Chambers v Weinstein
2014 NY Slip Op 32253(U)
August 22, 2014
Supreme Court, New York County
Docket Number: 157781/2013
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

---X

GERALD CHAMBERS, JOCELYN CHAMBERS, JULIAN CHAMBERS, and SASKATOON FINANCIAL LIMITED,

Plaintiffs,

-against-

ELIYAHU WEINSTEIN, FREDERICK TODD, 148 INVESTMENTS, LLC, TODD, FERENTZ & EDELSTEIN, LLP, ALEX SCHLEIDER, DAVID SCHLEIDER, AARON MUSCHEL, MEND-AM LLC, SHEL-AM CORP., DAVID STEINMETZ, NAFTALI KUNSTLINGER, KUNSTLINGER STEINMETZ LLP, AARON GLUCKSMAN, DIVERSIFIED HOLDINGS LLC, FREDERICK TOOD, as trustee of the ERASTINO TRUST, 121 PARK REALTY LLC, CONGREGATION KAHAL MINCHAS CHINUCH, CHAIM BABAD, NEW YORK LOSS MITIGATION INC., ARTHUR GOLDEN, GREENBERG TRAURIG, LLP, MICHAEL BURNBAUM, PROSKAUER ROSE LLP, and HENOCH PEARL,

Defendants.

---X

DECISION AND ORDER
Motion Sequence Nos: 001, 002, 003 -and- 004

Index No.: 157781/2013

O. PETER SHERWOOD, J.:

In the instant action, plaintiffs Gerald Chambers, Jocelyn Chambers, Julian Chambers and Saskatoon Financial Limited (collectively, Plaintiffs) seek monetary damages for a fraudulent Ponzi scheme allegedly perpetrated by the above-named defendants against Plaintiffs. The verified complaint, dated August 23, 2013 (Complaint), is 47 pages long and asserts 33 causes of action. This decision and order addresses the motions to dismiss filed by the following defendants: Proskauer Rose LLP (Proskauer; motion sequence number 001); Congregation Kahal Minchas Chinuch (Kahal), 121 Park Realty LLC (121 Park) and Chaim Babad (Babab, the president of Kahal) (collectively, the Kahal Defendants; motion sequence number 002); Greenberg Traurig, LLP (Greenberg; motion sequence number 003); and David Steinmetz, Naftali Kunstlinger and Kunstlinger Steinmetz LLP (collectively, the KS Defendants; motion sequence number 004). These

motions are consolidated for disposition. For the reasons set forth below, the motions are granted to the extent stated herein.

Background

The following information is derived from the Complaint, which is assumed to be true for purposes of the instant motions. Only those allegations that are relevant to these motions to dismiss are summarized below. The individual plaintiffs are New Zealand residents. The corporate plaintiff is a Cayman Island business entity. Complaint, ¶¶ 1-4. Starting in September 2011, defendants Eliyahu Weinstein (Weinstein), Frederick Todd (Todd), Alex Schleider (Schleider) and Aaron Muschel (Muschel) targeted Plaintiffs with a scheme to defraud them in real estate and other investment transactions. *Id.*, ¶ 27.

The Complaint avers, among other things, that based on Schleider's false representations that he would invest in certain investment transactions and take steps to protect those investments, Plaintiffs lent up to $6.7 million to defendant 148 Investment LLC (148), a company owned by Todd. *Id.*, ¶¶ 30-31. Schleider engaged the KS Defendants to represent Plaintiffs in transactions with 148. *Id.*, ¶ 32. In February and March of 2012, based on Schleider's representation that Weinstein had access to large blocks of Facebook shares that they intended to purchase through 148 prior to an initial public offering (IPO) and then sell them at a substantially higher price, Plaintiffs lent a total of $3.025 million to 148 to purchase pre-IPO shares in three separate transactions. However, 148 purchased no Facebook shares and did not otherwise invest the money. *Id.*, ¶¶ 35-50. Instead, Todd, Schlieder, Weinstein, Muschel and 148 engaged in self-dealings and used Plaintiffs' money for their own personal expenses. *Id.*, ¶ 51.

To further the fraudulent Facebook scheme, Todd represented to Plaintiffs that the transactions would be secured by collateral valued at $12 million, consisting of mortgages 148 held against a property known as 1741-1751 Park Avenue, New York (Park Avenue Property). *Id.*, ¶ 75. The complaint avers that defendant 121 Park had made a $6 million mortgage to Kahal securing the Park Avenue Property and recorded same in March 2008.[1] *Id.*, ¶ 76. In November 2011, Kahal

---

[1] Based on pleadings filed in this action (motion sequence number 005), it appears that 121 Park is the owner of the Park Avenue Property and had executed a mortgage in favor of Kahal. It also appears that 121 Park may be affiliated with Kahal, as these entities are

assigned the mortgage to 148, which was recorded in June 2012. However, in or about March 2012, 148 reassigned the mortgage to Kahal. Both of the collateral assignments were performed without any consideration, but rather were made to deceive Plaintiffs. *Id.*, ¶¶ 79-81, 88.

The Complaint also avers that in September 2011, Belle Glade Gardens Realty Group, LLC (BGG), a Florida company owned and controlled by Schleider, entered into an agreement with Prince of Belle Glade Gardens, LLC to purchase Belle Glade Gardens, a 384-unit apartment complex, for $16.4 million. Complaint, ¶¶ 118-120. Schleider retained defendant Greenberg to represent BGG in the transaction. *Id.* Although BGG deposited $120,000, Greenberg returned the down-payment to BGG in November 2011, thus terminating the purchase agreement. *Id.*, ¶ 121-122. In February and April 2012, Schleider represented to Plaintiffs that the BGG transaction was still active and that he would be matching their investment therein. *Id.*, ¶¶ 123. Based on the representation, Plaintiffs wired $2.5 million to Greenberg in February 2012, which was deposited into an escrow account for Schleider and a subaccount for BGG. Id., ¶¶ 124-125. Schleider subsequently directed Greenberg to wire $2.5 million to 148, but misrepresented to Plaintiffs that the $2.5 million was being held by Greenberg for the transaction. *Id.*, ¶ 128. In April 2012, Schleider induced Plaintiffs to make an additional $330,000 investment, but later directed Greenberg to deduct its legal fees from the $330,000 wired by Plaintiffs, without disclosing that the BGG deal was no longer active. *Id.*, ¶¶ 129-132. Schleider intended to and fraudulently turned over the BGG funds to 148 for use by Schleider, Todd, Weinstein and 148. *Id.*, ¶ 133.

