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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

0102049/2003
POLLER, LEAH
VS
WASHINGTON SQUARE WAR VETERANS

INDEX NO. 0102049/03

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

SEQ 2
COMPEL DISCLOSURE

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	Pursuant to the
Answering Affidavits — Exhibits	Court's Order dated
Replying Affidavits	August 1, 2003

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

ORDERED that the third-party defendants' motion to dismiss the third-party complaint pursuant to CPLR §§ 3016 [b] and 3211 [a] [1] is granted for the claim of interference with prospective business relations, but is denied in all other respects; and it is further

ORDERED that the third-party defendants' request for costs and disbursements is denied; and it is further;

ORDERED that the plaintiffs cross-motion for *summary* judgment and specific performance is denied in its entirety; and it is further

ORDERED that the plaintiffs request to dismiss the Vets and Barone's affirmative defense that the Vets are a Type B corporation is granted; and it is further

ORDERED that the plaintiffs request to impose sanctions on the Vets and Barone is denied; and it is further

ORDERED that the Vets' and Barone's request to conduct discovery in order to amend

Dated: 8/29/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

their pleadings alleging fraudulent inducement and breach of fiduciary duty and duty of loyalty and seeking indemnification is granted; and it is further

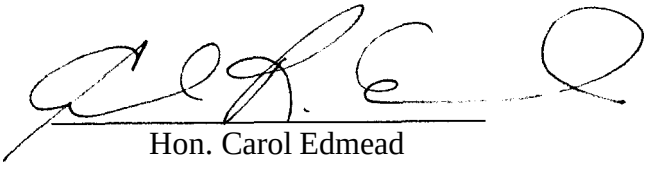
ORDERED that the Vets' and Barone's requests for the stay of the within proceedings, to further submit papers in opposition to the plaintiffs cross-motion and the third-party defendants' motion, and seeking a TRO suspending all proceedings are moot in light of the within Order; and it is further

ORDERED that all parties appear for a Preliminary Conference before Justice Carol Edmead, Part 35, 71 Thomas Street, Rm. 210, New York, NY 10013 on October 14, 2003 at 2:15pm, and it is further

ORDERED that counsel for third-party defendants serve a copy of this Order and Decision along with Notice of Entry upon all parties within 20 days from the date of entry.

The foregoing constitutes the Order and Decision of this Court.

DATED: August 29,2003



Hon. Carol Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X
LEAH POLLER,

Plaintiff,

Index No. 102049-03

-against-

Decision and Order

WASHINGTON SQUARE WAR VETERANS, INC. and JOHN BARONE,

Defendants.
----------X

WASHINGTON SQUARE WAR VETERANS, INC. and JOHN BARONE,

Third-party Plaintiffs,

-against-

GERALD L. LASKEY and GERALD L. LASKEY ASSOCIATES, INC.,

Third-party Defendants.
..... X

Hon. Carol Edmead, J.S.C.

MEMORANDUM DECISION'

Plaintiff Leah Poller ("plaintiff") commenced an action against defendants/third-party plaintiffs Washington Square War Veterans, Inc. ("Vets") and John Barone ("Barone") (collectively "the Vets and Barone") alleging breach of an option contract (the "Option Contract"), seeking specific performance and damages. The plaintiff entered into nine binder agreements (the "Binder Agreements") culminating with the Option Contract between the

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'The third-party defendants' motion and the plaintiff's cross-motion for summary judgment bear sequence number 001. The defendants/third-party plaintiffs' motion, seeking several forms of relief, bears sequence number 002. The motions are consolidated for disposition and same are decided as indicated herein.

plaintiff and the Vets, wherein the plaintiff was given the right to purchase the property owned by the Vets known as 179 Sullivan Street, New York (the "Property"), and the plaintiff subsequently exercised her right. The Binder Agreements and Option Contract were signed by the plaintiff and John Barone, Finance Officer of the Vets, on behalf of the Vets. The within motions arise out of the Vets and Barone's third-party complaint[2] against the third-party defendants Gerald L. Laskey individually ("Laskey") and Gerald L. Laskey Associates, Inc. ("Laskey Assoc.") (collectively "third-party defendants").

