Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

x

MARK SHAKAROV, individually and derivatively on behalf of M.E.A. BUILDERS LLC,

Plaintiff(s)

-against-

RAFAEL KHAVASOV, AMNER KHAVASOV, BARUCH ASSOCIATES LLC and SAMUEL BORUKHOV,

Defendant(s)

and

EUGENE YUABOV,

Nominal Defendant(s)

x

Index Number 707444 2016

Motion Date October 28, 2016

Motion Cal. Number 103

Motion Seq. No. 3

FILED
MAR 15 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 5 read on this motion by defendant Rafael Khavasov and defendant Amner Khavasov for, *inter alia*, an order pursuant to CPLR §3211(a)(1),(5), and (7) dismissing the first, second, third, fourth, fifth, sixth, ninth, and tenth causes of action asserted against them.

	Papers Numbered
Notice of Motion- Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	
Memoranda of Law	3-5

Upon the foregoing papers it is ordered that this motion is determined as follows:

The branches of the motion which are for an Order pursuant to CPLR §3211(a)(7) dismissing the first and second causes of action are granted. The branches of the motion which are for an Order pursuant to CPLR §3211(a)(7) dismissing the third, fourth, fifth, sixth, ninth and tenth causes of action are denied. The remaining branches of the motion are denied.

I. The Allegations of the Parties:

Plaintiff Mark Shakarov alleges the following:

Plaintiff Mark Shakarov, an engineer and real estate developer, organized MEA Builders, LLC for the purpose of engaging in real estate transactions. The company originally had three members: plaintiff Shakarov, defendant Amner Khavasov (AK), and nominal defendant Eugene Yuabov (EY). Although the company had no operating agreement, minutes dated May 14, 2007 show that the plaintiff and defendant EY each owned a 35% interest in the company and defendant AK owned a 30% interest in the company.

On May 7, 2007, MEA purchased vacant land known as 140-64 Burden Crescent, Briarwood, New York for $900,000, with the intent of erecting a building. Defendant EY and defendant AK contributed $600,000, and $300,000 toward the purchase price respectively, and the plaintiff contributed $270,000 toward construction costs. MEA also obtained a construction loan in the amount of $2,111,000 from Ponce De Leon Federal Bank. By the fall of 2010, MEA had finished construction of the building, which had an appraised value of approximately $2,700,000, and the company had successfully rented all of the units.

In 2011, plaintiff Shakarov learned from a mortgage broker that the mortgage held by Ponce De Leon Federal Bank could be refinanced with a loan from Banco Popular North America at a lower interest rate. However, Banco Popular demanded that MEA contribute additional capital in the amount of approximately $170,000, and that the members of the company personally guarantee the repayment of the loan. After the plaintiff refused to agree to these two demands, defendant Rafael Khavasov (RK) offered to loan $170,000 to MEA. The parties agreed that (1) the plaintiff would temporarily transfer a 34% interest in the company to RK, (2) defendant EY would temporarily transfer a 5% interest in the company to RK, (3) that RK's loan would be repaid from profits that otherwise would go to the plaintiff, and (4) that EY and RK would be entitled to deduct a percentage of company losses until the repayment of his loan. The parties further orally agreed that after the repayment of the RK loan, his membership in MEA would terminate and the membership interests of the plaintiff, EY, and AK would revert to those stated in the May 14, 2007 minutes. As evidence of this agreement, the parties signed a document captioned "Minutes of a Regular Meeting of Managing Members," (the April, 2011 minutes) which stated that EY was appointed a managing member holding a 30% interest, the plaintiff was appointed a managing member holding a 1% interest, AK was appointed a managing member holding a 30% interest, and RK was appointed a managing member holding a 39% interest. Since the arrangement was only temporary, the parties did not execute any further documents

evidencing the arrangement, although defendant EY, defendant AK, and the plaintiff did execute a document which, inter alia, placed a value of $150,000 on the plaintiff's 1% interest and provided that the property could not be sold without him being paid in full for his interest.