In 2011, Weinstein was prosecuted by the United States in the United States District Court of New Jersey (2011 Action). Proskauer represented Weinstein from December 31, 2012 to May 30, 2013 in the 2011 Action. Complaint, ¶ 226. As compensation for its services, Proskauer charged Weinstein $1 million as a minimum non-refundable fee. On December 20, 2012, Kahal paid the fee with a check containing a reference stating "Loan Return for 148 LLC." *Id.*, ¶¶ 227-228. The Complaint alleges that Proskauer did not perform adequate due diligence to insure that the retainer funds were not proceeds of Weinstein's criminal activities, and that Proskauer had "actual

---

represented in this action by the same counsel. By order of this court dated March 5, 2014, the Clerk of New York County was directed to cancel Plaintiffs' notice of pendency filed against the Park Avenue Property.

knowledge" that Weinstein was prohibited by the government in the 2011 Action from engaging in financial transactions of more than $1,000. *Id.*, ¶¶ 230-231. On January 3, 2012, Weinstein entered into a plea agreement whereby he admitted to committing wire fraud and money laundering. On May 20, 2013, Weinstein was charged by the United States with various criminal activities (2013 Action). The indictment alleges that Proskauer received $1 million. The Complaint alleges that Proskauer spent the $1 million within two weeks of its receipt from Kahal, and that Proskauer paid "an unknown portion of these funds to persons unknown" for the benefit of Weinstein, and "thereby intentionally engaged in a scheme to defraud Plaintiffs by agreeing to 'launder' funds for Defendant Weinstein and prevent their recovery by Plaintiffs." *Id.*, ¶¶ 240-241. Proskauer moved to be relieved as Weinstein's attorney in the 2011 Action, in light of the allegations in the 2013 Action. The motion was granted on May 30, 2013. *Id.*, ¶¶ 236-237.

Applicable Legal Standards

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether the plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003] (internal quotation marks omitted), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]. The pleadings are afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 [1994].

However, while factual allegations in a complaint should be accorded a favorable inference, "bare legal conclusions" and "inherently incredible" facts are not entitled to preferential consideration. *Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]. Moreover, "[w]hen the moving party [seeks dismissal pursuant to CPLR 3211 (a) (1) and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]. If the complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable

inference is rebutted." *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001].

Discussion

I. Proskauer motion to dismiss (motion sequence number 001)

The Complaint asserts five causes of action against Proskauer: aiding and abetting fraud (23rd); conversion (24th), accounting (25th); fraudulent conveyance (27th) and unjust enrichment (30th). Proskauer seeks to dismiss all causes of action against it pursuant to CPLR 3211 (a) (7).

1. Aiding and Abetting Fraud (23rd Cause of Action)

To state a claim for aiding and abetting fraud, a plaintiff must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. *Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009].

In this case, the parties do not dispute that Weinstein committed fraud prior to 2011 involving victims other than Plaintiffs. In fact, Weinstein was sentenced for fraud in the 2011 Action. The dispute in this case lies in whether fraud perpetrated against Plaintiffs in 2012 is adequately stated in the Complaint, and whether Proskauer had "actual knowledge" and gave "substantial assistance." Notably, Plaintiffs' allegations in the Complaint are primarily based on sworn statements, dated May 13, 2013, made by an FBI agent, Karl Ubellacker, in connection with the government's complaint filed in the 2013 Action. A copy of Agent Ubellacker's statement is annexed as exhibit B to Plaintiffs' opposition to Proskauer's motion to dismiss.

In opposition to the motion, Plaintiffs contend that Proskauer's actual intent can be inferred from the following factual circumstances. Proskauer knew of the allegations against Weinstein in the 2011 Action because it served as his defense counsel. It knew that Weinstein was prohibited from engaging in transactions over $1,000 without the approval of the government's special counsel. It knew that the $1 million retainer was "probably directly or indirectly" proceeds of the 2011 Action. Kahal paid Proskauer's retainer with a check bearing a notation that it was a "Loan Return for 148 LLC." Proskauer accordingly knew that the check never went to 148, but was diverted to pay Weinstein's legal fees, just as he had diverted funds in the 2011 Action. Additionally, after learning that the government might try to seize the diverted funds, Proskauer was told by Weinstein to "minimally" inquire about the source of funds with Todd, who replied in a manner as directed by

Weinstein. Lastly, Weinstein admitted that the fraudulent scheme in the 2011 and 2013 Actions "was a key component of both." Plaintiffs' opposition, ¶¶ 53-63.

Plaintiffs' contentions are insufficient to defeat the motion. That a law firm represents a client accused of a prior fraud against certain victims does not support an inference that the firm knew about, much less aided and abetted, a subsequent fraud committed by the client against other victims. Here, the government's complaints in the 2011 and 2013 Actions named different sets of victims and Plaintiffs were not named in the 2011 Action. Thus, Weinstein's retention of Proskauer as defense counsel in connections with the 2011 Action does not support an inference that Proskauer knew of the subsequent fraud allegedly perpetrated against the Plaintiffs, which fraud was the subject of the 2013 Action. *See National Westminister Bank v Weksel*, 124 AD2d 144, 150 [1st Dept 1987] (while a law firm gains access to information in the course of representing a client, "the fact of legal representation, even as to transactions allegedly the subject of subsequent [fraud], does not itself support the inference of the high degree of scienter necessary to extend fraud liability [against the firm] on an aiding and abetting theory").

Plaintiffs' attempt to overcome this flaw by relying on Weinstein's recent motion, filed by his new counsel in the New Jersey federal court, seeking "specific performance" of his plea agreement made with the government in connection with the 2011 charges,[2] is also misplaced. Even if his argument in that motion were true (i.e., the fraud scheme in the 2011 and 2013 Actions was "a key component of both"), it does not give rise to an inference that Proskauer knew of the fraud concerning the Facebook IPO and other transactions implicated in the 2013 Action. For the same reason, the fact that the retainer fee was paid via a third-party check, with a notation that it was a "Loan Return for 148 LLC," does not infer that Proskauer "substantially assisted" Weinstein in defrauding Plaintiffs by laundering funds that were "probably directly or indirectly fraudulent proceeds" of the 2011 Action. The 2011 Action did not involve Plaintiffs, 148 or the Kahal Defendants. There is no allegation that Proskauer had "actual knowledge "(as opposed to Plaintiffs' speculative phrase "probably directly or indirectly") of any connection between Weinstein and

---

[2] The motion apparently sought to preclude the government from pursuing additional charges against him in the 2013 Action in the guise of enforcement of the plea he struck in the 2011 Action

Plaintiffs at the time the retainer was paid. This remains true even if Proskauer "knew" that Weinstein was prohibited from engaging in financial transactions of more than $1,000 or failed to perform sufficient "due diligence" as to the source of the funds.

Moreover, even though the intent to commit fraud may be divined from the surrounding circumstances, "substantial assistance" in aiding and abetting fraud "means more than just performing routine business services for the alleged fraudster." *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011] (citations omitted). Here, it is not alleged that Proskauer provided substantial assistance to Weinstein, other than routine legal representation in the 2011 Action, by making fraudulent misrepresentation or inducing Plaintiffs in connection with transactions implicated in the 2013 Action.

