Fuks v Shomron
2016 NY Slip Op 31715(U)
September 14, 2016
Supreme Court, New York County
Docket Number: 102721/2012
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

MALI FUKS,

Plaintiff,

– against –

RUTH SHOMRON, as Wind Up Partner of R&L Realty Associates,

Defendant.

Index No.: 102721/2012

DECISION/ORDER

This action represents the latest incarnation of a seemingly endless dispute between plaintiff Mali Fuks and defendant Ruth Shomron regarding the operation and dissolution of their two member partnership, R&L Realty Associates (R&L). Shomron now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. Fuks opposes the motion and seeks leave to amend her complaint or to conduct additional discovery.

Relevant Facts and Background

The tortured history of the litigation between these partners is detailed in this court's prior decisions and is briefly summarized as follows: R&L was the owner of unsold shares allocable to 25 apartments located in the cooperative known as 205 West 103 Owners Corp. (Owners Corp.). In 1996, Fuks commenced an action, individually and derivatively on behalf of R&L, Fuks v Rakia Associates (Index No. 122768/1996) (Action 1), seeking an accounting and dissolution of the partnership. In 2002, Shomron commenced an action against Fuks, Shomron v Fuks (Index. No. 102882/2002) (Action 2), seeking, among other things, rescission of the sale of four apartments from R&L to entities related to Fuks's husband, Yoram Fuks, on the ground of fraud. Following trial of Action 2, this Court (Stackhouse, J.) issued a written decision, dated

September 27, 2006 (Shomron Aff., Exh. XX), and an interlocutory judgment, dated November 16, 2006 and filed on November 28, 2006 (id., Exh. D). The interlocutory judgment rescinded the sale of the apartments, dissolved R&L, and designated Ruth Shomron as the partner to wind up its affairs. The wind up was stayed pending entry of a final judgment in Action 1.[1] The Appellate Division subsequently affirmed the November 2006 interlocutory judgment. (Shomron v Griffin, 70 AD3d 406 [1st Dept 2010], affg 2006 WL 3026299 [Sup Ct, NY County, Sept. 25, 2006, No. 102882/2002].)

By interlocutory judgment, dated August 16, 2010 and filed on September 7, 2010, issued pursuant to a June 3, 2010 decision on the record (Shomron Aff. In Supp., Exh. E), this court modified the prior interlocutory judgment to the extent of vacating the stay of the wind up and granting Shomron the right to effectuate the sale of R&L's shares for the 25 apartments, pending the determination of Action 1. Paragraph 3 of this interlocutory judgment ordered Shomron to market and sell the shares "in a bulk sale through a licensed real estate broker." At that time, Fuks had a full opportunity to argue the merits of a bulk sale.

Owners Corp. also brought an action, 205 West 103 Owners Corp. v Shomron (Index No. 105360/2010), seeking damages and an injunction barring Shomron from selling R&L's shares for the apartments in a bulk sale. By decision on the record on October 28, 2010, the transcript of which was so-ordered on November 9, 2010 (Shomron Aff., Exh. F), this court dismissed the action, finding that the request for an injunction, supported by Fuks, appeared to be an end run around the September 7, 2010 interlocutory judgment directing the bulk sale.

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[1] Pursuant to the parties' stipulation of settlement on the record on February 24, 2010, this court issued an order, dated March 9, 2010, referring numerous issues to a Special Referee to hear and report. These issues included the remaining claims and counterclaims between Fuks and Shomron in Action 1 and any objections to the accounting provided by Fuks with respect to the rents and profits received on the four apartments in Action 2. (See Feb. 24, 2010 Tr., at 31-39 [Fuks Aff. In Opp., Exh. 1].) The reference is still pending.

Shomron entered into a Contract of Sale with purchaser David Paz for the shares for the 25 apartments. This contract was dated as of November 24, 2010, with an initial closing date of December 15, 2010. (Contract of Sale, at 1 [Shomron Aff., Exh. H].) R&L, acting by Shomron as wind up partner, subsequently brought an Article 78 proceeding against Owners Corp., R&L Realty Associates v 205 West 103 Owners Corp. (Index No. 104662/2011), to compel the board to execute documents necessary to effectuate the sale to Paz. By decision and order dated June 13, 2011 and filed on June 16, 2011 (Shomron Aff., Exh. I), this court granted R&L's petition and directed Owners Corp. to execute and deliver specified documents necessary to effectuate the sale.

