SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: C E Ramos

PART 53

Index Number : 601224/2007

RONI LLC

vs

ARFA, RACHEL L.

Sequence Number : 007

DISMISS ACTION

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
Apr 17 2009
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

NYS SUPREME COURT
RECEIVED
APR 16 2009
MOTION SUPPORT OFFICE

Motion is decided in accordance with accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/14/09

J.S.C.

CHARLES E. RAMOS

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MDAJ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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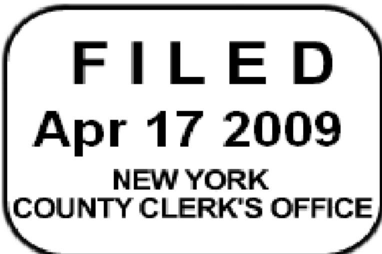

RONI LLC, ESHEL PROPERTIES, LLC, GILI HOLDINGS, LLC, and KRR INVESTMENTS, LLC, Assignees, and A.G. DOR INVESTMENTS, LLC, BANAGA LLC, MORDECHAI COLDENBERG, ELORY LLC, ELUNGER, INC., HOD INTERNATIONAL EQUITIES LLC, JOSSIFOFF LLC, KALINA & SONS LLC, KARSH N DYAZ LLC, LYDGAT, LLC, MAZELDIK LLC, RISING STAR, LLC, ROKCOM LLC, S.I. DAR LLC, SBGR LLC, SINTRA REAL-ESTATE LLC, TAMR LLC, TATIVA FINANCE LTD., WASTED DREAMS, LLC, YALLI, LLC, YORAM BAUMANN, LLC, ELI UNGER, JEOSHUA DOT, EREZ ZENOV, NIR KRIEL, EYAL SCHIFF, OVED SASON, AZARIA JOSSIFOFF, URI KALINA, ZVI KARSH, RON BAHAT, YEHUDA KEREN, JACOB PERRY, SHALOM PAPIR, RAFI RACHMAN, AMOS LASKER, ELI MOR, YORAM DAR, SHLOMO MASHIACH, EYTAN STIBBE, RON GUTTMAN, PNINA GOLDBERG, SHUKI WEISS, ILAN CALIC, and YORAM BAUMANN, as Assignors,

Plaintiffs,

-against-

Index No. 601224/07

RACHEL L. ARFA, ALEXANDER SHPIGEL, GADI ZAMIR, LAWRENCE A. MANDELKER, in his Official capacity as Court-Appointed Temporary Receiver, pursuant CPLR Art. 64 of HARLEM HOLDINGS, LLC, HARLEM ACQUISITION LLC, AMERICAN ELITE PROPERTIES, INC., MINTZ LEVIN COHEN FERRIS GLOVSKY & POPEO, P.C., JEFFREY A. MOERDLER, EDWARD LUKASHOK, AUBREY REALTY CO., AUBREY REALTY, LLC, 42ND STREET REALTY, LLC, TAMMAZ REALTY, LLC, AND ELUL ACQUISITION, LLC,

Defendants.

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Charles Edward Ramos, J.S.C.:

Motion sequence numbers 007 and 009 are consolidated for disposition.

In motion sequence number 007, defendants Rachel Arfa and Alexander Shpigel (together, Arfa/Shpigel) move to dismiss the causes of action asserted against them in the amended complaint (Complaint) (CPLR §§ 3016 [b], 3211 [a] [1], [7]).

Lawrence Mandelker, in his capacity as court-appointed temporary receiver (Receiver) of Harlem Holdings, LLC, Harlem Acquisition LLC, and American Elite Properties, Inc. (together, Harlem Holdings), defendant Gadi Zamir,[1] and defendants Edward Lukashok (Lukashok), Aubrey Realty Co., Aubrey Realty, LLC, 42nd Street Realty, Tammaz Realty, LLC and Elul Acquisition, LLC (together, the Lukashok Assisted LLCs)[2] cross-move to dismiss the Complaint (CPLR §§ 3016 [b], 3211 [a] [1], [7]).

