| **Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.** |
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| 2013 NY Slip Op 34023(U) |
| July 25, 2013 |
| Supreme Court, Orange County |
| Docket Number: 2300/2013 |
| Judge: Paul I. Marx |
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ORANGE
HON. PAUL I. MARX, J.S.C.

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WALLKILL MEDICAL DEVELOPMENT, LLC,

Plaintiff,

-against-

CATSKILL ORANGE ORTHOPAEDICS, P.C., BONEHEAD, INC. SOUTH, BRADLEY WIENER, M.D., RONALD ISRAELSKI, M.D., CHARLES EPISALLA, M.D., CHARLES PERALO, M.D. and ERIC MARTIN, M.D.,

Defendants.

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DECISION AND ORDER

Index No.: 2300/2013

Motion Date: May 15, 2013

Motion Sequence ## 1-3

The following papers numbered 1 to 16 were read on the motion of (1) Plaintiff Wallkill Medical Development, LLC ("Wallkill") for a temporary restraining order and preliminary injunction, brought by Order to Show Cause; and (2) the cross-motion of Defendant Charles Peralo, M.D. to dismiss; and (3) the cross-motion of Defendants Catskill Orange Orthopaedics, P.C. ("Catskill"); Bonehead, Inc. South ("Bonehead"); Bradley Wiener, M.D., Ronald Israelski, M.D., Charles Episalla, M.D. and Eric Martin, M.D. ("Individual Defendants") to dismiss:

Order to Show Cause-Affidavit of Ted A. Petrillo-Exhibits A-J . . . . . 1-2
Memorandum of Law in Support . . . . . 3
Affirmation of Michael Fahey, Esq. in Further Support-Exhibits A-C . . . . . 4

Notice of Cross-Motion to Dismiss of Peralo-Affirmation of Jacob R. Billig, Esq. and Affidavit of Charles Peralo, M.D. . . . . 5-7

Notice of Cross-Motion to Dismiss of Defendants Catskill, et al.-Affidavit of Bradley D.Wiener, M.D.-Exhibits A-F . . . . . 8-9
Memorandum of Law in Opposition and Support of Cross-Motion to Dismiss and Appendix . . . . . 10
Reply Affidavit of Ted A. Petrillo-Exhibits A-C . . . . . 11
Reply Memorandum of Law . . . . . 12
Sur-Reply Affirmation of Joseph M. Buderwitz, Esq. and attachments . . . . . 13
June 17, 2013 Letter from Joseph M. Buderwitz, Esq. and attached decision . . . . . 1

Upon the foregoing papers, it is ORDERED that (1) Wallkill's motion for a preliminary injunction is granted; (2) Defendant Charles Peralo, M.D.'s cross-motion to dismiss is granted; and (3) Defendants Catskill, Bonehead and the Individual Defendants' cross-motion to dismiss is granted in part and denied in part, for the reasons which follow.

Plaintiff Wallkill is a limited liability company formed for the purpose of constructing and operating a medical office building in Middletown, New York. Defendant Bonehead is a corporation which holds a 15% ownership interest in Wallkill. Defendant Catskill is a professional corporation that practices orthopedic medicine. Defendants Bradley Weiner, M.D., Ronald Israelski, M.D., Charles Episalla, M.D., Eric Martin, M.D. (collectively "Individual Defendants") and Defendant Charles Peralo, M.D.,[1] are principals of both Bonehead and Catskill. Catskill entered into a ten-year lease with Wallkill on or about November 2005 and took occupancy of the space on or about November 1, 2006.

On March 15, 2013, Wallkill moved this Court by Order to Show Cause for a temporary restraining order and preliminary injunction, seeking to stay and enjoin Defendants from "transferring, pledging, diverting, hypothecating or disposing of any of Catskill's assets, including accounts receivable and funds in its bank accounts, . . . except in the ordinary course of business." Order to Show Cause at p. 2. The Court signed the Order to Show Cause, which includes a temporary restraining order granting the same relief pending disposition of the motion.

