SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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EDUARD GITLIN

Plaintiff

– against –

ALEX CHIRINKIN, NELLIE CHIRINKIN,
ARKADY PAVLOV, ALEX CHIRINKIN, LLC
ALEXCHIRINKIN ENTERPRISES, LLC

Defendants.

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Index No. 012131/2007

DEFENDANT ALEX CHIRINKIN'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff filed the Summary Judgment only against Defendant Chirinkin[1] claiming that there is no question of fact as to Plaintiff's ownership of 50% membership interest in Kew Apartment Holdings, LLC ("Kew LLC") from 1997 through today. Moreover, Plaintiff alleges that he is entitled to all gross receipts of all money that Kew LLC has ever received as well as the money received by all subsequent sellers of the properties where Kew LLC used to have an interest.

Plaintiff's allegations of ownership in Kew LLC and entitlement to any distribution are completely disputed by Defendants and documentary evidence. Defendants believe that the driving force behind

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[1] Based on the plain reading of Plaintiff's Notice of Motion and supporting papers, Plaintiff moves solely against Defendant Alex Chirinkin and Defendant Arkady Pavlov.

Plaintiff's action is the fact that Plaintiff received a $430,000.00 loan from Chirinkin in the year 2006 that he does not want to return. Plaintiff does not dispute that he never spent a penny of his money to acquire and maintain the properties, or one minute of his time to manage the properties. Yet, Plaintiff claims the entitlement to almost $2,000,000.00.

Defendant Chirinkin has maintained that Plaintiff was not a member of Kew, LLC (Feinstein Aff. Ex. 1 §36 and §46). Defendant Pavlov says that he has never seen or heard that Plaintiff was a member of Kew, LLC until the instant action. (Feinstein Aff. Ex. 5 §20). Plaintiff's former accountant and accountant for Kew, LLC swore that Plaintiff was not a member of Kew, LLC. (Feinstein Aff. Ex. 6 §5). The Kew LLC's tax returns for the years 1998 through 2001 show that Plaintiff was not a member of Kew, LLC (Feinstein Aff. Ex. 7).

There is not a single person, except Plaintiff, who claims to know that Plaintiff was a member of Kew LLC in the years in question. There is no legitimate document confirming that Plaintiff was a member of Kew LLC in the years when the properties were sold. Plaintiff produces the Kew LLC's unsigned stock certificates and other corporate papers that Plaintiff claims were prepared by Plaintiff's former attorney Alfred Parisi (Feinstein Aff. Ex. 4 61:13-15). However, neither Plaintiff nor Plaintiff's attorney mention that Alfred Parisi was disbarred in 1999 and separately

sentenced for 3 to 9 years for grand larceny and forgery. In re Parisi, 698 N.Y.S.2d 247 (2nd Dept. 1999).

Similarly, Plaintiff and his attorney previously swore and affirmed that there was no operating agreement for Kew, LLC (Feinstein Aff. Ex. 8 at §21; Feinstein Aff. Ex. 9 at §4). Later, according to Plaintiff's attorney, she found the operating agreement "in a file of the Plaintiff's former attorney, Stuart Moshell" (Feinstein Aff. Ex. 10 at §5). Once again, Plaintiff and his attorney do not mention that Stuart Ronald Moshell was also disbarred in 2007. In re Moshell, 852 N.Y.S.2d 807 (2nd Dept. 2008). Moreover, Defendant Chirinkin unequivocally denies that he has ever seen or signed any of the "newly discovered" Kew, LLC's documents, including the operating agreement (Feinstein Aff. Ex. 11 100:25 - 102:14, 103:14-17).

Defendant Chirinkin never denied that Plaintiff was entitled to 33% of profit sharing in Kew, LLC's profits for the acquisition of coop apartments in Queens back in 1997 (they were sold in 1999-2000). (Feinstein Aff. Ex. 1 §§31-34). Apart from Queens coop purchase, Defendant Chirinkin acquired the Lucky Bucks and Pahrump properties (the "properties") by partially placing it in the name of Kew, LLC for accounting purposes. (Feinstein Aff. Ex. 1 §§40-41). Plaintiff Gitlin was never supposed to have any relationship or ownership to the properties or Kew, LLC (Feinstein Aff. Ex. 1 §§42-44). Little did Defendant Chirinkin

know that Plaintiff would come back 10 years later to claim something that never belonged to Plaintiff to begin with.

