New York Law Journal

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Eduard Gitlin individually, and on behalf of Kew Apartment Holdings, LLC, Plaintiffs v. Alex Chirinkin, Nellie Chirinkin, Arkady Pavlov, Alex Chirinkin, LLC, Alex Chirinkin Enterprises, LLC, Defendants, 012131/07

Justice Stephen A. Bucaria
012131/07
07-13-2011

Cite as: Gitlin v. Chirinkin, 012131/07, NYLJ 1202500464786, at *1 (Sup., NA, Decided June 29, 2011)

Justice Stephen A. Bucaria

Decided: June 29, 2011

ATTORNEYS

Plaintiffs Attorney: Law Offices of Barbara Lee Ford, Floral Park, NY.

Chirinkin Defenant's Attorney: Law Offices of Alvert Feinstein, New York, NY.

Defendant Pavlov's Attorney: Alston & Bird, New York, NY.

The following papers read on this motion:

Notice of Motion XX

Order to Show Cause X

Affirmation in Opposition XXX

Reply Affirmation XXX

Memorandum of Law XXXX

SHORT FORM ORDER

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Plaintiffs, Eduard Gitlin, individually, and on behalf of Kew Apartment Holdings, LLC,'s motion (seq. # 6) pursuant to CPLR §3212 for summary judgment is granted to the extent of liability as to defendant Alex Chirinkin on plaintiffs' claims for breach of fiduciary duty, fraud, and breach of contract and denied as to defendant Arkady Pavlov.

Defendant Arkady Pavlov's motion (seq. # 7) pursuant to CPLR §3212, granting him summary judgment dismissing all claims against him is denied.

Defendants Alex Chirinkin and Nellie Chirinkin's motion (Seq. # 8) pursuant to

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CPLR §6501 to cancel the notice of pendency on their private residence and impose sanctions upon plaintiffs is granted to the extent of canceling the notice of pendency.

Plaintiffs Eduard Gitlin (hereinafter "Gitlin" and Kew Apartment Holdings, LLC, (hereinafter "Kew") (collectively referred to as the plaintiffs), commenced this action against the defendants, Alex Chirinkin (hereinafter "Chirinkin"), Nellie Chirinkin (hereinafter "Nellie"), Arkady Pavlov(hereinafter "Pavlov"), Alex Chirinkin LLC (hereinafter AC LLC), and Alex Chirinkin Enterprises, LLC (hereinafter "ACE"), asserting causes of action for fraud, misappropriation of company assets, breach of fiduciary duty, aiding and abetting a breach of a fiduciary duty, unjust enrichment, self dealing, violations of the Debtor and Creditor Laws, breach of contract and for an accounting.

Plaintiffs seek to recover compensatory, consequential and punitive damages against the defendants.

This action arises out of the alleged fraudulent transfer of the assets of Kew, without any consideration to Kew, and without the knowledge or consent of Gitlin as a member of Kew. The alleged fraudulent transfer involves two properties located in the State of Nevada; a plot of land located in Clark County, referred to as the "Lucky Bucks property," and a plot of land located in Nye County, referred to as the "Pahrump property," which were partially owned by Kew. Gitlin contends that he and Chirinkin each had a 50 percent interest in Kew and he was entitled to 50 percent of Kew's share of the profits from the sale of the properties.

Motions for Summary Judgment

Plaintiffs move for summary judgment against the defendants Alex Chirinkin and Arkady Pavlov on their claims for violation of the Debtor and Creditor Law and unjust enrichment, and as against Chirinkin for breach of fiduciary duty, fraud and breach of contract.

Plaintiffs assert that pursuant to Kew's Articles of Organization, filed with the State of New York on March 21, 1997 (Ford Aff. Ex 13) and Kew's Operating Agreement (Ford Aff, Ex. 14) that Chirinkin and Gitlin were the only members of Kew, each having a 50 percent interest in the company. Plaintiffs contend that defendant Chirinkin, violated the Operating Agreement when without the knowledge or consent of Gitlin, he fraudulently transferred

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Kew's interest in the Nevada properties to defendant Pavlov and other entities owned by Chirinkin (see Ford Aff Exs. 21 & 23, Grant, Sale Bargain Deeds for the two properties). Those properties were later sold to other entities without any consideration to Kew or Gitlin.