Wallkill's request for interim injunctive relief is predicated upon Catskill's abandonment of its commercial lease with Wallkill, dissolution of its practice, and anticipated disposition of its assets allegedly in an effort to frustrate Wallkill's ability to enforce a judgment against it in the event that it prevails in this action. Wallkill alleges that Catskill has not paid rent for the month of February 2013 and through to the present. Wallkill contends that it has a special relationship with Catskill that goes beyond the usual landlord-tenant relationship, because Catskill's principals are also principals

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[1] Charles Peralo states in his affidavit in support of his cross-motion, that he was terminated from employment with Catskill in 2011, but he remains a shareholder of Catskill and Bonehead. *See* Cross-Motion of Charles Peralo, Affidavit of Charles Peralo, M.D. at ¶ 6.

of Bonehead, which is a member of Wallkill. Wallkill asserts that the interrelationship between the parties gives rise to a fiduciary obligation on the part of all Defendants to maintain the lease for their collective benefit.

In its complaint, Wallkill alleged causes of action against Catskill for breach of its lease agreement and aiding and abetting breach of fiduciary duty. Wallkill alleged causes of action against the remaining defendants for breach of fiduciary duty. Wallkill further alleged that Catskill's principals are also venture partners in Wallkill, and thereby owe a fiduciary duty to Wallkill. *See* Order to Show Cause, Complaint, Exhibit J. Wallkill served Defendants with the complaint on March 18, 2013.

On or about April 8, 2013, Wallkill served an amended complaint on Defendants. The amended complaint added causes of action for fraudulent and negligent misrepresentation based upon Defendants' allegedly false assertions to Wallkill that they would resolve their financial issues and work with Wallkill in good faith; Defendants' fraudulent concealment of their decision to dissolve Catskill and abandon its lease; and conspiracy to commit fraud.

Amendment of Complaint Subsequent to Motion for Preliminary Injunction

Wallkill amended its complaint as of right pursuant to CPLR §3025(a), but did not provide the Court with a copy of its amended complaint in connection with its pending motion for preliminary injunction.[2] The Court was made aware of the amendment by virtue of Defendants' cross-motions to dismiss the amended complaint.

Wallkill's amendment of the complaint raises the issue of what effect the amended pleading has on the pending motion for preliminary injunction. Once an amended pleading has been served in an action, "it supersede[s] the original complaint and [becomes] the only complaint in the case." *Halmar Distributors, Inc. v Approved Manufacturing Corp.*, 49 AD2d 841, 841 [1st Dept 1975]

[2] Wallkill's failure to include the amended complaint is not fatal to its motion, because it seeks monetary damages rather than a permanent injunction. A plaintiff who seeks preliminary injunctive relief in an action for a permanent injunction must attach a copy of the complaint or summons with notice to its motion papers. *See Seplow v Century Operating Co.*, 56 AD2d 515, 515-516 [1st Dept 1977] (citing 7A Weinstein-Korn-Miller, NY Civ Prac, par 6312.05); *see also Fairfield Presidential Associates v Pollins*, 85 AD2d 653, 653 [2nd Dept 1981].

(citing *Branower & Son v Waldes*, 173 App Div 676). Thereafter, "the action ... must proceed as though the original pleading had never been served." *Id.* (citing *Millard v Delaware, Lackawanna & Western R.R. Co.*, 204 App Div 80). The motion for a preliminary injunction need not abate, however, and the court may consider the motion relative to the amended pleading. *Id.*; *see also Taylor v Eli Haddad Corp.*, 118 Misc 2d 253, 256 [Sup Ct., NY County 1983]. Defendants provided a copy of the amended complaint with their Sur-reply Affirmation and all parties have addressed it in their further briefing of the motion. Therefore, the Court will consider the motion for preliminary injunction relative to the amended complaint.

Preliminary Injunction

As the party requesting preliminary injunctive relief, Wallkill has the burden to show that it meets the requirements for issuance of an injunction. To prevail on a request for a preliminary injunction the movant must demonstrate: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities in favor of the movant's position. *See Radiology Associates of Poughkeepsie, PLLC v. Drocea*, 87 AD3d 1121, 1123 [2nd Dept 2011] (citations omitted).