Third-party Defendants' Motion

The third-party defendants move to dismiss the Vets and Barone's third-party complaint for failure to detail the circumstances constituting the wrong pursuant to CPLR § 3016 [b], and for costs and disbursements. The third-party defendants contend that the gravamen of the third-party complaint is for fraudulent inducement, and that the allegations fail to identify any specific facts alleging any representation or omission made by Laskey. The third-party defendants also contend that the civil conspiracy claim should be dismissed either because it is not recognized in New York, or that there are no allegations linking Laskey to the plaintiff. The third-party defendants also argue that the claims for breach of fiduciary duty[3] and duty of loyalty lack

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[2] The third-party complaint alleges (1) that the third-party defendants fraudulently, deceitfully and/or otherwise wrongfully induced the Vets and Barone to sign the Option Contract, and Laskey wrongfully conspired with the plaintiff to induce the Vets and Barone to sign the Option Contract; *(2)* interference with prospective business relations; (3) that the third-party defendants acted with malice and in breach of their fiduciary duty and their duty of loyalty owed to the Vets; and (4) claims for indemnification. The third-party complaint also alleges that Gerald L. Laskey is the alter ego of Gerald L. Laskey Associates, Inc.

[3] The third-party defendants allegedly owed a fiduciary duty to the Vets based on the Binder Agreements and the Option Contract between the Vets and the plaintiff for the right to purchase the Property. The third-party defendants contend that documentary evidence establishes

specificity and to the extent that they incorporate references to fraudulent conduct alleged in the first cause of action, they are similarly insufficient. Additionally, the third-party defendants argue that inasmuch as the claims for third-party indemnification depend on the pleading of the first cause of action based on Laskey's alleged "wrongful behavior," such claims should be dismissed for the same reasons noted above. The third-party defendants also contend that the interference with prospective business relations claim is insufficiently pled, since there are no allegations that: (1) the Option Agreement would have been entered into "but for" Laskey's conduct, and (2) Laskey acted solely out of malice or employed wrongful means.

Individually, Laskey moves pursuant to CPLR §§ 3211 [a] [1] and 3016 [b] to dismiss the third-party complaint based on: (1) documentary evidence: to wit, the four brokerage agreements indicating that they were solely between Laskey Assoc. and the Vets, and (2) the Vets and Barone's failure to state the circumstances constituting the wrong in detail. Laskey contends that the mere allegation that Laskey Assoc. was operating as an alter ego of Laskey is insufficient to state a claim against Laskey individually.

In opposition, the Vets and Barone contend that the third-party complaint is not limited to allegations of fraud and fully complies with the CPLR.[4] Specifically, the Vets and Barone argue

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that the last binder expired on its terms on or about June 30,2000, and that the plaintiff seeks to enforce her rights under the Option Contract, not any binder.

"The Vets and Barone rely on the Court of Appeals which stated that CPLR § 3016 [b] requires only that the misconduct complained of be set forth in sufficient detail to clearly inform defendant with respect to incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud (*Lanzi* v ***Brooks*, 43** NY2d 778, 780 [1977]; ***Jered*** *Contracting Corp. v NYC Transit Auth., 22* NY2d 187 [1968]).

that the third-party complaint alleges, among other things, conspiracy, breach of fiduciary duty,[5] wrongful behavior, and failure to disclose. The Vets and Barone also argue that the third-party complaint identifies a fraudulent omission by the third-party defendants, i.e., their failure to inform the Vets to call their lawyer and not rely on Laskey's advice.

The Vets and Barone also contend that their claim is not that Laskey interfered with prospective business relations, but instead argue that in the absence of the third-party defendants' wrongful behavior the Property would not be "tied up in endless legal hassles."

Further, the Vets and Barone allege that the third-party complaint sufficiently pleads that Laskey, a licensed real estate broker, should be disciplined pursuant to RPL § 441-c, given that he drafted the Option Contract[6] without consulting the Vets' attorney or advising them to consult their attorney, and that this conduct can be considered the unlawful practice of law.

