Freeman v Laserline-Vulcan Energy Leasing, LLC
2012 NY Slip Op 33497(U)
April 2, 2012
Sup Ct, New York County
Docket Number: 651712/10
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. Justice PART 39

Index Number : 651712/2010
FREEMAN, DEBORAH H.
vs
LASERLINE-VULCAN ENERGY
Sequence Number : 001
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______
motion to/for ______

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

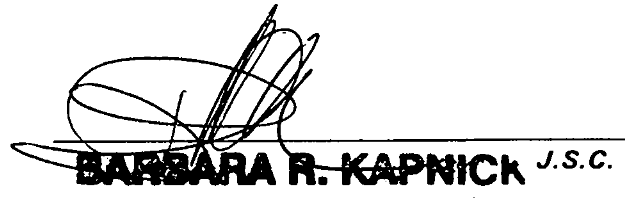
Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/2/12



BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

---------------------------------------X

DEBORAH H. FREEMAN,

Plaintiff,

- against -

LASERLINE-VULCAN ENERGY LEASING, LLC, LASERLINE LEASE FINANCE CORP., WILLIAM M. EDDINGTON a/k/a W.M. EDDINGTON a/k/a W. MARK EDDINGTON a/k/a MARK EDDINGTON,

Defendants.

---------------------------------------X

DECISION/ORDER
Index No. 651712/10
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

The following facts are alleged in the Verified Complaint, dated October 11, 2010 (the "Complaint").

Plaintiff Deborah H. Freeman ("Freeman") is an individual residing on the Upper West Side of Manhattan.

Upon information and belief, defendant LaserLine-Vulcan Energy Leasing, LLC ("LLVEL") and defendant LaserLine Lease Finance Corp. ("LLLFC") exist under the laws of the State of Utah and have offices in Palm Springs, California (LLVEL also has an office on East 52nd Street in Manhattan). LLLFC is a managing member of LLVEL. Non-party Vulcan Power Leasing, LLC is also a managing member of LLVEL (Vulcan Power Leasing, LLC and its related entities are jointly referred to as "Vulcan").

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Upon information and belief, defendant William M. Eddington, a/k/a W.M. Eddington a/k/a W. Mark Eddington a/k/a Mark Eddington ("Eddington") is an individual having an actual place of business and/or employment in Palm Springs, California and is the principal shareholder, director and President of LLLFC.

LLVEL was formed on or about July 22, 2004 and according to its Articles of Organization, was formed to engage in the sole business of selling and leasing advanced mobile power systems.

In or about the summer of 2004, defendants solicited various investors, including plaintiff, to loan a total of $2,500,000.00 to LLVEL as part of the $10,500,000.00 that was said to be necessary for one of the Vulcan entities to construct a "Vulcan Advanced Mobile Power System" ("VAMPS").

Construction Loan Request

As part of this solicitation, defendants sent plaintiff and the other potential investors a written Construction Loan Request ("CLR") on or about August 24, 2004.

The CLR indicated to plaintiff that Vulcan would provide $5,500,000.00 of the construction cost of the VAMPS unit, and that LLLFC had committed itself to providing the other $5,000,000.00.

Of the latter amount, $2,500,000.00 was said to have been already committed and approved.

The CLR also represented that Vulcan had previously manufactured and shipped VAMPS units to Iraq, where they were being operated by the U.S. Army Corps of Engineers. In addition, the CLR suggested that purchase orders for another four VAMPS units, at a purchase prices of $14,500,000.00 each, had been received.

According to the CLR, a participant loaning $2.5 million would receive 12.5% of the profit over the $10.5 million cost, or in other words, an anticipated return of approximately $500,000.00 plus the return of the $2.5 million loan.

The CLR estimated that it would take Vulcan AMPS, LLC (a Vulcan entity) 60 to 75 days to complete the manufacture of a VAMPS unit at its facility in North Carolina and that the term of the loans would therefore be "[a]s soon as the Unit is manufactured and delivered to purchaser but in no event longer than 6 months."

The CLR further represented that Vulcan would provide security for the monies loaned in the form of a completion bond from an "acceptable" insurance company, a guarantee of the return of the construction loan, and a first lien on the VAMPS unit to be

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constructed, which would be evidenced by a UCC-1 filing.

Plaintiff claims that Eddington confirmed the representations made in the CLR and that soon after her conversation with Eddington, she received a copy of a purported purchase order by Carbo Dynamics LLC ("Carbo Dynamics") for a VAMPS unit to be delivered by September 1, 2005 at the price of $14.5 million.