In early part of 2006, Defendant Chirinkin provided Gitlin with the loan advancement of $430,000 (Feinstein Aff. Ex. 1 §50). Plaintiff admitted the receipt of the money, but alleged that this money was a return of the loan that he provided to Defendant Chirinkin (Feinstein Aff. Ex. 2 §§11-12). Plaintiff signed the receipt of the partial advancement of the loan (Feinstein Aff. Ex. 3). During the deposition, however, Plaintiff had no choice, but to acknowledge that he did not provide the loan and that he "could not prove that [he] gave [Defendant Chirinkin] the loans and that "he wanted to pick [$430,000.00 from Chirinkin] up as a pre-payment of the loan." (Feinstein Aff. Ex. 4 101:17-18).

In their mad drive to confuse the court, Plaintiff and his current attorney provide contradictory, at best, statements on the critical points. For example, Plaintiff's swore in the Second Amended Complaint that he discovered the sale of the Pahrump property on May 24, 2007 (Feinstein Aff. Ex. 12 §17). In his deposition, however, Plaintiff stated that as early as 2006 (before the instant action), he knew that the Pahrump property was sold (Feinstein Aff. Ex. 4 21:15 - 23:2).

In addition, Plaintiff admitted that the note "loan for 158 Acres in Pahrump, Nevada" that Plaintiff listed on the check that he received from Defendant Chirinkin on or about July 30, 2006 was a lie because

Plaintiff knew that Pahrump property was already sold. (Feinstein Aff. Ex. 4 101:14 - 102:8; Feinstein Aff. Ex. 3). Such "inconsistencies", at least, cast a big doubt Plaintiff's current claims of ownership in Kew, LLC or Plaintiff being unaware that the properties were sold.

Lastly, Plaintiff's claim for Kew's LLC gross receipts and consequential damages have no basis in law or fact.

In sum, there is a material issue of fact on each of Plaintiff's claims and, therefore, Plaintiff's Motion for Summary Judgment should be denied.

SUMMARY JUDGMENT STANDARD

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 1067 (1979).

If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. Alvarez, supra, 68 N.Y.2d, at 324;

Zuckerman, supra, 49 N.Y.2d, at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion (Martin v. Briggs, 235 A.D.2d 192, 196 [1st Dept. 1997]).

It is well established that the "drastic remedy" of summary judgment should not be granted where, as here, there is "any doubt" as to the existence of factual issues, or where such issues are "arguable." *See* Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439, 441 (1968); Sillman v. 20th Century Fox Film Corp., 165 N.Y.S.2d 498, 505 (1957). Issue finding, rather than issue determination, is the key to the procedure. Insurance Co. of New York v. Central Mut. Ins. Co., 850 N.Y.S.2d 56, 59 (1st Dept. 2008).

Accordingly, a party opposing summary judgment will defeat the motion by demonstrating one or more factual issues requiring resolution at trial. Sommer v. Federal Signal Corp., 583 N.Y.S.2d 957, 963 (1992); Federal Ins. Co. v. Automatic Burglar Alarm Corp., 617 N.Y.S.2d 53, 54 (2nd Dept. 1994). As discussed more fully below, Plaintiff's motion should be denied as there are multiple issues of fact requiring resolution at trial.

ARGUMENT

POINT I

TRIABLE ISSUE OF MATERIAL FACT EXISTS AS TO THE ENTIRE MATTER OF PLAINTIFF'S MEMBERSHIP INTEREST IN KEW APARTMENT HOLDING, LLC.

Every material fact that Plaintiff alleges in the moving papers is completely disputed by Defendants and documentary evidence.

Defendant Chirinkin says that Plaintiff was not a member of Kew, LLC (Feinstein Aff. Ex. 1 §36 and §46). Defendant Pavlov says that he has never seen or heard that Plaintiff was a member of Kew, LLC until the instant action. (Feinstein Aff. Ex. 5 §20). Plaintiff's former accountant and accountant for Kew, LLC swore that Plaintiff was not a member of Kew, LLC. (Feinstein Aff. Ex. 6 §5). The Kew LLC's tax returns for the years 1998 through 2001 show that Plaintiff was not a member of Kew, LLC (Feinstein Aff. Ex. 7).