Plaintiffs' aver that Chirinkin, as president and a managing member of Kew, breached his fiduciary duty to the plaintiffs, pursuant to N.Y. Limited Liability Company Law §402 (d)(2), and engaged in self dealing and misappropriation of company assets and was unjustly enriched by the fraudulent transfer of Kew's assets. Plaintiffs allege that Chirinkin accepted money from Pavlov for his sole benefit and that of his company, VSA (Ford Affirmation Ex. 31, checks from Pavlov). Plaintiffs' also assert that defendants Pavlov and Chirinkin breached N.Y. Debtor Creditor Law and were unjustly enriched when Chirinkin improperly and fraudulently transferred Kew's ownership interest in the Nevada properties to Pavlov without providing any consideration to Kew, resulting in Kew becoming insolvent.

Gitlin contends that, due to the fraudulent transfers, he is entitled to $408,000.00 as his share of Kew's profit on the sale of its 50 percent interest in the Lucky Bucks property. Gitlin also claims that he is owed $400,000.00, as his share of Kew's profit on the sale of its 20 percent interest in the Pahrump property to BM Pahrump for $4,000,000.00. Gitlin also argues that he is entitled to consequential damages of $1,580,000.00 based from BM Pahrump's subsequent resale of the Pahrump property to Celebrate Properties, LLC on August 12, 2005, for $15,800,000.00. Gitlin argues that both Pavlov and Chirinkin are liable as they were unjustly enriched due to fraudulent transfers of the properties to Pavlov and subsequent sales to other entities.

Both defendants Chirinkin and Pavlov oppose the plaintiffs' motion for summary judgment and Pavlov also moves for summary judgment. The gravamen of Chirinkin's opposition is that Gitlin was not a member of Kew and thus not entitled to any of the proceeds from the transfer and/or sale of the Nevada properties. Chirinkin acknowledges that Gitlin was entitled to 33 percent of the profits with regard to Kew's sale of the New York Coop apartments and other business ventures where profits were shared on a 50-50 basis. However, Chirinkin contends that Gitlin was not entitled to share in the profits from the Nevada properties as he was not a member of Kew and the Nevada properties were partially placed in Kew's name only for purposes of accounting. Chirinkin also argues that Gitlin commenced this action in an attempt to avoid repaying a loan which Chirinkin made to Gitlin in 2006 for $430,000.

Defendant Chirinkin argues that the plaintiffs failed to establish a prima facie showing

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of fraud, breach of a fiduciary duty, or a violation of the Debtor and Creditor Law. Chirinkin avers that the plaintiffs fail to allege the particular circumstances of the fraud and merely assert that Chirinkin misrepresented the status of the property. Chininkin also argues that he did not breach a fiduciary duty because Kew had only a 20 percent interest in the Pahrump property while his other company, ACE, had a 80 percent interest in the property and in the absence of an agreement to the contrary, he as the absolute majority owner, had an unrestricted right to transfer the property to any third party and Gitlin had no right to object to the transfer even if he was a member of Kew.

Chirinkin further contends that the plaintiff Gitlin is not entitled to consequential damages or a share of gross receipts from the sale of the properties. He argues that at most Gitlin's possible equitable interest in the Nevada properties would not exceed $170,000.00, which does not allow for all possible debts and expenses that Kew owed as part owner of the properties. Moreover, Chirinkin argues that Gitlin would not be entitled to any recovery even if he were a member of Kew, as he did not contribute any funds for the purchase or maintenance of the properties.

In reply, plaintiffs assert that the issue of Gitlin's membership and 50 percent ownership interest in Kew cannot be disputed by Chirinkin as that issue had previously been determined by this Court (decision dated July 6, 2009) which was affirmed on appeal, see Gitlin v. Chirinkin, 71 AD3d 728 [2nd Dept. March 9, 2010].

Defendant Pavlov argues that plaintiffs cannot prove the claims against him for unjust enrichment and fraudulent conveyance under New York Debtor and Creditor Law and thus plaintiffs' motion for summary judgment against him should be denied and his motion should be granted dismissing the action against him.

