SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ **PART** 3
Justice

Index Number : 651918/2012
30-32 WEST 31ST LLC,
vs
HEENA HOTEL LLC,
Sequence Number : 002
DISMISS

INDEX NO. 651918/12
MOTION DATE 5/13/13
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1
Answering Affidavits — Exhibits _____ **No(s).** 2
Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9-10-13

Eileen Bransten **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: COM. DIV. PART 3
----------X

30-32 WEST 31ST LLC and ANDREW IMPAGLIAZZO,

Plaintiff,

- against -

HEENA HOTEL LLC, KHANDUBHAI PATEL, NAYAN PATEL, B.L. PATEL, CHAMP PATEL, HAMENT PATEL, and NCBL NY LLC,

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

Index No. 651918/2012
Motion Date: 5/13/2013
Mot. Seq. No.: 002

EILEEN BRANSTEN, J.:

Presently before the Court is the motion brought by defendants Heena Hotel LLC ("Heena"), NCBL NY LLC ("NCBL"), Khandubhai Patel, Nayan Patel, B.L. Patel, and Champ Patel (collectively, the "Patels"), pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss all claims asserted in plaintiffs' Amended Verified Complaint against NCBL, the Patels, and Hament Patel, and to dismiss the first, third, fourth, fifth, sixth and eighth causes of action against Heena. Defendants also request that the court, after notice to the parties, convert the motion to a motion for summary judgment pursuant to CPLR 3211(c).[1] Defendants' motion is opposed. For the reasons that follow, defendants' motion is granted in part and denied in part.

[1] The Court notes that defendants also sought relief regarding the notice of pendency plaintiffs filed on August 14, 2012 in this action against 29-33 Beekman Street, New York, New York, but plaintiffs have agreed to its vacatur (NYSCEF Doc. Nos. 79-80). In addition, pursuant to a stipulation dated March 22, 2013, filed on July 19, 2013, the action has been discontinued against defendant Hament Patel (NYSCEF Doc. No. 78).

FACTUAL ALLEGATIONS

This dispute stems from a joint venture between plaintiff 30-32 West 31st LLC ("30-32") and defendant Heena to construct, own and operate a hotel located at 30-32 West 31st Street in Manhattan (the "Property"). Plaintiff Andrew Impagliazzo is allegedly the sole member of 30-32. (Am. Compl. ¶ 2.) The Patels are alleged to be the members of Heena, *id.* ¶¶ 4-8, and several of them are also allegedly members of defendant NCBL. *Id.* ¶ 10.

Plaintiffs bring the instant action, asserting that Heena breached the Joint Venture Agreement provision entitling plaintiffs to share equally in the net proceeds of any sale of the hotel or the Property, and improperly disbursed sale proceeds to itself, its members (including the Patels), and vendors without plaintiffs' knowledge or consent. In addition, Plaintiffs assert that they were fraudulently induced to enter into various agreements by defendants' misrepresentations and that Defendants continued the fraud by concealing their acts. Plaintiffs also assert that Heena failed to repay certain loans made by Plaintiffs.

A. *The Sale and Purchase of the Property*

The relevant facts begin with 30-32's purchase of the Property in March 2007. (Am. Comp. ¶ 11.) On December 6, 2007, 30-32 and Heena entered into a three-page

"Joint Venture Agreement" (the "JVA"). The JVA provides that 30-32 would be responsible for constructing and opening a hotel on the Property, and that Heena would operate the hotel through any reputable hotel organization. (Affidavit of Nayan Patel ("Nayan Patel Aff."), Ex. B). 30-32 guaranteed that the total cost of constructing a "turn key" hotel would not exceed $38.5 million, with an additional reserve of $1.5 million for cost overruns. *Id.* at 1. These costs were to be shared equally by 30-32 and Heena. The JVA also provides:

> [Heena] agrees to execute such documents as shall provide assurances to [30-32] that in the event of a sale of the Hotel, [30-32] shall share equally with [Heena] in the net proceeds of such sale.

Id. at 3.

On December 6, 2007, the parties also entered into a contract of sale whereby 30-32 sold the Property to Heena for $12 million, later modified to $14,340,000. (Am. Compl. ¶ 13.) Plaintiffs allege that this price was "substantially below the fair market value of similarly-situated comparable properties," *id.*, which plaintiffs claim, in opposition to this motion, was $18 million as of July 2008. (Affidavit of Andrew Impagliazzo "Impagliazzo Aff.") Ex. 21.)

