[* 1]

SHORT FORM ORDER

INDEX No. 5297-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/13/11
ADJ. DATES 7/29/11
Mot. Seq. # 002 - Mot D
PC Scheduled: 10/28/11
CDISP Y____ N X

CHRISTOPHER ESPOSITO, Plaintiff, -against- JOHN C. TSUNIS, JOHN A. DANZI, HOME RUN HOTELS, LLC and LONG ISLAND HOTELS, LLC, Defendants.	PLUMMER & PLUMMER, LLP Attys. For Plaintiff 77 Arkay Dr. Hauppauge, NY 11788 MELTZER, LIPPE, GOLDSTEIN ET AL Attys. For Defs. Home Run & LI Hotels 190 Willis Ave. Mineola, NY 11501 RIVKIN, RADLER, LLP Attys. For Def. Danzi 926 RXR Plaza Uniondale, NY 11556 PINKS, ARBEIT & NEMETH, ESQS. Attys. For Def. Tsunis 140 Fell Ct. Hauppauge, NY 11788

Upon the following papers numbered 1 to 8 read on this motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 4-5; 6; Replying Affidavits and supporting papers 7-8; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by defendant, John A. Danzi, for an order dismissing the plaintiff's complaint to the extent that claims against this moving defendant are asserted is considered under CPLR 3211(a)(1) and (7) and is granted only as to the THIRD Cause of Action which is dismissed, and its is further

ORDERED that a preliminary conference shall be held with respect to all remaining causes of action on **October 28, 2011**, at 9:30 a.m., in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

The plaintiff, as purchaser of a portion of the individual defendants' equity interests in defendant, Home Run Hotels, LLC, and as a member thereof, commenced this action to recover money damages from defendants, Tsunis, Danzi and Home Run Hotels, LLC (hereinafter "Home Run") under theories of contract and tort law. In addition, the plaintiff seeks the equitable remedy of an accounting from the individual defendants and defendant, Long Island Hotels, LLC (hereinafter "Long Island") as to profits they allegedly derived from competing hospitality group developments and other hospitality investments in which they had ownership interests since February 19, 2003. By the instant motion (#002), defendant, John A. Danzi, seeks an order dismissing the four causes of action asserted against him by the plaintiff.

A review of the record adduced on this motion reveals the existence of the following facts. In 2002, defendants, Tsunis and Danzi formed Home Run Hotels, LLC, so as to engage in the commercial development of property in Central Islip as a hotel with affiliated services and to otherwise manage, operate, lease, sell or mortgage the property for profit. On February 19, 2003, the plaintiff executed a Subscription Agreement by which he purchased a of 4% ownership interest in Home Run. The February 19, 2003 Subscription Agreement reads as follows:

> Chris Esposito, hereby subscribes to purchase four percent(4%) membership interest in Home Run Hotels, LLC, a duly formed New York State limited liability company with offices at c/o Long Island Hotels LLC at 801 Motor Parkway, Hauppauge, New York 11788.
>
> Said interest shall represent a 4% equity in the Home Run Hotels LLC project at Courthouse Derive and Carlton Avenue, Central Islip, new York and shall enjoy a guaranteed return of 6% and return of principal for five (5) years guaranteed by John C Tsunis and John A. Danzi.
>
> Subscription for said interest shall be made upon execution of this subscription agreement to held in escrow by Tsunis, Gasparis &I Dragotta, LLC, as attorneys, as escrow agent to be subsequently paid over to Home Run Hotels, LLC at which time certificates representing said equity interest shall be duly issued.

A written guaranty of the type contemplated by the Subscription Agreement had previously been executed by defendants, Tsunis and Danzi, on February 14, 2003. The written guaranty recites that the plaintiff Esposito was the purchaser of the equity interests of Tsunis and Danzi in two hotel development projects, including the one for which Home Run Hotels, LLC had been formed and that the guarantors were required by the contracts with Esposito to execute such guaranty and that they did so in order to induce Esposito to purchase equity interests in the LLCs. Therein, Tsunis and Danzi guaranteed, absolutely, irrevocably and unconditionally, "that Esposito shall receive a SIX (6%) percent annualized return on the . . . and [the] FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS invested in Home Run Hotels LLC for the first FIVE (5) YEARS following Esposito's investment". Tsunis and Danzi further guaranteed the return Esposito's principal investment for the first five years in the event Esposito wished to terminate his equity interest Home Run within the 54th and 60th

months following his purchase of such interest. The terms of the guaranty prohibited modifications other than in writing and required that all notices, requests and demands be in writing. The five year term of the return of principal provision is alleged to have been extended by an Amended guaranty by Danzi and Tsunis.