Pavlov argues that the evidence clearly shows that he paid fair consideration for the properties and assumed significant risk. Pavlov argues that he paid hundreds of thousands of dollars for the properties

and took on significant risks by committing to pay carrying charges on the Lucky Bucks property. Both Gitlin and Chirinkin acknowledge that neither of them contributed their own funds toward the purchase of the New York or Nevada properties by Kew but instead borrowed money from their friends and acquaintances. Pavlov asserts that he assumed the obligation to make monthly payments for property taxes and carrying costs and would in turn receive 25 percent of the profits when the property was sold. Pavlov asserts that on April 3, 2001 he received a deed from Chirinkin who had signed the deed as the managing member of Kew.

Pavlov does not deny that he did not make any payments to Kew but instead wrote

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checks out of his personal account for the Lucky Bucks property to entities identified by Chirinkin and his total investment for the Lucky Bucks property was $58,286.74. The Lucky Bucks property was resold two years later to the federal government for $1,632,000.00.

As to the Pahrump property, Pavlov asserts that Chirkin approached him in 2003 regarding that property and he agreed to invest $320,000 for a 25 percent interest in the property. On January 21, 2003 he drew a check to VSA Enterprises LLC (hereinafter "VSA"), which was another of Chirinkin's companies. In August of 2003 Chirinkin gave him a copy of the deed to the Pahrump property, which listed him as having a 25 percent ownership interest. In the spring of 2004, Chirinkin advised Pavlov of a buyer for the property, and at a meeting with Chirinkin on May 12, 2004 and Pavlov signed a deed transferring his interest in the Pahrump property to BM Pahrump LLC. On June 28, 2004 Pavlov again met with Chirinkin to acknowledge his signature on the deed before a Notary Public, he latter received a check for his share of the profits from the title company.

Pavlov avers that he never heard of Gitlin prior to the commencement of this action, did not know Gitlin had any connection to Kew and was told by Chirinkin that Kew was one of his companies. At the time of his investment in the Lucky Bucks property, Chirinkin told him his down payment was being used to buy out another investor who was experiencing financial difficulties. Pavlov argues that he provided fair value for his interest in the properties, he operated in good faith, and the transactions were conducted at arm's length. Pavlov argues that he was not unjustly enriched as Gitlin did not convey any benefit upon him and he received no benefit from Kew. Pavlov denies that he had any intent to defraud Gitlin, whom he did not know even existed at the time of the transactions, but was defrauded by Chirinkin as to the ownership of Kew.

In response, plaintiffs argue that Pavlov knew, or should have known, that Kew was not wholly owned by Chirinkin, and Kew was not being compensated as Pavlov did not pay anything to Kew for his interest in the properties. Plaintiffs argue that because Pavlov failed to exercise due diligence in these real estate transactions, which would have exposed the fraudulent transfers, his intent can be inferred.

Factual and legal determinations

Kew was a New York Limited Liability Company, which filed Articles of Incorporation on March 21, 1997 (Ford Aff. Ex. 13). When Kew was formed, the members

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were Gitlin and Chirinkin who were also partners in other business ventures, including buying and selling of automobiles, where they split profits on a 50-50 basis (Ford Aff. Ex 25 depo of Chirinkin p 90 line 2 — p 91 line 14). Kew's Operating Agreement, entered into on March 21, 1997, lists Gitlin and

Chirinkin each as having a 50 percent ownership interest (Ford Aff Ex. 14).

Kew was initially formed to buy and sell Coop Apartments in New York and those investments were overseen by Gitlin. Kew no longer has any New York property investments and there are no claims regarding those investments.

Chirinkin was the president and sole member of Alex Chirinkin Enterprises, LLC (hereinafter "ACE") (Ford Aff Ex 25, Chirinkin Depo p. 62, lines 6-25, p. 63 line 2 — p. 64, line 18). Chirinkin was also the owner of a Limited Liability Companies known as VSA LLC and Alex Chirinkin LLC (hereinafter "AC LLC"). Nellie Chirinkin, is the wife of Chirinkin and was a Notary Public who notarized documents on behalf of her husband in connection with his business activities (Ford Aff Ex. 24), and she also worked for Gitlin in his title business.

Arkady Pavlov is a dentist who, in addition to owning his own business, invested in real estate properties, in particular the Pahrump and Lucky Bucks properties.