Plaintiffs allege that their willingness to sell the Property to Heena at below market value was "integrally related to Heena's promise to 30-32, in the [JVA], to split equally the net proceeds of any sale of the property after or during the development process."

(Am. Compl. ¶ 15; Impagliazzo Aff. ¶¶ 7-8.) Plaintiffs further allege that, at the closing, the defendants were short and unable to pay all closing costs, and that Impagliazzo and 30-32 advanced the sum of $434,000 "with the mutual understanding that same was to be repaid out of the construction loans to build the property or from proceeds generated from the operations or sale of the hotel project." (Am. Compl. ¶ 16; *see also* Impagliazzo Aff. ¶ 9). Plaintiffs rely on a document entitled "Closing Adjustments as of March 7, 2008," which shows that the net amount due Seller was "$5,631,419.42." (Impagliazzo Aff., Ex. 1). Underneath that number, in handwriting, the number "5,196,581.16" is subtracted for a balance of "434,838.26." *Id.* Impagliazzo defines this number as the "closing loan," *id.* ¶ 9, although no explanation of any kind appears on the document.

In addition, Impagliazzo avers that Heena and its members agreed to split with 30-32 the $1.3 million plaintiffs spent to buy out the tenants who were residing at the Property. (Impagliazzo Aff. ¶¶ 5, 8; Am. Compl. ¶ 17.) Heena allegedly agreed that half of this sum would be a credit to 30-32 that would be repaid out of the operating proceeds or upon the sale of the hotel. *Id.*

At the closing of the sale on March 7, 2008, the parties formed Shivkrupa Hotel LLC ("Shivkrupa") and executed an operating agreement (the "Shivkrupa Operating Agreement") wherein each member, 30-32 and Heena, "was entitled to equal equity

ownership of the LLC." (Am. Compl. ¶ 18).[2] However, in his opposing affidavit, Impagliazzo asserts that the Shivkrupa Operating Agreement "addresses only the operation or project of constructing and maintaining of a hotel" (Impagliazzo Aff. ¶ 11) and that at no time did Shivkrupa own the Property. *Id.* Also in March 2008, Heena entered into an ancillary written contract with Renotal Construction Corp. ("Renotal") by which the latter agreed to act as general contractor on the project. (Am. Compl. ¶ 19.)

While both the Complaint and Impagliazzo's opposing affidavit are murky on the details, apparently the project ran into certain difficulties. *See* Am. Compl. ¶ 12; Impagliazzo Aff. ¶ 12. Plaintiffs allege that "[b]y Modification dated December 10, 2010, Heena, 30-32 and Renotal agreed to amend the Operating Agreement." (Am. Compl. ¶ 20).[3] By May 2011, "a real estate broker was retained to market the Property for sale." *Id.* ¶ 21. It is alleged that Heena accepted an offer to sell the Property to CHSP 31st Street LLC ("CHSP") for $52 million. *See* Am. Compl. ¶ 22; Impagliazzo Aff. ¶ 14. Plaintiffs concede that they were asked to, and did, consent to Heena entering into a Purchase Sale Agreement with CHSP. *Id.*

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[2] This document is entitled "Limited Liability Company Agreement of Shivkrupa Hotel LLC." *See* Nayan Patel Aff. Ex. C.

[3] This document is entitled "Modification of Project Documents" (the Modification Agreement), is dated and was signed on December 17, 2010, and two additional parties to the agreement are the developer of the project, Hy Point Project & Development LLC ("Hy Point"), and the architect, Nobutaka Ashihara Associates. (Nayan Patel Aff., Ex. H.) The Modification Agreement also amends the JVA. *Id.*, Recital A.