Plaintiff attempts to prove his membership in Kew, LLC by producing unsigned company's stock certificate and the operating agreement. Plaintiff and his attorney recently found these documents after inspecting the files of Plaintiff's former two (2) disbarred attorneys. (Feinstein Aff. Ex. 10 at §5; (Feinstein Aff. Ex. 4 61:13-15). Besides, Defendant Alex Chirinkin unequivocally denies that he has ever seen or signed any of the "newly discovered" Kew, LLC's documents, including

the operating agreement (Feinstein Aff. Ex. 11 100:25 - 102:14, 103:14-17).

Plaintiff's motion papers are further contradicted by Plaintiff's own deposition where Plaintiff admitted that he did know that the properties were transferred as early as 2006. Moreover, Plaintiff admitted that $430,000.00 that he received from Defendant Chirinkin in 2006 were not the return of the loan that he previously claimed he provided to Chirinkin.

> Q. The loan to Mr. Chirinkin, you mentioned before there was no paperwork, no paperwork between you and Mr. Chirinkin with respect to the loan?
>
> A. Right.
>
> Q. Do you remember if there was any paperwork involved once he paid you the money back?
>
> A. Yes. He asked me to sign something that I received the money back...
>
> Q. If you look at this document – ...
>
> Q. Could you, please, explain to me what 158 acres in Parahmp is in this receipt?
>
> A. We did it at that time. I could not prove I gave him in loans. What happened, I didn't want to pick up the 350 as income. I wanted to pick it up as a pre-payment of the loan. So we agreed we would put that in because this was still our active property at that time, at the time when I was giving him the money.
>
> Q. There were a number of statements there that you would need to help me out with. I

thought you mentioned before that at that time, you knew the property was sold, that's why you called him in?

A. That's correct.

Q. How can you say the property was active?

A. I didn't say it was active at the time. I was giving him in the loans in the span of time from 1996 to 1997 to 2006, somewhere in that time frame, he received from me $350,000.

Q. But forgive me if I am completely clueless, I thought if somebody was giving you the money back and you were getting your money back, why would you ask him for an additional statement?

A. I didn't ask him for a statement.

Q. He was the one who asked to put 158 acres?

A. I told him to stipulate somehow to put in the numbers -- in the letter that I don't have to pick this up as income as a loan repayment. He said, why don't we put it in as a loan for 158 acres in Pahrump. That's what we agreed on.

Q. It wasn't a repayment of the loan?

A. It was a repayment of his personal loan, not for the 158 acres.

Q. You have to walk me through this again because... You said there was a loan before?

A. Yes, a personal loan...

Q. And you are telling me you didn't want to pick it up as an income?

A. Correct.

Q. Why would you pick it up as an income?

> A. Right, we needed to reference something. That's what we did.
>
> Q. Did you ever give him the money for the 158 acres in Parahmp, Nevada?
>
> A. No.
>
> Q. Is this a true statement that you are looking at right now?
>
> A. You are looking at the statement that he gave me back 350. The 158 we put so I do not have to pick that up as personal income on my income tax.
>
> Q. You never gave a loan for the property?
>
> A. No, the property was a gift.
>
> Q. If you are getting money for something that you did not give to begin with, wouldn't it be income? ...
>
> A. I am not an accountant so I don't know, but that's the way we structure it.

(Feinstein Aff. Ex. 4 95:21 - 104:25)

Thus, Plaintiff's claim to the ownership of Kew, LLC are flatly contradicted by Plaintiff's statements and actions, Defendants' sworn statements, Plaintiff's former accountant and documentary evidence.

POINT II

PLAINTIFF FAILS TO MAKE ANY PRIMA FACIE SHOWING OF DEFENANT CHIRINKIN'S FRAUD OR BREACH OF FIDUCIARY DUTY

"To recover damages for fraud, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and

known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury."Jablonski v. Rapalje, 14 A.D.3d 484, 487 (2nd Dept. 2005); *see also* Callas v. Eisenberg, 192 A.D.2d 349, 350 (1st Dept. 1993); Megaris Furs v. Gimbel Brothers, 172 A.D.2d 209 (1st Dept. 1991); Lanzi v. Brooks, 54 A.D.2d 1057 (3rd Dept. 1976), *affd.* 43 N.Y.2d 778 (1977).