Defendant RK signed the company's tax returns for 2011 through 2015 which had been prepared by his accountants, Baruch Associates, LLC and Samuel Borukhov. In April, 2015, the plaintiff demanded to see the company's tax returns, and he allegedly learned that defendant RK was reneging on his agreement to withdraw from the company once his loan had been repaid. In May, 2016, the plaintiff received a letter from RK's attorney notifying him that a special meeting had been called for June 8, 2016 for the purpose of directing the company's accountants to file amended tax returns from 2011 to date. The amended tax returns would state membership interests for the plaintiff, defendant RK, defendant EY, and defendant AK as 1%, 39%, 30%, and 30% respectively. Although, the plaintiff protested, the resolution passed.

Defendant RK alleges the following:

In 2011, the plaintiff, defendant AK, and defendant EY wanted to refinance the mortgage held by Ponce De Leon Federal Bank through Banco Popular. However, Banco Popular demanded an additional $170,000 in capital contributions from the members and their personal guarantees on the repayment of the loan. When defendant RK learned from defendant AK (his father) that the plaintiff did not agree to these terms, defendant RK offered to acquire the plaintiff's interest in the company. The plaintiff agreed to transfer a 34% interest in the company to defendant RK, and defendant EY also agreed to transfer a 5% interest in the company. The parties signed the April, 2011 minutes evidencing the transaction. Defendant RK purchased a permanent interest in the company, and he did not make a loan to the company. Defendant RK, not the plaintiff, gave his personal guarantee on the Banco Popular loan.

II. Discussion:

A. CPLR 3211(a)(7)

1.The First Cause of Action:

The first cause of action is for a preliminary injunction prohibiting the defendants from amending the corporate tax returns of MEA. The Court notes that it has already denied a motion by the plaintiff for such relief. The plaintiff seeks a preliminary injunction prohibiting the defendants from filing amended tax returns because, as explained in papers

filed on the previous motion for provisional relief, "[i[f MEA's accountants follow Khavasov's directive to amend MEA returns, the amended tax returns MEA files with the federal state and local government will contain inaccurate information concerning both the interests in MEA that each member owns and also overstate expenses that MEA (and its members) can properly and lawfully deduct." The plaintiff seeks to avoid the burden of filing amended company and individual tax returns now and subsequent amended company and individual tax returns if he prevails in this action. The first cause of action must be dismissed because a preliminary injunction is only a provisional remedy issued in connection with a cause of action.

2. The Second Cause of Action:

The second cause of action purports to be for "estoppel." The plaintiff alleges that RK signed MEA's tax returns stating that the plaintiff was entitled to deduct 33.5% of MEA's losses. While it is true that "[a] party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 422; *In re Elmezzi*, 124 AD3d 886), this is merely an estoppel (*see*, *Cusimano v. Strianese Family Ltd. P'ship*, 97 AD3d 744), not a separate cause of action.

3. The Third Cause of Action:

The third cause of action, which is for fraud, alleges that RK falsely represented that he would take the plaintiff's interest in MEA and the plaintiff's share of the profits only until a loan RK made to the company was repaid. "To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties ***" (*Krantz v. Chateau Stores of Canada Ltd.*, 256 AD2d 186, 187). In the case at bar, the defendants' contractual duties are sufficiently distinguishable from those duties relating to fraud. Moreover, allegations made by the plaintiff concerning fraud are not merely redundant of those made in the the breach of contract cause of action (*see*, *84 Lumber Co., L.P. v. Barringer*, 110 AD3d 1224). The claim for fraud does not "arise[] out of the facts and circumstances identical to the action for breach of contract (*see*, *Kleinerman v. 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449; *Spellman v. Columbia Manicure Mfg. Co.*, 111 AD2d 320).

4. The Fourth Cause of Action:

The fourth cause of action alleges that RK breached an agreement that he would relinquish his interest in MEA once the company repaid his loan. The fourth cause of action adequately states a cause of action for breach of contract. The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff,

the defendant's failure to perform, and resulting damage (*McCormick v. Favreau*, 82 AD3d 1537; *Clearmont Prop., LLC v. Eisner,* 58 AD3d 1052). The plaintiff has adequately stated a cause of action for breach of contract.