Although they consented to the sale, plaintiffs maintain that they never "consented to any proposed division of profits, net proceeds, disbursements or payments of expenses from the sale proceeds." Am. Compl. ¶ 24; *see also* Impagliazzo Aff. ¶ 14. Impagliazzo avers that, shortly after the contract of sale was signed, 30-32's attorney sought an accounting of the monies expended on the hotel project, and a proposed schedule of distribution of the expected net profits from the sale by Heena to CHSP (Impagliazzo Aff. ¶ 15), but that Heena refused, claiming that 30-32 was not a "seller" or "owner" of the Property and no right to any financial documentation concerning the sale. *Id.*

B. *Previous Litigation and Settlement*

On December 18, 2011, 30-32 commenced an action against Heena and filed a notice of pendency against the Property.[4] Impagliazzo alleges that he only agreed to discontinue the action without prejudice after Heena's attorneys claimed that the Property would go into foreclosure, tax arrears would accrue, and the seller would be lost if the notice of pendency were to remain. (Impagliazzo Aff. ¶ 16.) He further avers that:

> to induce me to cause the Notice of Pendency to be lifted, Nayan Patel expressly promised me that my right to be at the closing would be honored, and that I would receive $1,400,000.00 from the proceeds of the property sale to CHSP, as reimbursement for 30-32's loans to the company

[4] This action was commenced on December 9, 2011, *see 30-32 West 31 LLC and Hy Point Project & Dev. LLC v. Heena Hotel LLC* (Index No. 113864/11), and was discontinued without prejudice on December 20, 2011. (Affidavit of Andrew Impagliazzo, Ex. K.)

> ($434,838.00 for the closing loan and $650,000 for the buy-out loan, among other expenses that 30-32 and I advanced).

Id. ¶ 17. Nayan Patel emailed Impagliazzo on December 20, 2011 purporting to inform him that the closing was scheduled for December 27, 2011. *Id.* ¶ 18. Impagliazzo claims that immediately after 30-32 released the notice of pendency, Heena advanced the closing date by five days to December 22, 2011 and that it ultimately took place without plaintiffs' knowledge or presence. *Id.*; *see also* Am. Compl. ¶¶ 23-24.

Plaintiffs contend that they only obtained a copy of the settlement statement for the closing (Impagliazzo Aff. Ex. 15) from the title company, Terra Nova Title & Services, Inc. ("Terra Nova") (Am. Compl. ¶ 26) after this current action was commenced on June 4, 2012.

Plaintiffs allege that they have learned that Heena's members, including all of the Patels, each received "preferential and other returns including various subject expenses which were remitted without proper apportionment or due authority" from the $14,931,606.50 sale proceeds (the "Proceeds"), all allegedly in contravention of the JVA. *See* Am. Compl. ¶ 26; *see also* Impagliazzo Aff. ¶¶ 21-22. Specifically, plaintiffs challenge wire transfers of $190,067.43 and $1,532,621.30 from the Proceeds to Nayan Patel – payments are identified as unsecured loans in the closing documents. *See* Impagliazzo Aff. Exs. 16 & 17. Allegedly, defendant Khandubhai Patel was repaid $300,000 for a loan, and defendant Bharat Patel was compensated $200,000 for a loan, all

with interest. (Impagliazzo Aff. ¶ 22.) Impagliazzo claims that these alleged loan repayments from the Proceeds were taken without his consent and without any documentary proof to substantiate the existence of such loans. *Id.*

Plaintiffs also challenge a $12,250,000 wire transfer to NCBL, identified as "Seller's Proceeds" and a $2,776,606.50 wire transfer to "Sherin and Lodgen" identified as "proceeds and legal fees." *See* Impagliazzo Aff. Ex. 16 at 2; *see also* Am. Compl. ¶ 27. All of these sums were allegedly disbursed before the monies advanced by plaintiffs as part of the March 2008 sale to Heena were repaid. In his opposing affidavit, Impagliazzo avers that $650,000 (which he defines as the "buy-out loan"), together with the $434,838.26 closing loan, "should have been a priority, regardless of how the defendants are attempting to distort the definition of their 'expenses.'" (Impagliazzo Aff. ¶ 10.) However, Impagliazzo admits that he has "belatedly been repaid only $500,000.00 of the more than $1,000,000.00 I am owed, without interest." *Id.* ¶ 23; *see also* 6/12/12 Tr. at 12.) Plaintiffs also allege that "substantial sums" were placed in escrow with the title company ultimately to be transferred directly into Heena's operating account, and that Heena refuses to disclose the whereabouts or amounts of these escrowed funds. (Am. Compl. ¶ 28.) Despite assurances that 30-32's equity interest would be recognized and that all monies due 30-32 would be paid, defendants have ignored their promises and refused plaintiffs' requests for a full accounting. *Id.* ¶ 29.