Additionally, plaintiffs Roni LLC, Eshel Properties, LLC, Gili Holdings, LLC, KRR Investments, LLC, Assignees, and A.G. Dor Investments, LLC, Banaga LLC, Mordechai Goldenberg, Elory LLC, Elunger Inc., Hod International Equities, LLC, Jossifoff, LLC, Kalina & Sons LLC, Karsh N Dyaz LLC, Lydgat, LLC, Mazeldik LLC, Rising Star, LLC, Rokcom, LLC, S.I. Dar LLC, SBGR LLC, Sintra Real-Estate LLC, Tamr LLC, Tativa Finance LTD., Wasted Dreams, LLC, Yalli, LLC, Yoram Baumann, LLC, Eli Unger, Jeoshua Dor, Erez Zenov, Nir Kriel, Eyal Schiff, Oved Sason, Azaria Jossifoff, Uri Kalina, Zvi Karsh, Ron Bahat, Yehuda Keren, Jacob Perry, Shalom Papir, Rafi Rachman, Amos Lasker, Eli Mor, Yoram Dar, Shlomo Mashiach, Eytan Stibbe, Ron Guttman, Pnina Goldberg,

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[1] Following settlement, the action was discontinued as against Gadi Zamir, and his cross-motion deemed withdrawn.

[2] For the reasons stated on the record, the Court partially granted the cross-motion of defendants Edward Lukashok, Mintz Levin Cohen Ferris Glovsky & Popeo, P.C., and Jeffrey A. Moerdler (together, the Attorney Defendants), and dismissing all causes of action asserted against them. The Court reserved decision as to the Lukashok Assisted LLCs' cross-motion to dismiss, that is addressed herein (Transcript: November 20, 2008).

Shuki Weiss, Ilan Calic, and Yoram Baumann (together, Plaintiffs) cross-move for partial summary judgment as to liability on the third cause of action for breach of fiduciary duty.

In motion sequence 009, Arfa/Shpigel moves for a protective order staying disclosure pending this Court's determination of motion sequence 007 (CPLR §§ 3103 [a], 3214 [b]; Commercial Division Rule 11-d)[3].

Background

For a full recitation of the factual background in this action, see the decision and order entered August 4, 2008.

During the period of mid-2002 to early 2005, Arfa/Shpigel and former defendant Zamir, directly and through their wholly-owned companies Harlem Holdings and AmElite (together, the Promoters), solicited Plaintiffs, a group of individuals residing overseas in Israel, to invest in the acquisition of residential buildings located in upper Manhattan. Once the buildings were purchased, the Promoters planned to renovate and manage them, and ultimately, to sell or refinance them for profit. The Promoters organized seven limited liability companies (Property LLCs) to purchase and manage the separate properties (Properties), and to hold Plaintiffs' membership interests.

Plaintiffs comprise directly, or by assignment of claims, the substantial majority of the Israeli investors solicited by the Promoters, who subsequently became members of the Property

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[3] For the reasons stated on the record, the Court denied that motion (Transcript: November 20, 2008).

LLCs, either directly, or through corporations or LLCs.

Typically, the transactions were structured as follows: Arfa designed and supervised the structure of the investments and entities, while Shpigel used personal relationships in Israel to locate the investors, and Zamir scouted potential properties and negotiated contracts of sale. Harlem Holdings contracted with the property owners to purchase the properties, and held a minority interest in the Property LLCs on behalf of Arfa/Shpigel and Zamir, and eventually served as co-manager, alongside Shpigel and Zamir, of the Property LLCs, once formed.

Harlem Holdings typically entered into assignable purchase agreements with property owners, with an extended period of time until closing was scheduled to permit the Promoters to scout investors. The down-payment funds were largely forwarded by the individual Plaintiffs.

Typically, the Promoters required Plaintiffs to form a U.S. corporation or LLC to hold their Property LLC interest. Prior to closing, Plaintiffs were required to deposit their investment funds into accounts controlled by the Promoters or the attorney trust account of the Attorney Defendants. At closing, the contracts were assigned to the Property LLCs, title was conveyed to the respective Property LLC, and the seller was paid the purchase price with Plaintiffs' investor funds and from bank loans.

In connection with their services, the Promoters disclosed to Plaintiffs that they would only be paid a modest acquisition

fee (Acquisition Fee) for their services, totaling approximately 1.5 - 2.5 % of the purchase price of the Properties. The Acquisition Fee was to be paid out of the Property LLCs' funds, contributed by Plaintiffs or borrowed from lenders in connection with the acquisition of the Properties.

Further, the Promoters represented that they were also investing their own funds into the Property LLCs, and would only profit from the transactions in the event of a sale or refinance of the Properties from the equity interest in the Property LLCs that they acquired, in which case, Plaintiffs would also profit. With the exception of two of the Property LLCs, the Promoters prepared written promotional materials purporting to reflect the costs of the Properties' acquisition and the use of Plaintiffs' funds.