In reply, the third-party defendants argue that the Vets and Barone concede their failure to plead sufficiently a claim for fraud,[7] and that they fail to identify any representation by Laskey in the third-party complaint. The third-party defendants contend that their failure to tell the Vets to call their attorney is not sufficient to establish an omission. Also, the "mere bandying about" of the word "omission" without supporting allegations that a material fact was not disclosed does not satisfy the requirement of pleading fraud with particularity. Thus, the third-party defendants

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[5]The Vets and Barone contend that the third-party complaint alleges that the third-party defendants breached their fiduciary duty by failing to warn the Vets to call their attorney.

[6]The Vets and Barone allege that it "is clear and [they] will show" that the third-party defendants drafted the Option Contract and notes that the Binder Agreements are all on Laskey's letterhead.

[7]The third-party defendants contend that the Vets and Barone's use of the term "wrongful" is meaningless and does not constitute a recognizable cause of action.

contend that the showing that the third-party complaint fails to plead sufficiently a fraud cause of action is unopposed, and in the event that leave to replead is given, it should not extend to this claim.

The third-party defendants also contend that the Vets and Barone similarly abandon the allegations of civil conspiracy, interference with prospective business relations,[8] and the dismissal of the third-party complaint as to Laskey, and in the event that leave to replead is given, it should not extend to these claims.

According to the third-party defendants, the Vets and Barone's central allegations, that the third-party defendants engaged in the unlawful practice of law, gave "spurious advice," and failed to warn the Vets to call their lawyer, are not set forth in the third-party complaint. Additionally, there is no allegation that the third-party defendants prepared the Option Contract, or particulars as to the content of any legal advice Laskey allegedly gave with respect to the Option Contract. Thus, the third-party defendants argue that the third-party complaint should be dismissed in its entirety.

Plaintiff's Cross-Motion

The plaintiff cross-moves against the Vets and Barone for an order granting summary judgment and directing specific performance on the ground that the Vets and Barone are in breach of the Option Contract.[9] The plaintiff alleges that the parties entered into a valid and binding Option Contract to purchase the Property, which was signed by Barone who had actual

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[8] The Vets and Barone's claim for interference with prospective business relations is dismissed, given that the Vets and Barone concede in their opposition that this is not their claim (*see* the Vets and Barone's Aff. in Opp., p.6).

[9] *See* FN3, ***supra.***

authority to act[10] for his principal (the Vets). The plaintiff argues that even if Barone did not have authority to sign any agreements, she had reason to believe and was justified in believing that Barone was acting within the scope of his authority. The plaintiff further alleges that all acts committed by Barone within the scope of his apparent authority are binding on the principal even if the Vets did not authorize it. The plaintiff alleges that she timely exercised her option by letter and Notice of Election to purchase the Property dated July 20,2001. The plaintiff claims that the Vets and Barone wrongly refused to sell her the Property. Thus, she contends that the Vets and Barone are in breach of the fully enforceable Option Contract.

The plaintiff also cross-moves for the dismissal of the Vets and Barone's counterclaims against her for fraudulent inducement, conspiracy and interference with prospective business relations, and adopts all of the arguments presented in the primary motion as a basis for the dismissal. Similarly, she contends that New York does not recognize a cause of action for conspiracy, that the interference with prospective business relations claim is irrational as there is a binding Option Contract, and that acts of malice do not constitute a recognizable tort.

Further, the plaintiff requests that the Court impose sanctions on the Vets and Barone for their frivolous denials, among other things, that: (1) they ever owned the Property, **(2)** Barone had authority to act on the Vets behalf, or (3) they gave Laskey Assoc. the right to act as their broker.

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[10]In support of this contention, the plaintiff's cross-motion states that she attached a brokerage agreement signed by Barone wherein he is listed as the Financial Officer. However, plaintiff inadvertently attached a document entitled "Assignment of Option Contract" (the "Assignment"), signed by plaintiff and Laskey, wherein plaintiff assigned her rights and interests in the Option Contract to plaintiff and Laskey jointly. The Vets and Barone refer to this document as the "Smolung Gun."

The plaintiff also contends that the Vets and Barone's affirmative defense that the Vets are a Type B not-for-profit corporation requiring the Attorney General to be joined as a party and the Supreme Court's approval of the within sale pursuant to N-PCL § 510, is improper given that the Vets are a Type A corporation. In support, plaintiff submits the Vets' Articles of Incorporation that clearly define their stated purpose as "civic, patriotic, social and fraternal," the description for a Type A corporation. Additionally, there is no mention of "charitable activities," a characteristic of a Type B corporation. Thus, the plaintiff argues there is no requirement that the Attorney General be joined or that the Court's approval be obtained as a prerequisite to the sale at issue. The plaintiff also joins in the motion to dismiss the third-party complaint as frivolous.