In June or July 2011, defendants allegedly invested their "ill-gotten gains" obtained from the sale of the Property in defendant NCBL, an entity which acquired real property located at 29-33 Beekman Street, New York, New York, which the Complaint defines as the "Successor Property." (Am. Compl. ¶¶ 31, 42.)

C. *The Instant Complaint and Motion to Dismiss*

The Amended Complaint asserts eight causes of action against all defendants: (1) constructive trust upon the profits and proceeds of the sale of the Property or the Successor Property; (2) breach of contract; (3) fraud; (4) failure to exercise reasonable care and good faith; (5) misappropriation of corporate funds; (6) a request for attorney's fees; (7) accounting; (8) permanent injunctive relief.

Presently before the Court is Defendants' motion to dismiss. Defendants move to dismiss six of the eight causes of action for failure to state a claim for relief and argue that neither the Patels nor NCBL is a proper defendant under the remaining two causes of action (second and seventh).

In support of their motion to dismiss, defendants offer an affidavit from defendant Nayan Patel, in which he claims that the various agreements the parties executed, namely the JVA, the Shivkrupa Operating Agreement, and the Modification Agreement, expressly provide that Heena would be entitled to preferential payments before the net

proceeds from the sale of the Property were to be shared. Defendants claim that by mid-May 2011, Heena and 30-32 agreed that the project's costs and delays were such that the only viable option was to sell the project immediately upon completion. *See* Nayan Patel Aff. ¶ 17. Plaintiffs consented to the sale of the Property to CHSP for $52.2 million in a written agreement dated May 26, 2011. *Id.* Ex. J.

Regarding notice of the closing, defendants deny that they advanced the closing without notice to plaintiffs. They submit an email dated December 20, 2011 from Nayan Patel to Impagliazzo, which advises: "As of now the closing is set for December 27, I am trying to push the date short but no luck so far." (Nayan Patel Aff. Ex. J.) Defendants also maintain that the closing was not a sit-down closing, but a closing in escrow, and that plaintiffs had already agreed to the sale. *Id.* ¶¶ 18-19.

DISCUSSION

A. *Motion to Dismiss Under CPLR 3211(a)(1)*

Defendants first bring their motion under CPLR 3211(a)(1), which authorizes dismissal of a complaint based on documentary evidence. Defendants seek dismissal of all claims asserted against the Patels and NCBL, as well as the following claims asserted against defendant Heena: constructive trust, fraud, failure to exercise reasonable care and

good faith, misappropriation of corporate funds, a request for attorney's fees, and permanent injunctive relief.

Dismissal based on documentary evidence may only be granted if that evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). The Court notes, however, that affidavits are not considered documentary evidence under CPLR 3211(a)(1). *Solomons v. Douglas Elliman LLC*, 94 A.D.3d 468, 469-470 (1st Dep't 2012); *Tsimerman v. Janoff*, 40 A.D.3d 242, 242 (1st Dep't 2007).[5] Nor are emails considered the types of documentary evidence that would support dismissal under CPLR 3211(a)(1). *See Fontanetta v. John Doe 1*, 73 A.D.3d 78, 85 (2d Dept 2010); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (1st Dept 2004).

In support of their motion to dismiss, defendants rely on the following language of the JVA:

> From the mortgage proceeds or the proceeds of any refinancing of same, [Heena] shall receive $2,000,000.00 after initial capital contributions are returned to the parties, provided, however, that [30-32] shall receive a credit in the sum of $1,000,000.00 in the event the parties enter into a subsequent unrelated hotel project. In any event, [30-32] may demand that payment of said sum be made within a period of one (1) year from the date [Heena] has

[5] In addition, affidavits cannot be considered under subsection (a)(7) to support a motion to dismiss the complaint for failure to state a claim for relief. *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 351 (2013).

> received the said $2,000,000. [Heena] shall receive the first $12,000,000.00 of funds from a permanent mortgage or hotel operation without interest, or from a buy-out and thereafter distributions shall be equal.