Further, when a plaintiff seeks to extend an alleged fraud beyond the principal actors, the requirement of CPLR 3016(b) must be "strictly adhered" to because "the alleged aider and abetter, by hypothesis, has not made any fraudulent misrepresentation and should not be called to account for the intentional tort of another unless the circumstances of his connection therewith can be alleged in detail from the outset." *National Westminster*, 124 AD2d at 149. The allegations against Proskauer do not meet CPLR 3016 (b)'s requirements. Plaintiffs' reliance on *Eurycleia Partners, LP v Seward & Kissel, LLP* (12 NY3d 553 [2009]) is also misplaced. Indeed, in *Eurycleia*, the Court of Appeals dismissed the aiding and abetting fraud claim against the law firm that prepared the offering memoranda for a hedge fund that later collapsed. The Court held that even though "a plaintiff need not produce absolute proof of fraud," the allegations in the amended complaint were "conclusory" and did not give rise to a "reasonable inference" that the law firm committed fraud or aided and abetted fraudulent activities. *Id.* 560-561. Here, the Complaint fails to allege that Proskauer knew and substantially assisted Weinstein in those transactions in which Plaintiffs assert they were defrauded. Thus, the aiding and abetting fraud claim shall be dismissed.

2. Conversion (24th Cause of Action)

The Complaint alleges that 148 (through Weinstein) lent the Kahal Defendants $3.88 million. Complaint, ¶¶ 247-250. Weinstein then directed Kahal to pay $1 million of those funds to Proskauer as a retainer. *Id.* Proskauer knew or should have known that the funds were probably proceeds of his fraudulent activities. *Id.* The Complaint avers that Proskauer improperly retained and expended

the funds for its benefit, and demands the return of funds. *Id.*, ¶¶ 252-253. As noted, these allegations are largely based on the statements made by FBI Agent Ubellacker in the 2013 Action. Plaintiffs' opposition, ¶¶ 79-81. In their opposition papers, Plaintiffs also attached a document, which purports to show the $1 million payment made by Kahal to Proskauer, in a credit/debit schedule. *Id.*, exhibit O. In such regard, Plaintiffs contend that they are "entitled to the inference that all of the funds sent to [Kahal] by 148 were Plaintiffs' funds." *Id.*, ¶ 84.

A claim for conversion of money can be established "where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." *Thys v Fortis Sec., LLC*, 74 AD3d 546, 547 [1st Dept 2010] (internal quotation marks and citation omitted). "Although the action must be for recovery of a particular and definite sum of money, the specific bills need not be identified." *Id.* (citation omitted).

The conversion claim fails. Despite the allegation that Proskauer "knew or should have known" that the money it received from Kahal were proceeds of Weinstein's fraud, the Complaint does not establish that Proskauer knew or should have known that the money it received from Kahal were "specific, identifiable funds" belonging to Plaintiffs and, thus, had "an obligation to return [same to Plaintiffs] or otherwise treat in a particular manner the specific fund in question."

3. Accounting (25th Cause of Action)[3]

The Complaint alleges that Proskauer accepted $1 million from Weinstein or "other persons for the benefit of" Weinstein, and seeks to have Proskauer "provide an accounting of all sums received directly or indirectly from or for the benefit of Defendant Weinstein," because such funds "belonged to and originated from Plaintiffs." Complaint, ¶¶ 257-259.

To establish an accounting claim, a plaintiff must show "a fiduciary relationship between plaintiff and defendants." *AMP Servs. Ltd. v Walanpatrias Found.*, 34 AD3d 231, 233 [1st Dept 2006]. Here, the Complaint does not allege a fiduciary relationship between Plaintiffs and Proskauer. Yet, Plaintiffs argue that "Proskauer, as a law firm, is held to a higher obligation with respect to the monies of third parties in its possession than ordinary defendants Plaintiffs' opposition, ¶ 90." They rely on Rule 1.15(a) of the Rules of Professional Conduct ("A lawyer in possession of

[3] At oral argument held on April 8, 2014, the court dismissed the 25th (accounting) and 27th (fraudulent conveyance) causes of action. Transcript at 17-18 (NYSCEF Doc. No. 175).

any funds or other property belonging to another person . . . is a fiduciary . . .").

This argument has no foundation in law. The Court of Appeals has held that "an ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law." *Shapiro v McNeill*, 92 NY2d 91, 97 [1998]. A fiduciary relationship arises "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" or "when confidence is reposed on one side and there is resulting superiority and influence on the other." *Eurycleia*, 12 NY3d at 561 (citations omitted). Plaintiffs have not met either test in *Eurycleia*. Plaintiffs' other argument that Proskauer's withdrawal from its representation of Weinstein without completing same vitiates its entitlement to the retainer (Plaintiffs' opposition, ¶¶ 88, 91) is baseless because Proskauer does not represent Plaintiffs in any action or proceeding. Thus, the accounting claim is dismissed.

4. Fraudulent Conveyance (27th Cause of Action)

This cause of action is asserted against many defendants and alleges that they "received funds which were given by Defendants 148, Todd, Schleider, or Weinstein with *actual intent* to defraud Plaintiffs." Complaint, ¶ 270 (emphasis added). Apparently, Plaintiffs rely on Debtor & Creditor Law (DCL), section 276, which states, in relevant part, that "[e]very conveyance made and every obligation incurred with *actual intent* ... to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors." DCL § 276 (emphasis added).

Proskauer argues that the Complaint fails to plead this claim in detail pursuant to CPLR 3016(b). Even assuming it adequately alleges "a scheme to defraud the debtor" (i.e., Plaintiffs as "debtor") involving certain defendants, it does not support a claim against other defendants (i.e., Proskauer) if it "does not allege that the transfers were made in furtherance of the scheme . . . ." Proskauer's brief at 13, citing *Nisselson v Ford Motor Co. (In re Ford Monahan Ford Corp. of Flushing)*, 340 BR 1, 39 (Bankr ED NY 2006)(motion to dismiss the intentional fraudulent conveyance claim against Ford was dismissed because the "badges of fraud" were insufficiently pled against Ford).

In opposition, Plaintiffs contend, among other things, that they have adequately pled this claim against the Kahal Defendants. The Complaint, in paragraph 79, alleges that the Kahal

Defendants "agreed to assist" Weinstein, Todd and 148 "with their scheme to defraud Plaintiffs," and Proskauer received $1 million from Kahal as payment for Weinstein's legal fees, with the notation that it was a "Loan Return For 148 LLC," providing "further evidence of their fraudulent intent." Plaintiffs' opposition, ¶¶ 93-99.

To allege a claim under DCL § 276, the claimant must allege that "(1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by the debtor and (3) that the transfer was done with actual intent to defraud." *Nisselson*, 340 BR at 37. Importantly, a claim of actual fraudulent conveyance must plead the requisite "actual intent" with particularity, and the burden of proving same is on the party seeking to set aside the conveyance. *Paradigm BioDevices, Inc. v Viscoglisoi Bros., LLC*, 842 F Supp 2d 661, 667-668 [SD NY 2012] (analyzing DCL § 276 and dismissing the fraudulent transfer claim against all defendants other than the sole beneficiary of the transfer).