The Promoters did not disclose to Plaintiffs that they, directly and through the companies controlled by them, solicited, contracted for, and received secret additional payments (Commissions) stemming from the purchase the Properties, characterized as brokerage fees. The Commissions were paid by the sellers of the properties out of the proceeds of the sales of the Properties, and by mortgage brokers in connection with obtaining bank loans for the acquisition of the Properties. The Commissions received by the Promoters were substantial. They ranged from nine to fifteen percent of the purchase price of the Properties, totaling in excess of $ 6.5 million, and allegedly inflated the purchase prices of the Properties in this amount.

Harlem Holdings allegedly funded its capital contributions to acquire membership interests in the Property LLCs with a portion of the Commissions that it received.

The Attorney Defendants allegedly structured the acquisition of the Properties in a manner so as to conceal the Commissions paid to the Promoters, and organized the Lukashok Assisted LLCs, owned by the Promoters, to this end. The Lukashok Assisted LLCs purported to act as brokers in the transactions, thereby permitting them to receive Commissions on behalf of the Promoters. However, the Lukashok Assisted LLCs were not licensed real estate brokers.

Plaintiffs only learned that the Promoters were receiving the Commissions in late summer of 2005, when, in the context of growing discord between Zamir and Arfa/Shpigel, Zamir disclosed it to them.

Previously, the Property LLCs instituted an action against the Promoters for their failure to disclose the Commissions. The Court dismissed the action on the ground that the Property LLCs lacked standing to bring the claims, which dismissal was affirmed by the Appellate Division (*546-552 West 146th Street LLC v Arfa*, 54 AD3d 543 [1st Dept 2008]).

In March 2007, the Property LLCs and their principals assigned their claims (Assignments) against Defendants to four LLCs, whose members are comprised of certain investors, that, in turn, commenced this action.

In August 2008, the Court directed those plaintiffs to join

all of the investors who assigned claims to the original plaintiffs (August 4, 2008 Decision). Subsequently, Plaintiffs filed an amended complaint - the Complaint - joining additional plaintiffs.

In the Complaint, Plaintiffs seek an accounting and assert causes of action for waste, breach of fiduciary duty, and common law and constructive fraud.

Discussion

The Promoters move to dismiss the causes of action for common law fraud and breach of fiduciary in the first instance on the ground that, insofar as they are premised upon allegations of non-disclosure, they are preempted by the Martin Act.[4]

I. Breach of Fiduciary Duty

New York's Martin Act (General Business Law §§ 352-359) prohibits a broad range of deceitful conduct in connection with the promotion and sale of securities. The Martin Act vests the Attorney General with investigatory, regulatory and enforcement authority over prohibited acts. The Attorney General does not need to demonstrate scienter in order to establish liability under the Act.

The Court of Appeals has determined that there is no express or implied private right of action to enforce the Martin Act (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 2009 NY Slip Op 02482 [2009]; *CPC Intl. Inc. v McKesson Corp.*, 70 NY2d

[4] The Receiver largely adopts Arfa/Shpigel's arguments in support of dismissal.

268, 276-77 [1987]).

This Court determines that the Martin Act is not a bar to Plaintiffs' claims. First, the Martin Act, that was enacted to protect the public from fraudulent practices, regulates the purchase and sale of securities in "public offerings ... in or from New York" (GBL § 352-e [a]).

Assuming Plaintiffs' allegations as true for the purposes of this motion - as the court must at this stage - because the investments at issue were exclusively solicited and negotiated in Israel to a limited number of Israeli residents, their interests do not relate to the solicitation and purchase of securities "within or from New York" (*Fraternity Fund Ltd. v Beacon Hill Asset Mgt.*, 376 F Supp 2d 385, 410 [SD NY 2005]).

Further, the Martin Act regulates the "public offering" of securities (GBL § 352-e [a]). In order to determine if an offering was public or private, a factual determination must be made addressing the number of offerees and their relationship to each other and the issuer, the number of units offered, and the size and manner of the offering, i.e. the type and extent of advertising (*People v Michael Glenn Realty Corp.*, 106 Misc 2d 46, 47-48 [App Term 1980]).

Here, the small number of offerees, their alleged close relationship, and the absence of any advertizing are all indicia of a private offering (*Id.*).