R&L subsequently brought contempt proceedings against Owners Corp. for failure to comply with the June 16, 2011 order. By decision on the record on December 7, 2011 and order dated December 16, 2011 (Shomron Aff., Exh. U), this court found Owners Corp. and its individual directors in contempt and afforded them a final opportunity to purge their contempt.

Fuks also brought an order to show cause in Actions 1 and 2 for relief from the sale. In denying the motion by decision on the record on December 13, 2011, the transcript of which was so-ordered on April 11, 2012 (Shomron Aff. Exh. W), this court held that Fuks's motion appeared "to be yet another attempt to stop the sale that was ordered in the Order filed on September 7, 2010." (Id. at 14.) The court noted that "[a]t the time of the Article 78 proceeding, [Owners Corp.] and Ms. Fuks, as a director and/or officer had a full opportunity to address the merits of the sale to Paz." (Id. at 13.)

The sale to Paz finally closed on May 2, 2012. This action by Fuks against Shomron as wind up partner was filed on May 18, 2012. The complaint alleges seven causes of action for breach of fiduciary duty. The first and second causes of action are based on the bulk sale of the

shares for the 25 cooperative apartments to Paz. The third cause of action is based on Shomron's alleged distribution of $100,000 of funds from R&L to herself without an equal distribution to Fuks. The sixth cause of action is based on Shomron's dealings with Jacob Helfman, a former creditor of R&L. The fourth, fifth, and seventh causes of action were withdrawn during the briefing of this motion. (Stipulation dated Feb. 16, 2016 [NYSCEF No. 79]; Fuks Aff. In Opp. ¶ 6 [c]-[e].)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

For the reasons that follow, the court finds that Shomron makes a prima facie showing that the remaining causes of action of the complaint should be dismissed, and Fuks fails to raise a triable issue of fact as to any of these causes of action. To the contrary, in her repetitive and sometimes nonsensical papers on this motion, Fuks seeks to relitigate numerous issues that have been finally resolved by the courts or settled by the parties.

First Cause of Action

The first cause of action pleads that Shomron breached her fiduciary duties to Fuks by "failing to cancel the agreement with Paz" because of his alleged "inability . . . to close in a

timely manner," and by failing to "take the higher deal" offered by an alternative bidder procured by Fuks named Martin Hollander. (See Compl. ¶¶ 32-33.)

As noted above, Shomron entered into the contract of sale with Paz in November 2010, and the closing was initially scheduled to take place in December 2010. (Contract of Sale, at 1.) The undisputed evidence in the record shows that the closing was delayed as a result of the efforts of Owners Corp., supported by Fuks and found contemptuous by this court, to prevent the sale, and not by any inability of Paz to close. For example, Shomron annexes emails between Paz and R&L's transactional attorney, Mark Axinn, on the evening of December 14, 2010, discussing a last-minute adjournment of the closing date due to Owners Corp.'s failure to prepare documentation. Paz wrote to Axinn, at the time of this news, that "[e]veryone [was] already on the plane [t]o ny, to close . . . ." (Dec. 14, 2010 Emails [Halperin Reply Aff., Exh. J].) In opposition, Fuks does not contest this evidence, which makes a prima facie showing that the December closing date was adjourned as a result of Owners Corp.'s conduct. Rather, she claims that Paz was unable to close on the December date on an all cash basis, as required by the Contract of Sale. (Fuks Aff. In Opp. ¶¶ 6 [a] [xiv]-[xvi], 72.) She fails, however, to submit any evidence to raise a triable issue of fact as to Paz's ability to make a cash purchase at that time. The mere fact that Paz, after several months of delay and litigation, elected instead to obtain financing does not suffice to raise a triable issue of fact as to Paz's ability to complete a cash purchase in December 2010. Nor, under the circumstances, does Shomron's decision to permit him to obtain financing constitute a breach of her fiduciary duties.

