

Goldberg v GA Capital Partners LLC

2016 NY Slip Op 32369(U)

November 30, 2016

Supreme Court, New York County

Docket Number: 652748/2015

Judge: Shlomo S. Hagler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
CRAIG J. GOLDBERG,

Plaintiff,

Index No.:
652748/2015

-against-

GA CAPITAL PARTNERS LLC, GA CAPITAL
MANAGEMENT, LLC, THOMAS H. ALLEN, and
PHILIP A. MELCONIAN,

Motion Seq. No.: 002

Defendants.

DECISION & ORDER

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

Defendants GA Capital Partners LLC ("GACP"), GA Capital Management, LLC ("GACM"), Thomas H. Allen ("Allen") and Philip A. Melconian ("Melconian") move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the Amended Complaint.

Background

The following factual allegations are set forth in the Amended Complaint, and for the purposes of these motions are accepted as true.

On September 8, 2008, GACP was formed by way of an LLC Company Agreement (the "GACP LLC Agreement"), entered into by plaintiff Craig J. Goldberg ("plaintiff" or "Goldberg") and Allen. Pursuant to the GACP LLC Agreement, GACP was formed to, "inter alia, passively invest in investments for the purpose of receiving investment income," and "passively receive performance fees" (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶

20). A 50% interest was vested with Goldberg and a 50% interest was vested with Allen (*Id.* at ¶ 21).

On June 24, 2009, GACP entered into a limited liability company agreement with non-parties GA Investor I LLC, GA Investors II LLC and various third-party investors (the "GA Investors II LLC Agreement") (*Id.* at ¶ 27).¹ Under the terms of the GA Investors II LLC Agreement, GACP became a member of GA Investors II LLC (*Id.* at ¶ 28). GACM is not a member, but is its sole investment manager (*Id.* at ¶ 29, 32; *see Id.* at Exhibit "E" [GA Investors II LLC Agreement]).² The GA Investors II LLC Agreement provides that GACP is to receive 20% of profits from various investments, representing performance fees. It is alleged that the GA Investors II LLC Agreement does not provide for any other party to be allocated such income (*Id.* at ¶ 31).

¹The Amended Complaint provides that under the GA Investors II LLC Agreement, GA Investors II LLC was formed to "inter alia acquire, hold, issue, and sell SCNs, defined in relevant part, [as] 'financial instruments issued in the form of subordinated indebtedness, preferred stock or other instruments with substantial equity-like features by special purpose entities that issue commercial paper and are sponsored by banks or other financial institutions'" (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶ 30).

²Defendant Melconian is alleged to be the Chief Financial Officer of GACM and the principal of "Treasure Vase Management" ("Treasure Vase"). Melconian allegedly exercises "complete domination" over GACP and GACM (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶¶ 14-15). Plaintiff offers no support for this purported theory of piercing the corporate veil (*see Tr. of Oral Argument at 42-45*).

On June 28, 2013, Goldberg, Allen, GACP and GACM entered into a purchase and sale agreement, whereby Goldberg sold his interest in GACP and GACM to Allen (the "Purchase and Sale Agreement") (*Id.* at ¶¶ 2, 3, 35). Pursuant to the Purchase and Sale Agreement, Goldberg retained the right to 50% of GACP's operational income, including performance fees that GACP received in connection with a transaction known as the Alpine Investment (*Id.* at ¶ 39). The Amended Complaint alleges that on or about June 24, 2015, \$457,979.96 of the Alpine Investment fee payout owed to GACP, fifty percent of which was due to plaintiff (\$228,989.98) (the "Disputed Amount"), was wrongfully diverted to GACM (*Id.* at ¶¶ 43, 81).

The Amended Complaint references sections 2.3 and 7.6 of the Purchase and Sale Agreement which provide in pertinent part

"Section 2.3. *GACP Purchase Price.* In consideration for the sale, transfer and assignment of the Sold GACP Percentage Interest³, the Purchaser [Allen] shall pay to the Seller [Goldberg] (the "GACP Purchase Price") (i) fifty percent (50% of any Operational Income (including performance fees) received, directly or indirectly (including through an Underlying Entity), by GACP to the extent related to, arising out of, or with respect to GA Investors II's investment (including any future investment, whether pursuant to an increase in the letter of credit or otherwise), in the Alpine Investment..." (*Id.* at ¶ 39).

