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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C.
Justice

PART 44

Moore, Virginia

-v-

JP HHI LLC

INDEX NO. 104250/11

MOTION DATE 3/4/13

MOTION SEQ. NO. 1

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/30/2013

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

VIRGINIA MOORE,

Plaintiff,

-against-

JP HHI, LLC, A DELAWARE LIMITED LIABILITY COMPANY, JACOBSON PARTNERS AND BENJAMIN JACOBSON,

Defendants,

DECISION and ORDER
Index no. 11-104250

The Plaintiff Virginia Moore moves for summary judgment pursuant to CPLR §3212. Defendants, JP HHI (a limited liability company), Jacobson Partners, and Benjamin Jacobson oppose this motion. Defendants cross-move to consolidate this action with another action before this Court—*Jacobson Partners v. Charles Moore and Virginia Moore*, Index No. 113226/2011—and to amend their answer. Plaintiff opposes the cross-motion.

This motion arises from an action in which Plaintiff Moore seeks to recover unpaid distributions that are owed to her from JP HHI, LLC. The following facts are not at issue. Plaintiff is an investor in JP HHI, LLC (JP), a Delaware Limited Liability Company. Moore owns a 1.58 % membership interest ("Percentage Interest"). Defendant Jacobson Partners ("Jacobson") is the sole member of the Board of Directors of JP HHI, LLC. Benjamin Jacobson ("Benjamin") is the managing partner of Jacobson Partners. Pursuant to section 4.1 of JP HHI operating agreement, the Board may authorize distribution form the LLC to its members,

"provided that any such distributions shall be made to the members in proportion to their respective Percentage Interests." JP HHI made distributions to its members on two occasions, October 4, 2010 and March 24, 2011. Plaintiff's share of those distributions total $83,069.94, $28,318.10 from the first distribution and $54,751.84 from the second distribution. Neither of Plaintiff's distribution was paid to her.

A movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. CPLR §3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it entitled to summary judgment. *Zuckerman, supra.*

A review of the record shows that the Plaintiff has established a right to summary judgment. The defendants in their answer have admitted that according to JP HHI, LLC operating agreement Plaintiff was entitled to both distributions which total $83,069.94. The distribution was a legal obligation under the LLC operating agreement. Once the movant has established a *prima facie* case that it is entitled to summary judgment, the burden then shifts to the party opposing the motion to tender sufficient evidence in admissible form to defeat the motion. *Zuckerman, supra.* The Defendants have not shown any legal excuse or defense on why such obligation was not complied with. Defendants allege Plaintiff acted with "unclean hands" and in bad-faith, but have not tendered sufficient evidence in admissible form to prove their claims or to defeat Plaintiff's motion for summary judgment. Defendants have not alleged any facts, which showed that Plaintiff had a duty to the LLC, or that Plaintiff breached such duty, or

that the operating agreement was unenforceable. Therefore, Defendants failed to raise any triable issue of fact or law precluding summary judgment.

Defendants cross-move to consolidate this action with another action before this Court—*Jacobson Partners v. Charles Moore and Virginia Moore*, Index No. 113226/2011. Pursuant to NY CPLR §602, when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. The standard for determining whether the actions involve common question of law or fact is if evidence that would be admissible for one action would also be admissible in the second action. *Leeco Constr. Co. v. United States Liab. Ins. Co.*, 22 Misc. 3d 611 (N.Y. Sup. Ct. 2008).

Both actions arise out of different facts and questions of law, and therefore consolidation is improper. In this matter the Plaintiff, Virginia Moore, is suing JP HHI, LLC, and Jacobson Partners and Benjamin Jacobson as agents of the LLC, to recover her unpaid distributions. Ms. Moore owns a membership interest in the LLC, and pursuant to the LLC operating agreement distributions may be made, but when done, distributions should be made to all members of the LLC according to their percentage interest. Defendants have conceded to these facts. Furthermore, the second action *Jacobson Partners v. Charles Moore and Virginia Moore*, Index No. 113226/2011, arises out of an alleged oral agreement or contract between Benjamin Jacobson and Charles Moore (Plaintiff's husband), partners of Jacobson Partners. Plaintiff was not a party to this contract. The plaintiff in action two alleges that the money owed to them by Charles Moore was fraudulently conveyed to Virginia Moore who was unjustly enriched.

When reviewing both actions there are no common questions of law or fact to be consolidated. Both actions are separate and different and as such should remain so. Therefore, the cross-motion to consolidate is denied.

Defendants cross-move to amend their answer to assert the counterclaim and affirmative defense of fraudulent conveyances. Pursuant to NY CPLR § 3025(b) a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just. CPLR § 3025(b). In accordance with the laws of New York a freely given leave is one granted absent prejudice or surprise resulting from delay. *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475, 755 N.Y.S.2d 28 [1st Dept 2003]. The First Department has consistently stated that "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law". Thompson v Cooper, 24 AD3d 203, 205, 806 N.Y.S.2d 32 [1st Dept 2005].

The motion for leave to amend the answer to assert the counterclaim and affirmative defense of fraudulent conveyance is improper to this action. This counterclaim and affirmative defense is not supported by any facts alleged in this action. Therefore, the assertion of fraudulent conveyance as a counterclaim and affirmative defenses in this action would be insufficient and it would not state a cause of action in which relief can be granted. Defendants should move to amend their answer in the second action *Jacobson Partners v. Charles Moore and Virginia Moore*, Index No. 113226/2011, to assert the counterclaim of fraudulent conveyances, but as it is stated in this action it is improper. The cross-motion for leave to amend is thereby properly denied.

Accordingly, Plaintiff's motion for summary judgment pursuant to CPLR §3212 is **GRANTED**. Defendants' cross-motion to consolidate and for leave to amend their answer are **DENIED**.

July 30, 2013

HON. MILTON A. TINGLING
J.S.C.