The record further reflects that Hollander's non-binding offer to purchase the shares for the apartments was not made until September 12, 2011, nine months after Paz's closing was scheduled to have occurred. (Letter from Marcus & Millichap [Fuks's real estate broker] to

Richard L. Farren [Fuks's attorney], dated Sept. 12, 2011 [Shomron Aff., Exh. K].) At that point, as this court has previously held, the identification of a proposed new buyer could not serve as evidence that would support setting aside the court's June 16, 2011 order directing the sale to Paz. (Nov. 7, 2011 Tr., at 7-8, R&L Realty Assocs. v 205 W. 103 Owners Corp., Index No. 104662/2011 [Shomron Aff., Exh. R].) The record shows that Shomron nonetheless attempted to negotiate with both Hollander and Paz, and that Hollander rescinded his offer. (See Shomron Aff., Exhs. O-Q, S-T.) Shomron cannot be found to have breached her fiduciary duties by declining to breach the contract with Paz in order to accept a non-binding offer from Hollander.

The court rejects Fuks's assertion, not made in the complaint, that Shomron breached her fiduciary duties by failing "to afford Plaintiff the opportunity to counteroffer [Paz's bid] for the same or a greater price." (Fuks Aff. In Opp. ¶ 6 [a] [iii], [ix].) In support of this assertion, Fuks relies on section 12.04 of the R&L Partnership Agreement. (Id., Exh 3.) That section expressly provides that, while a partner may bid upon partnership assets in connection with the sale by the partnership and reduction to cash of any of its assets, "the Partnership has no obligation to reduce to cash its assets or to offer the assets of the Partnership to the Partners" in connection with such sale.[2] Fuks also relies on section 8.02 of the Partnership Agreement for her claim that she was entitled to specific notice of and an opportunity to counter Paz's bid. Section 8.02 is inapplicable, as it applies to offers to purchase all of a partner's interest in the partnership. More important, the bulk sale was ordered by the court in its June 3, 2010 decision on the record and the August 16, 2010 interlocutory judgment issued pursuant to that decision. In its June 3 decision, this court specifically noted that Fuks and Shomron were engaged in negotiations for

[2] It is noted that Fuks omits the language in quotation marks, above, from her citation to section 12.04 in her affidavit in opposition. (Fuks Aff. In Opp., at 4 n 6.)

Fuks to purchase the shares for the apartments, and stated that "Ms. Fuks may submit her proposal to purchase the apartments through the broker, Eastern Consolidated, which Ms. Shomron will retain." (June 3, 2010 Tr., at 29-30, Fuks v Rakia Assocs., Index. No. 122768/1996 [Shomron Aff., Exh. E].) Fuks presents no evidence that she subsequently made an offer, either through Eastern Consolidated or to Shomron directly.

Fuks also appears to assert, for the first time in opposition, that it was a breach of fiduciary duty for Shomron to reject a June 1, 2010 offer by Fuks to purchase Shomron's 50% interest in R&L. (See Fuks Aff. In Opp. ¶ 6 [a] [i], [iv]-[viii].) Fuks's offer, however, also required Shomron to release claims against Fuks. (Settlement Agreement, at 1 [Fuks Aff. In Opp., Exh. 4].) Moreover, the $4.5 million dollar purchase price, which Fuks characterizes as based on a valuation of the apartments at $9 million (i.e., higher than Paz's offer), was to be paid in significant part by promissory note, and the money was to be used to pay off loans and other obligations of the partnership. (Id.) Shomron's rejection of this offer does not constitute a breach of fiduciary duty.

The first cause of action accordingly will be dismissed.

Second Cause of Action

The second cause of action pleads that Shomron breached her fiduciary duties to Fuks by insisting on a bulk sale of the apartments "without any economically justifiable reason, and against Judge Stackhouse's order of Equitable sharing of R&L assets." (Compl. ¶¶ 37-38.) This cause of action further alleges that "Shomron retains a hidden interest in the entities that form the 'bulk' purchasers," i.e., the entities designated by Paz to take title to the apartments. (Id. ¶ 41.)

As previously noted, this court's August 16, 2010 interlocutory judgment modified Justice Stackhouse's earlier interlocutory judgment in Action 2, and ordered Shomron to "market

and sell the Apartments in a bulk sale through a licensed real estate broker." (Interlocutory Judgment ¶ 3 [Shomron Aff., Exh. E].) Fuks had a full opportunity to challenge the merits of a bulk sale in that action. As discussed above, she also continued unsuccessfully to seek relief from the sale after the 2010 interlocutory judgment was issued. It was not a breach of Shomron's fiduciary duty to comply with this court's orders.