(Nayan Patel Aff., Ex. B at 2). Plaintiffs argue that this provision does not apply to the "sale" of the property, but only to the distribution of funds "from a permanent mortgage or hotel operation," and that the term "sale of the Hotel" is not used in the JVA until the second to last paragraph of the agreement, where it states that Heena and 30-32 were to share equally in the "net proceeds" of any sale, a term which is not defined. Not only is the language of the JVA far from clear and subject to differing interpretations, as described below, this document, particularly the provision providing for a $12 million return to Heena, was changed by the Modification Agreement.

The Shivkrupa Operating Agreement also, according to defendants, confirms that the parties intended that Heena receive preferential payments. The definitions section of this agreement refers to three preferred returns and defines them as $2 million, $1 million (but only if 30-32 and Heena enter into a definitive written agreement to construct and operate a new hotel property, which apparently did not happen), and $12,025,000.00, respectively. (Nayan Patel Aff., Ex. C at 5, 9.) Section 7.2, entitled "Distribution of Capital Proceeds," makes clear that these three preferred returns belong to the "Owner Member," defined therein as Heena. *Id.* at 20. Finally, section 10.3 purports to terminate the JVA and declares it to be "null, void, and of no further legal

force or effect." *Id.* at 30. However, the court notes that the preferred returns are payable after certain capital contributions are returned to both members, *id.* at 19-20, which apparently never happened, since even Heena admits that the Property was never transferred to Shivkrupa. *See* Nayan Patel Aff. ¶ 13. In addition, paragraph 12 of the later-executed Modification Agreement provides that, except as specifically amended by that agreement, the JVA remains in full force and effect. (Naya Patel Aff., Ex. H at 3.) Thus, the relevance of the Shivkrupa Operating Agreement, and its legal effect on the JVA, is not entirely clear, as counsel for the defendants has acknowledged. *See* 6/12/12 Tr. at 21.

The third agreement that defendants rely on is the Modification Agreement (Nayan Patel Aff., Ex. H), which they claim was entered into in an attempt to rescue the hotel project when, due to plaintiffs' alleged gross incompetence in supervising the construction of the hotel, the hotel could not be completed in the original estimated time frame or cost. (Nayan Patel Aff. ¶¶ 9, 15.)[6] Allegedly in reliance on the promises of 30-32's principals to complete the project by March 1, 2011, Heena agreed to lend the developer, Hy Point, the general contractor, Renotal, and 30-32, on a joint and several basis, an additional $1 million pursuant to a promissory note ("Note") with a maturity date of March 30, 2011. The Note is attached to the Modification Agreement as Exhibit

[6] The court does not accept any of the factual averments in the Nayan Patel affidavit as true, and refers to them only to provide some context for the execution of this document.

B. It was also agreed that, in the event a Temporary Certificate of Occupancy ("TCO") for the hotel was not issued by March 1, 2011, Heena would be entitled to "TCO Late Fees" of $150,000 per month. *Id.* Ex. H at ¶ 6. The TCO was not issued until December 5, 2011, *id.* Ex. I, almost nine months too late. Defendants offer this document as additional proof that the Proceeds were properly distributed.

The Modification Agreement is vague and ambiguous in at least two major respects. First, Nayan Patel avers that all of the then equitable owners of 30-32, including Michael Altman and Ronnie Tal, agreed that repayment of the $1 million Note and the TCO Late Fees "would first be deducted before any available cash might be paid to them." (Nayan Patel Aff. ¶ 16.) However, there is nothing in the Modification Agreement itself to support this claim. In addition, plaintiffs contend that $1.5 million in late fees were improperly deducted from the Proceeds because "any fair reading" of paragraph 6 of the Modification Agreement is that late fees are to be paid by the contractor, Renotal, not by 30-32, who is listed as a "seller." Impagliazzo also claims that Heena expressly promised him that he would not be responsible for the late fees. (Impagliazzo Aff. ¶ 28.) It is not clear from the Modification Agreement who was to pay the TCO Late Fees, and when and how they were to be paid.