In opposition, the Vets and Barone argue that the plaintiff has not established a ***prima facie*** case warranting summary judgment. The Vets and Barone also contend that the plaintiff's claim regarding "frivolous" denials is unfounded, and that the plaintiff fails to specify any paragraphs in the Answer which constitute frivolous conduct. The Vets and Barone argue that there is no basis for sanctions since their failure to expressly deny certain allegations does not equate to "frivolous conduct" for which sanctions may be imposed, but rather constitutes an admission. However, the Vets and Barone indicate that the plaintiff should be sanctioned for her alleged misconduct. Additionally, the Vets and Barone contend that Barone had no authority to act where he was "deceived and snookered," and there can be no authority when there is no meeting of the minds.

Further, the Vets contend that they are a Type B corporation given that the characteristics are of a charitable and "do good" nature. Thus, any transfer of property would require court

approval." In support, the Vets and Barone submit the affidavits of Barone and Peter Ingravallo,[12] which detail the various "do good" activities the Vets have accomplished over the years, such as scholarship grants, sponsorships, shelter and financial assistance safe haven to needy veterans and food and money donations. Alternatively, the Vets and Barone request that a trial be held on the issue of whether the Vets are a Type B corporation.

In response, the plaintiff argues that any "charitable"-likecharacteristics occurred 19 years after their formation, and thus have no effect on the status "at the time of formation," as the statute reads. Therefore, the Vets are a Type A corporation.

The Vets and Barone's Motion

The Vets and Barone move for an order: (1) granting them the right to conduct court-ordered discovery, including without limitation matters relating to the Assignment *(see* ***supra,*** at FN10) between the plaintiff and Laskey, in order to amend the within pleadings, or alternatively suspending and adjourning all proceedings in this matter for 30 days in order to give the Vets and Barone time to prepare proposed amended pleadings; (2) suspending all proceedings herein pending the completion of such court-ordered discovery, and granting a temporary restraining order ("TRO") until a decision is rendered on their motion; and (3) granting the right to submit further opposition to the third-party defendants' motion to dismiss and the plaintiff's cross-motion. In further opposition to the plaintiff's cross-motion for summary judgment and to the

"The Vets and Barone argue that the Vets were organized in 1951 under the NY Membership Corporation Law ("MCL"), which was repealed and that corporations thereafter qualified under the N-PCL. The Vets and Barone allege that had the Vets been formed under the N-PCL, they would have claimed benefits and protections of being a Type B corporation.

[12]According to the Vets and Barone, Peter Ingravallo is Vice-Commander and CEO of Vets and a co-defendant with Barone in this action.

third-party defendants' motion to dismiss the third-party complaint, the Vets and Barone contend that the Assignment establishes, among other things, that the plaintiff and Laskey "were in a league to set up, cheat and do [the Vets and Barone] in." In pertinent part, the Assignment dated April 18, 2001

> assigns, transfers and sets unto [the plaintiff] and [Laskey] all of [the plaintiff's] rights, title and interests in and to [the Option Contract], ... it is hereby acknowledged that each party has contributed equally to the consideration given to [the Vets] for such Option Contract.

The Assignment also shows Laskey's and the plaintiff's "double dealing," provides a "specific act of fraud and deceit," and establishes a clear basis for the application of the equitable doctrine of "unclean hands" rendering the Option Contract unenforceable.

In opposition, the third-party defendants argue that the Vets and Barone's request to re-plead is improper because the motion was not accompanied by a proposed amendment, or an Affidavit of Merit.[13] With respect to the third-party defendants' contention concerning the Court's consideration of the letter dated July 1, 2003 written by counsel for the Vets and Barone, as to the plaintiff's assertion that said motion was untimely submitted, and as to the Vets and Barone's response thereto, and related assertions, in light of the parties' agreement to a designated list of documents to be considered **by** the Court, the arguments of the parties on these issues are deemed moot.