³Section 2.2 of the Purchase and Sale Agreement defines "Sold GACP Percentage Interest" as the Operational Income attributable to the GACP Percentage Interest owned by the Seller [plaintiff]" (Notice of Motion, Exhibit "D" [Purchase and Sale Agreement, Article II, Section 2.2]).

"Section 7.6. *Entire Agreement*. This Agreement, together with the GA LLC Agreements, the Supplementary Agreement and any other agreements referenced herein, constitutes the entire agreement among the Parties with respect to the matters covered herein and therein and supersedes all previous written, oral or implied understandings among them with respect to such matters" (the "Merger Clause") (*Id.* at ¶ 38).

The Amended Complaint alleges that the foregoing sections of the Purchase and Sale Agreement constitute evidence that such Purchase and Sale Agreement incorporates the GA Investors II LLC Agreement by reference (*Id.* at ¶ 43), meaning that "(a) defendants are obligated to pay GACP 20% of the Alpine Investment profit representing performance fees, and (b) Goldberg is entitled to receive 50% of the operational income, including performance fees, received by GACP to the extent related to, arising out of, or with respect to the Alpine Investment" (*Id.* at ¶ 40).

On June 24, 2015, GA Investors II LLC issued a distribution statement relative to the Alpine Investment, indicating that a performance fee payout would be paid to GACP (*Id.* at ¶ 42). However, plaintiff alleges that another distribution was issued the next day which indicated that fees were not received by GACP. Rather, plaintiff alleges that defendants diverted the performance fees to GACM (*Id.* at ¶¶ 43-44). The Amended Complaint states that defendants admitted that the Alpine Investment performance fees were diverted to GACM in order to allow GACM to pay investment advisor fees under agreements

entered into in or about March 2009 ("Letter Agreements") which provided for such payments to investment advisors (*Id.* at ¶¶ 24, 45-47).

According to the Amended Complaint, defendants wrongfully diverted the fees to GACM even though (i) the Letter Agreements provide that the entity receiving a servicing distribution (i.e. GACP) must pay the investment advisor fee to a third party; and (ii) the GA Investors II LLC Agreement, incorporated by reference into the Purchase and Sale Agreement, provides that GACP, not GACM, receive the performance fees (*Id.* at ¶ 47).

Goldberg argues that by wrongfully diverting this money to GACM, defendants deprived him of his 50% share. Goldberg has brought this action against defendants seeking damages for breach of contract, conversion, unjust enrichment, fraud, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty.

Discussion

On a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88

[1994]). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997]). Where a defendant has submitted evidentiary material in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7)...the criterion is whether the [plaintiff] has a cause of action, not whether he has stated one...." (*Leon v Martinez*, 84 NY2d at 88 quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence establishes a defense as to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88).

First Cause of Action for Breach of Contract against GACP, GACM and Allen

The requisite elements of a breach of contract claim are existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and damages resulting from that breach (*Harris v Seward Park Hous. Corp.*, 79

AD3d 425, 426 [1st Dept 2010])). "Generally, a party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011] [internal quotation marks and citation omitted]).

The Amended Complaint alleges that defendants have breached their obligation under the Purchase and Sale Agreement to pay 50% of any Operational Income, including performance fees, received directly or indirectly by GACP with respect to GA Investors II LLC's investment in the Alpine investment (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶ 54). Defendants argue that by its terms, the Amended Complaint fails to plead that GACP received the Disputed Amount, but instead pleads that GACM, and not GACP, received such amount (*Id* at 43, 48). Accordingly, defendants contend that plaintiff has failed to plead a breach of contract action.⁴

In addition, defendants maintain that there can be no claim

⁴Defendants argue that this Court must look to the Purchase and Sale Agreement which becomes part of the pleading to determine whether a cause of action for breach of contract has been properly pled (rather than rely solely on contradictory claims in the Amended Complaint itself) (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983] ("interpretation of the contract is a legal matter for the court, and its provisions establish the rights of the parties and prevail over conclusory allegations in the complaint"); *see also Sterling Resources Intl., LLC v Leerink Swann, LLC*, 92 AD3d 538, 538 [1st Dept 2012])).

for breach of contract against GACM and GACP, because by its terms, the Purchase and Sale Agreement only required Allen, but not GACM or GACP, to pay the purchase price. With respect to Allen, the Purchase and Sale Agreement only obligated him to pay plaintiff amounts received by GACP. As the Amended Complaint itself does not allege that GACP received any such Disputed Amount, there can be no breach of contract claim against Allen.