On June 2, 1998 Kew acquired an undivided 50 percent interest in the Lucky Bucks property, the other owners were Modern Way Business Enterprises, Inc (hereinafter "Modem") and Feldbyn Roman (hereinafter "Roman"), who each held an undivided 25 percent interest in that property. The purchase price of the Lucky Bucks property was $522,900 (Ford Aff. Ex 19). Chirinkin managed Kew's Nevada property interests (Ford Aff Ex 25 Depo of Chirinkin, Giltin Aff ¶12). On August 3, 2001, title to the Lucky Bucks property was transferred to newly recorded owners listed as VSA (50 percent ownership), Modern (25 percent ownership) and Pavlov (25 percent ownership) (Ford Aff. Ex. 21).

Gitlin was not made aware of the transfer of the Lucky Bucks property and no consideration was provided to Kew for its 50 percent undivided ownership interest in the property or to Gitlin regarding his interest in Kew (Gitlin Aff ¶s 16 & 17). Pavlov paid a total of $58,286.74 for his 25 percent interest in the Lucky Bucks property, $40,000.00 as a down payment, the remainder in the form of monthly carrying cost payments from time he acquired his interest until the property was sold (Pavlov Aff. ¶11).

On July 9, 2002 the Lucky Bucks property (as owned by VSA, Modern and Pavlov) was sold to the United States Of America for $1,632,000.00 (Ford Aff. Ex. 22).

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Upon the sale of the Lucky Bucks property, Pavlov received a check for 25 percent of the profits (Geerchen Aff. Ex. E, Pavlov Aff ¶13). None of the proceeds or any consideration received from the transfer and subsequent sale of the Lucky Bucks property was given to Kew or to Gitlin as a member of Kew.

On July 9, 1998, Kew acquired a 20 percent interest in the Nevada Pahrump property and Alex Chirinkin Enterprises, LLC (hereinafter "ACE") acquired an 80 percent interest in the property. The purchase price of the Pahrump property was $1,146,050.00 (Ford Aff Ex. 20). As the only members of Kew, both Chirinkin and Gitlin executed escrow documents with regards to the purchase of the property (Ford Aff. Ex. 16).

On January 21, 2003, Pavlov wrote a check to VSA for a 25 percent interest in the Pahrump property (Pavlov Aff ¶14).

On August 25, 2003 the title to the Pahrump property was conveyed from ACE (80 percent interest) and Kew (20 percent interest) to AC LLC (75 percent interest) and Pavlov (25 percent interest) (Ford

Aff. Ex. 23). The Grant Bargain and Sale Deed, dated August 25, 2003, was signed by Chirinkin, as President of AC LLC and as president of Kew. Gitlin did not execute the deed nor was he listed on it as a member of Kew (Ford Aff Ex 23). Kew was not provided any consideration for its ownership interest in the Pahrump property.

On May 12, 2004, the Pahrump property was sold to BM Pahrump, LLC for $4,000,000.00 (Ford Aff. Ex. 25) and then resold on August 12, 2005, from BM Pahrump, LLC to Celebrate Properties, LLC for $15,800,000.00 (Ford Aff Ex 29).

None of the proceeds or any consideration received from the transfer and subsequent sales of the Pahrump property were provided to Kew for its 20 percent ownership interest in the property or to Gitlin as a member of Kew.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facia showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v. King,10 AD3d 70, 74 [2nd Dept. 2004], aff'd as mod., 4 NY3d 627 [2005], citing Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med Ctr., 64 NY2d851, 853 [1985]. "Failure to make such prima facia showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v. King, supra at 74; Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med Ctr., supra. Once the movant's burden is met, the burden shifts to

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the opposing party to establish the existence of a material issue of fact. Alvarez v. Prospect Hosp., supra at 324. The evidence presented by the opponent of summary judgment must be accepted as true and must be given the benefit of every reasonable inference. See, Demishick v. Community Housing Management Corp., 34 AD3d 518, 521 [2nd Dept. 2006] citing Secof v. Greens Condominium, 158 AD2d 591 [2nd Dept. 1990].

Initially, the Court notes that in its decision, dated July 6, 2009, on discovery motions in this action, the following was stated.