According to the Complaint, in reliance on the foregoing representations, plaintiff decided to loan money to LLVEL and sent checks totaling $280,000.00 to defendants in or about September and October 2004.

Promissory Note, Loan and Security Agreement and Performance Bond

On or about February 28, 2005, Eddington sent plaintiff a Promissory Note, a Loan and Security Agreement (the "LSA"), and a copy of a First Written Demand Financial Guarantee Performance Bond (the "Bond") having a liability limit of $5,000,000.00.

In the Promissory Note, which was dated as of October 13, 2004, LLVEL promised to pay plaintiff $280,000.00, with interest on the unpaid principal amount at the rate of 10% per annum, "payable on the sale and delivery of the Equipment as defined in the Loan and Security Agreement but in no event later than six months from

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the date hereof." In addition to the payment of the principal amount of the loan plus interest, the Promissory Note stated that LLVEL would pay plaintiff "an investment banking fee equal to the difference between the interest payable hereunder and the sum of FIFTY-SIX THOUSAND AND NO/100 DOLLARS ($56,000.00)."

Furthermore, the Promissory Note also includes the following provision:

> All payments of principal and interest on this Promissory Note, and all payments of any other amounts due hereunder or under the Loan Agreement will be made solely from the Security and only to the extent that Owner[1] shall have sufficient income or proceeds from the Security. Lender[2] agrees that it will look solely to the Security to the extent available for distribution as herein provided. Owner will not be personally liable to Lender for any amounts payable under this Promissory Note or for any other amounts payable or any liability under the Loan Agreement or this Promissory Note. All and each of the representations, warranties, undertakings and agreements made in the Loan Agreement on the part of the Owner are made and intended not as personal representations, warranties, undertakings and agreements by or for the purpose or with the intention of binding Owner personally but are made and intended for the purpose of binding only the Security. No personal liability or responsibility is assumed by Owner hereunder or under the Loan Agreement and no such personal liability shall at any time be enforceable against Owner on

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[1] "Owner" is defined as Laserline-Vulcan Energy Leasing, LLC, a Utah limited liability company (*i.e.* LLVEL).

[2] "Lender" is defined as Deborah Freeman, an individual.

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account of any representation, warranty, undertaking or agreement of Owner hereunder or under the Loan Agreement either expressed or implied, all such personal liability, if any, being expressly waived by Lender.

The LSA, dated as of September 10, 2004, describes the "Collateral," as follows:

> (A) all of Owner's [LLVEL's] rights, interests and privileges in and to the Equipment[;]
>
> (B) all rents, issues, profits, revenues and other income or proceeds of the property subjected or required to be subjected to the Lien of this Loan Agreement, including, without limitation, all payments or proceeds payable to Owner with respect to the sale, lease or other disposition of the Equipment, and all estate, right, title and interest of every nature whatsoever of Owner in and to the same and every part thereof;
>
> (C) all insurance proceeds with respect to the Equipment or any part thereof;
>
> (D) all moneys and securities now or hereafter paid or deposited or required to be paid or deposited to or with Owner by or for the account of any purchaser of the Equipment and held or required to be held by Owner hereunder; and
>
> (E) all proceeds of the foregoing.

According to the Complaint, the Bond purported to be issued by Provident Capital Indemnity, Ltd., of San Jose, Costa Rica, on December 23, 2004 and indicated that it was issued to insure LLVEL

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that Vulcan AMPS LLC would timely construct and deliver a VAMPS unit in accordance with drawings and specifications prepared by the designated end user, Carbo Dynamics.

The Complaint alleges that Eddington told plaintiff that her investment would not become effective until she signed and returned the LSA and that the pledged equipment would be the security for the repayment of her loan.

Plaintiff claims that she relied on Eddington's various representations, as well as the documents he sent her, and signed and returned the LSA to the defendants.

The maturity date of the Promissory Note was never extended. LLVEL failed to make the payments required by the Promissory Note by its maturity date, or at any time since then. Plaintiff claims, upon information and belief, that the VAMPS unit for which plaintiff's money was loaned to LLVEL was never manufactured.