Wallkill contends that it is likely to succeed on the merits of its breach of contract claim because Catskill stopped paying rent and abandoned the lease, and its principals voted to dissolve. It further contends that Defendants do not dispute the truth of these allegations and that it may obtain a preliminary injunction based upon that cause of action alone. Defendants do not address Wallkill's breach of contract claim in evaluating the likelihood of success element for preliminary injunctive relief. Accordingly, the Court finds that Wallkill has demonstrated a likelihood of success on the merits of its breach of contract claim. The Court declines to consider whether Wallkill is likely to succeed on the merits of its remaining claims for purposes of injunctive relief since a likelihood of success on one cause of action is sufficient to support that application. However, the remaining claims will be examined in relation to the cross-motions to dismiss.

Turning to the element of irreparable harm, Wallkill asserts that it meets that element by showing that denial of the injunction will likely result in its inability to collect on a judgment if successful in this action, due to the dissolution of Catskill and the intent of its principals to distribute

Catskill's assets to other creditors, including Chase Bank to whom its assets have been pledged. Defendants contend that a money judgment will adequately compensate Wallkill for its loss of rental income. They do not refute Wallkill's assertion that they intend to distribute their assets to Chase Bank, a secured creditor of Catskill, which took over a line of credit Catskill initially opened with Bank of New York in the late 1990's. *See* Cross-Motion to Dismiss of Defendants Catskill, et al., Affidavit of Bradley Wiener, M.D. at ¶ 8. The line of credit was restated on January 20, 2012, with the personal guarantee of each of the Individual Defendants. The sum owed on the line of credit totaled $991,769.50 as of March 22, 2013. *Id.*

Defendants are correct that generally a preliminary injunction should not issue where "the plaintiffs can be fully compensated by a monetary award, . . . because no irreparable harm will be sustained in the absence of such relief." *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 [2nd Dept 2009]. However, where "the uncontrolled sale and disposition by the defendants of their assets would threaten to render ineffectual any judgment which the plaintiffs might obtain", a preliminary injunction should issue in order to preserve the status quo. *Zonghetti v Jeromack*, 150 AD2d 561, 562 [2nd Dept 1989] (citing *Robjudi Corp. v Quality Controlled Prods.*, 111 AD2d 156, 157 [2nd Dept 1985]). Defendants do not refute Wallkill's contentions that Catskill is no longer doing business, or that its principals have voted to dissolve, or that it has a secured creditor to which nearly $1,000,000.00 of its assets are pledged, or that its principals have stated a preference to satisfy that debt over any amounts allegedly owed to Wallkill.[3] Under these circumstances, Wallkill has met the irreparable harm element for an injunction by demonstrating a realistic threat to its ability to collect a money judgment against Defendants.

The final prong of the test for an injunction requires a balancing of equities in favor of the moving party. Wallkill claims that the equities tip decidedly in its favor, particularly since Catskill is no longer a going concern and no harm will befall it if its assets are preserved. Wallkill asserts that it is at risk of losing its financing from Liberty Bank, which is secured by Wallkill's lease with

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[3] Thus, the Court finds that there are no issues of fact that require a hearing or which undermine Wallkill's likelihood of success on the merits of its claim. *See Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612, 613 [2008] (citing *Milbrandt & Co. v Griffin*, 1 AD3d 327, 328 [2003]; *County of Westchester v United Water New Rochelle*, 32 AD3d 979, 980 [2006]).

Catskill. Wallkill seeks to secure its financing with Catskill's remaining assets until it is able to find a replacement lease to serve as substitute security. Defendants do not address this element of the test. Therefore, the Court finds that the equities favor Wallkill.

Since Wallkill has met all three elements of the test for granting a preliminary injunction, Wallkill's motion for a preliminary injunction is granted.

Plaintiff's Request for an Order of Attachment

CPLR §6201(1) provides that "[a]n order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled . . . to a money judgment against one or more defendants, when . . . the defendant, with intent to . . . frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or . . . is about to do any of these acts." The party seeking attachment must show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." CPLR § 6212(a). Whether to grant an order of attachment is within the discretion of the Court.