"More particularly, with respect to the defendants' request for the individual plaintiff's tax return and bank statements in order to possibly prove that he was not a member of Kew at the time when the subject transactions took place, the individual plaintiff has demonstrated his membership in Kew, LLC on March 21, 1997, the date of the execution of the Kew LLC operating agreement. That document identifies Mr. Gitlin as having a 50 percent ownership interest in Kew LLC. That document imposes several obligations on the members, inter alia, a fiduciary obligation and responsibility to the LLC and its members. That document also requires some affirmative action to accomplish the withdrawal of a member and that must be accomplished "either in writing or at a meeting called for such purpose" (Article 1X, 9.1). The defendants have not produced any evidence of such an event, and without such event, there is a clear presumption that such membership continues.

Plaintiffs argue that based upon that decision (affirmed on appeal, see Gitlin v. Chirinkin, 71 AD3d 728 [2nd Dept. 2010]) of this Court, it is the law of the case, that Gitlin had a 50 percent ownership interest in Kew. However, even without that prior decision, the submitted evidence on this motion clearly establishes that Gitlin was a member of Kew with a 50 percent interest. The evidence relied upon includes but is not limited to: the Articles of Organization(Ford Aff Ex 13); Operating Agreement (Ford Aff Ex 14) both dated March 21, 1997; and more particularly with regards to this action, the Installment

Note in the amount of $696,050.00 (Ford Reply Aff. Ex11) and escrow agreement dated June 3, 1998 regarding the $450,000.00 down payment (Ford Aff Ex. 19) both for the Pahrump property which were signed and initialed, several times, by Chirinkin as the only member of ACE and by both Chirinkin and Gitlin as the only members of Kew.

Gitlin has established that he became a member of Kew with a 50 percent ownership interest when it was formed and Chirinkin has failed to come forth with any evidence that an event of withdrawal occurred as required pursuant to Article IX, section 9.1

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(Admission and Withdrawal of a Member) of Kew's Operating Agreement.

Thus, plaintiffs have submitted sufficient proof to establish a prima facia entitlement to summary judgment against defendant Chirinkin for violating Limited Liability Company Law (LLCL) 402(d)(2), which requires a vote of the majority in interest of the members to sell or transfer substantially all of the assets of the company, and for breaching his fiduciary duty, as a manager of Kew, to act in good faith, LLCL §409. It is undisputed that the Nevada properties were the only assets of Kew at the time they were transferred to Pavlov and other entities without any compensation being provided to Kew. "[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" Rut v. Young Adult Inst., Inc., 74 AD3d 776, 777 [2nd Dept. 2010]; see Kurtzman v. Bergstol, 40 AD3d 588,590 [2nd Dept. 2007]). Similarly, plaintiff is entitled to summary judgment against defendant Chirinkin on the breach of contract claim as it has been established that he breached the terms of Kew's operating agreement.

It is undisputed that Chirinkin was the managing member of Kew, that he removed Kew from the title and its ownership interest in the Nevada properties without the knowledge or consent of Gitlin, and Gitlin did not receive any compensation. Thus, plaintiffs have established all three elements of breach of fiduciary duty, which Chirinkin has not rebutted.

Plaintiff Gitlin has also made a prima facia showing of entitlement to summary judgment on the claim of fraud by defendant Chirinkin which was not rebutted. "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 AD3d 484, 487 [2nd Dept 2005]; see Lama Holding Co. v. Smith Barney, 88 NY2d 413[1996]).

Contrary to the assertions of defendant Chirinkin that the plaintiff failed to properly allege a claim for fraud, this Court previously held that plaintiffs' allegations supported each element of fraud as against Chirinkin.

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In its decision on defendants' motions to dismiss plaintiffs' complaint, this court, by order dated November 28, 2007 held:

That plaintiff has stated factual allegations in support of each element of fraud for defendant Alex Chirinkin only. The plaintiff alleges that the defendant Alex Chirinkin represented that he would manage the day-to-day activities of Kew to the benefit of Kew and its members and that this statement was

false. Additionally, the defendant continued to counsel the plaintiff in connection with the investment property without divulging that the property had been transferred and sold thereby omitting a material fact and deceiving the plaintiff. The plaintiff relied upon this misrepresentation by continuing to believe that the property had not been sold, as a result, the plaintiff was allegedly damaged."