The GA Investors II LLC Agreement provides that GA Investors II LLC, not the defendants herein, pay the Disputed Amount to GACM (Notice of Motion, Exhibit "E" [GA Investors II Agreement], ¶ 5.12 ("each Member's share of all Distributable Funds...shall be distributed by the Company [GA Investors II LLC]")). There is no direct allegation in the Amended Complaint that defendants herein had a contractual obligation to pay the Disputed Amount to GACP. Plaintiff pleads however, that the GA Investors II LLC Agreement was incorporated by reference into the Purchase and Sale Agreement, meaning that the Purchase and Sale Agreement was breached when GA Investors II LLC, not defendants, failed to pay GACP the Disputed Amount as alleged in the Amended Complaint (*Id.* at ¶¶ 31, 34, 40, 43).⁵

⁵By incorporating the GA Investors II LLC Agreement into the Purchase and Sale Agreement, plaintiff is alleging that as a result, he becomes a party to the GA Investors II LLC Agreement (the GA Investors II LLC Agreement was entered into between GA Investors II LLC, GACP, GA Investors I LLC and other undisclosed entities). There is no allegation that plaintiff himself is a party to that agreement. As such, plaintiff lacks standing to

This claim is belied by the documentary evidence. First, the Purchase and Sale Agreement contains no language specifically incorporating the terms of the GA Investors II LLC Agreement by reference. Plaintiff argues that the Merger Clause of the Purchase and Sale Agreement (Notice of Motion, Exhibit "D", ¶ 7.6) supports its contention that the GA Investors II LLC Agreement is incorporated into the Purchase and Sale Agreement. Section 7.6 of the Purchase and Sale Agreement provides in pertinent part that "any other agreements referenced herein, constitutes the entire agreement among the [p]arties with respect to the matters covered herein..." (*Id.*).

Plaintiff relies on this language in the merger clause stating that "any other agreements referenced herein constitutes the entire agreement among the Parties" (Notice of Motion, Exhibit "D" [Purchase and Sale Agreement], ¶ 7.6). "The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing" (*Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]). In other words, its purpose is to state that the subject written contract is the total expression of the parties thereby negating earlier agreements (*see Fit Tech, Inc. v Bally Total Fitness Holding*

sue for breach of contract of the GA Investors II Agreement itself.

Corporation, 374 F3d 1, 10 (1st Cir 2004).

Plaintiff argues that the GA Investors II LLC Agreement is referenced in the Purchase and Sale Agreement and consequently falls under the language in the merger clause as "other agreements referenced herein". However, the references to the GA Investors II LLC Agreement in the Purchase and Sale Agreement are unavailing. The first reference to GA Investors II LLC Agreement is set forth in the subsection of "Defined Terms" - "Alpine Investment" but is only for definitional purposes (Notice of Motion, Exhibit "D" [Purchase and Sale Agreement], Article 1, Section 1.1(b)(i)).⁶

The second reference in the Purchase and Sale Agreement to the GA Investors II LLC Agreement is set forth in Section 5.3 which provides, in pertinent part, that plaintiff will "continue to remain actively involved in the business and affairs of GACM and GA Investors II with respect to GACM's performance of services for GA Investors II under the Asset Management Agreement, entered into as of June 24, 2009, by and between GACM and GA Investors II (the "Asset Management Agreement") and GA

⁶Purchase and Sale Agreement, Article I ("Purchase and Sale of GACM Percentage Interest"), Section 1.1 ("Defined Terms") subsection (b)(i) provides (as redacted) "Alpine Investment shall mean the letter of credit issued by GA Investors II LLC, a Delaware limited liability company ("GA Investors II") for the benefit of Alpine pursuant to the LOC Reimbursement Agreements (as defined in the Limited Liability Company Agreement of GA Investors II (the "GA Investors II LLC Agreement"))" (Notice of Motion, Exhibit "D" at 2).