On or about June 6, 2008, Eddington sent a letter to plaintiff and the other investors proposing a deal whereby Vulcan would purchase additional equity in LLVEL by making fourteen monthly payments of $59,300.00 to LLVEL. That money would then be distributed to the investors to repay the principal amounts of

their notes, but not any interest or investment banking fees. To receive any payments, each investor would be required to discontinue pending law suits and suspend any threats to sue LLVEL. Enclosed with Eddington's letter was a form entitled "Consent to Proposed Settlement."[3]

Hoping to at least recover the principal amount of her investment, plaintiff signed the Consent to Proposed Settlement on or about June 13, 2008 and returned it to defendants. Plaintiff never received any payments from LLVEL under the proposed settlement which, according to the Complaint, was never finalized, put into effect or honored.

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[3] The Consent to Proposed Settlement provided as follows:

> The undersigned, a Noteholder, hereby consents to the proposed settlement arrangement in which Vulcan Power Leasing, LLC will purchase over a period of fourteen (14) months at the rate of approximately $59,300.00 per month additional equity in LaserLine-Vulcan Energy Leasing, LLC (the "Company"). It is understood that upon receipt of each such installment, the Company will commence the payment to all noteholders on a prorate basis. The undersigned further agrees immediately suspend all actions or threatened actions for collection until this settlement is finalized between the Company, its Members and Manager. The undersigned further agree to execute a mutual release with the Company, its Members and Manager and deliver same to the Company along with the dismissal of any pending legal actions with prejudice when the undersigned has received the full 14 installments.

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Plaintiff subsequently filed the instant Complaint, which alleges three causes of action:

(1) upon information and belief, several of the representations that were made by the defendants in soliciting plaintiff's money and her execution of the Loan and Security Agreement, were false or materially misleading when made and were made with the intent to defraud the plaintiff - including, but not limited to, statements regarding the procurement of an order for a VAMP unit and statements that other funding from investors was already secured;

(2) rescission of the Loan and Security Agreement because of the complete failure of the consideration offered to plaintiff for her loan; and

(3) breach of fiduciary duties owed by defendants to plaintiff.

Defendants now move for an order dismissing all claims asserted against them pursuant to CPLR 3211(a)(1) and (7).

Discussion

It is well settled that

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint as true, accord

> plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 NY2d 83, 88 (1994) (internal citations and quotation marks omitted).

First Cause of Action

Defendants primarily argue that plaintiff is precluded from bringing a breach of contract claim because the relevant lending documents expressly state that plaintiff can only look to the proceeds of the venture, if any, for repayment in the event of a default. Since the VAMPS was ultimately never constructed and there are apparently no proceeds available to repay plaintiff's loan, defendants contend that the claims here are merely an attempt to recast a breach of contract claim as a fraud claim.

Plaintiff asserts that her fraud claim does not allege that defendants are liable because they misrepresented their intention to perform under the contacts; rather, it is based on the

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allegation that defendants knowingly misrepresented facts to plaintiff to induce her to enter into the transaction and to loan defendants $280,000.00.

It is well settled that

> [a] fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff's breach of contract claim. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract . . . and therefore involves a separate breach of duty.

MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 AD3d 287, 293 (1st Dep't 2011) (internal citations and quotation marks omitted).

Here, the Court finds that plaintiff's fraud claim is based upon allegations that defendants made prior oral and written misrepresentations, collateral to both the Promissory Note and the LSA, which induced her participation in the transaction. Therefore, these allegations are not duplicative of allegations that would give rise to a claim for breach of the Promissory Note or the LSA.

Defendants also argue that even if the fraud claim is not duplicative of a breach of contract claim, plaintiff's allegations still fail to sufficiently plead fraud.

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"In order to establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." *Id.*

With respect to the justifiable reliance prong, defendants argue that plaintiff expressly disclaimed reliance on any representations in Section 3.01 of the LSA, which provides:

> Section 3.01. Liability of Owner. It is expressly understood and agreed by the parties hereto that **all and each of the representations, undertakings and agreements made in this Loan Agreement** on the part of Owner are made and intended not as personal representations, warranties, undertakings and agreements by or for the purpose or with the intention of binding Owner personally but are made and intended for the purpose of binding only the Collateral. Nothing herein contained shall be construed as creating any liability on Owner, individually or personally, to perform any covenant either expressed or implied contained herein, all such liability, if any being expressly waived by the parties to this Loan Agreement and by any person claiming by, through or under the parties to this Loan Agreement.

(emphasis added).

The Court finds that this language cannot bar the instant fraud claim, because, as stated above, it is not based on representations contained in the LSA.