Plaintiffs' proof sufficiently established that Chirinkin had affirmatively told Gitlin that he would manage the Nevada properties on behalf of Kew and Gitlin, However, despite Gitlin's inquiries about the status of the Nevada properties and whether to develop or sell them, Chirinkin continued to respond that a decision had not been made yet. Those representations were false when made as the properties had already been transferred and sold without Gitlin's knowledge and without compensation to Kew or Gitlin.

The plaintiff has also established entitlement to summary judgment against defendant Chirinkin on the claim of unjust enrichment which he has failed to rebut. "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" Cruz v. McAneney, 31 NY3d 54,59 [2006]; Old Republic National Title Ins. Co. v. Luft, 52 AD3d491, 491-492 [2bd Dept. 2008]. The submitted evidence clearly establishes that Chirinkin as a member of Kew transferred Kew's interest, for no consideration, in the two Nevada properties to other entities in which he had an ownership interest, and to Pavlov. The properties were subsequently sold for a significant profit for which Gitlin did not receive his share, to which he was entitled as a member of Kew with a 50 percent ownership interest.

In addition, as Gitlin was a member of Kew with an ownership interest, he was also a creditor of Kew to the extent that he was entitled to a share of Kew's assets.

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When Kew's last asset, the Pahrump property, was transferred without any consideration, it resulted in Kew's insolvency as it was not possessed of any assets with which it could satisfy debts owed to Gitlin. Accordingly, plaintiff have established that Chirinkin fraudulently transferred that property in violation of the Debtor and Creditor Law §273 (see Steinberg v. Levine, 6 AD3d 620,621 [2nd Dept 2004; Capital Contribution Services, Limited, v. Ducor Express Airlines, Inc., 440 F.Supp. 2d 195,203 [E.D.N.Y 2006]; Ford v. Martino, 281 AD2d 587, 588 [2nd Dept. 2001]. Moreover, plaintiffs have established that Chirinkin transferred the property with actual intent to defraud Gitlin in violation of §276 of the Debtor and Creditor Law.

However, Chirinkin has raised an issue of fact as to the profit which Kew made upon the sale of the Nevada properties to the United States of America and to BM Pahrump. Thus, Chrinkin has raised an issue of fact as to the damages which Gitlin suffered based upon the loss of his 50 percent share of the net profits realized by Kew upon the sale of the properties. Issues also exist regarding monies purportedly loaned from Chirinkin and Gitlin to each other and what if any bearing those purported loans have with regards to Gitlin's share of the profits from the sale of the Nevada properties. Accordingly a trial is necessary to determine the issue of damages. The amount of reasonable attorneys fees to be assessed against defendant Chirinkin to plaintiff, Gitlin, pursuant to Debtor and Creditor Law §276-a shall be determined at the damages trial in this matter.

The branch of plaintiffs' motion for summary judgment against defendant Pavlov and Pavlov's motion for summary judgment are both denied as issues of fact exist as to whether Pavlov was unjustly

enriched. The evidence submitted on the plaintiffs' and Pavlov's motions for summary judgment and in opposition to each others motions have raised material issues of fact as to what Pavlov knew or should have known regarding his investments in the subject properties.

Despite the undisputed fact that Pavlov received a significant return on his investments in the properties, issues of fact exist as to whether the amounts he tendered, and risks he undertook, constituted fair consideration at the time of purchase, see N.Y Debtor and Creditor Law §278. Issues also exist as to whether Pavlov was unjustly enriched to the plaintiff's detriment which would be against "equity and good conscience to permit the defendant to retain what is sought to be recovered" Paramount Film Distrib. Corp., v. State of New York, 30 NY2d 415, 421 [1972]; Cruz v. McAneney, supra at 59; Old Republic National Title Ins. Co. v. Luft, supra at 491-492

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[2bd Dept. 2008]. These issues of material fact require a trial for determination.

Motion, Seq. # 8, to cancel the Notice of Pendency

Defendants Alex Chirinkin and Nellie Chirinkin seek an order (motion Seq. # 8), pursuant to CPLR §6501, to cancel the notice of pendency on their private residence and to impose sanctions upon plaintiffs.