The Court finds that Wallkill has satisfied the requirements for obtaining an order of attachment under CPLR §6201. Wallkill has shown the existence of a meritorious cause of action, a likelihood of success on the merits and one of the grounds for attachment specified in CPLR §6201. *See Mineola Ford Sales Ltd. v Rapp*, 242 AD2d 371 [2nd Dept 1997]; *see also Arzu v Arzu*, 190 AD2d 87 [1st Dept 1993]; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Development Corporation*, 118 AD2d 769, 772-773 [2nd Dept 1986]. Wallkill has shown that Defendants have assigned Catskill's assets to Chase Bank, which will frustrate Wallkill's efforts to collect any judgment that might be rendered in its favor.

Pursuant to CPLR §6212(b), a plaintiff requesting an order of attachment shall provide an undertaking. That section reads:

> "On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than five hundred dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or it if is finally decided that the

> plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees. The surety on the undertaking shall not be discharged except upon notice to the sheriff."

Section 6212 further provides that "[w]ithin ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it is based and the summons and complaint in the action." CPLR §6212(c). Under the circumstances presented, and as a matter of discretion, Plaintiff shall post an undertaking in the amount of $100,000 in cash or by bond as a condition to an order of attachment.

Defendant Peralo's Cross-Motion to Dismiss

Defendant Peralo separately cross moves to dismiss Wallkill's amended complaint on the following grounds: (1) Plaintiff fails to plead fraud with specificity; (2) Plaintiff's claim that he owes it a fiduciary duty is barred by the Statute of Frauds because there is no writing that evidences such a duty; (3) Plaintiff fails to meet the requirements for an order of attachment; and (4) he does not owe a fiduciary duty to Plaintiff and has not been a member of Catskill since 2011. Peralo submits an affidavit in support of his motion attesting that he surrendered his medical license in 2011, without disciplinary action being taken against him by the State of New York,[4] and was thereafter "terminated as an employee of Catskill Orange." Affidavit of Charles Peralo, M.D. at ¶ 6. Peralo asserts that he had no involvement in the decisions that are at issue, which occurred after he was terminated. Wallkill treats all Defendants as a group, but has not specifically opposed Peralo's motion. Defendants Catskill, Bonehead and the Individual Defendants also have not opposed Peralo's motion. Accordingly, Peralo's motion to dismiss is granted.

Catskill, Bonehead and the Individual Defendants' Cross Motion to Dismiss

Defendants Catskill, Bonehead and the Individual Defendants cross move to dismiss Wallkill's amended complaint on a number of grounds: (1) Plaintiff lacks standing to sue; (2) Plaintiff's causes of action fail to state claims upon which relief can be granted; and (3) Plaintiff's

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[4] Catskill, Bonehead and the Individual Defendants submit a copy of the consent order, dated May 10, 2011, by which Peralo was precluded from practicing medicine in New York.

claims are precluded by documentary evidence.[5] Their motion is based in part upon documentary evidence, specifically, the lease between Wallkill and Catskill and Wallkill's Restated Operating Agreement ("Operating Agreement").

For purposes of deciding the CPLR §3211(a)(7) motion to dismiss, the Court must accept the factual allegations set forth in the amended complaint as true, giving it a liberal construction and providing "the benefit of every possible inference" to the plaintiff. *People v. Coventry First LLC*, 13 NY3d 108, 115 [2009] (citing *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). The Court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." *Id.* (quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001] [internal quotation marks omitted]). The Court may also consider affidavits submitted by the plaintiff to cure any pleading defects. *Harris v. Barbera*, 96 AD3d 904, 906 [2nd Dept 2012] (citing *Quinones v Schaap*, 91 AD3d 739 [2nd Dept 2012]; *Reiver v Burkhart Wexler & Hirschberg, LLP*, 73 AD3d 1149 [2nd Dept 2010]; *see also Gelobter v Fox*, 90 AD3d 829, 830-831[2nd Dept 2011]).