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Next, defendant argues that reliance here is not justified because plaintiff is "a sophisticated business woman engaging in an arms'-length transaction, [who has] fail[ed] to even allege that she engaged in any due diligence, . . . [or] that the requisite information was not available to her at the time the representations she now complains about were made." (Def.'s Mem. of Law, at 7.) *See HSH Nordbank AG v. UBS AG,* ___ AD3d ___, 2012 WL 997166, at *5 (1st Dep't March 27, 2012) (citing *Ventur Group, LLC v. Finnerty,* 68 AD3d 638, 639 [1st Dep't 2009] [quoting *UST Private Equity Invs. Fund v. Salomon Smith Barney,* 288 AD2d 87, 88 (1st Dep't 2001)]).

In plaintiff's affidavit, sworn to on April 5, 2011, however, she states the following:

> 5. First of all, I do not, and have never owned or run a business. I graduated from Barnard College in 1969 with a B.A. degree in Art History. After college I worked as an administrative assistant or secretary for a number of companies in the public relations and advertising fields, but never held a managerial position of any sort. In fact, I have not held a regular job since 1992, as the wealth I inherited from my parents, who owned a poultry business in Wichita, Kansas, where I grew up, has allowed me to pursue my artistic ambitions as a photographer.
>
> 6. Secondly, I am not particularly sophisticated with regard to investments. While I do own a portfolio of stocks, it is managed by a friend of mine because I realize that I lack the knowledge, skill and interest to manage it myself.

> 7. For these reasons, I had no idea how to perform 'due diligence' with regard to the representations made to me by the defendants before loaning them my money, and since defendants d[id] not indicate[] what steps I could have taken, or what 'requisite information' was 'available at the time' . . . I still have no clue as to how I could have discovered defendants' fraud before I fell victim to it.
>
> 8. Furthermore, several of the defendants' key representations, on which I relied, including that Vulcan AMPS, LLC had previously manufactured VAMPS electric power generators[,] which were in use by the Army Corps of Engineers in Iraq, that defendant had received purchase orders for four VAMPS electric power generators from Veteran, S.A. at the price of $14,500,000.00 each, and that $2,500,000.00 had 'already been committed to and approved' towards the construction of the VAMPS electric power generator for which I loaned defendants my money, were matters peculiarly within defendants' knowledge[,] which I had no obvious way to verify.

With respect to the justifiable reliance prong, New York law is clear that

> . . . [w]here a party has means available to him for discovering, 'by the exercise of ordinary intelligence,' the true nature of a transaction he is about to enter into, 'he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.'

88 Blue Corp. v. Reiss Plaza Assocs., 183 AD2d 662, 664 (1st Dep't 1992) (internal citations omitted); *see also Danann Realty Corp. v. Harris*, 5 NY2d 317, 322 (1959).

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Here, the Court notes that defendants' assertions as to plaintiff's sophistication and business acumen are unsupported and appear only in their memorandum of law, and thus cannot be considered on this motion to dismiss. Although it is undisputed that plaintiff did not conduct any due diligence prior to loaning defendants $280,000.00, whether she had the means available to her for discovering the true nature of the transaction is a question of fact that cannot be resolved at this early stage. *See Talansky v. Schulman*, 2 AD3d 355, 360-61 (1st Dep't 2003) (citing *Country World, Inc. v. Imperial Frozen Foods Co., Inc.*, 186 AD2d 781, 782 (2d Dep't 1992).

Defendants also argue that plaintiff fails to meet the heightened pleading standard under CPLR 3016(b) because the allegations supporting the fraud claim are pled "upon information and belief." However, the plaintiff has cured this alleged pleading defect by providing a detailed affidavit to support her allegations, which this Court is permitted to consider. *Leon v. Martinez*, 84 NY2d at 88.

Finally, the Court notes that during oral argument held on the record on August 3, 2011, counsel for defendants specifically cited the Decision/Order of the Hon. Eileen Bransten, dated December 17, 2009, in an action entitled *Gluckman v. Laserline-Vulcan Energy*

Leasing, LLC, et al, Index No. 601687/2008, to support their argument that plaintiff here has waived any right to recovery. (Tr., August 3, 2011, 8:2-9:10.) Defendants' reliance on the *Gluckman* decision, however, is misplaced since that case did not involve the same allegations at issue here and specifically dismissed the fraud claims on the grounds that they were duplicative of the breach of contract claims[4] and/or failed to allege collateral misrepresentations.