Investors II LLC Agreement" (Notice of Motion, Exhibit "D" [Purchase and Sale Agreement] at 7). There is no indication in this provision that the terms of the GA Investors II Agreement are incorporated by reference into the Purchase and Sale Agreement. Rather the section provides that plaintiff is to remain actively involved in GACM's provision of services to GA Investors II LLC.⁷

In order to further support his incorporation by reference argument, plaintiff states that references in the Purchase and Sale Agreement to the "GA LLC Agreements" include the GA Investors II LLC Agreement. However, the term "GA LLC Agreements" is defined in the Purchase and Sale Agreement to comprise the GACP LLC Agreement, dated September 4, 2008, and a GACM LLC Agreement but does not reference the GA Investors II LLC Agreement (Notice of Motion, Exhibit "D" [Purchase and Sale Agreement] at 1; see also ¶ 5.5). "If these commercially sophisticated and counseled parties had intended to make the [GA Investors II LLC Agreement] part of their agreement, they could easily have accomplished the purpose by drafting the contractual writings so that one or more of them expressly incorporated [this agreement] by reference" (*Cornhusker Farms v Hunts Point Coop.*

⁷Section 5.3 of the Purchase and Sale Agreement also provides that all material decisions made by GACM with regard to the Alpine Investment shall be made by Purchaser (Allen) and Seller (Goldberg). This provision does not refer or incorporate the terms of the GA Investors II LLC Agreement.

Mkt., 2 AD3d 201, 204 [1st Dept 2003]).

Moreover, from the face of the Purchase and Sale Agreement and the GA Investors II LLC Agreement, it is clear as a matter of law that the Agreements were intended to be two separate agreements. The Agreements were executed four years apart (the GA Investors II LLC Agreement on June 24, 2009, and the Purchase and Sale Agreement on June 28, 2013), had different purposes and involved different parties. Defendants state that of the many parties who were parties to the GA Investor II LLC Agreement, only two are a party to the Purchase and Sale Agreement which is not disputed by plaintiff (*see Schonfeld v Thompson*, 243 AD2d 343 [1st Dept 1997]; *see also County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944 [2d Dept 2012]).

In his opposition, plaintiff also alleges breaches of section 5.3 and 5.5 of the Purchase and Sale Agreement by their terms. Such allegations were asserted for the first time in the Goldberg Affidavit submitted in support of plaintiff's opposition, and in plaintiff's Memorandum of Law. At the outset, this Court notes that a breach of said sections or even reference thereto were not alleged in the Amended Complaint. Plaintiff is not permitted to further amend his Amended Complaint without leave of the court (CPLR 3025(b)).

Even if this Court were allow such new claims, Section 5.3 merely gives plaintiff certain rights under the Asset Management

Agreement, entered into between GACM and GA Investors II LLC, and Section 5.5 restricts conduct of Goldberg and the GA Entities (GACP and GACM) from taking action to circumvent Goldberg's obligation to pay or reduce the payment "if the purchaser (Allen) is also not affected to the same degree" (*Id.* at 7-8). Plaintiff has failed to assert how Allen was not affected by the alleged diversion of the subject Disputed Amount to GACM to the same degree as Goldberg.⁸ For the foregoing reasons, plaintiff's cause of action for breach of contract is dismissed.⁹

Non Breach of Contract Causes of Action

Second Cause of Action for Conversion against all defendants

The Amended Complaint alleges that plaintiff has an "immediately superior right to and legal ownership in a contractually defined portion of the performance fees that have been wrongfully and unjustifiably diverted to GACM by the defendants" and that "defendants dominion over and possession of these funds were done intentionally and without authority, and is

⁸Defendants also refer to an email from Goldberg to Allen, dated June 25, 2015, wherein plaintiff implies that it was the intent of the parties for GACP to pay the Disputed Amount to certain redacted parties (Notice of Motion, Exhibit "F"). Plaintiff states that this email does not "amoun[t] to a concession that [he is] not owed money" (Plaintiff's Memorandum of Law in Opposition, Exhibit "B" [Goldberg Affidavit] at ¶ 16).