Fuks's speculation that Shomron has a hidden interest in the entities that took title to the shares for the apartments appears to be based on her belief that Paz did not pay the required contract deposit of $715,000 in connection with his Contract of Sale until he obtained a "hard money loan" of $700,000 from Shomron on January 5, 2011. (Fuks Aff. In Opp. ¶ 6 [b] [xi]-[xx].) In reply, however, Shomron submits a letter dated November 29, 2010 from Paz's attorney, Jeffrey A. Farkas, to R&L's transactional attorney. Attached to this letter was an escrow check from Farkas for $715,000, "representing the contract down-payment" on Paz's Contract of Sale. (Halperin Reply Aff., Exh. O.) Although discovery in this action is complete, Fuks submits no evidence supporting her contention that Shomron ever possessed an interest in the purchasing entities.[3]

The second cause of action will accordingly be dismissed.

Third Cause of Action

The third cause of action, which pleads that in 2008 Shomron withdrew from R&L a distribution in the amount of $100,000, without an equal distribution to Fuks, is barred by the three-year statute of limitations for breach of fiduciary duty claims seeking damages. (See IDT

[3] Documents obtained by Fuks from Paz's mortgage lender, submitted by Shomron on this motion, include charts showing the ownership structure of the entities, which do not on their face indicate any involvement by Shomron. (Halperin Reply Aff, Exh. N.)

Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139-140 [2009], rearg denied 12 NY3d 889; Kaufman v Cohen, 307 AD2d 113, 118 [1st Dept 2003].)

The six-year statute of limitations for breach of fiduciary duty claims based on fraud is inapplicable. (See IDT Corp., 12 NY3d at 139.) There is no viable allegation of concealment, as Fuks does not deny that she was aware that the additional distribution would be made. While Fuks denies Shomron's assertion that the $100,000 distribution was made to Shomron as repayment of a loan, Fuks also does not dispute that the payment was made in connection with the return to R&L of the four apartments that had been purchased by Yoram Fuks, and that she did not object to the distribution at that time. (Fuks Aff. In Opp. ¶¶ 8 [viii], 113.)

Fuks's attempt to characterize this cause of action as one for breach of the Partnership Agreement in order to avoid the three-year statute of limitations is unavailing, particularly as Fuks does not cite a relevant provision of the Partnership Agreement that was allegedly violated. (See IDT Corp., 12 NY3d at 139-140 [holding that a court must look "to the reality, rather than the form, of th[e] action"].)

Even if this cause of action is not time-barred, its lack of merit is demonstrated as a matter of law. Shomron's claim that the $100,000 distribution was made to her in repayment of loans she had made to R&L, and was authorized by Fuks and her attorneys, is supported by Shomron's recitation of the negotiations surrounding the distribution and contemporaneous emails by her attorney. (See Shomron Aff. In Supp., ¶¶ 110-116 & Exh. Z.) Fuks's conclusory denial that the $100,000 was made in repayment of loans to Shomron is insufficient to raise a triable issue of fact on the issue. As discussed above, she does not deny that she did not object to the distribution. (See Shomron Aff. In Supp., Exh. Z [emails copied to Fuks's attorneys, documenting Shomron's request for such distribution].) Nor does she raise a triable issue of fact

based on her self-serving assertion that she could not have objected to the distribution because she could have been "misinterpreted as interfering with the execution of the 2006 Interlocutory Judgment, requiring the recession [sic] of the four apartments sold to Yoram between 1991 – 1993." (Fuks Aff. In Opp. ¶ 8 [vii].)

The third cause of action will accordingly also be dismissed.

Sixth Cause of Action

The sixth cause of action pleads that Shomron breached fiduciary duties to Fuks by entering into an agreement with Jacob Helfman, an alleged former creditor of R&L, to "open[] his statute of limitations and allow[] him to sue" R&L, and by "initially financ[ing] Helfman's attorneys," in return for a share of his recovery. (Compl. ¶¶ 61-63.) This cause of action further pleads that Shomron settled Helfman's claims against R&L for more than they were worth to prevent Helfman and his "strategic advisors" from testifying that Shomron's fraud claim against Yoram Fuks in Action 1 was "predicated on a lie." (See id. ¶¶ 64-71.)