Accordingly, based upon the foregoing, defendants' motion to dismiss the first cause of action is denied.

Second Cause of Action

The second cause of action seeks to rescind the LSA for failure of consideration.

> Failure of consideration gives the aggrieved party the right to rescind the contract. Such failure occurs whenever one who has promised to give some performance fails without his or her fault to receive in some material respect the agreed quid pro quo for the performance. . . . A distinction exists between want of consideration (a party did not receive anything of value in the transaction) and failure of consideration (a party did not get what it was promised) on the one hand, and adequacy of consideration on the

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[4] Plaintiff has not alleged a breach of contract claim in this case.

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> other. Either want or failure of consideration supports a claim for rescission. A claim of inadequacy of consideration, however, does not. Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.

28 NY Prac., § 12:3; *see Apfel v. Prudential-Bache Securities Inc.*, 81 NY2d 470, 476 (1993); *Sciuto v. Iannucci Food Corp.*, 219 AD2d 635, 635 (2d Dep't 1995); *Fugelsang v. Fugelsang*, 131 AD2d 810, 811 (2d Dep't 1987).

Defendants' only argument in support of dismissing the second cause of action is that because the fraud claim should fail, there is no basis upon which to sustain the claim for rescission.

Since plaintiff's fraud claim has not been dismissed, the Court finds that it would be premature to dismiss the claim for rescission.

Third Cause of Action

The third cause of action seeks to recover for an alleged breach of fiduciary duty owed by defendants to plaintiff.

Defendants argue that the breach of fiduciary claim must be dismissed because the plaintiff did not have the requisite fiduciary relationship with the defendants.

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Plaintiff argues that LLLFC and Eddington were her fiduciaries by virtue of the following:

> 9. I first became involved with Mark Eddington and LaserLine Lease Finance Corp. a few years before they asked me to loan money for the venture at issue. My friend, Leslie Mandel-Herzog, had already invested money in some airplane leasing companies that those defendants managed, and encouraged me to do likewise because of the relatively high rate of return which the investment provided. Therefore, in or about 2002, I purchased an equity interest in a company called LaserLine Properties IV, LLC.
>
> * * *
>
> 11. LaserLine Lease Finance Corp., was and still is the managing member of LaserLine Properties IV, LLC, and Mark Eddington is the President of LaserLine Lease Finance Corp. It is therefore my understanding that LaserLine Lease Finance Corp. and Mark Eddington both stand in a fiduciary relationship to me with regard to my on-going investment in LaserLine Properties IV, LLC.
>
> 12. After I became a member of LaserLine Properties IV, LLC, Mark Eddington and I began to have frequent communications about my investment, and about other ventures in which I might invest. As a result of those communications, and the payments that I was receiving as [a] result of my investment in LaserLine Properties IV, LLC, I came to trust and rely on Mark Eddington, and believed, by the Summer of 2004, that he was looking out for my interests.

(Freeman Aff. ¶¶ 9, 11-12.)

Accepting the facts alleged above and in the Complaint as true and according plaintiff the benefit of every possible inference,

(*Leon v. Martinez*, 84 NY2d at 87), plaintiff allegedly became a minority member of non-party LaserLine Properties IV, LLC in 2002, and was thus owed a fiduciary duty by the managing member, which is defendant LLLFC. *Cottone v. Selective Surfaces, Inc.*, 68 AD3d 1038, 1039 (2d Dep't 2009); *see also* Limited Liability Company Law Section 409(a). Plaintiff, however, cites no authority to support her assertion that a fiduciary relationship exists here. There is no basis to find that the fiduciary relationship between plaintiff and LLLFC, which arises out of plaintiff's minority membership in non-party LaserLine Properties IV, LLC, extends beyond the context in which the fiduciary relationship was created. Moreover, there is no basis to hold that because Eddington is the president of LLLFC, the managing member of non-party LaserLine Properties IV, LLC, he owes plaintiff a fiduciary duty here.

Accordingly, defendants' motion to dismiss the third cause of action is granted.

Defendants are directed to serve Answers to the first two causes of action in the Complaint within 20 days of notice of entry of this Decision/Order. All parties or their counsel shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on May 16, 2012 at 10:00 AM.

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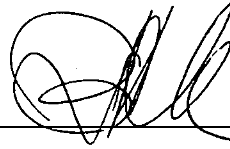
This constitutes the decision and order of this Court.

Dated: April 2, 2012



BARBARA R. KAPNICK
J.S.C.

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