To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MICHAEL MIKHAILOV,

Plaintiff,

-against-

Index No. 17393/2010
DECISION & ORDER
Motion Sequence 5

ITZKAK KATAN, RICHARD MARANS, and MARANS, WEISZ & NEWMAN, LLC

Defendant.

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The following papers numbered 1 through 8 were received and considered in connection with the above-captioned matter:

PAPERS	**NUMBERED**
Notice of Motion/Marans Affidavit in Support/Exhibits A-R	1-3
Memorandum of Law in Support	4
Opposition Affidavit	5

FACTUAL & PROCEDURAL BACKGROUND

Defendants, Richard Marans and Marans, Weisz & Newman, LLC (hereinafter "Marans law firm") move this Court for an order of summary judgment dismissing Plaintiff's first amended Complaint as against Defendants. In his complaint, Plaintiff alleges that prior to May 15, 2008, Defendant Katan represented that he owned half or all of the membership interest in Gowanus Village IV, LLC (hereinafter Gowanus). Gowanus was a tenant-in-common owner having a 33.33% interest in a parcel of real property known as 420 Carroll Street, Brooklyn, New York. On or about December 19, 2008, Plaintiff entered into an agreement with Defendant Katan pursuant to which Plaintiff purportedly purchased a 49% membership interest in Gowanus. The Agreement was executed by Plaintiff and Defendant Katan, and the Marans law firm was escrow agent.

Pursuant to the agreement, Defendant Katan was to convey the Membership Interest to Plaintiff for $2.2 million ($2,200,000.00) payable as $900,000.00 delivered simultaneously with another $100,000.00 on December 24,2 008; another $600,000.00 delivered on or about 90-days from the execution of the agreement; and $600,000.00 delivered when the New York City Planning Commission certifies that the property has been rezoned fo residential development. The Agreement made representations of ownership of the shares, and disclosed that Katan had a loan obligation to Africa Israel, Ltd in the amount of approximately $1.4 million.

Plaintiff's complaint says that he paid Defendant Katan the first payment of $900,000.00 on December 19, 2008, and the $100,000.00 on December 22, 2008. The agreement further stated that "[t]he Assignment of Membership Interests shall be held in escrow by law firm of Marans Weisz & Newman, LLC and released upon receipt of the second payment by Katan and shall only be effective upon receipt of the second payment." Plaintiff claims that after the first payment, he discovered

Defendants' alleged misrepresentations, fraud, and concealment. Specifically, Plaintiff alleges that he discovered, subsequent to paying $1,000,000.00 for Katan's membership interest, that Defendant Katan had executed a security agreement with AI Holdings (USA) Corp. (hereinafter "AI Holdings").

Plaintiff alleges that about seven months prior to the execution of the agreement, Defendant Katan, while represented by the Marans law firm, executed a promissory note to pay an entity known as AI Holdings the sum of $1,412,039.00. With said note, Defendant Katan also further executed a security agreement with AI Holdings. Plaintiff alleges that Mr. Katan with the collusion of the Marans law firm, concealed the existence of the security agreement. Plaintiff further alleges that Defendants knew Plaintiff would not have entered into the agreement to purchase Mr. Katan's interest if he had known about the security agreement between Mr. Katan and AI Holdings. As such, Plaintiff alleges that the security agreement renders the interest he purchased without residual value. Plaintiff avers that by entering the Agreement [with Plaintiff], Defendant Katan breached most of the material terms of the Security Agreement and was attempting to sell to Plaintiff property which Defendant Katan lacked the right to transfer or sell. Plaintiff's complaint alleges that the Marans law firm represented Defendant Katan in these transactions and aided and abetted Mr. Katan in said transactions, thereby taking part in defrauding and fraudulently inducing Plaintiff into the agreement with Defendant Katan for Gowanus. Plaintiff's first amended complaint was filed on or about February 27, 2011.[1] The Maran Law Firm answered Plaintiff's complaint on or about April 8, 2011. The parties

[1]Prior to Plaintiff's First Amended Complaint, Plaintiff filed a summons and verified complaint on or about July 13, 2010. Defendants Richard Marans and the Marans Law Firm then moved to dismiss pursuant to CPLR 3211(a)(1) & (a)(7). Pursuant to the Short Form Order issued by the Honorable J. Emmett Murphy, on February 3, 2011, Defendants' motion was Denied. Said Decision is relevant to the present motion and will be discussed further, *infra*. Defendants then answered Plaintiff's complaint on or about February 22, 2011.

conducted depositions and the note of issue was filed on January 19, 2012. Defendants, Richard Marans and the Marans Law Firm, now moves this Court for summary judgment pursuant to CPLR §3212.