⁹Having determined that plaintiff's Amended Complaint fails to state a cause of action under CPLR 3211(a) (7), it is not necessary to reach defendant's alternate grounds for dismissal, to wit, CPLR § 3211(a)(1) (action barred by documentary evidence) (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

in derogation of plaintiff's rights (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶¶ 56-58).

In order to plead the tort of conversion, the complaint must allege two elements: "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]). "The mere right to payment cannot be the basis for a cause of action alleging conversion" (*Zendler Constr. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439, 440 [2d Dept 2009] [internal quotations and citations omitted]).

Here, Goldberg fails to plead that he owns or has an immediate right of possession to the Disputed Amount. The Amended Complaint alleges that the funds were owed to GACP, and therefore plaintiff pleads that it is GACP, not plaintiff, who has a possessory right or interest in the Disputed Amount.

In addition, as the property alleged to be converted is money, the money must be "specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Republic of Haiti v Duvalier*, 211 Ad2d 379, 384 [1st Dept 1995]). Defendants argue that the Purchase and Sale Agreement, fails to create an identifiable fund which defendants were required to transfer to plaintiff. In any

event, a conversion claim which is duplicative of a breach of contract claim, must be dismissed (*Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433 [1st Dept 2013]). Here, plaintiff's cause of action for conversion seeks the same relief and is based on the same facts as his breach of contract cause of action (see Tr. of Oral Argument at 44).

Third Cause of Action for Unjust Enrichment against all defendants

Likewise, Goldberg's claim for unjust enrichment is duplicative of his claim for breach of contract. Where a claim for unjust enrichment seeks precisely the same damages as a claim for breach of contract, it is indistinguishable from the claim for breach of contract and must be dismissed (*Benham v eCommission Solutions, LLC*, 118 AD3d 605, 607 [1st Dept 2014]). To plead unjust enrichment in the alternative to a breach contract cause of action, plaintiff would be required to plead a legal duty, independent of the Purchase and Sale Agreement, to pay the Disputed Amount.

Here, there is no dispute as to the existence and validity of the Purchase and Sale Agreement; the parties simply disagree as to whether the agreement has been breached. Goldberg has failed to allege a legal duty independent of the Purchase and Sale Agreement, which would make his unjust enrichment claim distinguishable from his breach of contract claim (see Tr Oral

Argument at 42-43).¹⁰

Fourth Cause of Action for Fraud against Allen and Melconian

In order to successfully state a cause of action for fraud, a plaintiff must plead a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A fraud claim must also be pled with specificity, as required by CPLR 3016 (b). In his claim for fraud, Goldberg alleges that he justifiably relied on the distribution statement of June 24, 2015, "authored" by Melconian and "approved" by Allen, which indicated that a performance fee payout from the Alpine Investment would be paid to GACP (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶ 42).

The Amended Complaint alleges that Allen and Melconian "made these representations even though they knew the statements were false, and at the time, they were in the process of wrongfully

¹⁰Plaintiff also argues that at the very least an unjust enrichment claim can be brought against Melconian as he is not a party to the Purchase and Sale Agreement, and against GACM which, is alleged by defendants to have no contractual obligation with respect to plaintiff. However, the existence of an express contract covering the subject matter of plaintiff's complaint "bars any quasi contractual claims against...a third party non-signatory to the valid and enforceable contract" (*Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313, 313 [1st Dept 1995]; see also *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012] ["[T]here can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim"]).

diverting the [Disputed Amount] to GACM" (*Id.* at ¶ 67). The Amended Complaint further alleges that this misrepresentation was made to induce plaintiff's reliance, and that he justifiably relied on the misrepresentation in believing business was continuing as usual, causing him not to protect his own interests (*Id.* at ¶¶ 69-70). According to the Amended Complaint, on June 25, 2015, GACP issued another distribution statement advising that the Disputed Amount was paid separately and not to GACP (*Id.* at ¶ 44)¹¹. However, Goldberg fails to sufficiently plead how he relied on the allegedly false June 24, 2015 distribution statement to his detriment. His conclusory allegation that he justifiably relied on the misrepresentation in believing business was as usual, causing him not to protect his own interests is not sufficiently particular to satisfy CPLR 3016 (b).