Moreover, each of the foregoing elements must be supported by factual allegations sufficient to satisfy pleading rule and "CPLR 3016(b) imposes a more stringent standard of pleading than the generally applicable [notices] and complaints based on fraud... which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed." Lanzi v. Brooks, 54 A.D.2d 1057, 1058 *affd* 43 N.Y.2d 778 (1977). "Vogue expressions of home and future expectation provide an insufficient basis upon which to predicate a claim of fraud." Oil Field Supply Serv v. Alani, 35 A.D.3d 372, 375 (2nd Dept. 2006); *see also* Roney v. Janis, 53 N.Y.2d 1025 (1981); Fitch v. TMF Sys., 272 A.D.2d 775 (3rd Dept. 2000).

Plaintiff claims that he was allegedly defrauded by Defendant Alex Chirinkin in connection with the transfer of the properties. However, Plaintiff fails to even allege the particular circumstances of the fraud, and merely claims that Defendant Chirinkin misrepresented the status of the property to him. Plaintiff never describes under what circumstances

Defendant made this misrepresentation or when, nor does he offer any evidence to establish that the misrepresentation was made with the purpose to defraud Plaintiff.

In this matter, Plaintiff has failed to comply with CPLR 3016 (b) with regard to pleading any fraud claim. The allegations in the complaint relating to fraud are entirely conclusory. Nothing in the Plaintiff's submitted evidence show what, if anything, Defendant Gitlin told Plaintiff to constitute fraud. Plaintiff's claim that Defendant Alex Chirinkin lead him to believe that the properties were not sold are not supported by any documentary evidence. In fact, Plaintiff's own admissions show that he did know that the properties were transferred long before he alleges he learned about the transfer. (Feinstein Aff. Ex. 4 21:15 - 23:2).

Moreover, Kew only had 20% ownership interest in the Pahrump property. The remaining 80% was owned by Defendant Alex Chirinkin through Alex Chirinkin Enterprises, LLC. In the absence of the agreement to the contrary, as the absolute majority owner, Alex Chirinkin had unrestrictive right to transfer Pahrump property to any third party. Thus, even if Plaintiff had any membership interest in Kew, he could not object to or stop the transfer of Pahrump property at any time.

Lastly, there exist a material issue of fact as to whether Plaintiff owned any interest in Kew LLC at all. Plaintiff cannot prevail on the

claim of fraud as a matter of law if it is disputed whether he had any interest the properties to begin with.

POINT III

PLAINTIFF'S FAILED TO MAKE A PRIMA FACIE SHOWING UNDER THE DEBTOR AND CREDITOR LAWS §§273, 274, 276 AND 276(A)

Plaintiff's claims that the transfers on the properties were in violation of N.Y. Debt. & Cred. Law §§ 273, 274 and 276 fail because (a) Plaintiff failed to establish his status as "creditor" of Kew LLC within the meaning of Debtor and Creditor Law, or that (b) Kew LLC was rendered insolvent as a result of transfer, or (c) Nevada properties were not transferred for fair and adequate consideration, or (d) Kew was either on the verge of conducting business nor contemplated conducting business for which it would have had too little capital, and (e) Chirinkin had actual intent to hinder, delay or defraud Gitlin.

First, Plaintiff failed to produce any evidence that he actually invested money in Kew. In fact, Plaintiff does not even dispute that he never invest any money in Kew, LLC (Feinstein Aff. Ex. 4 21:11, 31:12-16,104:5, 113:11).

Secondly, as Plaintiff testified himself, Kew, LLC has never had any debts or any creditors. (Feinstein Aff. Ex. 13 78:24 - 79:6).

Thirdly, at no time, did Kew, LLC become insolvent within the meaning of N.Y. Debt. & Cred. Law §§ 273 and 271(1) because when

Kew, LLC transferred its interest in the properties, it had no debts. Thus, Kew's "salable value of [its] assets [was not] less than the amount that [Kew] was required to pay its probable liabilities." N.Y. Debt. & Cred. Law §271(1). Similarly, Plaintiff cannot maintain any claim under N.Y. Debt. & Cred. Law § 274 because at no time was Kew left with inadequate capital to satisfy anticipated obligations of the business.

Moreover, Plaintiff has no claim against Defendant Chirinkin under N.Y. Debt. & Cred. Law §§ 273, 274 and 276 because Defendant Chirinkin was always empowered to make transfers on Kew's behalf by virtue of being the managing member of the company. Plaintiff had "no interest in the specific property of the limited liability company" under NY LLCL §601.

Lastly, there is no allegation that Alex Chirinkin Enterprises, LLC owed any duty or was a debtor of Plaintiff. As the 80% owner of Pahrump property, Defendant Alex Chirinkin, as the sole owner of Alex Chirinkin Enterprises, LLC had unrestricted right to transfer the Pahrump property.