While the same general standard regarding liberal construction and acceptance of factual allegations in the complaint applies in deciding a motion to dismiss pursuant to CPLR §3211(a)(1), the Court must determine whether the documentary evidence conclusively establishes a defense as a matter of law to the claims being asserted. *Leon v. Martinez*, 84 NY2d 83, 88 [1994] (citing *Heaney v Purdy*, 29 NY2d 157 [1971]); *730 J & J LLC v. Fillmore Agency, Inc.*, 303 AD2d 486, 486 [2nd Dept 2003].

A. Breach of Contract

Defendants seek dismissal of Wallkill's cause of action for breach of contract as against Catskill, contending that this claim is premature because Wallkill has not taken the necessary steps under the lease to accelerate the rent. Specifically, Defendants contend that Wallkill has not tried to re-let the premises or submitted an appraisal or rent projections. Defendants seek dismissal of this

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[5] The cross-motions of both sets of defendants are subject to denial for failure to attach to their moving papers a copy of the amended complaint, which is the operative pleading and the one that they seek to dismiss. Because Wallkill fails to object on this ground and Defendants ultimately provided a copy of the amended complaint with their Sur-Reply Affirmation, the Court will overlook the defect in both sets of motion papers and consider the cross-motions on their merits.

cause of action as to Bonehead and the Individual Defendants, because none of them are signatories or guarantors of the lease.

Wallkill counters Defendants' argument with its assertion that Catskill is liable under the lease for the unpaid rent and the steps Defendants refer to are relevant only in a summary proceeding. Wallkill contends that it need not undertake a summary proceeding because Catskill has abandoned the lease and Wallkill is in possession of the premises. Wallkill asserts that it is seeking rent due under the lease and the exact amount should await trial.

"The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages." *Kausal v Educational Prods. Info. Exch. Inst.*, 105 AD3d 909, 910 [2nd Dept 2013] (citing *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2nd Dept 2011]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806, [2nd Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2nd Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2nd Dept 1986]).

Wallkill has stated a cause of action for breach of contract regarding Catskill's lease. Wallkill alleges that it performed under the lease and Catskill breached the lease, resulting in damages to Wallkill. Wallkill's right to sue for breach of the lease is not contingent upon re-letting the premises or obtaining an appraisal. *Cf. 1056 Sherman Avenue Associates v Guyco Construction Corp.*, 261 AD2d 519, 520 [2nd Dept 1999] ("a partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting")(citations omitted). A commercial landlord is not required to relet the premises and thereby mitigate its damages. *Rubin v. Dondysh*, 153 Misc 2d 657, 658 [NY App Div 1991] (citing *Syndicate Bldg. Corp. v Lorber*, 128 AD2d 381 [1st Dept 1987]; *Mitchell & Titus Assocs. v Mesh Realty Corp.*, 160 AD2d 465 [1st Dept 1990]).

Wallkill may clearly seek recovery, as it has in the amended complaint, for past due rent. Its cause of action for breach of contract is not rendered premature merely because its claim for damages for the remainder of the lease may be inchoate. The lease describes tenant's failure to timely pay rent as a default for which the landlord may elect to recover the difference between the rent that the tenant was required to pay for the remainder of the lease term and the amount of rent the landlord receives from the new tenant, "net of all reasonable costs of reletting ...". Order to Show Cause, Exhibit A,

Lease at ¶ 33.2. The lease also provides that in the alternative, the landlord may recover from the tenant the difference between the rent it would have received from the tenant and the "then-projected rental value of the Demised Premises for what would have been the remainder of the Term." *Id.* at ¶ 33.3. Although Wallkill has elected to pursue the first measure of damages, it need not set forth the precise amount of those damages at this juncture where the Court is merely considering whether a cause of action has been stated. Therefore, the motion to dismiss the breach of contract cause of action as against Catskill is denied.

With regard to Bonehead and the Individual Defendants, the breach of contract cause of action is dismissed in its entirety. None of these defendants signed the lease, which is between Wallkill and Catskill only. In addition, the lease did not require, and Bonehead and the Individual Defendants did not provide, a guarantee. Therefore, they cannot be held liable for payment of rent under the lease. This cause of action may properly be dismissed as to Bonehead and the Individual Defendants pursuant to CPLR §3211(a)(11) based on documentary evidence submitted, the lease agreement.