On June 25, 2010, plaintiffs filed a notice of pendency dated June 24, 2010 with the Nassau County Clerk's Office on the premises known as 21 The Grasslands, Woodbury, New York (hereinafter referred to as "The Grasslands"), the personal residence of defendants' Alex and Nellie Chirinkin located in Nassau County, New York (Chirinkin Defendants' motion, Seq. # 8, Ex. A). In the notice of pendency, plaintiffs' assert that the proceeds obtained in fraud of the plaintiff were used to purchase The Grasslands property as part of a series of multiple transfers engaged in for the purpose of defrauding Gitlin and the creditors of Kew.

The defendants Alex and Nellie Chirinkin assert that the Notice of Pendency on their personal residence should be cancelled as it was filed in violation of current statutory and case law. They further seek the imposition of sanctions on the plaintiffs for frivolously filing the notice and refusing to remove it when they were requested to do so. The Chirinkin defendants argue that the notice of pendency has no foundation in law and must be cancelled as the plaintiffs' action is for money damages and nothing in the judgment demanded in the complaint would affect the title to, possession of or enjoyment of the subject property, The Grasslands.

In opposition, plaintiffs argue that this is not simply an action to recover their membership interest in Kew but is also a derivative action on behalf of the company. Plaintiffs assert that the Alex Chirinkin transferred to his wife Nellie all or most of the monies realized from the fraudulent transfers of Kew's assets and the proceeds were used to purchase the Chirinkin defendants' personal residence. While plaintiffs appear to argue that their second amended complaint, read as a whole, supports a claim for a constructive trust over defendants' personal residence, such a claim has not actually been plead.

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CPLR§ 6501. Notice of pendency; constructive notice, sets forth the following:

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property,

except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

"A notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or the possession, use or enjoyment of, real property (CPLR 6501; see 5303 Realty Corp. v. O & Y Equity Corp., 64 NY2d 313, 320-321 [1984]; Nastasi v. Nastasi, 26 AD3d 32, 35 [2nd Dept 2005]" Ewart v. Ewart 78 AD3d 992 [2nd Dept. 2010]). "This includes a shareholder's derivative action 'if the suit is seeking to recover the corporation's real property'" Ali v. Ahmad, 24 AD 3d 475 [2nd Dept. 2005]; quoting (5303 Realty Corp., supra at 324, see also Keen v. Keen; 140 AD2d 311, 312 [2nd Dept 1988)]).

Even a liberal reading of the plaintiffs' complaint fails to establish an action for a constructive trust over Alex and Nellie Chirinkins' New York residence. Accordingly, despite the plaintiffs' attempt to characterize it otherwise, this is an action for money damages and the dissolution of Kew and not one that would affect the title to, or the possession, use or enjoyment of the subject real property. Thus, the Chirinkin defendants have established their right to have the notice of pendency filed against their property cancelled. See CPLR 6501; (5303 Realty Corp., supra; Pizzurro v. Pasquino, 201 AD2d 635 [2nd Dept. 1994]; Shkolnik v. Krutoy, 32 AD3d 536 [2nd Dept. 2006]; Distinctive Custom Homes Bldg. v. Esteves, 12 AD3d 559 [2nd Dept. 2004]). However, the portion of

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the Chirinkin defendants' motion seeking the imposition of sanctions is denied.

Therefore it is hereby

ORDERED, that the plaintiffs' motion for summary judgment (Seq # 6) is granted only against defendant Alex Chirinkin on the issue of liability, a trial is necessary to determine damages, and it is further

ORDERED, that defendant, Arkady Pavlov's motion for summary judgment (Seq # 7) is denied in its entirety, and it is further

ORDERED, that the motion (Seq. # 8), brought by defendants Alex Chirinkin and Nelli Chirinkin, to cancel the notice of pendency filed on their personal residence and for sanctions, is granted to the extent that the notice of pendency shall be cancelled, and it is further

ORDERED, that the Nassau County Clerk is directed to cancel the notice of pendency dated June 24, 2010, filed on June 25, 2010, indexed against the premises located at 21 The Grasslands, Woodbury, New York, known as and by lot 97 on Map of Hunters Run at Woodbury, Section 3 situated at Woodbury, Town of Oyster Bay.

This constitutes the decision and order of the Court.