The plaintiff opposes the motion by the Vets and Barone, arguing that her rights in the Option Contract are freely transferable and not prohibited, thus it would not void the Option

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[13]The third-party defendants note that an Affirmation by an attorney is not a sufficient substitution of an Affidavit of Merit by one with personal knowledge of the facts, and that the Barone Affidavit is devoid of any explanation of the alleged fraud.

Contract. Additionally, she contends that the Assignment did not change or alter any of the terms of the Option Contract since the obligations of the Vets were triggered prior to the Assignment. Furthermore, the plaintiff claims that she had no duty to disclose the Assignment to the Vets and Barone. In any event, the plaintiff argues that even if the Assignment were prohibited or unenforceable, the Vets and Barone are not excused from their obligation to sell the Property to the plaintiff pursuant to the validly exercised Option Contract.

Analysis

Third-party Defendants' Motion to Dismiss the Third-party Complaint

Contrary to the third-party defendants' contentions, the Vets and Barone may maintain their claims of (1) fraudulent and/or deceitful and/or otherwise wrongful inducement and civil conspiracy related thereto, (2) breach of fiduciary duty and duty of loyalty, and (3) third-party indemnification.

With respect to the claims of fraudulent inducement and breach of fiduciary duty, CPLR § 3016 [b] states that "[w]here a cause of action or defense is based upon misrepresentation, fraud . . . breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." In this regard, a claim based on fraud must clearly inform the plaintiff of the circumstances constituting the alleged fraud *(see Big Apple Car, Inc. v City of New York*, 204 AD2d 109 [1st Dept 19941; *see generally Ghandour v Shearson Lehman Bros. Inc.*, 213 AD2d 304 [lst Dept 19951). As stated in *Jered Contracting Corp. v New York City Transit Auth.* (22 NY2d 187 [19681). "It is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted. Thus, any insufficiency of detail in violation of CPLR § 3016 [b]

results only in an amendment, not a dismissal *(Marcucilli* v *Alicon Corp.,* 41 AD2d 932 [2d Dept 19731).

To state a claim for fraudulent inducement the Vets and Barone must allege that the third-party defendants fraudulently made a misrepresentation of fact, opinion, intention, or law for the purpose of inducing the Vets and Barone to act or refrain from action in reliance thereon in a business transaction, that their reliance was justifiable upon the misrepresentation, and injury *(see Channel Master Corp. v Aluminium Ltd. Sales,* 4 NY2d 403 [1958] citing REST TORT § 525; see *also Shea v Hambros PLC,* 244 AD2d 39 [1st Dept 1998] [finding that a material omission can satisfy the misrepresentation element for a fraudulent inducement claim]).

A broker is under a legal obligation to make a full, fair and prompt disclosure to his employer of all material facts within his knowledge which might affect his principal's rights and liabilities or influence his actions in relation to the subject matter; the failure to so disclose can result in the agent being held liable for any resultant loss sustained by his principal (*Murph & Fritz's Place, Inc. v Loretta,* 447 NYS2d 205 [NY City Ct. 19821; *see Associates* v *Helmsley-Spear, Znc.,* 146 AD2d 468 [1st Dept 1989] [agent is charged with duty of loyalty and may not have interests in transactions, which are adverse to those of his principal, and, when conflict of interest arises, nothing less than full and complete disclosure is required of agent]).

Here, the "Smolung Gun" Assignment contains and places sufficient facts from which an alleged fraud could be reasonably inferred, and place third-party defendants on notice of same *(see* ***Big*** *Apple Car, Inc. v City of New York,* 204 AD2d 109, *supra* [where misconduct complained of was set forth in sufficient detail by the pleadings, affidavits, and other evidence, and clearly informed the plaintiff of the circumstances constituting the alleged fraud, dismissal

pursuant to CPLR § 3016 [b] was unwarranted]). The "Smoking Gun" Assignment discloses the possibility that the third-party defendants were no longer acting in the interests of the Vets and Barone at the time the Option Contract was executed. Further, the submissions indicate that the third-party defendants failed to disclose to the Vets and Barone the possible conflict of interest that arose from Laskey's apparent interest in the Property at the time the Option Contract was executed. The submissions indicate that Laskey permitted the Vets and Barone to reasonably believe that he was acting in their best interests in order for the Vets and Barone to execute the Option Contract, from which Laskey was to later benefit ***(see Matter*** of ***Donati*** v ***Shaffer***, 187 AD2d 426 [2d Dept 19921, ***rev'd*** *on* ***other grounds,*** 83 NY2d 828 [1994] [broker's license suspended when broker failed to disclose that both parties to one transaction were represented by one attorney, and failed to disclose to his principles that he had an interest in the property]).