In any event, Plaintiffs' claims are not preempted. In determining that no private right of action exists under the

Martin Act, the Court of Appeals determined that those claims that directly implicate an area that the Martin Act expressly grants to the Attorney General to regulate and enforce are barred (*Vermeer Owners, Inc. v Guterman*, 78 NY2d 1114, 1116 [1991]).

Plaintiffs' claims for common law fraud and breach of fiduciary duty, premised upon material misrepresentations and omissions concerning the receipt of secret payments to fiduciary promoters of interests in real estate ventures to a small number of non-resident, overseas investors do not encroach upon the legislative scheme underlying the Martin Act. Consequently, the Martin Act does not preempt Plaintiffs' claims.

Arfa/Shpigel contend that, to the extent that Plaintiffs' claims are premised upon failure to disclose, these claims are preempted. In support of this argument, they cite to the recent Court of Appeals decision *Kerusa Co. LLC* (2009 NY Slip Op 02482). However, that case is materially distinguishable.

There, the court determined that a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor where the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act and the Attorney General's implementing regulations (*Id.*). The court reasoned that the common law fraud claim, asserted by the purchaser of a condominium against the sponsor who allegedly fraudulently failed to disclose various construction and design defects in the offering plan amendments, directly implicated the substantive

disclosure provisions of the Martin Act, that exclusively grant enforcement authority to the Attorney General.

The court noted that GBL § 352-e, the disclosure provisions, was enacted "for the protection of purchasers in offerings of cooperative and condominium units .... [and provide for] full disclosure of risks and unit purchasers' self-protection by analysis of risks." Additionally, the court referenced the disclosure regulations implemented by the Attorney General in the NYCRR concerning newly constructed condominiums pursuant to GBL § 352-e (*Id.*, *5).

The disclosure requirements of GBL § 352-e and 13 NYCRR part 20 (implemented pursuant to GBL § 352-2 [1] [b]) detail the numerous items of information that a sponsor of a newly constructed condominium must disclose to potential purchasers in an offering statement, in addition to the format and content of offering plans and filings, including a certification sworn to by the sponsors' principals and a representation that all material changes and facts affecting the property or offering be included in an amendment to the offering plan, and authorizes the Attorney General to enforce its provisions and implementing regulations.

Consequently, the court determined that the claim was preempted, because the plaintiff-purchaser sought relief for the sponsor's alleged failure to disclose precisely the type of information that 13 NYCRR § 20.4 (the implementing regulations enacted pursuant to GBL § 352-e) requires a sponsor to disclose in the transmittal letter and certification that must be

submitted with an offering plan. Because the plaintiff's claim directly concerned an area that the Martin Act expressly granted enforcement authority to the Attorney General, the plaintiff's claim was necessarily preempted.

However, unlike the common law fraud claim at issue in *Kerusa Co. LLC* (*Id.*), Plaintiffs' claims do not involve alleged material omissions from an offering plan,[5] or, generally, the conversion of a building from residential rental status to cooperative or condominium ownership. Consequently, the conclusion reached in *Kerusa Co. LLC* (*Id.*) is not applicable of the claims asserted here.

Otherwise, all of the cases that Arfa/Shpigel cite to are fundamentally distinguishable, because they involve non-disclosure claims that directly implicate the disclosure requirements contained in the Martin Act, and that the legislature expressly granted the Attorney General exclusive authority to regulate and enforce (*see e.g. Horn v 440 East 57th Co.*, 151 AD2d 112, 120 [1st Dept 1989]). Therefore, the claims are not barred.

Alternatively, the Promoters assert that Plaintiffs fail to sufficiently allege the existence of a fiduciary duty, because the alleged breaching conduct at issue, the failure to disclose

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[5] The Martin Act defines "plan," as used in the phrase "offering plan," as an "offering statement or prospectus submitted to the department of law for the conversion of a building or group of buildings or development from residential rental status to cooperative or condominium ownership" (GBL § 352-e [2-a] [a] [i]).

in addition to affirmative misrepresentations, occurred prior to the formation of the Property LLCs that Arfa/Shpigel eventually became managers of, and the transactions at issue arose out of an arm's length business relationship.

In opposition and in support of its cross-motion for partial summary judgment, Plaintiffs argue that the Promoters owe a fiduciary duty of full disclosure that was breached as a matter of law by their failure to disclose the existence of the Commissions, that the Promoters concede that they received. Plaintiffs assert that an arm's length relationship was transformed into a fiduciary one as the result of several factors.