Thus, even if Gitlin were a member of Kew, LLC, he has no claim against Defendant Alex Chirinkin N.Y. Debt. & Cred. Law §§ 273, 274 and 276.

POINT IV

PLAINTIFF CAN NEVER BE ENTITLED TO ANY KEW'S GROSS RECEIPTS AND CONSEQUENTIAL DAMAGES

"In order to recover consequential damages, the plaintiffs were required to plead that those damages were the natural and probable consequences of the breach, and were contemplated at the time the contract was executed ... As the complaint failed to allege that those damages were within the contemplation of the parties at the time the contract was executed, the claim for consequential damages should be dismissed". Atkins Nutritionals, Inc. v. Ernst & Young, LLP, 754 N.Y.S.2d 320, 322 (2nd Dept. 2003). Moreover, "The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud" Lama Holding Co. v. Smith Barney 88 N.Y.2d 413, 423 (1996).

Plaintiff asserts that he is entitled to 50% of all gross receipts that Kew, LLC could have received for the properties transfers that occurred in 2001 and 2003 and all sales of the properties that the third parties subsequently completed. In total, Plaintiff counts that he is entitled to $1,988,000.00 in lost profits and consequential damages. Plaintiff's claims to damages have no support in law or fact.

Kew, LLC received 50% in the Lucky Bucks Property which was purchased on July 2, 1998 for $522,900. Neither Kew nor Plaintiff

contributed a penny for Kew's 50% interest in the Lucky Bucks property. (Feinstein Aff. Ex. 4 at 120:8-121:5, 126:22, 128:14). The Lucky Bucks property was encumbered by the mortgage of $352,500. Even if all of Plaintiff's allegations were proven true, Plaintiff would have $42,600 equity in Lucky Bucks ($522,900-$352,500 divided by 4). When the Kew's 50% interest in the Lucky Bucks property was transferred to Defendant Pavlov on April 3, 2001, Defendant Pavlov paid $40,000 for the alleged Plaintiff's 25% share.

Kew, LLC received 20% in the Pahrump Property which was purchased on July 21, 1998 for $1,146,000. Neither Kew nor Plaintiff contributed a penny for Kew's 20% interest in the Pahrump property. (Feinstein Aff. Ex. 4 at 104:5, 113:11). The Pahrump property was encumbered by the purchase money mortgage of $696,050.00. Even if all of Plaintiff's allegations were proven true, Plaintiff would have $44,995 of net equity in Lucky Bucks ($1,146,000 - $696,050.00 divided by 10). When the Kew's 20% interest in Pahrump property was transferred to Defendant Pavlov on January 21, 2003, Defendant Pavlov paid $320,000.00 for 25% which translates to $130,000 for the alleged Plaintiff's 10% share.

Thus, at the time when the properties were purchased, Plaintiff's possible equitable interest was no more than $87,595 ($42,600 in Lucky Bucks + $44,995 in Pahrump). At the time of the transfer of the properties, Plaintiff's possible equitable interest was $170,000 ($40,000

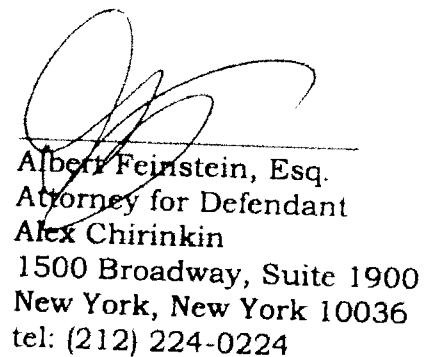
in Lucky Bucks + $130,000 in Pahrump).

These calculations do not even include all possible debts and expenses that Kew owed or was supposed to pay as part of the ownership of the properties. In addition, Plaintiff claimed that the gains would have been reduced by "the debts [that] would have to be satisfied upon the sale of the properties." (Feinstein Aff. Ex. 13 78:8-9). Considering that Plaintiff's equitable share could never exceed $170,000 and Plaintiff's failure to contribute any funds to purchase and maintain the properties or pay off any of the claimed property debts, Plaintiff would not be entitled to any recovery even if he were a member Kew, LLC.

CONCLUSION

For the stated reasons, Defendant Alex Chirinkin respectfully asks the court to deny Plaintiff's Motion for Summary Judgment.

Dated: April 5, 2011
New York, New York



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