Accordingly, Defendants' motion to dismiss this cause of action is denied as to Catskill and granted as to Bonehead and the Individual Defendants.

B. Breach of Fiduciary Duty

Defendants also seek dismissal of the causes of action for breach of fiduciary duty against Catskill and the Individual Defendants, because none of them are members of Wallkill. They seek to characterize the relationship between the parties as an arms-length business transaction predicated upon the commercial lease between Catskill and Wallkill. Defendants seek dismissal as to Bonehead, contending that although Bonehead is a member of Wallkill, it does not owe a fiduciary duty to Wallkill because it is a minority member and not in a position of power over the management and affairs of the company. They contend further that as a consequence of Bonehead not owing a duty to Wallkill, the Individual Defendants do not owe a fiduciary duty to Wallkill as principals of Bonehead.

Wallkill describes Defendants as venture partners and characterizes their relationship with it as having "a heightened level of trust and confidence." Wallkill Memorandum of Law in Further Support of Motion for Injunctive Relief and in Opposition to Defendants' Cross-Motion to Dismiss at p. 18. Wallkill asserts that Defendants' fiduciary obligations are based upon:

> "(1) their venture partnership with Wallkill; (2) their ownership interest in Wallkill; (3) their individual signatures on Wallkill's operating agreement; (4) Catskill Orange's status as a Member-Affiliate under the Operating Agreement; (5) their submission of personal financial statements to secure the Joint Venture Project's construction financing; (6) their special knowledge of Wallkill's operations and finances; (7) their active role in Wallkill's management and decision-making process; and (8) the benefits that Defendants received based solely on their position as fiduciaries of Wallkill."

*Id.* at p. 18. Wallkill relies upon its Operating Agreement, which was signed by all parties except Catskill, to support its designation of all of the Defendants as venture partners.

The Court of Appeals has held that where parties have a contract that governs their relationship, courts generally look to the contract "'to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency.'" *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19-20 [2005] (quoting *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 160 [1993]). Courts should not find a "'higher realm of relationship and fashion the stricter duty'" if the parties themselves have not created a "'relationship of higher trust'" in their agreement. *Id.* at 20 (quoting *Northeast* at 162).

Bonehead, as a member of Wallkill, unquestionably owes a fiduciary duty to Wallkill and its other members. "Absent provisions in an LLC agreement 'explicitly' disclaiming the applicability of a fiduciary duty, LLC members owe each other 'the traditional fiduciary duties that directors owe a corporation.'" *DirecTV Latin Am., LLC v Park 610, LLC*, 691 F. Supp. 2d 405, 438-439 [SDNY 2010] (citing *Berman v Sugo LLC*, 580 F. Supp. 2d 191, 204 [SDNY 2008] ("members of a limited liability company, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members"). The Court of Appeals has stated that they "owe to one another, while the enterprise continues, the duty of the finest loyalty." *Meinhard v Salmon*, 249 NY 458, 463-464 [1928]. Indeed, a co-member owes to fellow members "a fiduciary duty to make full disclosure of all material facts" and disclaimers in a contract will not relieve the member of that obligation. *Salm v. Feldstein*, 20 AD3d 469, 470 [2nd Dept 2005]. Moreover, "a member of a limited liability company, has a fiduciary obligation to the limited liability company and to others in the partnership, which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty." *Willoughby Rehab. & Health Care Ctr., LLC v. Webster*, 13 Misc 3d 1230(A) [Sup Ct.,

New York County 2006] (citing *Salm v Feldstein, supra* at 470; and *Nathanson v Nathanson*, 20 AD3d 403, 404 [2nd Dept 2005]). Bonehead owes a duty to Wallkill to act in furtherance of their venture and to not take actions that would undermine the venture.