Finally, the Modification Agreement specifically provides that it controls in the event of a conflict between any of the "Project Documents," defined to include the JVA

and Shivkrupa Operating Agreement. Exhibit A to the Modification Agreement contains amendments to the Shivkrupa Operating Agreement. The definition of "Third Preferred Return" is deleted in its entirety, and is replaced with the following:

> 'Third Preferred Return' means an amount to be mutually agreed upon by the Members that is reflective of the initial amount of capital invested by Owner Member in the Project being developed at the Premises. For the avoidance of doubt, the First [sic] Preferred Return is referenced as $12,000,000.00 in the JV Agreement, but such amount might have been changed subsequent to the execution of the JV Agreement. In the event the Members are not able to agree upon the amount of First [sic] Preferred Return on or prior to the Adjustment Date, the matter shall be subject to and decided by arbitration . . .

(Nayan Patel Aff. Ex. H at 1-2.) According to Impagliazzo, there was never any agreement reached as to the amounts that Heena was to be distributed prior to the division of the Proceeds and defendants offer no documentary proof of any such agreement. (Impagliazzo Aff. ¶ 27.)

Defendants' motion to dismiss the complaint based on documentary evidence is therefore denied. The various agreements that the parties executed do not conclusively establish that Heena was entitled to preferential payments before the Proceeds were to be shared with the plaintiffs or that all of the challenged disbursements were proper. Defendants rely on many factual averments made in the moving affidavit of Nayan Patel, which although proper on a motion for summary judgment pursuant to CPLR 3212, are not and have not been considered by the court in reaching a decision on this motion.

Likewise, Defendants' request to convert the motion into a summary judgment motion is denied, given the presence of factual in this case, which cannot be resolved without some pretrial disclosure.

B. *Defendants' Motion to Dismiss Under CPLR 3211(a)(7)*

1. Count One – Constructive Trust

Defendants also move to dismiss six of the Complaint's eight individual causes of action under CPLR 3211(a)(7). Plaintiffs' first cause of action seeks to impose a constructive trust "upon the profits and proceeds of the sale of the property and the successor property." (Am. Compl. ¶ 43.) "A constructive trust may be imposed in favor of one who transfers property in reliance on a promise originating in a confidential relationship where the transfer results in the unjust enrichment of the holder." *Rogers v. Rogers*, 63 N.Y.2d 582, 585-586 (1984) (citing *Sharp v Kosmalski*, 40 N.Y.2d 119, 121 (1976)). "In general, to impose a constructive trust, four factors must be established: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Marini v. Lombardo*, 79 A.D.3d 932, 933 (2d Dep't 2010).

Defendants concede that the parties "did enter into a joint venture agreement such that a fiduciary relationship arose." (Defs.' Mem. of Law at 10.) Indeed, case law treats joint venturers as akin to partners, who owe each other a fiduciary duty. *R.C. Gluck & Co.*

v. Tankel, 12 A.D.2d 339, 342 (1st Dep't 1961). However, defendants contend that this fiduciary relationship arose no earlier than the date on which the JVA and the contract of sale were executed. Thus, defendants argue that no fiduciary relationship existed while the parties were negotiating these documents, and thus, plaintiffs could not have been unfairly induced to transfer title to the Property for less than its fair market value in reliance on any promises by Heena. Defendants argue that the only promises on which defendants relied are set forth in the written JVA, which was negotiated at arm's length by sophisticated business entities represented by counsel. Defendants further maintain that, since 30-32 purchased the Property for about $12.2 million several months before selling it to Heena for $14.3 million and because Heena allegedly did not even recover all the sums due it pursuant to the parties' written agreement, as per the affidavit of Nayan Patel, Heena was not unjustly enriched.

As the Court of Appeals has observed, ascertaining the existence of a fiduciary duty "inevitably requires a fact-specific inquiry," *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 561 (2009), and, on a motion to dismiss for failure to state a claim for relief, the court must accept all of the plaintiffs' factual allegations as true. Impagliazzo alleges, in opposition to defendants' motion, that the parties "built a trusting relationship in negotiating the terms of selling the property and in developing a future business relationship together. I believed that when Henna [sic] and I were negotiating

the terms of the contract of sale, and the JVA[,] that we established a confidential or fiduciary relationship. We were going to be future partners in what I perceived as a long term business." (Impagliazzo Aff. ¶ 6.) Impagliazzo further avers that he sold the Property to Heena at a loss only because the parties agreed to form the joint venture, and because Heena and its principals promised to reimburse plaintiffs for the "closing loan" and the "buy-out loan." *Id.* ¶¶ 7-10. Not only must the court accept these factual averments as true, it would be improper, at this early stage of the litigation, for the court to make any pronouncements as to exactly *when* a fiduciary relationship arose between 30-32 and Heena, whether the plaintiffs actually sustained a loss on the sale to Heena or whether Heena was unjustly enriched upon the resale to CHSP. *See Tobias v. First City Nat. Bank & Trust Co.*, 709 F. Supp. 1266, 1277-1278 (S.D.N.Y. 1989). Dismissal of the constructive trust claim is denied.