Applying the foregoing to this case, while the actual intent of Weinstein to defraud Plaintiffs is undisputed, the Complaint does not contain "sufficiently particularized allegations" that the transfer by Kahal to Proskauer was made "in furtherance of the scheme to defraud" for purposes of DCL § 276. *Nisselson*, 330 BR at 38-39. The Complaint also does not allege that Plaintiffs were "present or future creditors" of Kahal, when the payment to Proskauer was made as required by DCL § 276. Instead, the Complaint lists Proskauer among 16 defendants who allegedly received fraudulent transfers from three other defendants. Therefore, the fraudulent conveyance claim against Proskauer is dismissed.

5. Unjust Enrichment (30th Cause of Action)

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] (citation omitted). To establish this claim, a plaintiff must show: "(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'." *Id.* at 182 (citations omitted). While privity is not required, the complaint must still show there is a connection between the parties that is not "too attenuated." *Id.*

Similar to the fraudulent conveyance claim, the unjust enrichment claim is asserted against multiple defendants. The Complaint alleges that the defendants, including Proskauer, "accepted

monies directly or indirectly from the transactions described herein" and the "retention of said monies would unjustly enrich said defendants." Complaint, ¶¶ 297-298. As to Proskauer, the Complaint seek a $1 million judgment. Moreover, Plaintiffs argue that because Proskauer kept the $1 million retainer to which they have made a claim, not requiring Proskauer, as a fiduciary, to return the funds would unjustly enrich Proskauer, particularly when it voluntarily withdrew as Weinstein's counsel while keeping the unearned fee. Plaintiffs' Opposition, ¶¶ 101-104.

Plaintiffs' arguments are unavailing. As discussed above, Proskauer is not Plaintiffs' fiduciary. The retainer was paid by Kahal, on behalf of Weinstein, Proskauer's client. The fact that Plaintiffs have made a claim against the retainer does not establish that a benefit has been bestowed upon Proskauer. Also, the cases cited by Plaintiffs (Plaintiffs' Opposition, ¶ 102) do not support their assertion because the plaintiffs in those cases bestowed a benefit directly upon the defendants. Here, the facts show that any benefit bestowed upon Proskauer came from the Kahal Defendants, not Plaintiffs. Thus, the unjust enrichment claim against Proskauer must be dismissed.

II. Kahal Defendants' motion to dismiss (motion sequence number 002)

The Complaint asserts four causes of action against the Kahal Defendants: aiding and abetting fraud - Collateral Assignment (6th); aiding and abetting fraud (8th); accounting and constructive trust (26th); and unjust enrichment (30th).

1. Aiding and Abetting Fraud (6th and 8th)

The Kahal Defendants argue at length that Plaintiffs failed to satisfy the elements of fraud (*see* Kahal brief at 11-15). The argument is irrelevant because the claim against them is aiding and abetting fraud, which has different elements, as discussed above in Section I.1. In their reply brief, the Kahal Defendants argue that Plaintiffs are "sophisticated investors who knowingly chose to do business with an accused fraudster," and that Plaintiffs unreasonably relied on the fraudulent representations (including the Park Avenue Property assignment) made by Weinstein and his accomplices. Notably, the Kahal Defendants also aver that "Plaintiffs have failed to assert one of the most basic elements of aiding-and-abetting fraud - reliance." Kahal reply brief at 1-2, 4-6. However, "reliance" is not an element of an aiding and abetting fraud claim and merits no further discussion. Relying on *Stanfield*, 64 AD3d at 475-476, the Kahal Defendants contend that the aiding and abetting claim should be dismissed because "Plaintiffs have failed to allege any fiduciary duty

or other independent duty owed to them by Kahal." Kahal brief at 11. The reliance on *Stanfield* is misplaced because fiduciary duty must be alleged only if a plaintiff alleges a failure to disclose by the aider and abetter. Here, Plaintiffs allege that the Kahal Defendants affirmatively assisted 148 and Weinstein in the fraud, not a failure to disclose the fraud.

In opposition to the Kahal Defendants' motion, Plaintiffs contend that the Kahal Defendants knew of the fraudulent scheme and provided "substantial assistance" in furtherance of the scheme. Plaintiffs argue the following: timing of Kahal's assignment of the Park Avenue Property mortgage to 148 to induce and defraud Plaintiffs to loan to 148 the funds for the purported Facebook transactions and the mortgage reassignment by 148 to Kahal after the loans were made; manipulation of collateral and cooperation with Weinstein and cohorts to establish nonexistent assets for 148; borrowing of money by Kahal and repaying same when directed by Weinstein, including the $1 million payment to Proskauer for the benefit of Weinstein when such payment should have gone to 148; absence of documentation and/or explanation to account for Kahal's transactions with other undisclosed, but seemingly Weinstein-related, entities; unsubstantiated and conclusory statements made by Babad in his affirmation regarding the underlying transactions.[4] Plaintiffs Opposition, ¶¶ 37-84.

In response, the Kahal Defendants submitted two documents: (1) Loan Agreement and Amendment to Letter of Intent (the Amendment) executed by Todd (on behalf of 148) and Babad (on behalf of Kahal); and (2) Promissory Note signed by Babad (on bahalf of Kahal). The Kahal Defendants argue that the aiding and abetting claims should be dismissed because the promissory note shows "what monies 148 had to lend" in consideration for the mortgage assignment (thus rebutting the allegation that the assignment was not supported by consideration). Kahal Reply 7-9. Additionally, the Amendment shows that Plaintiffs misunderstood "the timing and nature of the

---

[4] Attached to the Babad affirmation were copies of checks, a bank statement and a credit/debit schedule with little or no explanation. The affirmation also contained general statements without details, such as: "It was originally contemplated that 148 would loan in excess of $8,000,000 to Kahal . . . but at no time did Kahal borrow from 148 more than $2,250,000. Additional funds were provided to Kahal from entities other than 148 . . . As security other than the Park Avenue Mortgage was being held in escrow, the Park Avenue Mortgage was assigned back to Kahal, even though the full loan had not been repaid at that time . . ." Plaintiffs' Opposition, exhibit L (Babad affirmation).

transactions," because Plaintiffs "rely upon the dates when the underlying documents [the mortgage assignments] were signed, not taking account whether those documents were held in escrow pending final performance of the agreed upon terms." *Id.* The Kahal Defendants also assert that Kahal did not assign the mortgage to 148 on November 22, 2011 (although the recording document in the New York City registry showed the document date as 11-22-2011) because "negotiations between the parties regarding the assignment continue long after that date" and the Amendment stated that it was "effective as of February 14, 2012." *Id.* at 9. The Kahal Defendants contend that this evidence "demonstrates the problem with Plaintiffs' timeline and abrogates the implication that the Kahal Defendants knew of, and assisted, with Weinstein's fraud." *Id.*

Contrary to such contention, the Complaint states that Plaintiffs made three separate loans to 148: $1.2 million on 2/5/2012; $1.65 million on 2/15/2012; and $1.825 million on 3/4/2012. Complaint ¶¶ 38, 43 and 49. The Complaint also states that on 2/15/2012 and 3/4/2012, 148 (through Todd) represented to Plaintiffs that 148 had collateral of $12 million, including the mortgage on the Park Avenue Property. These statements are consistent with and provide support for a reasonable inference, at least with respect to the 2/15/2012 and 3/4/2012 loans that post-dated the Amendment, that the collateral assignment between 148 and Kahal was orchestrated to induce Plaintiffs in making these loans. "Participants in a fraud do not affirmatively declare . . . that they are engaged in the perpetration of a fraud . . . an intent to commit fraud is to be divined from surrounding circumstances." *Oster v Kirschner*, 77 AD3d 51, 55-56 (1st Dept 2010). Here, the "documentary evidence" on which the Kahal Defendants rely for dismissal of the aiding and abetting fraud claim, pursuant to CPLR 3211 (a) (1), does not flatly contradict the factual claim. *Goshen v Mut. Life Ins. Co.*, 98 NY 2d 314[2002]. Thus, the sixth and eighth causes of action sounding in aiding and abetting fraud are entitled to every favorable inference and survive the motion to dismiss.

