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

PRESENT: _____ **Justice** **PART** _____

Index Number : 601115/2009
PAPPAS, STEVE
vs.
TZOLIS, STEVE
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 601115-09
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memo decision

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

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Dated: 3/3/10. _____ J.S.C.

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Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

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STEVE PAPPAS and CONSTANTINE IFANTOPOULOS, individually and derivatively on behalf of VRAHOS LLC,

Plaintiffs,

-against-

Index No. 601115/09
PC No. 22907

STEVE TZOLIS and VRAHOS LLC,

Defendants.

----------X

IRA GAMMERMAN, J.H.O.:

Defendant Steve Tzolis moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint. The complaint alleges that, in January 2006, plaintiffs Steve Pappas and Constantine Ifantopoulos, together with Tzolis, formed plaintiff-defendant Vrahos LLC, a Delaware corporation; that the parties entered into an Operating Agreement ("Agreement"), dated January 13, 2006, pursuant to which Pappas and Tzolis would make capital contributions of $50,000 each, and Ifantopoulos a contribution of $25,000; that, on that same day, Vrahos acquired an approximately 49-year lease ("Lease") on the premises located at 68-74 Charlton Street in Manhattan; that, on June 16, 2006, Vrahos sublet the demised premises to Tzolis, on terms set forth in the Agreement; that, on January 18, 2007, Pappas and Ifantopoulos sold their interests in Vrahos to Tzolis, with Pappas receiving $1 million and Ifantopoulos receiving $500,000; that, on or about August 28, 2007, Tzolis assigned the Lease to non-party Charlton Soho LLC ("CS") for the sum of $17.5 million; and that, on (unspecified) information and belief, Tzolis had been negotiating with CS prior to January 18, 2007, but failed to disclose those negotiations to plaintiffs. On the basis of these allegations, the complaint alleges 11 causes of action, including, among others, breach of fiduciary duty, breach of contract, tortious interference with business opportunities, and fraud; and seeks damages, as well as a variety of equitable relief, including imposition of a constructive trust, rescission, and an accounting.

Plaintiffs contend that this action is governed by New York law, because the Operating Agreement provides that the Agreement "shall be governed and construed under the substantive laws of the State of New York," Weinstein Affirm., Exh. C, at 11. Tzolis contends, to the contrary, that Delaware law applies, because New York Limited Liability Company Law § 801 (a) provides that "the laws of the jurisdiction under which a foreign limited liability company is formed govern its . . . internal affairs and the liability of its members and managers . . . ." For purposes of deciding this motion, I need not decide which law to apply, because the result is the same, under both Delaware and New York law.

In connection with Tzolis's purchase of plaintiffs' interests in Vrahos, the parties signed a "Certificate" that stated, in relevant part, that "each of the undersigned sellers agrees that Steve Tzolis has no fiduciary duty to the undersigned sellers in connection with [the sales of their interests]." Weinstein Affirm., Exh. G. Plaintiffs argue that they were fraudulently induced to sign the Certificate, inasmuch as Tzolis failed to disclose his negotiations with CS. However, Tzolis does not rely upon the Certificate as effecting a waiver of fiduciary duties that he might, otherwise, have owed to plaintiffs, but rather, as evincing and certifying the absence of any such duties on his part.

The Operating Agreement provides:

> 11. Other Activities of Members. Any member may engage in business ventures and investments of any nature whatsoever, whether or not in competition with the LLC, without obligation of any kind to the LLC or to the other Members.
>
> ***
>
> 20.7 Headings. The headings in this Agreement . . . shall be given no effect in the interpretation of this Agreement.