2. Counts Two and Seven – Claims Asserted Against Defendant NCBL

Defendants next seek dismissal of Counts Two and Seven – breach of contract and accounting – only to the extent asserted against defendant NCBL. After review of the arguments, however, the motion to dismiss NCBL from the case is also denied.

The closing documents for the sale of the Property to CHSP reveal that $12,250,000 was wire-transferred to NCBL and is identified as "Seller's Proceeds."

(Impagliazzo Aff. Ex. 16.) Defendants purport to explain this as intercompany loan, which was later reversed. *See* Nayan Patel Aff. ¶ 28 & Ex. L. However, they offer no documents to support Mr. Patel's averments, which are, by themselves, insufficient to support dismissal under CPLR 3211(a)(7). The Complaint further alleges that this money was then used to acquire the Successor Property on Beekman Street in Manhattan. (Am. Compl. ¶¶ 31, 42.) The fact that the Successor Property was acquired by NCBL in June 2011, *see* Nayan Patel Aff., Ex. L, does not definitively establish that no part of the Proceeds were ever used for this investment. Accordingly, defendants have not established a basis for dismissal of Counts Two and Seven as to defendant NCBL.

3. Count Three – Fraud

The third cause of action alleges common-law fraud. A cause of action to recover damages for fraud requires allegations of a misrepresentation of a material fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance by the other party and resulting damages. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996). Where a fiduciary relationship exists, a fraud claim "may be predicated on acts of concealment." *Kaufman v. Cohen*, 307 A.D.2d 113, 119-120 (1st Dep't 2003).

Two of the allegations that make up plaintiffs' fraud claim are that defendants formulated a plan to convey the Property without any intention of honoring the parties' agreements and that they modified the parties' business documents to secure preferred returns. (Am. Compl. ¶ 50.) As to the latter allegation, since any modifications were in writing and agreed upon by both sides, such modifications can hardly form the basis of a fraud claim. Nor can a cause of action alleging breach of contract be converted to one for fraud merely with an allegation that the contracting party never intended to meet its contractual obligations. *Sound Commc'n, Inc. v. Rack & Roll, Inc.*, 88 A.D.3d 523, 523-524 (1st Dep't 2011); *Trusthouse Forte (Garden City) Mgt. v. Garden City Hotel*, 106 A.D.2d 271, 272 (1st Dep't 1984).

However, plaintiffs also allege that defendant Nayan Patel made affirmative misrepresentations concerning plaintiffs' ability to be physically present at the closing of the sale of the Property to CHSP and that plaintiffs would receive $1.4 million from the Proceeds. (Impagliazzo Aff. ¶ 17.)[7] Plaintiffs also allege that defendants affirmatively concealed all information concerning the closing of the sale to CHSP despite plaintiffs' repeated demands. *Id.* ¶¶ 19-21. Defendants offer Nayan Patel's email dated December

[7] Plaintiffs' submission of a portion of a letter dated December 29, 2011 from Heena's counsel marked "Confidential For Settlement Purposes Only," wherein he discusses a potential monetary settlement of the parties' dispute, *see* Impagliazzo Aff., Ex. 13, was in clear violation of CPLR 4547. No part of this letter has been considered by the court in reaching a determination of this motion.

20, 2011 as proof that no misrepresentation was made. However, Nayan Patel's email only serves to generate factual disputes, which are not amenable to disposition on a 3211(a)(7) motion. In this email, Nayan Patel advised that he was trying to "push the date short" from December 27th, he also stated that "but no luck so far. I will know more tomorrow." (Nayan Patel Aff., Ex. K). This suggests that he would further advise plaintiffs of the status of his efforts, which plaintiffs allege did not occur (Cmplt., ¶ 23; Impagliazzo Aff. ¶ 18). Thus, instead of providing a basis for dismissal, defendants' submission of this email on this motion does the opposite – it highlights a factual dispute that militates against the granting of the motion to dismiss.

