[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Warren Cole

-v-

Harry MacKlowe

INDEX NO. 650100/11

MOTION DATE _____

MOTION SEQ. NO. 3

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

is decided in accordance with the annexed decision.

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

Dated: 9/16/13

CK
CYNTHIA S. KERN, 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: Part 55

----------x

WARREN COLE,

Plaintiff,

Index No. 650100/2011

-against-

DECISION/ORDER

HARRY MACKLOWE, MAK WEST 55TH St ASSOCIATES AND MAK 55 ACQUISITION CORP.,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover his alleged share of a partnership distribution he claims he should have received as a 9% partner in defendant Mak West 55th Street Associates, L.P.. By order dated November 16, 2011, the Honorable Justice Solomon granted defendants' motion to dismiss plaintiff's complaint. However, on appeal, the First Department reversed Justice Solomon's decision and remanded the case. Plaintiff now moves for an order pursuant to CPLR § 3212(e) granting him partial summary judgment on his first cause of action as against the corporate defendants for breach of contract. He has withdrawn that portion of his motion seeking partial summary judgment against Harry Macklowe on his first cause of action.

for breach of contract. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. Defendant Harry Macklowe ("Macklowe") is a developer and owner of Manhattan real estate. Plaintiff was employed by Macklowe's management company, Manhattan Pacific Management Co. ("Manhattan Pacific"), from 1988 until April 1999. In 1987, Macklowe organized the defendant entity known as Mak West 55th Street Associates, L.P. (the "Partnership") to hold the fee interest in 125 West 55th Street (the "Property"). Thereafter, plaintiff became a limited partner in the Partnership pursuant to the "Limited Partnership Agreement of MAK West 55th Associates" dated January 1, 1994 (the "LPA"). As a limited partner, plaintiff owned a 9% interest in the Partnership. However, Section 11.1 of the LPA provided that:

> Upon the termination for any reason of [plaintiff's] employment by Manhattan Pacific Management Co., Inc., (the "Termination") he shall sell to [Macklowe] or his designee, and [Macklowe] or his designee shall purchase from [plaintiff], [plaintiff's] interest in the partnership at a price determined pursuant to section 11.2

Pursuant to Section 11.3 of the LPA, the closing for this transaction was to take place "ninety days after the Termination."

In 1998, the Partnership transferred the Property to 125 West 55th Street LLC ("125 West LLC"), which the Partnership allegedly owned a 90% interest in. In April 1999, plaintiff's employment with Manhattan Pacific ended and Macklowe offered to purchase Cole's interest in, *inter alia*, the Partnership. However, plaintiff refused the offer by Macklowe and, thereafter, Macklowe informed plaintiff that he was rescinding plaintiff's interest. It is undisputed that Macklowe paid plaintiff no money to acquire his interest in the Partnership.

In 2008, 125 West LLC sold the Property for over $443 million dollars. Pursuant to

Section 12.2 of the LPA, upon sale of the Property, the General Partners were required to dissolve the Partnership and "after paying or making provision for all liabilities to creditors of the partnership, shall distribute the partnership's cash and other assets among the Partners in proportion to their respective aggregate Percentages." At the time the Property was sold, Macklowe operated under the belief that plaintiff's 9% interest had been rescinded and allocated the Partnerships assets from the sale accordingly. It is undisputed that plaintiff never received any profits from the sale of the Property.