DISCUSSION

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557(1980). Furthermore, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). To demonstrate its entitlement to relief the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact. *McDonald v. Mauss*, 38 AD3d 727, 728 (2nd Dept. 2007). Here Defendant contends that Plaintiff's causes of action in the first amended complaint, as asserted against Richard Marans and the Marans law firm, are without merit and as such should be dismissed as against Defendants.

Plaintiff's Breach of Contract Claim

Defendants contend that Plaintiff's breach of contract claim must fail as a matter of law. The terms of the escrow clause require the Marans law firm to hold the membership interest in escrow until the second payment is received. Plaintiff's complaint alleges that he never made the second payment which would have triggered the duty by the Marans law firm as escrow agent. As such Plaintiff cannot establish that the Marans breached any duty as escrow agent. Pursuant to the terms of the agreement, the Marans held on to the Membership shares and Plaintiff has yet to formally elect to take his proportionate membership interest in Gowanus and demand same from the Marans law

firm. As such, Defendant contends, Plaintiff cannot demonstrate that the Marans law firm breached any duty as escrow agent under the Agreement.

In order for Plaintiff to establish that Defendant breached the agreement, Plaintiff must show: 1. the formation of a valid contract between the parties; 2. breach of the Agreement; 3. performance of the agreement by the Plaintiff; and 4. damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694(2nd Dept. 1986). It is undisputed that a contract existed between the parties, and that the Marans were a party to same in the capacity as escrow agent. However, Defendant's contention that it did not breach a duty owed to Plaintiff remains a question of fact. Defendant contends that it breached no duty owed to Plaintiff as it maintained the Membership Interests in escrow pursuant to its responsibilities as escrow agent. Plaintiff argues that Defendant breached its duty as escrow agent when it knowingly received Plaintiff's one million dollars for the Membership Interests which Katan represented, in documents prepared by the Marans, that he owed free and clear. Plaintiff alleges that the Marans knew that Katan was transferring Membership Interests that he had no legal right or ability to sell.

The law is clear that escrow agents act as trustees and thereby have a duty to act for any party with a beneficial interest in the trust corpus *Farago v. Burke*, 262 N.Y. 229 (1933). As such, the escrow agent is, in effect, the agent of both parties, and, therefore, acts for the benefit of both parties. *See*, *99 Commercial Street, Inc. v. Goldberg*, 811 F.Supp. 900, 906 (1993); *see also*, *Farago v. Burke*, 262 N.Y. 229, 233. Defendants argue that they did not breach any duty owed pursuant to the terms of the Agreement, however, Plaintiff alleges a breach of the escrow agent's duty as trustee and thereby raises a question of fact as to whether Defendant breached his implicit, contractual duty as a fiduciary of the trust. The role of the court in deciding a motion for summary judgment is not to

resolve these issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 A.D.2d 553 (2nd Dept.1992); *Barr v. County of Albany*, 50 N.Y.2d 247, 254 (1980); *James v. Albank*, 307 A.D.2d 1024 (2nd Dept.2003); *Heller v. Hicks Nurseries, Inc.*, 198 A.D.2d 330 (2nd Dept.1993). As there remains a question of fact as to whether Defendant breached a duty to Plaintiff, Defendant's motion to dismiss Plaintiff's breach of contract claim is denied.

Plaintiff's Claim of Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant's contend that Plaintiff's claim of breach of implied covenant of good faith and fair dealing should be dismissed as it is redundant if Plaintiff merely pleads that Defendant did not act in good faith in performing its contractual obligations. *See New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 (1995). A breach of the implied covenant of good faith and fair dealing claim that is duplicative of a breach of contract claim must be dismissed. *Id.* A good faith claim will be dismissed as redundant if it merely pleads that defendant did not act in good faith in performing its contractual obligations. *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423 (1st Dept.2010).

Here Plaintiff's cause of action alleges that "Defendants have breached their covenant of good faith and fair dealing in making and performing the Agreement with an intent and design to destroy and injure the right of Plaintiff to receive the fruits of the Agreement." Said cause of action is in fact duplicative of Plaintiff's breach of contract claim and as such, Defendants are entitled to dismissal of Plaintiff's claim of breach of the implied covenant of good faith and fair dealing.

Plaintiff's Claim for Failure of Consideration

Plaintiff states in his affidavit in opposition that this cause of action is not asserted against the Defendants Richard Marans or the Marans law firm. As such, the Marans are entitled to dismissal of Plaintiff's cause of action alleging failure of consideration.