Defendants further argue that plaintiffs have failed to allege and cannot prove any injury stemming from Impagliazzo's absence at a closing held in escrow. However, Impagliazzo alleges that he was induced to forgo his legal rights regarding the notice of pendency he filed against the Property on December 18, 2011 based on Nayan Patel's allegedly false promises regarding the closing and the disbursement of the Proceeds, and that monies held in escrow at the closing were later released without any payment to plaintiffs. (Impagliazzo Aff. ¶¶ 19, 29.) These allegations, accepted as true for purposes of this motion to dismiss, are sufficient to allege proximate cause and resulting injury.

4. Counts Four, Five, Six and Eight

Plaintiffs make no attempt, in their opposition papers, to argue against dismissal of their fourth cause of action (lack of good faith), fifth cause of action (misappropriation of corporate funds), sixth cause of action (seeking attorneys' fees) and the eighth cause of action (injunctive relief). The fourth cause of action and fifth causes of action are dismissed as duplicative of the breach of contract and breach of fiduciary claims. *See Refreshment Mgt. Servs., Corp. v. Complete Office Supply Warehouse Corp.*, 89 A.D.3d 913, 915 (2d Dep't 2011). As for the sixth cause of action, plaintiffs allege no exception to the "American rule," which precludes plaintiffs from recovering attorney's fees as damages in the event it prevails on any of its claims. *BLT Steak, LLC v. 57th Street Dorchester, Inc.*, 93 A.D.3d 554, 555 (1st Dep't 2012).

5. Claims Asserted Against Individual Defendants

The motion to dismiss as against the individual defendants is granted as to all of the Patels, with the exception of the fraud claim against Nayan Patel. The sole basis for the claims against these individuals is that they are members of Heena, a limited liability company. This violates Limited Liability Law § 609, which provides that neither a member, manager nor agent of a limited liability company is liable for the debts, obligations or liabilities of the company or of each other, solely by reasons of being such

a member or participating in the conduct of the business of the company. *See Matias v. Mondo Props. LLC*, 43 A.D.3d 367, 367-368 (1st Dep't 2007); *Retroupolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 210 (1st Dep't 2005).

However, "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *Am. Express Travel Related Serv. Co. v N. Atl. Res.*, 261 A.D.2d 310, 311 (1st Dep't 1999). As stated above, plaintiffs have alleged personal involvement by defendant Nayan Patel in deliberately misleading plaintiffs about the date of the closing and how the Proceeds would be disbursed in order to induce plaintiffs to cancel the notice of pendency that was filed against the Property. Plaintiffs also have alleged that Nayan Patel stood to personally gain substantial sums from the transaction. The Complaint states a cause of action for fraud against this defendant, but he is not personally liable for any of the contractual obligations of Heena.

CONCLUSION and ORDER

For the foregoing reasons, it is

ORDERED that defendants' motion to dismiss the Complaint is granted to the extent of dismissing:

--the fourth, fifth, sixth and eighth causes of action;

--all causes of action against Khandubhai Patel, B.L. Patel, and Champ Patel; and

--all causes of action against Nayan Patel, except the third cause of action

and is otherwise denied; and it is further

ORDERED that the Complaint is dismissed in its entirety as against Defendants Khandubhai Patel, B.L. Patel, and Champ Patel, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

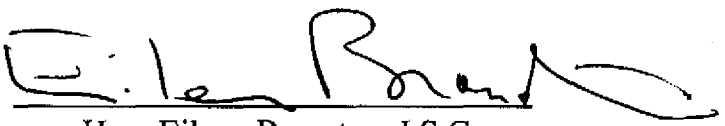
ORDERED that counsel for the moving defendants shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-file Support Office (Room 119) who are directed to mark the court's records to reflect the change in the caption herein.

ORDERED that the remaining defendants shall serve and file an answer to the Amended Verified Complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the remaining defendants are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on October, 2013, at 10 AM.

Dated: New York, New York
September 10, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.