2. Accounting and Constructive Trust (26th Cause of Action)

Plaintiffs contend that the accounting claim does not require a fiduciary relationship because it is "based upon an equitable principle" and because Kahal aided and abetted fraud. They rely on *Kaminsky v Kahn* (23 AD2d 231, 238 [1st Dept 1965]) ("[i]t is generally held that equity has jurisdiction to compel an accounting whenever one party has profits in which another is entitled to share regardless of the relationship between the parties at the time the profits were earned") (internal

brackets and quotation marks omitted) to support such a proposition.

Such reliance is misplaced. The *Kaminsky* defendant was the majority shareholder as well as chairman of the board of directors, and had a duty to exercise good faith toward minority shareholders, including the plaintiff. Thus, the above quoted language is dicta, as the appellate court directed an accounting under the "special circumstances" in that case. *Id.* In any event, *Kaminsky* was decided in 1965 and the current law requires a fiduciary relationship as an element of an accounting claim. *See e.g., AMP Servs.*, 34 AD3d at 233; *Zyskind v Facecake Mktg. Tech., Inc.*, 110 AD3d 444, 446 [1st Dept 2013] (accounting claim dismissed because it did not allege a fiduciary relationship). Likewise, the constructive trust claim should be dismissed because it has been held that a confidential relation is a required element. *See Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]. Indeed, a plaintiff seeking the imposition of a constructive trust must allege four elements: a fiduciary relationship; a promise, express or implied; a transfer in reliance thereon; and unjust enrichment. *See Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]. Here, Plaintiffs have not pled all the elements required for a constructive trust claim. Therefore, the 26th cause of action shall be dismissed.

3. Unjust Enrichment (30th Cause of Action)

As discussed above in Section I.5, even though privity is not required for an unjust enrichment claim, the complaint must show there is a connection with the plaintiff and the defendant that is not "too attenuated." *Mandarin Trading*, 16 NY3d at 182; *see also Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] (relying on case precedent and requiring a "sufficiently close relationship" for an unjust enrichment claim). Even assuming the truth of the allegations in the Complaint and giving the facts alleged every favorable inference, the fact that Plaintiffs and the Kahal Defendants "had no dealings with each other" requires dismissal of this claim. *See Georgia Malone*, 19 NY3d at 518.

III. Greenberg motion to dismiss (motion sequence number 003)

The Complaint asserts six causes of action against Greenberg: aiding and abetting fraud (12th); breach of fiduciary duty (13th); negligence (14th); conversion (15th); fraudulent conveyance (27th); and unjust enrichment (30th).

1. Aiding and Abetting Fraud (12th Cause of Action)

As discussed in the background section above, Schleider retained Greenberg to represent

BGG, a company he controlled, in connection with BGG's purchase of Bell Glade Gardens. In October 2011, Schleider deposited $120,000 with Greenberg, but the deposit was returned in November 2011. Plaintiffs claim this terminated the BGG transaction and Greenberg knew about it. On February 23, 2012, Schleider represented to Plaintiffs that the BGG transaction was still active, so they wired $2.5 million to Greenberg. Four days later, Schleider told Greenberg to wire the funds to 148 without also telling Plaintiffs. In April 2012, Plaintiffs wired another $330,000 to Greenberg. Thereafter, Schleider directed Greenberg to deduct its legal fees from the $330,000 and wire the balance to 148. In June 2013, Plaintiffs demanded repayment of the $2.83 million, and Greenberg refused.

Plaintiffs allege that Greenberg aided and abetted Schleider in the fraud. To rebut the allegation that Greenberg "knew" the BGG transaction had been terminated in November 2011, Greenberg submitted emails, copies of which are annexed as exhibits to the Lehrfield affidavit in support of the motion to dismiss, as documentary evidence. The emails reflected communications between Schleider, Lehrfield (a Greenberg attorney on the BGG transaction) and Levine (deputy counsel of Greystone, the owner of Belle Glade Gardens), and indicated that the BGG transaction remained under negotiations in February through April 2012.

Plaintiffs contend that the emails are "not documentary evidence and do not conclusively establish a defense as a matter of law." Plaintiffs' Opposition at 5, citing *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.* (10 AD3d 267, 270-271 [1st Dept 2004]) for the proposition that emails cannot be considered documentary evidence. This reading of the law is too narrow and the reliance thereon by Plaintiffs is misplaced. The appellate court in *Weil Gotshal* determined that the motion court had erred by disregarding the fact that the email was "only an overview of [the witness's] testimony and viewed it as the whole of her testimony." *Id.* at 271. In such regard, the cases cited by Plaintiffs only held that the subject documentary evidence, such as emails, were insufficient due to the particular facts in those cases, and cannot be taken as an iron-clad proposition of law. In any event and contrary to Plaintiffs' conclusory allegation that Greenberg "knew" that the BGG transaction had terminated in 2011 (and thus "knew" about the fraud), the emails show that the parties to the transaction were still negotiating during the period, February to April of 2012 when Plaintiffs wired the funds to Greenberg. Notably, Plaintiffs have not submitted

any contradictory evidence.

The allegations that (1) Greenberg "knew" about the fraud because Greenberg knew that the wired funds came from Plaintiffs and not from Schleider; and (2) Greenberg substantially assisted Schleider in the fraud by wiring the funds to 148 and not returning same to Plaintiffs in light of its notice of their rights in the funds (Plaintiffs' Opposition, at 8-11) are also insufficient. In *Shapiro v McNeill*, 92 NY2d 91, 95 [1998], the Court of Appeals dismissed the complaint against the defendant lawyer based on facts similar to this case. The *Shapiro* plaintiff made checks payable to the lawyer for the accused fraudster when he became "leery of the [fraudster's] arrangement," noting that they were for specific transactions. *See id.* The fraudster then delivered the checks to his lawyer and said they were payments earned by him on the sale of investments to Shapiro, and the checks were deposited into the lawyer's escrow account. *See id.* The escrow funds were later disbursed by the lawyer according to the fraudster-client's instructions without notice to plaintiff. *See id.* The Court dismissed plaintiff's claim and held that the defendant lawyer did not owe plaintiff, a non-client, a legal duty. *See id.* at 99. Here, Greenberg disbursed the funds as directed by its client. Plaintiffs never communicated with Greenberg nor gave any instructions or demands with respect to the wire funds until well after the disbursal of such funds.