Additionally, the Vets and Barone argue that Laskey failed to advise them to contact their attorney, and that they would not have entered into the Option Contract had they consulted their attorney and not relied on Laskey's advice. The Court notes that although the Vets and Barone failed to articulate the advice relied upon, they have a chance to replead, thus, such failure is of no moment.

With respect to the Vets and Barone's breach of fiduciary duty claim, it is well settled that a real estate broker is a fiduciary with a duty of loyalty and has an obligation to act in the best interests of the principal *(Dubbs* v ***Stribling & Associates,*** 96 NY2d 337 [2001]). Where a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided

loyalties (*Id*, at 341). "The disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance" (*Id*, citing *Wendt v Fischer*, 243 NY 439,443 [19261).

Applying these principals to this case, the third-party defendants, as the real-estate broker, owed a duty of loyalty and an obligation to act in the best interest of its principal, the Vets. Thus, in light of the Assignment, the Vets and Barone have set forth sufficient allegations to support their claim that the third-party defendants' failure to disclose the Assignment is a breach of their fiduciary duty. Therefore, the motion to dismiss this claim at this juncture is denied.

Although New York does not recognize an independent tort of civil conspiracy (*Hoag* v *Chancellor, Inc.,* 246 AD2d 224 [1st Dept 19981 citing *Alexander & Alexander* of *New* ***York*** *v Fritzen,* 68 NY2d 968 [1986]; ***Bums*** *Jackson Miller Summit & Spitzer v Lindner,* 88 AD2d *50,* 72, affd. 59 NY2d 314 [1983]), allegations of conspiracy are permitted when the actionable wrong lies in the commission of an tortious act, such as fraud (*cf. Small* v *Lorillard Tobacco Co., Inc.*, 94 NY2d 43 [1999] [holding that when a fraud claim fails, the civil conspiracy claim also fails on the ground that it is not an independent tort]; *Linden* v *Lloyd's Planning Service, Inc.*, 299 AD2d 217 [1st Dept 19991 [finding that plaintiff has no viable underlying claim for fraud, thus her civil conspiracy claim is dismissed]). ***So*** long as there is a viable independent claim for fraud, the civil conspiracy claim cannot be dismissed at this juncture.

Thus, the motion to dismiss the claims of fraudulent and/or deceitful and/or otherwise wrongful inducement, and civil conspiracy related thereto, and breach of fiduciary duty and duty of loyalty is denied.

Turning to the indemnification claims, the sole basis asserted by third-party defendants to dismiss such claims is that such claims depend on Laskey's alleged "wrongful behavior," which,

according to third-party defendants, was not sufficiently pled. To the degree that the third-party complaint and submissions herein set forth sufficient allegations concerning Laskey's alleged "wrongful behavior," including fraudulent and conspiratorial conduct, third-party defendants' application is denied.[14]

Laskey's motion to dismiss the third-party complaint as against him is denied. In order to state a cause of action under the alter ego theory, it must be shown that: (1) Laskey exercised complete domination over Laskey Assoc. with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the Vets and Barone, resulting in their injury *(see First Capital Asset Management, Znc. v N.A. Partners, L.P.,* 300 AD2d 112 [1st Dept 20021). The four brokerage agreements Laskey submits as documentary evidence, on their face, indicate that Laskey was not party to the Binders or Option Contract in his individual capacity. However, such documents are countered by the "Smoking Gun" Assignment, which indicates Laskey's exclusive control over Laskey Assoc. to procure a personal interest in the Property. The statements in the "Smoking Gun" Assignment that Laskey contributed equally to the consideration of the Option Contract and was to share equally in the profits of the sale indicate that the Option Contract was procured in furtherance of the conspiracy for Laskey and Poller to obtain the Property from the Vets and Barone, to the detriment of the Vets and Barone. Thus, Laskey's motion to dismiss the complaint as asserted against him in his individual capacity is denied.