In 2007, Helfman commenced an action in this Court against R&L (Helfman Action, Index No. 602424/2007), alleging various causes of action relating to an alleged investment of $100,000 in 1992 and an asserted right to certain cooperative shares and two related apartments located in the cooperative known as 205 West Owners Corp. This action was settled by a "Confidential Settlement Agreement" (Helfman Settlement), dated February 3, 2010, by and among Helfman, R&L, Shomron, and Fuks herself. (Id. ¶ 1 [Shomron Aff. In Supp., Exh. X (describing causes of action in Helfman Action)].) The Helfman Settlement settled Helfman's above-described claims and any other existing claims against R&L, Fuks, and Shomron, for a payment by R&L to Helfman of $700,000. (Id. ¶¶ 2 [a], 3.) R&L, Fuks, and Shomron, in return, released all of their claims against Helfman. (Id. ¶ 3.)

Shomron and Fuks separately entered into a Letter Agreement, dated January 29, 2010, on the letterhead of Shomron's attorney, Guy S. Halperin, to Fuks's counsel, Alan V. Klein (Letter Agreement [Shomron Aff. In Supp., Exh. Y]). This Agreement provided that it was "intended to specifically confirm the separate understandings reached between Ruth [Shomron] and Mali [Fuks] with respect to [the Helfman] settlement." (Id. at 1.) The Agreement noted that the settlement amount to be paid by R&L to Helfman was $700,000, and set forth the portion of this amount that Fuks and Shomron would each be required to pay. (Id. ¶¶ 1, 7.) The Agreement further provided, in pertinent part:

> "Ruth and Mali agree to release each other with respect to any and all claims concerning Jacob Helfman with the exception of any claims that Mali has asserted against Ruth in the pending action entitled Fuks v. Rakia et. al. (Sup. Ct. N.Y. County Index No. 122768/96) for the alleged misappropriation of funds that Jacob Helfman may have paid, lent or otherwise given to R&L. Mali and Ruth will each execute releases consistent with this provision."

(Id. ¶ 8.) Fuks and Shomron both signed the letter under a line which stated: "AGREED AND ACCEPTED BY."

Shomron contends, among other things, that the sixth cause of action is barred by these Agreements. (See Shomron Aff. In Supp. ¶¶ 99, 106.) Fuks, in opposition, attempts to supplement the sixth cause of action with 39 paragraphs of factual allegations, most of which do not appear in the complaint. (Fuks Aff. In Opp. ¶ 7.) Fuks alleges, among other things, that although section 2 (f) of the 2010 Helfman Settlement provided that R&L and Helfman would bear their own attorney's fees and costs associated with Helfman's action, Shomron caused R&L to pay at least $5,500 for Helfman's litigation costs in 2008 and 2009, and "never retrieved" those costs from Helfman following the settlement. (See Fuks Aff. In Opp. ¶ 7 [vi]-[xii].) Fuks further alleges that Shomron "concealed from Plaintiff that Helfman's litigation was in part

financed either by R&L or Shomron" (id. ¶ 7 [xviii]), and that she also failed to disclose that the Helfman Settlement would compensate Zvi Zer, a former associate of Fuks who had testified against Yoram Fuks in Action 1. Fuks asserts that this compensation to Zer violates Helfman's representation in paragraph 5 of the Helfman Settlement that he alone had rights to the settlement proceeds and that he would not assign his rights to the proceeds to anyone. (Id. ¶ 7 [xxii]-[xxiv].) Finally, Fuks contends that the Letter Agreement between herself and Shomron "was never executed," as "the parties never exchanged releases." (Id. ¶ 106.) She also appears to argue that she entered the agreement because Shomron "deceive[d] [her] regarding the terms of the Helfman Settlement, including funneling R&L's money to Helfman's litigation costs and Zer." (Id.)

