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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 114603/2011
YERUSHALMY, OREN
vs.
RESLES, OFER
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | **No(s).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

Replying Affidavits _____ | **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: October 21, 2012

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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OREN YERUSHALMY,

Index No.
114603/11

Plaintiff,

-against-

OFER RESLES, OXFORD CAPITAL THIRD AVENUE LLC, 554-556 THIRD AVENUE LLC, 554-556 MANAGER LLC, NYS CAPITAL GROUP, INC. and SNY CAPITAL GROUP LLC,

Defendants.

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Joan A. Madden, J.:

Defendants 554-556 Third Avenue LLC (554-556) and 554-556 Manager LLC (Manager) move for an order, pursuant to CPLR 3211 (a) (7), dismissing the claims against them. Plaintiff Oren Yerushalmy (plaintiff) opposes the motion, which is denied for the reasons below.

Background

In this action, plaintiff seeks to recover damages, among other claims, for fraud and unjust enrichment based on defendants' alleged conspiracy to frustrate and render uncollectible a June 19, 2008 judgment he obtained against defendant Ofer Resles (Resles).

Defendant 554-556 developed a building known as the Aurora, located at 554-556 Third Avenue, New York, New York, as a condominium and corporate housing residential facility (Complaint, ¶ 2). Plaintiff and Resles each were 50% members, and Resles was also manager, of defendant Oxford Capital Third Avenue LLC (Oxford). Oxford's sole asset is a membership interest in 554-556 (*id.*, ¶¶ 3-4). As 50% members of Oxford, they each had an equal interest in 554-556 (*id.*). Defendant Manager is also a member of 554-556, and Oxford and Manager, or companies related to Manager, are majority members of 554-556 (*id.*, ¶ 6). Mitchell Maidman

owns and operates Manager, and resides in a penthouse apartment in the Aurora (*id.*).

Disputes arose between Oxford and Manager, particularly between plaintiff and Maidman, over the operation of 554-556 (*id.*, ¶ 11). On July 22, 2005, Resles purchased plaintiff's entire 50% interest in Oxford for $3.5 million, becoming Oxford's sole member (*id.*, ¶ 12). As part of this transaction, Resles executed a promissory note (2005 Note) in plaintiff's favor in the amount of $1 million plus interest, due on or before December 31, 2005, and granted plaintiff a first priority security interest in all of Resles's right, title, share and interest in Resles's membership interest in Oxford (*id.*, ¶¶ 13-15). Resles was obligated under the 2005 Note to "'keep the collateral [Oxford shares] free from any lien, security interest or encumbrance . . .'" (*id.*, ¶ 16, quoting paragraph 6 of 2005 Note). Plaintiff filed a UCC-1 Financing Statement recording this obligation (*id.*, ¶ 17).

Plaintiff asserts that defendants 554-556 and Manager were aware of the 2005 Note and the first priority security interest granted therein at the time the note was delivered, but falsely claim they had no knowledge of it (*id.*, ¶¶ 18-19).

Resles failed to pay the 2005 Note, and plaintiff commenced an action in 2006, entitled *Yerushalmy v Resles*, Index No. 604415/06 (Sup Ct, NY County) (Judgment Action), for the failure to pay. That action resulted in a judgment, entered on June 19, 2008 (the Judgment), in the amount of $1,645,201.78 (*id.*, ¶¶ 20-24). Resles was unable to pay the Judgment, so plaintiff looked to the collateral given as security for the 2005 Note, which was the shares of Oxford, whose sole asset is a percentage interest in 554-556 (*id.*, ¶ 26).

A year before the Judgment was entered, but while that Judgment Action was pending, on March 6, 2007, Resles, without notice to plaintiff, took a loan of $300,000 from 554-556 (2007 Note). This loan was evidenced by a note, which was due and payable on February 28, 2010, and

granted 554-556 a security interest in Oxford's membership interest in 554-556 (*id.*, ¶ 29). The proceeds of this loan went to Resles.

Plaintiff alleges that defendants Resles, Oxford, 554-556 and Manager conspired to use the 2007 Note as a mechanism to avoid having plaintiff secure the Oxford shares, because so long as the 2007 Note was unpaid, plaintiff could not take the Oxford shares (*id.*, ¶ 31). Defendants extended the 2007 Note without notice to plaintiff, and it is now due and payable in 2015 (*id.*, ¶ 32).

Plaintiff then sought and obtained an order in the Judgment Action, dated December 15, 2008, in which Resles was directed to turn over to plaintiff all of his right, title and interest in the Oxford shares (*id.*, ¶ 26; Exhibit G to Affidavit of Michael Fishman in Opposition). Resles did not comply with this order (Complaint, ¶ 26).