'"The third-party defendants have not sought, and this Court does not address the viability of the indemnification cause of action pursuant to CPLR § 3211 [a] [7].

Plaintiff's Cross-Motion

It is well settled that in order to prevail on a motion for summary judgment, the movant must make **a** prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact *(Winegrad* v *New York Univ. Med. Ctr.*, 64 NY2d 851,853 [1985]; *Zuckerman* v *City of New York*, 49 NY2d 557, 562 [1980]; *Sillman* v *Twentieth Century-Fox Film Corp.*, 3 NY2d 395,404 [1957]).

In order to prevail on a motion alleging breach of the Option Contract, the plaintiff must establish that there was a validly executed option contract and that it was breached (see *Boal v Smith*, 35 AD2d 730, affd. 29 NY2d 518 [1971]). The general rule in regard to option contracts is that the provisions of such contract must be complied with strictly, in the manner and within the time specified *(see Boal v Smith, supra).* The plaintiff has met her burden to sufficiently establish that there was a validly executed Option Contract with the Vets and Barone and that she exercised her option in strict compliance with such contract.

Once this showing has been met, the burden then shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial on the action *(Zuckerman* v *City of New York*, 49 NY2d at 562, *supra).* Where a party is induced to enter into a transaction that he was under no duty to enter into by means of another party's fraud or material misrepresentation, the transaction is voidable **as** against the latter and unenforceable *(see* REST CONTR § 476; *see Manufacturers and Traders Trust Co. v Cottrell*, 71 AD2d 538 [4th Dept 1979]; *see also Channel Master Corp. v Aluminium Ltd. Sales, supra).*

The Vets and Barone allege, among other things, that the third-party defendants failed to

disclose a material fact that the Vets should contact their attorney and not rely on Laskey's advice. The Vets and Barone argue that they would not have entered into the Option Contract had they consulted their attorney and not relied on Laskey's advice. Additionally, the Vets and Barone argue that the Assignment establishes that the plaintiff and the third-party defendants conspired to fraudulently induce Barone to sign the Option Contract. Arguably, the Assignment raises an issue as to whether a conspiracy between plaintiff and Laskey was formed prior to the exercise of the option. For summary judgment purposes, the plaintiff's cross-motion is denied on the ground that issues of fact exist as to whether the Option Contract is enforceable. Accordingly, the plaintiff's request that this Court order specific performance of the sale of the Property is also denied *(see Partlow* v *Mulligan*, 76 NYS2d **181** [NY Sup 19471).

Inasmuch as the plaintiff adopts all of the arguments in the primary motion as a basis for the dismissal of the counterclaims for fraudulent inducement and civil conspiracy, they are disposed of in the same manner. Thus, the motion to dismiss the above mentioned counterclaims is denied. As for the counterclaim alleging interference with prospective business relations, it is dismissed given that the Vets and Barone concede in their opposition that this is not their claim *(see* ***supra,*** at FN8).

With respect to the plaintiff's request to dismiss the Vets and Barone's affirmative defense on the ground that the Vets are a Type A corporation, the plaintiff's cross-motion seeking to dismiss such defense is granted. Type **A** not-for-profit corporations are those

> formed for any lawful non-business purpose or purposes including, but not limited to, any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional commercial, industrial, trade or service association (N-PCL § 201 [b]).

Type B corporations are those "formed for any one or more purpose of the following non-business purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals" (N-PCL § 201 [b]). The status of the corporation is determined at the time of formation (N-PCL § 510 [a] [3]).

According to the Vets' Certificate of Incorporation, when formed in 1951 their purpose, among other things, was to "preserve the memories and incidents of our associations in the Great Wars . . . promote social intercourse and fellowship among its members and to maintain a clubhouse or clubrooms for their use and entertainment . . . [t]o buy, sell, lease, rent or mortgage real and personal property of whatsoever kind, nature or description." Thus, the only stated purposes at their formation were "fraternal" and not "charitable." Given that the Vets' subsequent participation in charitable and "do good" events years after their formation are immaterial, this Court finds that the Vets are a Type A corporation.