The allegations that Greenberg was an escrow agent for Plaintiffs with respect to the wired funds, and that Greenberg became a fiduciary of Plaintiffs, are also unavailing. The appellate courts have dismissed such claims on similar facts. *See e.g., Shapiro v Snow Becker Krauss*, 208 AD2d 461, 461 [1st Dept 1994] (plaintiffs' check payable to defendant lawyer's escrow account "did not transform defendant into an escrow agent with a fiduciary duty to inquire of plaintiffs as to any conditions attached to the payment of checks"); *Ehrlich v Froehlich*, 72 AD3d 1010, 1012 [2d Dept 2010] (nonclient plaintiff who wired funds into defendant lawyer's account could not prevail on a breach of contract claim when defendant made a prima facie showing that no escrow agreement existed and plaintiff's unsubstantiated claim to the contrary was without merit and warranted dismissal). Here, there is no escrow agreement, written or oral, between Plaintiffs and Greenberg. Plaintiffs' voluntary wiring of funds does not make Greenberg an escrow agent or a fiduciary of Plaintiffs.

2. Breach of Fiduciary Duty (13th Cause of Action)[5]

Plaintiffs allege that Greenberg, as escrowee, breached its fiduciary duty when it disbursed Plaintiffs' wired funds without their knowledge and consent because the Rules of Professional Conduct of New York and Florida imposed a fiduciary duty on attorneys who are in possession of funds of a third party.

The breach of fiduciary duty claim lacks support in law and must be dismissed. Because there is no attorney-client relationship, no escrow agreement or any communication between Greenberg and Plaintiffs, a fiduciary duty does not lie. Moreover, as noted above, the New York Court of Appeals has held that "an ethical violation will not create a duty that gives rise to a cause of action that would otherwise not exist at law." *Shapiro*, 92 NY2d at 97; *accord Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010] ("[s]tanding alone, an ethical violation will not create a duty giving rise to a cause of action that would otherwise not exist at law"). The result is the same in Florida. *See Holton v Florida*, 2007 WL 951726, *3 [MD Fla Mar. 28, 2007] (the preamble to the rules regulating the Florida bar states that "the violation of a rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached," and court dismissed a legal malpractice claim against the attorney).

3. Negligence (14th Cause of Action)[6]

Even though there is no privity between Plaintiffs and Greenberg, plaintiffs contend that a claim for professional negligence lies when there is fraud, collusion or other malicious act committed by the attorney. *See Estate of Schneider v Finmann*, 15 NY3d 306, 308-309 [2010]; *Prudential Ins. Co. Of Am. v Dewey, Ballantine, Bushy, Palmer & Wood*, 170 AD2d 108, 118 [1st Dept 1991]. While the proposition of law cited by Plaintiffs in the foregoing cases is correct, the negligence claim fails because, as discussed in Section III.1, Plaintiffs have failed to allege that Greenberg knew of the fraud and gave substantial assistance to it.

4. Conversion (15th Cause of Action)

---

[5] At oral argument, the court dismissed this breach of fiduciary duty claim. *See* Transcript at 38, (NYSCEF Doc. No. 175).

[6] At oral argument, the court also dismissed this negligence claim. *See id.* at 42.

Plaintiffs contend that conversion of funds occurred when Greenberg wired their $2.83 million to 148 on February 27, 2012 without their authorization or consent, and that the conversion did not advance the BGG transaction for which Plaintiffs' funds were intended. *See* Plaintiffs' Opposition at 16-17.

The conversion claim should be dismissed because, as discussed, Plaintiffs never provided instructions to Greenberg regarding the wired funds, and they did not demand a return of funds until more than a year after disbursement to 148. *See United Credit Corp. v J.L.E. Indus.*, 251 AD2d 69, 70 [1st Dept 1998] (conversion claim dismissed because "[p]laintiff failed to raise an issue of fact in response to defendant attorney's showing that he had disbursed [the funds] before receiving . . . letter demanding that he turn over the proceeds of the check"). Moreover, as discussed, Plaintiffs have failed to allege that Greenberg owed them a fiduciary duty as to the wired funds.

5. Fraudulent Conveyance (27th Cause of Action)

The three elements of a DCL § 276 cause of action are set forth in Section I.4. Plaintiffs argue that they satisfied all three elements because (1) $2.83 million is a "thing of value;" (2) if Greenberg had no privity and was not an escrowee, its retention of the funds established a debtor-creditor relationship and it became a "debtor;" and (3) Greenberg's wiring of funds to 148 instead of returning same to Plaintiffs was an "intent to defraud." Plaintiffs' Opposition at 18.

Plaintiffs' arguments must be rejected as to elements two and three because plaintiffs have provided no legal authority therefor. As discussed, Greenberg has no legal duty, and thus no legal responsibility, to Plaintiffs when the funds were wired to 148 in accordance with its client's instruction. Thus, Greenberg did not become a "debtor" of Plaintiffs. The "intent to defraud" allegation is conclusory because Greenberg did not know of the fraud, and "actual knowledge" is a crucial element of an aiding and abetting fraud claim. Accordingly, the fraudulent conveyance claim should be dismissed.

6. Unjust Enrichment (30th Cause of Action)

The elements of an unjust enrichment claim are set forth in Section I.5, and as discussed therein, even though privity is not required for the claim, a plaintiff must show it has a connection with the defendant that is not too attenuated. Plaintiffs argue that Greenberg must have at least been

aware of their existence because they wired funds to Greenberg designated for the BGG transaction. However, as stated in *Mandarin Trading*, "there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement." 16 NY3d at 182. Here, it is undisputed that Greenberg neither communicated with Plaintiffs, which could have caused them to rely upon in wiring the funds, nor induced Plaintiffs to wire the funds. In any event, Greenberg did not retain the fees and become "enriched." Instead, it wired the funds according to its client's instructions and deducted the legal fees for services rendered. There is no allegation that the fees were unreasonable or excessive. Accordingly, the unjust enrichment claim must be dismissed.

IV. The KS Defendants' motion to dismiss (motion sequence number 004)

The Complaint asserts the following causes of action against the KS Defendants: breach of fiduciary duty (18th, 19th and 20th); aiding and abetting fraud (22d); fraudulent conveyance (27th); and unjust enrichment (30th). The Complaint alleges that Schleider retained the KS Defendants to represent Plaintiffs' interest in specific transactions perpetrated by the fraudsters. As a result of such representation, Plaintiffs assert three claims of breach of fiduciary duty against the KS Defendants: failure to disclose their prior representation of certain defendants; failure to perform due diligence as to the fraudsters' assets and drafted transaction documents that purportedly provided security for Plaintiffs' loans; and failure to provide advice which led to Plaintiffs' release of a lien on a Tennessee real property that was pledged to secure one of the loans. Plaintiffs also allege that the KS Defendants aided and abetted fraud.