On December 17, 2009, in connection with its efforts to collect on the 2007 Note, 554-556 sought to sell the Oxford shares in 554-556 at a public auction (*id.*, ¶ 33). The value of the Oxford shares is significantly more than the amount due on the 2007 Note (*id.*, ¶ 34). Resles, Oxford, 554-556 and Manager then purportedly concocted a sham dispute and litigation over the 2007 Note to prevent plaintiff from securing the Oxford shares to satisfy his Judgment, and to fraudulently secure plaintiff's agreement not to take the Oxford shares until the 2007 Note was repaid (*id.*, ¶ 35). That litigation is entitled *Oxford Capital Third Avenue LLC v 554-556 Third Avenue LLC*, Index No. 603764/09. The parties then entered into a "settlement" of that sham dispute on July 9, 2010 (July 2010 Settlement Agreement), in which Resles was granted a Lease with Option which enabled him to lease and purchase, at a below market price, a penthouse apartment in the Aurora, in which Resles was living. The defendants failed to supply plaintiff with a copy of the exhibits to the settlement, which would have alerted him to the fact that the

due date on the 2007 Note was extended to 2015 (*id.*, ¶ 37). The Lease with Option asset was then transferred by Resles to defendant SNY Capital Group LLC, a corporation owned entirely by Resles's wife, for no consideration and without plaintiff's consent (*id.*, ¶ 40).

The July 2010 Settlement Agreement also provided that Resles, on behalf of Oxford, would conduct an audit of 554-556's accounts, particularly regarding certain loans and advances made to 554-556 by its majority owner (the Manager Loans) which must be paid before any distribution could be made to a shareholder, such as to Oxford. Manager provided limited financial information to Resles indicating that the Manager Loans were approximately $28.3 million. A notice regarding the auction sale of Oxford's interest in 554-556, however, indicated that the Manager Loans were $24 million, and the terms of the alleged sale of Oxford's interest indicated that the loans were approximately $22.3 million. Plaintiff asserts that Resles has agreed to forgo the audit in exchange for the Lease with Option on the penthouse apartment, then transferred that option to SNY, and to advance other business dealing he has with Maidman (Complaint, ¶¶ 44-52). Plaintiff asserts that the overstated value of the Manager Loans will negatively impact the value of Oxford's interest in 554-556, and was used to fraudulently secure plaintiff's agreement not to take the Oxford shares until the 2007 Note was repaid (*id.*, ¶ 53).

Plaintiff further alleges that defendants Resles, 554-556 and Manager conspired to prevent plaintiff from conducting the audit by falsely representing in court that Resles was conducting the audit, and forcing plaintiff to spend time and money pursuing the audit (*id.*, ¶¶ 60-62).

Finally, plaintiff asserts that Resles is using defendants SNY and NYS Capital Group, Inc. to hide his income from plaintiff and to fraudulently secure plaintiff's agreement not to take the Oxford shares until the 2007 Note was repaid (*id.*, ¶¶ 63-77).

Based on these allegations, plaintiff has asserted two claims against 554-556 and Manager for fraud (first cause of action) and unjust enrichment (the second cause of action). He asserts that defendants "made fraudulent omissions and misrepresentations of fact relating to the 2005 Note and obligations under the Judgment" (*id.*, ¶ 79). He alleges that defendants were aware that they were never going to permit him to secure the Oxford shares, and they "conspired to devise impediments, and a sham litigation, to prevent [him] from securing the Oxford shares" (*id.*, ¶ 81). As part of this conspiracy, Resles, without notice to plaintiff, took the $300,000 loan, evidenced by the 2007 Note, and 554-556 and Manager extended the due date on that note; entered into the July 9, 2010 purported settlement further encumbering plaintiff's interest in the Oxford shares; permitted Resles to fraudulently transfer a valuable asset (the Lease with Option) to SNY for no consideration; and allowed the Oxford shares to be devalued by overstating the Manager loans (*id.*, ¶¶ 82-86). In the unjust enrichment claim, plaintiff alleges that by all of the conduct alleged defendants are being unjustly enriched (*id.*, ¶¶ 94-96).

In moving to dismiss, 554-556 and Manager urge that the fraud claim is insufficient under CPLR 3016 (b) because it fails to allege what they individually did to defraud plaintiff. In addition, they argue that even if they did devise impediments and a sham litigation, this conduct did not constitute fraud because they did not owe any fiduciary duty to plaintiff, and such conduct was not unlawful. With regard to unjust enrichment, defendants urge that plaintiff fails to allege a relationship between him and 554-556 and Manager that could have caused reliance or inducement.