Thus, paragraph 11 eliminates the fiduciary relationship that would, otherwise, be owed by the members to each other and to the LLC, and plaintiffs' reliance on *Blue Chip Emerald LLC v Allied Partners Inc.* (299 AD2d 278 [1st Dept 2002]) is misplaced. In *Blue Chip*, the Court held that, at the time that the parties entered into a buy-out agreement, which included terms similar to those in the Certificate, the parties owed each other a fiduciary duty, and the disclaimers of such duty, allegedly agreed to as the result of fraud, were ineffective. Here, by contrast, the parties agreed that, from the start of the LLC, they would have no fiduciary duty to it, or to each other. Plaintiffs'

reliance upon *Blackmore Partners, L.P. v Link Energy LLC* (864 A2d 80 [Del Ch 2004]) is similarly misplaced. In that case, the court refused to dismiss a claim of breach of fiduciary duty on the part of the directors of a limited liability company, but that company's agreement contained an exculpatory clause immunizing directors from liability for violation of the duty of care, not, as here, a clause eliminating fiduciary duties. In *Continental Ins. Co. v Rutledge & Co.* (750 A2d 1219 [Del Ch 2000]), the court held that a contractual clause permitting partners to engage "in other business activities of every kind and description" does not allow self-dealing, when acting within the limited partnership. Here, however, the Agreement permits "business ventures and investments of any nature whatsoever," and it cannot be read to exclude business ventures involving the LLC. Moreover, while Delaware may well not permit the elimination of fiduciary duties among the members of limited partnerships, *see Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160 (Del Supr 2002), *affd* 840 A2d 641 (Del Supr 2003), it does permit such elimination among the members of limited liability companies. Delaware Limited Liability Company Act § 18-1101 (c), provides, in relevant part, that:

> [t]o the extent that . . . a member or manager . . . has duties (including fiduciary duties) to a limited liability company or to another member or manager . . . [those] duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided that the limited liability agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

6 Del C § 18-1101.

Similarly, under New York law, parties are free to contract as they wish, so long as the terms of their contract are neither unlawful, nor in violation of public policy. The terms of the Agreement here are neither.

While plaintiffs allege that Tzolis violated the implied contractual covenant of good faith and fair dealing, they do so in a completely conclusory manner. The factual basis for that cause of action, as for every other cause of action in the complaint, is that, at the time that Tzolis purchased plaintiffs' interests in Vrahos, he failed to disclose to plaintiffs the possibility of a profitable assignment of the Lease to CS. But the purchase of plaintiffs' interests is not contemplated in the Operating

Agreement. Under Delaware law, a plaintiff seeking to state a claim for breach of the implied covenant of good faith must "allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract" (*Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872 [Del Ch 2009]; *Fitzgerald v Cantor*, 1998 WL 842316 [Del Ch, Nov. 10, 1998]), and the implied covenant "cannot be used to forge a new agreement beyond the scope of the written contract," *Chamison v HealthTrust, Inc.--Hosp. Co.*, 735 A2d 912 (Del Ch 1999), *affd* 748 A2d 407 (Del Supr 2000). Similarly, New York law holds that the implied covenant of good faith and fair dealing cannot be used to create independent contractual rights, *Madison Apparel Group Ltd. v Hachette Filipacchi Presse, S.A.*, 52 AD3d 385 (1st Dept 2008); *National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309 (1st Dept 2006). Nor does the implied covenant create a special relationship between the parties to a contract, such as would give rise to a duty to disclose material information, *Manti's Transp., Inc. v C.T. Lines, Inc.*, 68 AD3d 937 (2d Dept 2009). The complaint fails to identify any specific provision of the Agreement that Tzolis may have violated. While plaintiffs also allege that Tzolis violated the sublease agreement that he entered into with Vrahos, by failing to make certain payments that that agreement required, any claim that plaintiffs might have had regarding such failure was extinguished at the time that they sold their interests in the LLC. Consequently, I am dismissing both the first cause of action (breach of fiduciary duty) and the third cause of action (breach of contract and of the implied covenant of good faith and fair dealing).

The second cause of action alleges that Tzolis's purchase of plaintiffs' interests in the LLC, coupled with his failure to inform plaintiffs of CS's interest in the Lease, constituted a misappropriation of a business interest of the LLC. Even assuming that plaintiffs have standing to raise this claim, the claim is not viable because the Operating Agreement gives each party thereto the right to pursue business opportunities in competition with the LLC, *see Barrett v Toroyan*, 28 AD3d 331 (1st Dept 2006), citing *Continental Ins. Co. v Rutledge & Co.*, 750 A2d 1219, *supra*.