With regard to Catskill and the Individual Defendants, however, Wallkill's Operating Agreement does not support its characterization of those defendants as venture partners, because they are not members of Wallkill. Wallkill also contends that a fiduciary duty arises from their status as Member-Affiliates and Principals of Bonehead. Catskill clearly does not come within the definition of "Member-Affiliate" set forth in the Operating Agreement, which states:

> 1.4.15 "Member-Affiliate" means (a) any Member; (b) any officer or director of a Member that is a corporation; (c) any partner in a Member that is a partnership; (d) any trustee of a Member that is a trust; (e) any member of a Member that is a limited liability company; (f) any holder of a direct or indirect beneficial interest in a Member; (g) any spouse, descendant or spouse of a descendant of a person or entity identified in the preceding clauses of this Paragraph 1.4.15, the persons and entities described in such preceding clauses and this clause being hereafter called "related parties"; (h) any partnership in which any related party is a partner; (i) any partnership, corporation, limited liability company or other entity that - legally or practically - controls, or is controlled by or is under common control with any one or more related parties; and (j) any party that would be a Member Affiliate as thus defined if all of the then-incumbent Manager were also a Member.

The Individual Defendants, on the other hand, fall within both the definition of "Member-Affiliate" and "Principal" under the Operating Agreement, based on their status as officers or directors of Bonehead. *See* Restated Operating Agreement at ¶ 1.4.15(b) and ¶ 1.4.23. The Operating Agreement states that "'Principal' of a Member is "an individual who may be required to assume certain obligations as Guarantor or Indemnitor as described in Paragraph 5." *Id.* at ¶ 1.4.23. As principals of Bonehead, the Individual Defendants are obligated by the Operating Agreement to provide a personal guarantee for Wallkill's indebtedness on its construction loan. Each of them signed the Operating Agreement for that purpose. *Id.* at ¶ 5. Thus, they are limited guarantors whose guaranty is further conditioned upon the lender's election to seek recourse against them for a portion of the indebtedness for the construction loan. *Id.* Pursuant to the terms of the Operating Agreement, the Individual Defendants' limited and conditional liability does not extend

beyond the construction loan. *See Gluckman v Laserline-Vulcan Energy Leasing, LLC, et al.*, 2009 NY Slip Op 33080(U) [Sup Ct, New York County December 29, 2009], attached to Defendants Catskill, et al.'s Memorandum of Law in Opposition. Accordingly, while the Operating Agreement may have created a fiduciary duty on the part of the Individual Defendants, it was limited by its terms to the construction loan and does not extend to the Catskill lease.

However, a fiduciary relationship may arise independent of an agreement. "[I]t is fundamental that fiduciary 'liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.'" *EBC I, Inc., supra* 5 NY3d at 20 (quoting Restatement [Second] of Torts § 874, Comment b)." Whether a fiduciary relationship exists independent of an agreement is necessarily fact-specific.

Courts are generally reluctant to disregard corporate form, which individuals enter into specifically to avoid personal liability. *Bridgestone/Firestone v. Recovery Credit Servs.*, 98 F.3d 13, 17 [2d Cir. 1996] (citing *Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 703 [2d Cir. 1990]). Indeed, "[t]he corporate veil will be pierced only when the corporate 'form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation . . . and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.'" *Id.* (quoting *Gartner v. Snyder*, 607 F.2d 582, 586 [2d Cir. 1979]). Particularly in the case of small, privately-held corporations such as those involved in this case, where the factors courts generally consider to determine whether to pierce the corporate veil may be loosely applied,[6] "the courts apply the preexisting and overarching principle 'that liability is imposed to reach an equitable result'." *Id.* at 18 (quoting *Brunswick Corp. v. Waxman*, 599 F.2d 34, 36 [2d Cir. 1979]).

With that in mind, the Court considers the allegations of the amended complaint, which at this stage of the case it must accept as true, with regard to the relationship between the parties. Wallkill alleges that it entered into a joint venture with Defendants to obtain financing for the

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[6] The factors include "intermingling of corporate and personal funds, undercapitalization of the corporation, failure to observe corporate formalities such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors." *Bridgestone/Firestone, supra* 98 F.3d at 17.

construction of, and to construct, a medical facility, occupied by their practice group and thereafter to lease and/or sell space in the facility. Defendants participated in the joint venture through Bonehead, a corporation formed for that purpose, and through Catskill, a professional corporation that leased space in the facility. Wallkill alleges that Defendants came in on the ground floor, so to speak, and were involved in the venture prior to construction of the facility. They were given priority in selecting the space occupied under the lease; signed the Operating Agreement to provide personal guarantees for Wallkill's construction financing; had knowledge of Wallkill's finances; and knew the significance of the lease to Wallkill's mortgage financing. This is clearly more than an arms length transaction between Catskill and Wallkill for leased space.