According to the Complaint, the Promoters allegedly solicited Plaintiffs, comprised of foreign nationals residing in Israel, by utilizing their personal relationships and contacts. The Promoters sought investments from Plaintiffs in entities not yet in existence, for the purpose of acquiring property in and around Manhattan. Plaintiffs allegedly had little or limited knowledge of New York real estate or American laws, customs, or practices with respect to real estate or investments. The Promoters allegedly induced Plaintiffs to invest with them by representing that they had specialized and superior knowledge and expertise of the New York real estate market.

Further, the Promoters represented that they would field the Properties for acquisition, and would negotiate the contracts to purchase the properties. Additionally, they represented that

they would eventually create, organize and manage the entities that would, in turn, acquire the Properties. Often prior to the closing, and in some instances prior to the execution of the purchase agreements, Plaintiffs were required to deposit their investments into the Promoters' accounts.

Promoters of a transaction, who both solicit investors and organize the entity to carry out the transaction, typically owe a stricter duty to those investors who they induced to invest, even before the corporation comes into existence (*Brewster v Hatch,* 122 NY 349, 358 [1890]; *Gates v Megargel,* 266 Fed 811, 816-17 [2d Cir], *cert denied* 254 US 639 [1920]; *see also* 1A Fletcher Cyc. Corp. §§ 192-93). That duty includes the duty to disclose and be accountable for secret profits derived from the organization of the corporation, or other facts concerning the financial structure of the corporation of which the promoters have special knowledge (*Brewster,* 122 NY at 358).

Notwithstanding a promoter's status, a fiduciary duty may arise out of a relationship of trust, confidence or superior knowledge or control. In particular, a fiduciary duty may arise in an otherwise typical arm's length business transaction where the defendant has superior expertise or knowledge concerning some subject matter, and misled the plaintiff by false representations concerning that subject (*Talansky v Schulman,* 2 AD3d 355, 361 [1st Dept 2003]; *Solutia Inc. v FMC Corp.,* 456 F Supp 2d 429, 456 [SD NY 2006]; *see also EBC I, Inc. v Goldman Sachs & Co.,* 5 NY3d 11, 19-22 [2005]).

The genesis of the alleged fiduciary relationship between Plaintiffs and the Promoters is the overseas solicitation of Plaintiffs, that began prior to the Promoters' assumption of the role of managers of the various Property LLCs. An alleged relationship of trust was created upon the Promoters' representation that they would entirely organize the transactions, and had superior knowledge and expertise of the New York real estate market, but would bear the same profits and losses as Plaintiffs. On this basis, Plaintiffs reposed trust and confidence in them.

Moreover, the Promoters were in a unique position of having superior (arguably exclusive) access to information concerning every aspect of the transactions. The Promoters allegedly directed the Attorney Defendants to conceal from Plaintiffs that the Promoters were receiving Commissions, and to organize the transactional documents in such a manner so as to make it virtually impossible for Plaintiffs to discover the secret payments. Consequently, there was no way for Plaintiffs, by due diligence, to discover that the Promoters were receiving Commissions. On the basis of these allegations, Plaintiffs sufficiently alleges the existence of a fiduciary relationship.

Further, Plaintiffs sufficiently allege self-dealing and bad faith on the part of the Promoters that would constitute a breach of fiduciary duty (*see Braddock v Braddock*, _AD3d_, 2009 NY Slip Op 00039 [1st Dept 2009]). Under the circumstances of the parties' alleged relationship, Plaintiffs had reason to believe

that the Promoters would treat them with good faith and integrity, and not conceal from them that they were secretly receiving Commissions.

Arfa/Shpigel rely upon *Stuart Silver Assocs., Inc. v Baco Develop. Corp.*, 245 AD2d 96 [1st Dept 1997]). There, the court determined that plaintiffs failed to demonstrate that the difference in expertise between them and the defendant was not so great as to create a fiduciary relationship between them that would oblige the defendant to suggest that plaintiffs perform due diligence before investing. The defendant solicited the plaintiffs to become limited partners in several existing partnerships co-owned by the defendant.

However, *Stuart Silver Assocs., Inc.* (*Id.*), is distinguishable from this action in several material ways. First, that court determined on a motion for summary judgment with a full evidentiary record before it that the plaintiffs were "relatively sophisticated investors who should have understood the risks of investing in a real estate venture" (*Id.*, 99).