Moreover, the Amended Complaint has failed to plead out-of-pocket damages (*Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 27 [1st Dept 2010]). The Amended Complaint merely alleges that as a result of Allen and Melconian's wrongful conduct, plaintiff incurred "substantial damage insofar as the defendant's diversion created a sizeable tax liability that

¹¹Although plaintiff maintains that he relied on the false June 24, 2015 Distribution Statement which was allegedly contradicted the next day by the issuance of the June 25, 2015 Distribution Statement, the June 24, 2015 Statement by its terms provides "payment amounts may be modified by other agreements" (Plaintiff's Memorandum of Law in Opposition, Exhibit "B" [Goldberg Affidavit], Attachment "C").

cannot be offset by expense deductions" (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶ 71). This allegation is belied by a memorandum, dated July 1, 2015, from Goldberg to Allen, attached in redacted form to plaintiff's affidavit, wherein Allen states that they each will "be allocated half (\$221,356.98) of the taxable income allocated to GACP and half (\$221,356.98) of the deduction" (Plaintiff's Memorandum of Law in Opposition, Exhibit "B" [Goldberg Affidavit] at ¶ 17; Attachment "D"). For the foregoing reasons, plaintiff's cause of action for fraud is dismissed (*see Tr. Oral Argument at 44*).

Fifth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing against GACM, Allen and Melconian

Plaintiff alleges that "by diverting Alpine Investment performance fees to GACM, defendants acted arbitrarily and unreasonably" and that these acts "had the effect of preventing Goldberg from receiving the fruits of the contract [the Purchase and Sale Agreement]" (Notice of Motion, Exhibit "A" [Amended Complaint] at ¶¶ 73-75).

Most significantly and dispositive of this claim, Goldberg's cause of action for breach of implied covenant of good faith and fair dealing arises out of the same facts as the breach of contract claim and seeks identical damages. As such, this cause of action must be dismissed (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]). Furthermore, as Melconian was not a party to the Purchase and

Sale Agreement, he cannot have breached an implied or express obligation under such contract (see *Tr. of Oral Argument* at 44; see generally *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [1st Dept 2003] ["While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or create independent contractual rights"]).

Sixth Cause of Action for Breach of Fiduciary Duty against GACM, Allen and Melconian

Plaintiff alleges that "defendants were in a position to act for the benefit of Goldberg", that "Goldberg was induced to and did repose confidence in defendants" and that "defendants breached their fiduciary duty to Goldberg when they, *inter alia*, diverted Alpine Investment performance fees to GACM" (Notice of Motion, Exhibit "A" [Amended Complaint], ¶¶ 78-80). First, plaintiff has not pled with the requisite particularity. CPLR 3016(b) requires breach of trust be pled so that "the circumstances constituting the wrong shall be stated in detail." Goldberg's allegation that "defendants were in a position to act for [his] benefit" is conclusory and insufficient to establish the existence of a fiduciary relationship between the parties (see *Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 62 [2d Dept 2013]). Plaintiff claims that there was an "informal" fiduciary relationship between him and defendants after he sold his interests in GACM and GACP as he was in an

"inferior position of trusting that defendants would act for his benefit by actually paying the Alpine Investment performance fees to the [sic] GACP" (Plaintiff's Memorandum of Law in Opposition at 24). Here, however, the plaintiff and defendants were sophisticated parties in an arms-length business relationship which does not, without more, give rise to a fiduciary relationship (see *Id.*; *RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 842 [1st Dept 2010]).

In any event, plaintiff's claim for breach of fiduciary duty is duplicative of the breach of contract claim and therefore cannot stand (see *Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008]; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]; Tr. of Oral Argument at 42). As such, plaintiff's cause of action for breach of a fiduciary duty fails to state a cause of action.

Conclusion

Accordingly, it is

ORDERED, that defendants' motion to dismiss the Amended Complaint is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: November 30, 2016

ENTER:



J.S.C.
SHLOMO HAGLER
J.S.C.