The KS Defendants move to dismiss the complaint on three grounds: (1) pursuant to CPLR 3211 (a) (8) (lack of personal jurisdiction); (2) pursuant to CPLR 324 (a) (*forum non conveniens)*; and (3) pursuant to CPLR 3211 (a) (1) (documentary evidence) and (a) (7) (failure to state a cause of action).

1. Personal Jurisdiction

As a threshold matter, the KS Defendants contend that the Complaint should be dismissed because this court does not have personal jurisdiction over them. Plaintiffs counter that the KS Defendants waived this defense by seeking to extend their time to answer pursuant to CPLR 320 (a),

which states, in part: "[t]he defendant appears by serving an answer . . . or by making a motion which has the effect of extending the time to answer." Plaintiffs assert that because KS Defendants' counsel appeared on November 22, 2013 and requested an extension of time to answer or move, they waived this defense. *See* Plaintiffs' opposition at 7. Plaintiffs' argument is utterly meritless because CPLR 320 (c)(2) states plainly that an appearance is not equivalent to personal service if the objection is "asserted by motion or in the answer as provided in rule 3211." *See also Matter of Nicola v Board of Assessors of Town of N. Elba*, 46 AD3d 1161, 1162 [3d Dept 2007] ("an appearance will operate to waive objections to the court's personal jurisdiction 'unless an objection to jurisdiction [under CPLR 3211 (a)(8)] is asserted by motion or in the answer as provided in rule 3211'"). Here, the objection is made in a pre-answer motion. The personal jurisdiction defense has not been waived.

Regarding that branch of motion to dismiss that is based a CPLR 3211 (a) (8), it has been held that "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Doe v McCormack*, 100 AD3d 684, 684 [2d Dept 2012] (citation omitted). However, "in opposing a motion to dismiss pursuant to CPLR 3211 (a) (8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth a sufficient start, and show their position not to be frivolous." *Id.* (brackets, quotation marks and citation omitted).

In New York, there are two types of personal jurisdiction: CPLR 301 (general jurisdiction) and CPLR 302 (specific or long-arm jurisdiction) (McKinney's 2014). Plaintiffs contend that this court has both general and specific jurisdiction over the KS Defendants. General jurisdiction, permits a court to exercise personal jurisdiction over a defendant in its "home" forum based on the defendant's overall contacts with that forum even if the claim has no connection to it. The United States Supreme Court has held that in order for a court to assert personal jurisdiction over a nonresident defendant, the plaintiff must establish that the defendant has a substantial presence in the forum state so that the exercise of jurisdiction over the defendant would comport with the traditional notions of fair play and substantial justice. *World-wide Volkswagen Corp. v Woodson*, 444 US 286, 292 [1980], *citing Intl. Shoe Co. v Washington*, 326 US 310, 316 [1945]. New York law is essentially the same. With respect to CPLR 301, "the authority of the New York courts to

exercise jurisdiction over a foreign corporation is based solely upon the fact that the defendant is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction." *Laufer v Ostro*, 55 NY2d 305, 309-310 [1982] (brackets, quotation marks and citations omitted). Here, Plaintiffs allege that the KS Defendants have engaged in a "continuous and systematic" course of doing business in New York and, thus, this court has general jurisdiction over them pursuant to CPLR 301.

In 2014, the U.S. Supreme Court modified the "continuous and systemic" standard in its analysis of general jurisdiction. *Daimler AG v Bauman*, __ US __, 134 S Ct 746 [2014]. In that case, Daimler AG, a German corporation, was sued by Argentinian residents alleging that its Argentinian subsidiary committed tortious acts in Argentina; the suit was brought in a federal court in California based on services performed in California by Daimler's U.S. subsidiary, MBUSA. *See id.* at 750-751. The question before the Supreme Court was "whether Daimler's affiliations with California are sufficient to subject it to the general (all purpose) personal jurisdiction of that State's courts." *id.* at 758. In its analysis, the Supreme Court stated that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *id.* at 760. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile" and "[w]ith respect to a corporation, the place of incorporation and principal place of business" are the paradigm bases for general jurisdiction. *Id.* (citations omitted, quotation marks in original). In so holding, the Supreme Court disagreed with the formulation that would allow the exercise of general jurisdiction in every state in which a corporation "engages in a substantial, continuous and systemic course of business," characterizing such a formulation as "unacceptably grasping." *id.*

In this case and as noted above, the DS Defendants are David Steinmetz (DS) and Naftali Kunstlinger (NK), who are members of Kunstlinger Steinmetz LLP (KS Firm). DS and NK are attorneys licensed to practice law in New York and New Jersey, and both are residents of New Jersey. The KS Firm, formed in 2009 by NK and DS, is a New Jersey law firm having its principal place of business in Lakewood, New Jersey. It is not authorized to do business in New York. Based on the Supreme Court's holding in *Daimler*, this court lacks general jurisdiction over the DS

Defendants.[7]

Plaintiffs also argue that the KS Defendants, and DS and NK in particular, are licensed to practice law in New York but failed to comply with Judiciary Law § 470, which requires them to maintain a law office in New York. Plaintiffs therefore contend that the KS Defendants can be deemed to have given implied consent to the general jurisdiction of this court. Plaintiffs cite no law for the proposition. Judiciary Law § 470 states that "[a] person, regularly admitted to practice as an attorney . . . in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney . . . although he resides in an adjoining state." Thus, under § 470, attorneys who do not maintain an office in New York may not practice law here. Although they have been admitted to practice law in New York, DS and NK do not have a New York office, as required to practice here by § 470.[8] Plaintiffs argue that the KS Defendants, who are attempting to use their lack of an office to avoid personal jurisdiction "should be treated, for jurisdictional purposes, as if they had complied." Plaintiffs' Opposition at 9-10. Plaintiffs rely on an archaic case, *Matter of Burnham* (58 Misc 576, 570 [Sup Ct Special Term, NY County 1908]), for the proposition that an attorney, as an officer of the court, cannot escape the summary jurisdiction of the court to compel him to account for and return monies to his client that he was not entitled to

---

[7]Even if this court were to apply the "continuous and systemic" standard, the factual evidence set forth in the affidavits and affirmations submitted by the parties militates against Plaintiffs, because they have not sustained the ultimate burden of establishing general jurisdiction.

[8] The statute was challenged in *Schoenefeld v State of New York* (907 F Supp 2d 252 [ND NY 2011]), where the federal district court held that the law was unconstitutional because it violated the Privileges and Immunities clause of the U.S. Constitution. On appeal, the question as to what minimum requirements would satisfy the statute mandating a nonresident attorney to maintain an office for the transaction of law business in New York was certified by the Second Circuit to the New York Court of Appeals. On May 6, 2014, the Court of Appeals accepted the certified question. *See Shoenefeld,* 23 NY3d 941 (2014). On the other hand, in March 2012, after the federal court issued the *Schoenefeld* decision, the Appellate Division ruled that the plaintiff's counsel's failure to maintain an in-state office violated the statute, without discussing its constitutionality. *Webb v Greater N.Y. Auto. Dealers Assn., Inc.*, 93 AD3d 561 [1st Dept 2012]. *See also EIC Assoc., Inc. v Nacirema Envtl. Servs. Co., Inc.*, 2012 WL 10008215 [Sup Ct, NY County August 27, 2012] (decision stated that the federal court's *Schoenefeld* decision was not binding upon the court, which was required to follow precedent set by the First Department).

keep, for which reason he was barred from practicing law. Plaintiffs' reliance on *Burnham* is entirely misplaced because the facts there are distinguishable and the court's rationale and holding therefor is inapplicable to this case. In fact, the penalty for a violation of § 470 is prohibiting the attorney from continuing to appear as counsel in the case or striking the pleadings filed in that case.