Here, in contrast, Plaintiffs allege that they are overseas investors who had little or no knowledge of New York real estate or American law, customers or business practices, and that the Promoters induced the investments by representing that they possessed superior knowledge and expertise of the New York real estate market. At this early pre-answer stage, the court must accept these allegations as true.

Further, in *Stuart Silver Assocs., Inc.* (*Id.*), the court

determined that the plaintiffs were not so inexperienced as to not know what type of information to request concerning the potential profitability of the venture that they were investing in.

Here, the allegations are that the Promoters concealed that they were receiving Commissions, misrepresented to Plaintiffs that they were only receiving a modest fee for their services, and directed the Attorney Defendants to conceal the Commissions from Plaintiffs. Thus, because the Promoters were in a unique position insofar as they possessed superior information concerning the transactions, and had virtually complete control over the exact financial details of the transactions that they were organizing, Plaintiffs allege that there was no way for them to discover that the Promoters were secretly contracting with the sellers of the Properties to receive Commissions.

Similarly, the cause of action for constructive fraud is sufficiently stated (*Monaco v New York Univ. Ctr.*, 213 AD2d 167, 168 [1st Dept], *lv dismissed, denied* [1995]; *see also Cooper v Peterson*, 164 Misc 2d 878, 883 [Sup Ct, St. Lawrence County 1995]).

Nonetheless, the nature and extent of the parties' relationship wrests upon factual determinations that the Court cannot make at this pre-answer, pleading stage (*EBC I, Inc.*, 5 NY3d at 19-20; *Braddock*, 2009 NY Slip Op 00039). For this reason, Plaintiffs' cross-motion for summary judgment is denied, as premature.

As for the cause of action for waste, Arfa/Shpigel correctly argue that it belongs to the Property LLCs, and not to Plaintiffs, who comprise the majority of the Property LLCs' members (*Abrams v Donati*, 66 NY2d 951 [1985], *rearg denied* 67 NY2d 758 [1986]).

II. Common Law Fraud

In support of its cause of action for common law fraud, Plaintiffs allege that the Promoters misrepresented that the amounts listed or identified as payments to the seller and third-party brokers were the actual and necessary costs of acquisition of the Properties, and that the Acquisition Fees were the only fees that they were to receive for their services in connection with the acquisition of the Properties. Additionally, the Promoters allegedly represented to Plaintiffs that because they were also investing their own funds to acquire the Properties, that they were in a similar position with respect to profits and losses as Plaintiffs. However, the Promoters allegedly knew that, had they disclosed the true amounts that the sellers and third-party brokers were to be paid, Plaintiffs would never have agreed to contribute the inflated amounts that included the Commissions. Plaintiffs allege damage in the amount of its pro-rata share of the inflated purchase price of the Properties.

The Promoters argue that the fraud claim fails for lack of specificity, and because Plaintiffs fail to identify any cognizable material misrepresentation, justifiable reliance, and damages.

A. Specificity

The Complaint sufficiently describes the manner in which the Promoters concealed from Plaintiffs the secret brokerage agreements and other payment arrangements made with the sellers of the Properties and mortgage brokers in order to receive the Commissions, and directed the Attorney Defendants and the Lukashok Assisted LLCs, who facilitated the scheme by receiving the payments in their purported capacity of real estate broker, to conceal from Plaintiffs that they were receiving Commissions.

At this pre-discovery stage, Plaintiffs are understandably unable to provide further details of the Promoters' alleged fraudulent intent in concealing the Commissions, that is likely within their own knowledge (*see Pludeman v Northern Leasing Systems, Inc.*, 40 AD3d 366, 367 [1st Dept 2007], *affirmed* 10 NY3d 486 [2008]).

Nonetheless, Plaintiffs fail to allege with sufficient particularity the actual misrepresentations concerning the amount and scope of fees that they were receiving. For instance, there is no allegation of who made the misrepresentations, and when they were made.

Plaintiffs' demonstration of a good ground for the assertion of a claim for fraud based upon fraudulent misrepresentations justifies the granting of leave to replead, if so advised, to afford them the opportunity to adequately plead the claim (CPLR 3211 [e]; *EBC I, Inc.*, 5 NY3d at 23).