DISCUSSION

The motion to dismiss by 554-556 and Manager is denied.[1] First, plaintiff's fraud claim is sufficient at this early stage to withstand dismissal. To plead a claim for fraud, a plaintiff must allege a material misrepresentation of an existing fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Plaintiff must sufficiently identify the misrepresentations by defendants, and when and how they were made to plaintiff, and identify the individual defendant's roles in the alleged fraud (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 295 [1st Dept 2011]). The fraud claim must be pleaded with the particularity required under CPLR 3016 (b). That provision, however, "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] [internal quotation marks and citation omitted]). Plaintiff need not present "unassailable proof" at this early stage, but instead, need simply allege the basic facts to establish the claim (*id.* at 492). The facts must be sufficient to permit a reasonable inference of defendant's knowledge of or participation in the fraudulent conduct (*id.*; *see also Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559).

As alleged in the complaint, the fraud in this case was not an isolated incident of a single misrepresentation. Rather, it was a scheme allegedly orchestrated by 554-556 and Manager. This scheme allegedly began when plaintiff was seeking the Judgment on his 2005 Note and

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[1]As a threshold issue, plaintiff asserts that defendants' motion is defective, because they fail to annex the complaint to the motion. While plaintiff is correct that this failure is a procedural defect which could warrant denial, defendants have cured the defect by supplying a copy of the complaint as an exhibit to their reply (*see Sternstein v Metropolitan Ave. Dev., LLC*, 32 Misc 3d 1207 [A], 2011 NY Slip Op 51206 [U] [Sup Ct, Kings County 2011] [defendant cured procedural defect of failing to submit copy of pleading by submitting on rely]).

looking to the collateral, the Oxford shares, given as security. It continued when 554-556 gave Resles a sham loan, which Resles was not going to repay, using that same collateral, without notifying plaintiff and to prevent him from securing the shares. Then 554-556 and Manager commenced a sham litigation with Resles so that they could purportedly enter into the "settlement" which extended that 2007 Note for a significant time period, gave Resles the Lease with Option on the penthouse, without consideration, and secured plaintiff's agreement not to take the Oxford shares until the 2007 Note was repaid in 2015. 554-556 and Manager then are purported to have materially misrepresented the value of the Manager Loans, which must be repaid before any distribution to shareholders, including Oxford, and, with Resles, misrepresented that an audit was being conducted to determine that value, also in order to secure plaintiff's agreement not to seek a sale of the Oxford shares, and to prevent recovery on the Judgment (*see* Exhibits E, F, H and I annexed to Affirmation of Michael Fischman in Opposition). Plaintiff could not have learned the truth about these Manager Loans unless he conducted an audit. He initially sought an order regarding the audit from the court in the Judgment Action, and Resles represented to the court and plaintiff that he was conducting it in December 2010 (Exhibit G to Fischman Affirm.). Resles, however, then gave up his right to conduct the audit in exchange for the right to transfer the Lease with Option to SNY, and the right to live in the penthouse (Complaint, ¶ 52).

It is also alleged that the ultimate purpose of this scheme was to keep plaintiff from satisfying his Judgment, and from becoming involved in 554-556 and Manager's business affairs, or questioning the Manager Loans. These allegations are sufficient to give rise to a reasonable inference of fraud (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 493). The concrete facts regarding the 2007 Note, its default and the sham litigation between the defendants

regarding that note, are peculiarly within the defendants' knowledge, and, at this early stage, it could potentially work an unnecessary injustice to dismiss this claim where if there is any pleading deficiency it may be cured later in this proceeding after some discovery (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 491-492). Contrary to defendants' contention, plaintiff does not have to allege that they owed him a fiduciary duty in order to assert fraud based on these alleged misrepresentations, (*see Batas v. Prudential Life Ins. Co. of Am.*, 281 AD2d 260 (1st Dept 2001). Therefore, the fraud claim is sufficiently stated to survive defendants' motion.

The unjust enrichment claim is also sufficient. To assert a claim for unjust enrichment, a plaintiff must allege that a benefit was bestowed by the plaintiff on the defendants, and the defendants have obtained that benefit without adequately compensating plaintiff for it (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 111-112 [1st Dept 2005]). The allegations set forth above with regard to the fraud claim indicate that a benefit was conferred on defendants in that they have obtained the benefit of plaintiff's interest in the Oxford shares without compensating plaintiff.

Conclusion

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendants are directed to answer the claim within thirty days of the date of this decision and order; and it is further

ORDERED that a preliminary conference shall be held on December 20, 2012, at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: October 24 2012

J.S.C.