The Court finds that Wallkill has sufficiently alleged "special circumstances" which, in this Court's view, created a relationship of higher trust, requiring Defendants to act in the best interest of the joint venture. *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 AD3d 6, 21-22 [2nd Dept 2008]. "[I]t is well settled that '[a]ny one[, including an officer of a corporation who knowingly participates in a breach of the corporation's fiduciary duties,] who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby.'" *Talansky v Schulman*, 2 AD3d 355 [1st Dept 2003] (quoting *Wechsler v Bowman*, 285 NY 284, 291[1941]; *accord Fallon v Wall St. Clearing Co.*, 182 AD2d 245, 251[1992]). Defendants owe a fiduciary duty to Wallkill by virtue of the special relationship amongst all of the parties and they are liable for the alleged breach of that duty. Wallkill has sufficiently stated a cause of action for breach of fiduciary duty. Accordingly, Defendants' motion to dismiss is denied as to that claim.

The Court agrees, however, that Wallkill may not maintain a cause of action for conspiracy to commit fraud. "New York does not recognize an independent cause of action based upon a civil conspiracy to commit a tort." *Dune Deck Owners Corp. v Liggett*, 85 AD3d 1093, 1096 [2nd Dept 2011] (citing *Dickinson v Igoni*, 76 AD3d 943, 945 [2nd Dept 2010]; *Hebrew Inst. for Deaf & Exceptional Children v Kahana*, 57 AD3d 734, 735 [2nd Dept 2008])). Accordingly, Defendants' motion to dismiss is granted as to that claim.

As to Wallkill's remaining causes of action, Defendants assert that they should be dismissed because they are premised upon a non existent fiduciary duty. The Court having determined that Wallkill has sufficiently alleged of a cause of action for breach of fiduciary duty, Defendants' arguments as to the remainder of the causes of action in the amended complaint are rejected, along

with Defendants' request for sanctions for filing frivolous claims. Wallkill has stated a cognizable claim for breach of fiduciary duty against Defendants that is not based upon the lease agreement with Catskill or the Operating Agreement with the other Defendants. Moreover, Wallkill has alleged its claims with the specificity required by CPLR §3016(b). The allegations underlying Wallkill's cause of action for breach of contract may overlap with their other causes of action, as Defendants note, however that circumstance alone does not warrant dismissal. The same factual nexus may give rise to different causes of action, particularly where the duties do not all arise from the same agreement. *See Bender Ins. Agency, Inc. v Treiber Ins. Agency, Inc.*, 283 AD2d 448, 450 [2nd Dept 2001] (breach of contract and breach of fiduciary duty). Accordingly, Defendants' motion to dismiss is denied as to the remaining causes of action in the amended complaint.

In light of the foregoing, it is

ORDERED, that Wallkill's motion for preliminary injunction is granted. It is further

ORDERED, that an order of attachment shall immediately issue against Catskill's assets; and it is further

ORDERED, that Wallkill shall post, within ten (10) days of service of the Decision and Order with notice of entry, an undertaking in the amount of $100,000.00 as a condition of the order of attachment; and it is further

ORDERED, that if Defendants recover judgment or if it is ultimately decided that Wallkill was not entitled to an attachment, Wallkill shall pay to Defendants all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment. It is further

ORDERED that Defendant Peralo's cross-motion to dismiss is granted. It is further

ORDERED that Defendants Catskill, Bonehead and the Individual Defendants' cross-motion to dismiss is granted in part and denied in part, as set forth above. It is further

ORDERED that **the parties shall appear for a compliance conference on August 26, 2013 at 9:15 a.m.**

The foregoing constitutes the Decision and Order of the Court.

Dated: July 25, 2013
Goshen, New York

ENTER

HON. PAUL I. MARX, J.S.C.