Plaintiff's Claim of Fraud in the Inducement

Plaintiff's complaint alleges that "Defendants' false representations and concealment of defendant Katan's lack of title, lack of possession of the Gowanus membership shares, lack of power and authority to sell the membership interests under the Agreement, fraudulently induced plaintiff into entering the agreement." Defendants argue that Plaintiff's entire theory of liability with respect to the fraudulent inducement claim is that the agreement is based upon the alleged false representations and/or concealment concerning the status of Mr. Katan's membership interests in Gowanus and his inability to transfer same in light of the security agreement with AI Holdings. Defendant notes that Plaintiff was well aware of the loan prior to the December 2008 closing. In fact, the agreement specifically references said loan, and includes a guarantee that Defendant Katan shall pay the amount due AI Holdings As such, Defendant argues that Plaintiff cannot sustain a claim that alleges that there was a misrepresentation or omission of fact.

In opposition, Plaintiff contends that the Security Interest rendered Katan completely without any legal right or ability to sell the Membership Interests. Although Plaintiff was aware of the security agreement, he alleges that he was not aware that said agreement rendered the Membership Shares valueless. As such, Plaintiff argues he was fraudulently induced to purchase an interest that Katan did not have.

In order to sustain a cause of action for fraudulent inducement, plaintiffs must show "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *See*, *She v. Hambros PLC*, 244 A.D.2d 39, 46 (1st Dept. 1998)[internal citations omitted]. Here, Plaintiff raises a sufficient question of fact in opposition to Defendants entitlement to judgment as a matter of law on the fraud in the inducement claim. Specifically, Plaintiff raises of question of fact as to whether material omissions of fact were made by Defendants to induce Plaintiff to purchase the membership interest. As such, Defendants are not entitled to judgment as a matter of law on Plaintiff's fraudulent inducement cause of action.

Plaintiff's Claim for Negligent Misrepresentation

A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information. *J.A.O. Acquisition Corp v. Stavitsky*, 8 N.Y.3d 144, 148 (2007). Defendants contend that as Plaintiff knew that Defendant Katan had pledged his membership interest, no misrepresentations were made to Plaintiff and Plaintiff cannot sustain a claim of negligent misrepresentation. In opposition, Plaintiff asserts that he did not, as Defendants allege, have knowledge that Defendant Katan's membership shares were encumbered by the AI Holdings transaction.

As discussed, *supra*, Plaintiff raises a question of fact about the transfer of the membership interest, and the duty owed to Plaintiff in the disclosure of information regarding same. As such, Defendant is not entitled to summary judgment on Plaintiff's negligent misrepresentation claim.

Plaintiff's Claim of Breach of Fiduciary Duty

As this Court discussed, *supra*, the escrow agent is a trustee and has a duty to act for the benefit of any party with a beneficial interest in the trust corpus *Farago v. Burke*, 262 N.Y. 229 (1933). As such, Plaintiff has raised a question of fact as to whether Defendant breached this duty when it allowed Defendant Katan to transfer to Plaintiff his allegedly encumbered, and thereby valueless membership interests. Accordingly, Defendant is not entitled to dismissal of Plaintiff's cause of action for breach of fiduciary duty.

Plaintiff's Negligence Claim

Defendant argues that Plaintiff's negligence claim cannot be asserted against Richard Marans or the Marans law firm as Plaintiff was not a member of Gowanus and therefore, the Marans owed no duty to Plaintiff. As this Court determined, *supra*, that a fiduciary relationship exists between these parties, Plaintiff can sustain a negligence claim and Defendants are not entitled to the relief they seek.

Plaintiff's Claim of Unjust Enrichment

Defendants contend that Plaintiff cannot sustain a claim against Richard Marans or the Marans law practice for unjust enrichment. As Plaintiff concedes that this claim is not made against Defendants, Defendants are entitled to dismissal of this cause of action.

Plaintiff's Claim Under New York Judiciary Law §487

Judiciary Law §487 provides, "[a]n attorney or counselor who ...[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ...[i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." Here Plaintiff claims

that the Marans, with Defendant Katan are guilty of deceit and collusion with the intent to damage Plaintiff. Again, Plaintiff raises a question of fact as to whether Defendants colluded with Defendant Katan to induce him to buy allegedly worthless membership interests. As such, Defendant is not entitled to dismissal of Plaintiff's cause of action pursuant to New York Judiciary Law §487.

Accordingly, Defendants motion for summary judgment is hereby GRANTED in part and DENIED in part. To the extent any relief requested in Motion Sequence 5 was not addressed by the Court, it is hereby deemed denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
November 2., 2012

Sam D. Walker
HON. SAM D. WALKER, J.S.C.

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