5. The Fifth Cause of Action

The fifth cause of action seeks a judgment declaring that RK has no interest in MEA. The fifth cause of action is viable because of the "present controversy or disputed jural relationship between the parties to this action that would be resolved by issuance of the requested declaration" (*Touro Coll. v. Novus Univ. Corp.,* -AD3d-, -NYS3d-,, 2017 WL 366373).

6.The Sixth Cause of Action:

To state a claim for unjust enrichment, the plaintiff must allege "that (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 ***" (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [brackets and internal quotation marks omitted]; *Georgia Malone & Co., Inc. v. Rieder,* 19 NY3d 511, 516). The complaint adequately alleges facts supporting the elements of a cause of action for unjust enrichment.

7.The Ninth Cause of Action

The ninth cause of action seeks a judgment declaring that the plaintiff is entitled to a 35% share of MEA's profits and losses. The ninth cause of action is sufficiently stated (*see, Touro Coll. v. Novus Univ. Corp*, *supra*).

8. The Tenth Cause of Action:

The tenth cause of action is for specific performance of the alleged agreement requiring defendant RK to relinquish his interest in MEA. The elements of a cause of action for specific performance of a contract are (1) that the plaintiff substantially performed his contractual obligations and was willing and able to perform his remaining obligations, (2) that the defendant is able to perform his contractual obligations, and (3) that the plaintiff does not have an adequate remedy at law (*see*, *EMF Gen. Contracting Corp. v. Bisbee*, 6 AD3d 45). The complaint adequately pleads facts supporting a cause of action for specific performance.

B. CPLR 3211(a)(5) (Statute of Frauds)

General Obligations Law §5-703(3) bars an oral agreement to convey an interest in a corporation or limited liability company whose primary asset is real property. (*See, Yenom Corp. v. 155 Wooster St., Inc.,* 33 AD3d 67*; Bergman v. Krausz,* 19 AD3d 186;*, Gora v. Drizin*, 300 AD2d 139.) The defendants argue that the statute of frauds bars enforcement of the alleged agreement between RK and the plaintiff whereby the former allegedly promised to re-transfer an interest in MEA back to the plaintiff. But the court does not view this transaction between RK and the plaintiff as a complete and independent contract in itself; the transaction is rather part of an entire agreement between the two men whereby the plaintiff first obligated himself to convey a 34% interest in MEA to RK, and the plaintiff allegedly did so. The plaintiff may be able to invoke the doctrine of part performance to remove the bar of the statute of frauds. (*See*, Gen. Oblig. Law § 5-703(4) ["Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance."].) " Codified in New York's General Obligations Law, section 5-703(4), the doctrine of part performance is based on principles of equity, and, specifically, recognition of the fact that it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement ***" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC*, 93 NY2d 229, 235; *Yenom Corp. v. 155 Wooster St., Inc., supra*). The dismissal of the complaint pursuant to the statute of frauds is precluded by triable issues of fact pertaining to the doctrine of part performance (*see*, *Luft v. Luft*, 52 AD3d 479).

The Court notes that the statute of frauds may not be raised against a cause of action for fraud (*see, e.g., Caramante v. Barton*, 114 AD2d 680).

C. CPLR §3211(a)(1)

CPLR §3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:1.a defense is founded on documentary evidence***" (*see, Galvan v. 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743). In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp, supra; Fontanetta v. Doe*, 73 AD3d 78; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.) In the case at bar, the defendants rely on two documents:(1) the April 1, 2011 minutes and (2) the members' certificate given to Banco Popular at the October, 2011 closing, both of which, signed by the members of MEA, including the plaintiff, state that plaintiff is a 1% member and RK is a 39% member. Corporate minutes are not documentary evidence within the meaning of CPLR §3211(a)(1).

(*Rabos v. R & R Bagels & Bakery, Inc.*, 100 AD3d 849). Moreover, even if the April, 2011 minutes, and members' certificate are considered "documentary evidence" within the meaning of CPLR §3211(a)(1), they do not conclusively refute the plaintiff's claim that he had an oral agreement with defendant RK whereby the latter was to relinquish his interest in MEA once a loan was repaid. There are issues of fact and credibility pertaining to this claim which cannot be resolved on the basis of documentary evidence alone.

Dated:

MAR 08 2017

J.S.C.