The plaintiff's request that the Court impose sanctions on the Vets and Barone for frivolous denials is unfounded. Conduct is frivolous when it: (1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false (22 NYCRR § 130-1.1). An allegation that is not addressed by any denial is deemed admitted (CPLR § **3018** [a]).

The Vets and Barone concede in their opposition that they did not address the plaintiff's allegation that they owned the Property, and therefore admitted to same. Turning to the Vets and Barone's denial that Barone had authority to act on the Vets behalf, imposing sanctions would be

inappropriate given that the denial is based on their claims for fraud and breach of fiduciary duty. Inasmuch as the Vets and Barone deny other allegations in the plaintiff's complaint, those denials are supported by reasonable arguments, and thus sanctions are unwarranted *(see* 22 NYCRR § 130-1.1).

The Vets and Barone's Motion

The Vets and Barone's request to conduct discovery in order to amend the pleadings is granted in light of the Assignment. While leave to amend should be freely given, the discretion is left to the court (CPLR § 3025 [b]). Where the proposed amended pleading is not submitted with a motion to amend the pleadings, there must at least be a specification of what new theories or facts supporting recovery will be included in an amended pleading ***(Walker*** v ***Pepsico, Znc.,*** 248 AD2d 1015 [4th Dept 1998]), so that a court might have a chance to exercise its discretion by weighing the several factors which are relevant to such a motion ***(Brunch*** v ***Abraham &*** *Strauss* ***Dept.*** *Store*, 220 AD2d 474,475 [2d Dept 19951). The Vets and Barone's motion specifies the proposed facts arising from the "just revealed" Assignment. Thus the failure to attach a proposed amended pleading is not fatal.

In light of the fact that the Court denied summary relief and granted the Vets and Barone the right to engage in discovery, the request for the stay of the within proceedings is moot, and the Vets and Barone's request to further submit papers in opposition to the plaintiff's cross-motion and the third-party defendants' motion is also moot. The Vets and Barone's request seeking a TRO suspending all proceedings pending this decision is also moot.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the third-party defendants' motion to dismiss the third-party complaint pursuant to CPLR §§ 3016 [b] and 3211 [a] [1] is granted for the claim of interference with prospective business relations, but is denied in all other respects; and it is further

ORDERED that the third-party defendants' request for costs and disbursements is denied; and it is further;

ORDERED that the plaintiff's cross-motion for summary judgment and specific performance is denied in its entirety; and it is further

ORDERED that the plaintiff's request to dismiss the Vets and Barone's affirmative defense that the Vets are a Type B corporation is granted; and it is further

ORDERED that the plaintiff's request to impose sanctions on the Vets and Barone is denied; and it is further

ORDERED that the Vets and Barone's request to impose sanctions on the plaintiff is denied; and it is further

ORDERED that the Vets and Barone's request to conduct discovery in order to amend their pleadings alleging fraudulent inducement and breach of fiduciary duty and duty of loyalty and seeking indemnification is granted; and it is further

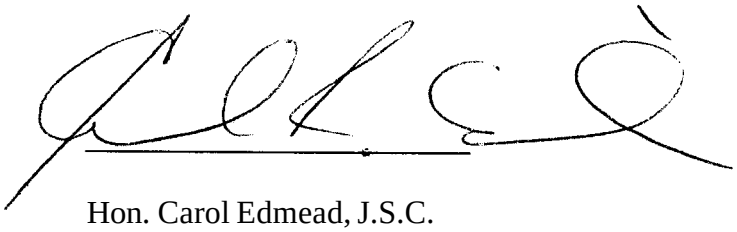
ORDERED that the Vets and Barone's requests for the stay of the within proceedings, to further submit papers in opposition to the plaintiff's cross-motion and the third-party defendants' motion, and seeking a TRO suspending all proceedings are moot in light of the within Order; and it is further

ORDERED that all parties appear for a Preliminary Conference before Justice Carol Edmead, Part 35, 71 Thomas Street, Rm. 210, New York, NY 10013 on October 14, 2003 at 2:15pm, and it is further

ORDERED that counsel for the third-party defendants serve a copy of this Order and Decision along with Notice of Entry upon all parties within 20 days from the date of entry.

The foregoing constitutes the Decision and Order of this Court.

DATED: August 28, 2003



Hon. Carol Edmead, J.S.C.