In 2011, plaintiff commenced the instant action asserting claims for breach of contract, unjust enrichment and violations of Section 273 of the Debtor Creditor law against defendants. All of plaintiff's claims are predicated on the alleged failure of defendants to tender 9% of the distribution from the sale of the Property in 2008 to plaintiff. Defendants' originally moved to dismiss the complaint and by order dated November 16, 2011, Justice Solomon granted defendants' motion to dismiss on two separate grounds. One ground was that the purpose of the Partnership ceased in 1998 when the Partnership conveyed the property it held to 125 W. 55th Street LLC. The other ground was that plaintiff's interest in the Partnership was extinguished when plaintiff failed to sell his shares to defendant Macklowe when his employment relationship ended. Plaintiff appealed the motion and the First Department reversed the decision. In its opinion, the First Department stated that:

> Contrary to the defendants' assertion, plaintiff's failure to sell his interest did not divest him of his partnership interest. Not only is the agreement void of any language mandating this result, but such interpretation of the agreement runs afoul of the well settled principle that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties (*Matter of Lipper Holdings v. Trident Holdings*, 1 A.D.3d 170, 171 [1st Dept 2003]). In the absence of express language divesting plaintiff of his partnership interest for his

> failure to sell his interest, such a result is simply contrary to basic contract law. Moreover, the interpretation of the agreement urged by defendants–allowing them to acquire plaintiff's partnership interest absent the consideration expressed in the agreement–represents a windfall to the defendants that is absurd, not commercially reasonable and contrary to the express terms of the agreement and thus the intent of the parties. Accordingly, plaintiff continues to hold his partnership interest.

Plaintiff now moves for an order granting him summary judgment on his first cause of action for breach of contract against the corporate defendants based upon the First Department's finding that he "continues to hold his partnership interest." Specifically, plaintiff argues that defendants breached Sections 6.1 and 12.2 of the LPA by not distributing to plaintiff 9% of the net proceeds from the 2008 sale of the Property. Defendants oppose the motion on the ground that there exists material issues of fact as to whether plaintiff is estopped from asserting his right to the 9% interest in the Partnership or whether plaintiff waived his interest as he never, over nine years, rejected to the rescission of the interest by Macklowe or the Partnership's non-issuance of K-1s for tax purposes. Additionally, defendants argue that plaintiff's motion is premature as no discovery has taken place.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, plaintiff is entitled to summary judgment on his first cause of action for breach of contract against the corporate defendants as he has demonstrated his *prima facie* right to judgment as a matter of law. To make out a *prima facie* claim for breach of contract, a plaintiff must show: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *Noise in Attic Prod., Inc. v. London Records*, 10 A.D.3d 303 (1st Dept 2004). Here, it is undisputed that the LPA is a binding and enforceable contract between the parties that allocated a 9% interest in the Partnership to plaintiff. Additionally, it is undisputed that pursuant to Section 12.2 of the LPA, upon dissolution of the Partnership, the General Partners were required to "distribute the partnership's cash and other assets among the Partners in proportion to their respective Percentages." As the First Department found, "plaintiff's failure to sell his interest [upon his termination] did not divest him of his partnership interest . . . [and he] continues to hold his partnership interest." Thus, defendants' breached the LPA when they failed to distribute 9% of the Partnership's assets to plaintiff upon dissolution of the Partnership in 2008 and plaintiff was damaged by failing to collect the money he was legally entitled to.

In response, defendants have failed to demonstrate that a triable issue of fact exists as to their affirmative defenses of waiver and estoppel. "Waiver is an intentional relinquishment of a known right with full knowledge of the facts upon which the existence of the right depends." *Amrep Corp. v. American Home Assur. Co.*, 81 A.D.2d 325, 329 (1st Dept 1981). It is well settled that waiver "cannot be created by 'negligence, oversight or thoughtlessness.'" *Byer v. City of New York*, 50 A.D.2d 771 (1st Dept 1975) (quoting *Alsens Amer. Portland Cement Works v. Degnon Contr. Co.*, 222 N.Y. 34, 37 (1917)). Indeed, such intention "'must be unmistakably

manifested, and is not to be inferred from a doubtful or equivocal act." *EchoStar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614 (1st Dept 2010). With respect to estoppel, the Court of Appeals has explained: "[t]he purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position." *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006). "In order to prevail on the theory of equitable estoppel, the party seeking estoppel must demonstrate a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position." *River Seafoods, Inc. v. JPMorgan Chase Bank,* 19 A.D.3d 120, 122 (1st Dept 2005). Specifically, "it is only where a party has a duty to speak and fails to do so in order to deceive, that silence may give rise to an estoppel." *Fisher Bros. Sales v. United Trading Co. Desarrollo y Comercio*, 191 A.D.2d 310, 311-12 (1st Dept 1993). Moreover, "an estoppel will only rarely be permitted to overcome a signed writing." *Id.* at 311.