The court finds that Fuks fails to raise a bona fide issue of material fact warranting trial on this cause of action, which is barred by the Helfman Settlement and the Letter Agreement between Fuks and Shomron. The Letter Agreement is definite as to the claims being released. The parties did not include an explicit reservation that there would be no binding contract until execution of further documentation. On the contrary, their acceptance of the contract, by signing the Letter Agreement, confirms their intent that the contract be binding. Moreover, the material terms of the contract have been performed. The court accordingly finds that the release is binding notwithstanding the parties' failure to execute a separate release document. (See Kowalchuk v Stroup, 61 AD3d 118, 122-123 [1st Dept 2009]; accord Trolman v Trolman, Glaser & Lichtman, P.C., 114 AD3d 617, 618 [1st Dept 2014]; compare Atalaya Special Opportunities Fund IV LP v James Crystal, Inc., 112 AD3d 490, 491 [1st Dept 2013] ["proposal letter" held not binding].)

Fuks also fails to raise a triable issue of fact as to whether the Letter Agreement should be rescinded. Fuks's allegations in this regard, involving a purported scheme by Shomron to use the Helfman Settlement to compensate witness Zvi Zer for fraudulent testimony before Justice Stackhouse, represents yet another attempt to relitigate the November 2006 interlocutory judgment of Justice Stackhouse. That interlocutory judgment, which was affirmed by the Appellate Division, rescinded the sale of shares for four apartments to Yoram Fuks based on the finding that he, with Mali Fuks's complicity, fraudulently failed to disclose his interest in the purchasing entities. (See Decision after trial, 2006 WL 3026299, affd 70 AD3d 406, supra.)

By decision on the record on November 19, 2009, this court denied a motion by Mali Fuks to vacate Justice Stackhouse's interlocutory judgment on the ground that Shomron paid for perjured testimony from Zer at the trial. As noted in the decision, this claim was based on the allegations of Rebecca Rottier in a letter to Justice Stackhouse, dated March 18, 2009, and in an affidavit, sworn to at Fuks's request on April 16, 2009 – over 2 ½ years after the trial. Rottier in fact subsequently recanted those allegations. (Nov. 19, 2009 Decision, at 4.)[4] The decision held that Rottier's assertions were plainly insufficient to show that Shomron procured perjured testimony from Zer, or to raise a triable issue of fact in that regard. (Id.) This decision also denied a separate motion by Fuks to enjoin Shomron from entering into a settlement on behalf of R&L of the Helfman Action against R&L. (Id. at 3, 5.)

Undeterred, five years after the denial of the motion to vacate Justice Stackhouse's November 2006 interlocutory judgment, and after the numerous other motions and proceedings relating to the bulk sale that are described above, Fuks moved to renew her 2009 motion to vacate that interlocutory judgment. As noted in this court's decision on the record of the renewal

[4] This decision was issued after Justice Stackhouse's retirement, effective April 30, 2009.

motion on September 11, 2014, the transcript of which was so ordered on December 1, 2014, the motion was based in part on an affidavit by Zer, which was signed in 2011 and therefore did not qualify as newly discovered evidence. Although she had recanted her affidavit in support of Fuks's 2009 motion to vacate the interlocutory judgment, Rottier signed a new affidavit in support of Fuks's 2014 motion. The decision found that Zer and Rottier were both "serial recanters," and that their affidavits were conclusory, unreliable, and palpably insufficient to support a different result than that reached in the November 2006 interlocutory judgment, or to show that a fraud was perpetrated on the court. (Sept. 11, 2014 Decision, at 12.)

Notably, Fuks's instant motion is supported by the same 2011 affidavit from Zer that was submitted on the motion to renew. (See Fuks Aff. In Opp., Exh. 25.) This affidavit addresses his testimony about the sale of shares to the Yoram Fuks entities and the issue of whether Shomron knew about Yoram Fuks's interest in the entities. (Id. ¶¶ 6-36.) The affidavit also discusses, among other things, Shomron's extension of Helfman's statute of limitations in order to "purchase his silence" because he allegedly had knowledge that Shomron knew of Yoram Fuks's interest (see id. ¶¶37-39), as well as Shomron's knowledge that payments were to be made from the Helfman Settlement to Zer and Rottier, as Helfman's "strategic advisers." (Id. ¶¶ 40, 59-60.)

