once the parties contract for the purchase of membership in Richmond, all further obligations end. Under New York law, Parties are permitted to contract away fiduciary rights, as the Op Agreement did (See *Kagan v HMC-New York, Inc*., 94 AD3d 67, 71 [1st Dept 2012] See also *Neary v Burns*, 44 Misc 3d 280, 295 [NY Sup 2014].

Accordingly, no breach of contact can be found.

5. <u>Plaintiff Fails to State a Cause of Action for Unjust Enrichment</u>

Plaintiff's unjust enrichment claim is duplicative of its breach of contract claim and must therefore be dismissed. "Where, as here, a written contract governs the parties' rights, an unjust enrichment claim cannot be maintained. *See MG W. 100 LLC v. St. Michael's Protestant*

Episcopal Church, 127 A.D.3d 624, 626, 8 N.Y.S.3d 299 (1st Dept.2015) ("the existence of a valid and enforceable written agreement governing the parties dispute [ ] precludes recovery in quasi contract for events arising out of the same subject matter"), *Urban Soccer Inc. v Royal Wine Corp.,* 53 Misc 3d 448, 458 [NY Sup 2016], *judgment entered*, [Sup Ct Aug. 22, 2016], *affd*, 148 AD3d 576 [1st Dept 2017], and *appeal dismissed*, 148 AD3d 576 [1st Dept 2017] citing *Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987).

In this Action there are two contracts that govern the parties rights, the Op Agreement and MIPA. Accordingly, Plaintiff's unjust enrichment claim must be dismissed prior to trial.

6. Plaintiff Cannot Recover Punitive Damages

Plaintiff's cause of action for punitive damages is dependent upon the viability of their cause of action to recover damages for fraud, once the fraud claim is dismissed the claim for punitive damages also has to be dismissed. *Elsky v KM Ins. Brokers*, 139 AD2d 691 [2d Dept 1988].

Moreover, "(i)t is well settled that punitive damages may not be awarded to redress a private wrong, and, accordingly, that such damages are not available "in the 'ordinary' fraud and deceit case." *Kelly v Defoe Corp*., 223 AD2d 529, 529 [2d Dept 1996] "Punitive damages may only be recovered in a fraud action where the fraud is aimed at the public generally, is gross, and involves high moral culpability." *Kelly v Defoe Corp*., 223 AD2d 529, 529 [2d Dept 1996] Punitive damages are not appropriate recovery for an isolated transaction incident to an otherwise legitimate business (See also *Sample v. Yokel*, 94 A.D.3d 1413, 943 N.Y.S.2d 694 (4th Dep't 2012) where purchasers of real property were not entitled to punitive damages from vendor, in connection with their claims for fraud, restitution, etc. where there was no misconduct

on the part of vendor, and, even if vendor engaged in wrongdoing, the case arising out of sale of the property was not exceptional.)

The singular omission of fact, which Defendants believed to be in keeping with the procedures of the Op Agreement, cannot be grounds for imposing punitive damages. Defendants' conduct did not rise to a high level of moral culpability and are insufficient to support a claim for punitive damages.

A. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's relief request in its Complaint in its entirety; and (ii) granting Defendants' such other and further relief as the Court deems just and proper, including but not limited to, attorneys' fees and costs of defending this Action.

Dated: November 11, 2019
New York, New York

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