In the present case, there exists no material issue of fact in dispute as plaintiff's alleged actions evidencing his intent to not claim his 9% interest in the Partnership are insufficient as a matter of law to constitute waiver or to give rise to an estoppel. While defendants present several instances of inaction by plaintiff, which they contend demonstrate his intention to not claim his 9% interest in the Partnership, they fail to identify one single affirmative act by plaintiff evidencing such an intent. Indeed, defendants mostly rely on plaintiff's lack of response to their actions–Macklowe's rescission of plaintiff's 9% in 1998 and his failure to issue plaintiff K-1s

after 1998–to evidence plaintiff's intent. However, defendants cannot rely on their own actions to evidence an intention by plaintiff, especially here, where the LPA itself created no duty for plaintiff to act in order to maintain his 9% interest. In the end, the LPA created no affirmative duty on plaintiff to assert his right to his interest and his failure to actively press for K-1 statements or in any way argue about defendants' alleged "rescission" of his 9% interest in the Partnership amounts to nothing more than silence and inaction, which are insufficient to establish an intent to waive a known right or to give rise to an estoppel.

Moreover, defendant's contention that plaintiff's failure to request K-1s for the Partnership in the nine years between his termination and commencement of this lawsuit evidences waiver of his right is unavailing as any such request would have been futile. As the First Department held in another lawsuit between these parties, "[t]he law requires no one to do a vain thing." *Cole v. Macklowe*, 64 A.D.3d 480, 481 (1st Dept 2009). In 1999, Macklowe made it clear that he had considered plaintiff's interest in the Partnership rescinded. Thus, it would have been futile for plaintiff to request a K-1 as there was no chance Macklowe would have honored such a request.

Finally, defendants contention that summary judgment should be denied pursuant to CPLR § 3212(f) because no discovery has taken place is unavailing. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, defendants claim a need for: (1) plaintiff's tax returns; (2) any communication from plaintiff that he opposed Macklowe's rescission of his interest; (3) any communication that plaintiff made to Macklowe demanding the

issuance of K-1s for his purported 9% interest in the Partnership; (4) any communication that plaintiff made to Macklowe asserting the he actually owned an interest in the Partnership; and (5) any communication that plaintiff made to any third party regarding his interest in the Partnership. This claimed need is unavailing as said information would not change the essential facts of this case, namely that plaintiff had a 9% interest in the Partnership that was neither bought nor, as the First Department found, rescinded. Moreover, plaintiff has annexed his federal and state tax returns to his reply and supplemental papers which demonstrate that he did acknowledge additional interests which were in dispute at the time of filing his tax returns. Additionally, any communication between plaintiff and Macklowe is presumably already in the possession of defendants and need not be sought through discovery. Finally, any communication from plaintiff to third parties which might have indicated that he was not claiming an interest in the Partnership would not be relevant to the present action. The issue in this case is whether there was a waiver or estoppel by plaintiff of his right to claim an interest in the Partnership. There would be no basis for defendants to claim that they relied to their detriment on any representations plaintiff may have made to third parties regarding his interest or lack thereof in the Partnership which they are not even aware of at the present time or that such statements unmistakably manifested an intent on plaintiff's part to waive his rights.

Based on the foregoing, plaintiff's motion for partial summary judgment on his first cause of action for breach of contract is hereby granted as to defendants Mak West 55th Street Associates, L.P. and MAK 55 Acquisition Corp. Settle order.

Dated: 9/16/13

CK

CYNTHIA S. KERN J.S.C.