The plaintiff alleges that under the 6% annualized return on principal investment provisions of the February 19, 2003 Subscription Agreement , he was entitled to $150,000.00 from Home Run. The plaintiff further alleges that Home Run paid the plaintiff only the sum of $71,054.79, leaving a balance due in the amount of $78,945.21. The plaintiff claims that Danzi breached the terms of his written guaranty since Home Run has not paid the full 6% annualized return on the plaintiff's principal investment of $500,000.00 due during the first five years. The plaintiff further claims that defendant Danzi breached the terms of an Amended Guaranty which purportedly gave the plaintiff a perpetual right to the return of his principal investment in Home Run and that Danzi breached his fiduciary obligations to the plaintiff. Finally, the plaintiff alleges that defendant Danzi owes the plaintiff an accounting of certain of the profits he derived from his alter ego, defendant, Long Island Hotels, LLC and other investments. In this regard, the plaintiff alleges that both of the LLC defendants are owned and controlled by defendants, Tsunis and Danzo and that such defendants operate Long Island as alter egos of themselves.

The claims asserted against defendant Danzi, for which dismissal is sought on this motion pursuant to CPLR 3211(a)(1) and/or (a)(7), are set forth as the SECOND, THIRD, FIFTH and SIXTH Causes of Action in the plaintiff's complaint. For the reasons stated, the motion is granted to the extent that the THIRD Cause of Action, sounding in breach of an Amended Guaranty, is dismissed.

It is well established that a motion pursuant to CPLR 3211(a)(1) for dismissal of a claim based on documentary evidence is appropriately granted only where the documentary evidence submitted utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see* ***Goshen v Mutual Life Ins. Co. of New York***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Mason v First Cent. Nat. Life Ins. Co. of New York***, 86 AD3d 854, 927 NY2d 694 [2d Dept 2011]). To be considered documentary for purposes of CPLR 3211(a)(1), the submissions must be unambiguous and of undisputed authenticity and consist of writings and documents other than letters, affidavits and deposition testimony (*see* ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v Doe***, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]).

In his THIRD Cause of Action, the plaintiff charges Danzi (and Tsunis) with breaching an Amended Guaranty. Said Amended Guaranty allegedly extended the five year term for the return of principal that was set forth in the written guaranty of February 14, 2003 executed by Danzi. However, defendant Danzi established by production of the written guaranty that the terms thereof precluded changes, modification and discharge thereof except by a writing signed by the party against whom enforcement of the change, modification or discharge is sought (*see* Guaranty dated February 14, 2003 ¶ 3).

It is well-settled that a continuing guarantee with a no-oral-modification clause is not amenable to oral modification or termination as the statute of frauds bars oral modifications to a contract which expressly provides that modifications must be in writing (*see* General Obligations Law § 15-301; ***North***

Bright Capital, LLC v 705 Flatbush Realty, LLC, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***B. Reitman Blacktop, Inc. v Missirlian,*** 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]; ***Bank of New York v Kranis***, 189 AD2d 741, 592 NYS2d 67 [2d Dept 1993]). Since the plaintiff neither alleges nor relies upon the existence of a writing signed by defendant Danzi that changed the terms of the written guaranty dated February 14, 2003, so as to extend the term thereof beyond the five year period stated therein, the plaintiff's THIRD Cause of Action wherein Danzi is charged with breaching an Amended Guaranty that allegedly extended the five year term for the return of principal set forth in the written February 14, 2003, is dismissed pursuant to CPLR 3211(a)(1).

The remaining portions of this motion are, however, denied. It is well settled law that when a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). In considering a motion to dismiss for legal insufficiency under CPLR 3211(a)(7), the court must afford the complaint a liberal construction after accepting the facts alleged therein to be true and determine only whether those facts fit within any cognizable legal theory (*see* ***Peery v United Capital Corp***., 84 AD3d 1201, 924 NYS2d 470 [2d Dept 2011]; ***Reiver v Burkhart, Wexler & Hirschberg, LLP***, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]; ***Goldin v Engineers Country Club***, 54 AD3d 658, 864 NYS2d 43 [2d Dept 2008]). If the court can determine that the plaintiff may be entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see* ***Symbol Tech. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc***., 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]).