The fourth cause of action alleges that Tzolis's purchase of plaintiffs' interests constituted

conversion. It is axiomatic that property that a party has willingly sold cannot form the basis for a claim for conversion.

The fifth cause of action, which alleges unjust enrichment, is not viable because plaintiffs willingly sold their interests in the LLC in an arms'-length transaction (and at a 2,000% profit), and they were free to assess for themselves the value of the interests that they sold. To the extent that this cause of action is not entirely redundant to the claim alleging fraud, it is no more than a lament that plaintiffs failed to get a better price for the interests that they sold.

The sixth, seventh, and eighth causes of action request certain forms of equitable relief. They rise or fall with the other causes of action.

The ninth cause of action alleges that Tzolis tortiously interfered with plaintiffs' prospective business opportunities by (a) inducing them to sell to him their interests in the LLC, and (b):

> by inducing the [non-party] lawyers representing the LLC . . . to breach their fiduciary duty to the LLC and to the Plaintiffs, by creating the documents [effecting the sale of plaintiffs' interests], and inducing the Plaintiffs to execute them without telling them that Tzolis was breaching his fiduciary duty to the LLC and to the Plaintiffs because of the failure of Tzolis to disclose to the Plaintiffs the existence of the opportunity for the sale of the Lease, for $17,500,000 or other amount.

Weinstein Affirm., Exh. A, at 20.

To the extent that these allegations state any cause of action, such cause of action is entirely redundant to the cause of action alleging breach of fiduciary duty.

The tenth cause of action alleges fraud and misrepresentation, but it does not allege that Tzolis made any false statements to plaintiffs. Rather, this cause of action rests entirely upon Tzolis's alleged failure to inform plaintiffs of his alleged negotiations with CS. Absent a fiduciary relationship to plaintiffs, the only basis for a claim that Tzolis had a duty to disclose is the so-called "special facts" doctrine. That doctrine holds that where one party to a transaction has such a superior knowledge of the relevant facts that a failure to disclose them would render the transaction inherently unfair, that party has a duty to disclose those facts, *Strasser v Prudential Sec.*, 218 AD2d 526 (1st Dept 1995). A necessary element for the application of this doctrine is that the party lacking the relevant knowledge could not have acquired it by the use of ordinary intelligence, *Jana L. v West*

129th St. Realty Corp., 22 AD3d 274 (1st Dept 2005). Here, the complaint does not allege that either Pappas, or Ifantopoulos posed any questions to Tzolis as to why he was suddenly offering them, respectively, $1 million and $500,000 in return for their respective investments, one year earlier, of $50,000 and $25,000. But even if plaintiffs could, in other circumstances, benefit from the special facts doctrine, the central allegation of the complaint, to wit, that Tzolis knew, in January 2007, that he was likely to be able to assign the Lease to CS for a substantial profit, is made solely on information and belief, without any specification of the source of information, or of the basis for the belief. Such an allegation does not suffice to support a claim of fraud, either under New York law, or Delaware law, *Wall St. Transcript Corp. v Ziff Communications Co.*, 225 A2 322 (1st Dept 1996); *Nutt v A.C. & S., Inc.*, 466 A2d 18 (Del Super 1983), *affd* 480 A2d 647 (Del Supr 1984); *see also Kanbar v Aronow*, 260 AD2d 182 (1st Dept 1999); *Griffin Corporate Services, LLC v Jacobs*, 2005 WL 2000775, 2005 Del Ch LEXIS 120 (Del Ch 2005).

The 11th cause of action purports to assert a derivative claim against Tzolis, on behalf of the LLC. Inasmuch as plaintiffs are strangers to the LLC, not having owned any interest in it since January 18, 2007, they lack standing to assert this claim.

Accordingly, it is hereby

ORDERED that the motion is granted and the complaint is dismissed with costs and disbursements as calculated by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/3/10

ENTER:

J.H.O.

IRA GAMMERMAN