Further, as acknowledged by Plaintiffs, an attorney is likely not subject to personal jurisdiction merely by virtue of having once been admitted to the Bar of the State of New York. *See Mangia Media Inc. v University Pipeline, Inc.*, 849 F Supp 2d 319, 322 [ED NY 2012]. Thus, the mere fact that DS and NK are licensed to practice in New York does not subject them (and the KS Firm) to the personal jurisdiction in this court.

2. Specific Jurisdiction

CPLR 302 (a) sets forth four different scenarios in which the New York courts can exercise specific or long arm jurisdiction over non-domiciliary defendants. *See* CPLR 302 (a) (1) - (a) (4). In this case, Plaintiffs allege that the KS Defendants are subject to the New York jurisdiction pursuant to CPLR 302 (a) (1), which states, in relevant part: "[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state."

Notably, CPLR 302 (a) (1) is a "single act statute" in that physical presence in New York is not required and only "one New York transaction is sufficient." However, jurisdiction may attach under this section only as to a cause of action "arising from" the transaction "of business within the state or contracts anywhere to supply goods or services in the state." *Id.* The statute is "only applicable where the defendant's New York activities were purposeful and substantially related to the claim." *D&R Global Selections, S.L. v Bodega Oregario Falcon Pineiro*, 90 AD3d 403, 404 [1st Dept 2011]. "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (citation omitted, quotation marks in original).

Plaintiffs argue that CPLR 302 (a) (1) jurisdiction exists because (1) DS and KN are New York attorneys, and by litigating in New York courts they purposefully availed themselves of the

benefits of New York; (2) they should have foreseen the prospect of defending a suit in New York because the suit comports with traditional notions of fair play and substantial justice; (3) this action affects title to real property in New York (i.e., the Park Avenue Property) and the KS Defendants were hired to secure Plaintiffs' funds against the mortgages that property; and (4) New York is the only possible venue for suit upon all of Plaintiffs' claims. *See* Plaintiffs' Opposition at 14-15.

None of these reasons, except perhaps the third, is within the contemplation of the statute. Also, none of the reasons are relevant for purposes of this "single act" statute, because an important inquiry is whether the "defendant's activities here were purposeful and [whether] there is a substantial relationship between the transaction and the claim asserted." *Bankrate, Inc. v Mainline Tavistock, Inc.*, 18 Misc 3d 1127[A] *5, 2008 Slip Op 50213[U] [Sup Ct, Kings County 2008], quoting *Kreutter v McFaddin Oil Corp.*, 71 NY2d 460, 467 [1988]. These factors are absent in this case.

As to the third reason, the record reflects that the activities related to the Park Avenue Property, including negotiation and drafting of the transaction documents, all occurred in New Jersey, not in New York. Thus, the DS Defendants' conducted no activities and transacted no business in New York within the meaning of CPLR 302 (a) (1).

Plaintiffs have attached an email to their papers, apparently in a attempt to show that the KS Defendants nonetheless conducted activities in New York relating to the Park Avenue Property. Plaintiffs cite *Deutsche Bank Secs., Inc. v Montana Bd. Of Invs.* (7 NY3d 65, 71 [2006]), in which the Court of Appeals held that there was jurisdiction under CPLR 302 (a)(1) over "commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions." In that case, the Court of Appeals was concerned that "technological advances in communication" enabled parties to "transact enormous volumes of business within a state without physically entering it" and CPLR 302 (a)(1) would cover those defendants who "project" themselves into New York transactions via electronic means by "initiating and pursuing" negotiations. *Id.* In this case, the subject email, attached as exhibit T to Plaintiffs' papers, was written and sent by Schleider to Gerald Chambers, with a copy to DS. DS did not initiate the email nor did he project himself into the business transaction. Thus, *Deutsche Bank* is inapplicable. Specific jurisdiction is not available pursuant to CPLR 302 (a)(1).

Because the DS Defendants are not subject to the personal jurisdiction of this court -- general and specific -- it is unnecessary to address the remaining issues raised by the parties, including the applicability of forum non conveniens and whether the claims stated causes of action under CPLR 3211 (a) (7).

Conclusion

Based upon all of the foregoing, it is hereby

ORDERED that the motion by Proskauer Rose LLP (motion sequence number 001) seeking dismissal of plaintiffs' complaint is granted, and the complaint is dismissed in its entirety against this defendant with costs and disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant, and the defendant is severed from this action; and it is further

ORDERED that the motion by Congregation Kahal Minchas Chinuch, 121 Park Realty LLC and Chaim Babab (motion sequence number 002) seeking dismissal of plaintiffs' complaint is granted only to the extent of dismissing the twenty-sixth and thirtieth causes of action, and the defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion by Greenberg Traurig, LLP (motion sequence number 003) seeking dismissal of plaintiffs' complaint is granted, and the complaint is dismissed in its entirety against this defendant with costs and disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant, and the defendant is severed from this action; and it is further

ORDERED that the motion by David Steinmetz, Naftali Kunstlinger and Kunstlinger Steinmetz LLP (motion sequence number 004) seeking dismissal of plaintiffs' complaint is granted, pursuant to CPLR 3211 (a) (8), in that this court lacks jurisdiction over the defendants, and the defendants are severed from this action; and it is further

ORDERED that the action is severed and continued against the defendants not dismissed from the case; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the following amended caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

GERALD CHAMBERS, JOCELYN CHAMBERS, JULIAN CHAMBERS, and SASKATOON FINANCIAL LIMITED,

Plaintiffs,

-against-

Index No.: 157781/2013

ELIYAHU WEINSTEIN, FREDERICK TODD, 148 INVESTMENTS, LLC, TODD, FERENTZ & EDELSTEIN, LLP, ALEX SCHLEIDER, DAVID SCHLEIDER, AARON MUSCHEL, MEND-AM LLC, SHEL-AM CORP., AARON GLUCKSMAN, DIVERSIFIED HOLDINGS LLC, FREDERICK TOOD, as trustee of the ERASTINO TRUST, 121 PARK REALTY LLC, CONGREGATION KAHAL MINCHAS CHINUCH, CHAIM BABAD, NEW YORK LOSS MITIGATION INC., ARTHUR GOLDEN, MICHAEL BURNBAUM, and HENOCH PEARL,

Defendants.

----------X

This constitutes the decision and order of the court.

DATED: August 22, 2014

ENTER,

O. PETER SHERWOOD
J.S.C.