It is equally well settled that "[W]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (***Rietschel v Maimonides Med. Ctr***., 83 AD3d at 810, 921 NYS2d 290 [2d Dept 2011]). The court is thus permitted, but not compelled, to consider evidentiary material submitted by a moving defendant, and where it does so, the criterion becomes whether the plaintiff has a cause of action, not whether he has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Bodden v Kean***, 86 AD3d 524, 927 NYS2d 137 [2d Dept 2011]). However, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action (*see* ***Sokol v Leader***, 74 AD3d 1180, *supra,* quoting, ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]). Absent a showing that a material fact as claimed by the plaintiff is not a fact at all and the absence of any dispute with regard to it, a motion pursuant to CPLR 3211(a)(7) to dismiss for legal insufficiency must be denied (*see* ***Rietschel v Maimonides Med. Ctr***., 83 AD3d at 810, *supra*; ***Sokol v Leader***, 74 AD3d 1180, *supra*). Consideration as to whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; ***Khoury v Khoury***, 78 AD3d 903, 912 NYS2d 235 [2d Dept 2010]).

Here, defendant Danzi does not contend that the FIFTH Cause of Action sounding in breach of fiduciary duties and the SIXTH Causes of Action for an accounting, both of which are cognizable only where a confidential or fiduciary relationship exists between the parties, fail to state claims for such relief (*see* ***AHA Sales, Inc. v Creative Bath Prod., Inc.***, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]). Instead, it is contended that the plaintiff has no such cognizable claims because Danzi did not breach any fiduciary duty owed to the plaintiff. In support of this contention, Danzi alleges that the Operating Agreement of Home Run as Amended, to which he and the plaintiff are signatories as members, absolves Danzi, who is also a manager of Home Run, of any fiduciary duties that would otherwise prohibit Danzi's involvement in the other real estate developments which the plaintiff alleges competed with and interdicted Home Run's ability to sustain profits.

The court finds however, that Danzi's characterization of the relied upon terms of Home Run's Operating Agreement as amended, which purportedly contemplate and permit Danzi's engagement in the activities complained of by the plaintiff, fail to establish that, as a matter of law, the plaintiff has no claims for damages or an accounting due to Danzi's breach of fiduciary duties owing to the plaintiff. Since neither the Operating Agreement nor its amendment expressly absolve defendant Danzi of or permit him to engage in the specific activities complained of by the plaintiff, it is not clear that, as a matter of law, material facts as claimed by the plaintiff "are not facts at all" and that no significant dispute exists with regard thereto or that Danzi has a legal defense based upon the submitted documentary evidence (*see* ***Bodden v Kean***, 86 AD3d 524, *supra*; ***Mason v First Cent. Natl. Life Ins. Co. of New York***, 86 AD3d 854, *supra*). Danzi's demands for dismissal of the FIFTH and SIXTH Causes of Action set forth in the complaint purusant to either CPLR 3211(a)(1) or (a)(7) are thus denied.

Likewise denied are the remaining portions of Danzi' s motion wherein he seeks dismissal of the SECOND Cause of Action set forth in the plaintiff's complaint. Therein, Danzi is charged with breach of the terms of the written guaranty dated February 14, 2003 wherein Danzi guaranteed, absolutely, irrevocably and unconditionally "that Esposito shall receive a SIX (6%) percent annualized return on the . . . and [the] FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS invested in Home Run Hotels LLC for the first FIVE (5) YEARS following Esposito's investment". Danzi's demands for dismissal of the plaintiff's claim of breach of the written guaranty are premised upon allegations that defendant, Home Run, did not default in any obligation to pay the 6% annualized return on the plaintiff's principal investment of $500,000.00 for the first five years as set forth in the Subscription Agreement offer to purchase that was accepted by the defendants. However, the court finds that Home Run's Operating Agreement, as amended, does not conclusively demonstrate that the plaintiff has no cause of action against Home Run for recovery of the remaining amounts due under the 6% annualized return on the plaintiff's principal investment of $500,000.00 or that the terms of such Operating Agreement provide Danzi with a legal defense to the plaintiff's claims for recovery of such outstanding monies. The issue regarding whether Home Run is obligated to pay these outstanding amounts thus remains in dispute and is a factor which implicates a default on the part of Home Run. Since a default on the part of Home Run has not been established as being "not a fact at all", Danzi *may* be liable under the terms of his written guaranty of Home Run's obligation to provide the plaintiff with the 6% return on the plaintiff's principal investment of $500,000.00 for all of the first five years as set forth in the Subscription Agreement. Danzi's demand for dismissal of the SECOND Cause of Action set forth in the complaint pursuant to either CPLR 3211(a)(1) or (a)(7) is thus denied.

In view of the foregoing, the instant motion (#002) by defendant, John A. Danzi, to dismiss the claims asserted by the plaintiff is granted only to the extent that plaintiff's THIRD Cause of Action is dismissed pursuant to CPLR 3211(a)(1). Counsel for the parties are directed to appear for the preliminary conference scheduled above with respect to the other causes of action asserted by the plaintiff against defendant Danzi.

DATED: 9/6/11

THOMAS F. WHELAN, J.S.C.