B. Materiality

Arfa/Shpigel's argument that Plaintiffs fail to allege that the Promoter's non-disclosure of the Commissions was material, because Plaintiffs knew what prices were being paid for the Properties and that the projected returns provided to Plaintiffs were based on those prices, is meritless. A fact may not be dismissed as immaterial unless it is so obviously unimportant that reasonable minds could not differ on the question of its importance (*Swersky v Dreyer and Traub,* 219 AD2d 321, 328 [1st Dept], *rearg denied* 232 AD2d 968 [1996], *app withdrawn* 89 NY2d 983 [1997]).

The Commissions were in excess of $6.5 million, were paid in addition to the Acquisitions Fees and third-party broker fees received by the Promoters, and constituted eight to fifteen percent of the purchase price of the Properties. The Court cannot conclude as a matter of law that reasonable minds would deem this fact unimportant.

B. Justifiable Reliance

Arfa/Shpigel additionally contend that Plaintiffs fail to plead justifiable reliance, and rely upon a provision contained in several of the Property LLCs' operating agreements that states that the Promoters are permitted to provide services to the seller of the Properties, and because two draft letter agreements sent to two of the individual plaintiffs purportedly make reference to additional fees that the Promoters were set to receive.

However, the import of this provision and determining

whether Plaintiffs were on constructive notice of the Commissions by virtue of a sentence allegedly contained in two draft letter agreements referencing the Promoters' receipt of extra fees raises factual issues that simply cannot be resolved on a pre-answer motion to dismiss the pleadings (*Braddock*, 2009 NY Slip Op 00039).

C. Damages

Finally, Arfa/Shpigel assert that Plaintiffs fail to allege that they sustained out-of-pocket damages, because those investors who invested in several of the Property LLCs actually made a profit from their initial investment.

Plaintiffs sufficiently allege that they suffered actual pecuniary loss as a direct result of the fraud that induced their investment, in the amount of the inflated purchase prices of the Properties.

III. Claims Against the Lukashok Assisted LLCs

Plaintiffs' causes of action against the Lukashok Assisted LLCs are for aiding and abetting breach of fiduciary duty and fraud, based upon the Promoter's primary breach of duty. The Attorney Defendants created the Lukashok Assisted LLCs, that are owned, by the Promoters, in order to receive directly or indirectly, Commissions on their behalf.

Liability for aiding and abetting fraud or breach of fiduciary duty requires "actual knowledge" of the underlying tort, in addition to substantial assistance to the primary violator (*Yuko Ito v Suzuki*, 57 AD3d 205, 207 [1st Dept 2008];

Houbigant, Inc. v Deloitte & Touche LLP, 303 AD2d 92, 100 [1st Dept 2003]).

Plaintiffs have failed to provide a factual basis concerning the Lukashok Assisted LLCs' alleged direct knowledge of, and substantial assistance to, the Promoters' commission of fraud and breach of fiduciary duty (*Kaufman v Cohen,* 307 AD2d 113, 125 [1st Dept 2003]). Nearly all of the allegations relate to the primary conduct of the Attorney Defendants, and not the Promoters. This Court's prior dismissal of all claims asserted against the Attorney Defendants as not viable additionally requires dismissal of the claims for aiding and abetting based upon their primary conduct.

Accordingly, it is

ORDERED that the motion (007) by Rachel Arfa and Alexander Shpigel, and the cross-motion by Lawrence Mandelker, in his capacity as court-appointed temporary receiver, are granted to the extent that the second cause of action for waste and the sixth cause of action for fraud premised on affirmative misrepresentations are dismissed, and the motion and cross-motion are otherwise denied; and it is further

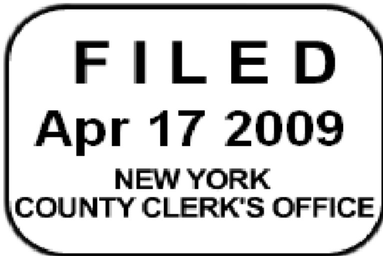
ORDERED that the cross-motion by Aubrey Realty Co., Aubrey Realty, LLC, 42nd Street Realty, Tammaz Realty, LLC and Elul Acquisition, LLC is granted and all causes of action as against them are dismissed; and it is further

ORDERED that the motion (009) by Rachel Arfa and Alexander Shpigel for a protective order is denied; and it is further

ORDERED that plaintiffs are granted leave to replead the sixth cause of action for fraud premised upon affirmative misrepresentations within 10 days after service of a copy of this order with notice of entry. In the event that plaintiffs fail to replead within such time, leave to replead shall be deemed denied; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: April 14, 2009



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J.S.C.

CHARLES E. RAMOS