Fuks's instant motion annexes numerous other documents that concern these same issues, including a statement by Zer to Israeli police in response to a complaint filed against him by Helfman for forgery, which discusses the payments to be made to Rottier and Zer from the Helfman Settlement, and which was also filed on Fuks's motion to renew. (See e.g. id., Exhs. 26 [Zer 2011 Aff. in Helfman Action], 29 [Settlement in Action by Helfman against Rottier (Sup Ct, NY County, Index No. 102698/2011)].)

This court previously twice held that this evidence was insufficient to support vacatur of the November 2006 interlocutory judgment. The court now holds that the evidence is equally insufficient to support Fuks's apparent contention that, or to raise a triable issue of fact as to whether, the Letter Agreement should be rescinded.

Moreover, the above procedural history reflects that Fuks was concerned, at the time she signed the Helfman Settlement and Letter Agreement, that Zer might receive a portion of the proceeds of the settlement. Her 2009 motion to vacate the November 2006 interlocutory judgment predates her execution in 2010 of both agreements. In addition, on December 28, 2009, Fuks's counsel sent an email to Shomron's counsel stating that Fuks "believes that Ruth [Shomron] has been a central figure in attempts to increase the settlement amount so that some of the settlement proceeds could be diverted to Zvi Zer to compensate him for his testimony in the Shomron v Fuks litigation." (Halperin Reply Aff., Exh. P.) Fuks nonetheless subsequently signed the Letter Agreement agreeing to release Shomron from "any and all claims concerning Jacob Helfman" (except Fuks's claims asserted in Action 1 and not at issue in the instant action, alleging Shomron's misappropriation of funds lent by Helfman to R&L). (See Letter Agreement ¶ 8.)

The law is clear that "[a] release should never be converted into a starting point for litigation except under circumstances and under rules which would render any other result a grave injustice." (Centro Empresarial Cempresa S.A. v America Movil, S.A.B., 17 NY3d 269, 276 [2011] [internal quotation marks, ellipses, and citation omitted].) Thus, "a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release. Were this not the case, no party could ever settle a fraud claim with any finality." (Id. [internal citation omitted].) The present fraud

claim is precisely the type of claim contemplated by the release in the Letter Agreement, and therefore cannot serve as a basis on which to vacate that release or the Helfman Settlement.

Finally, the court finds that no viable cause of action exists based on Fuks's allegations as to Shomron's post-release conduct – in particular, that following the Helfman Settlement in 2010, Shomron failed to "retrieve" from Helfman funds she previously paid to him for his litigation costs in 2008 and 2009, or to sue Helfman for allegedly transferring money from the Settlement to Zer. (See supra at 11-12.) These allegations are largely duplicative of and dependent on the fraud claims released by the Letter Agreement – namely, Fuks's claim that Shomron improperly funded Helfman's litigation against R&L in 2008 and 2009, and her claim that Shomron and Helfman agreed to increase the settlement payment in order to funnel money to Helfman's "strategic advisors," Rottier and Zer. To avoid the effect of the release, Fuks attempts to recast these allegations as breaches by Shomron of the Helfman Settlement, or as Shomron's failure to enforce the Helfman Settlement in violation of her fiduciary duties to Fuks.

As discussed above, Fuks claims that Shomron's failure to recoup the 2008-2009 payments violated section 2 (f) of the Settlement, which provided for all of the parties to pay their own costs and attorney's fees. She further claims that Helfman's use of the settlement proceeds to settle claims against Rottier in separate actions constitutes an "assign[ment]" of his right to the proceeds under the Settlement, in violation of his representation in section 5 that he would not assign to anyone his rights to the proceeds of the Settlement.

It is undisputed that Shomron did not seek to recover the $5,500 in attorney's fees allegedly advanced to Helfman in connection with his action against R&L. There is also evidence in the record that there were separate actions in this Court by Helfman against Rottier (Index No. 102698/2011) and Rottier against Helfman (Index No. 100245/2011 [the Rottier

Action]). Further, a portion of the Helfman Settlement proceeds was held in escrow, and $75,000 was ultimately released from the escrow to Rottier in settlement of all claims between Helfman and Rottier.[5]

It is well settled that contemporaneous agreements governing the same transaction should be read together. (See generally Brax Capital Group, LLC v WinWin Gaming, Inc., 83 AD3d 591, 592 [1st Dept 2011]; Gulf Ins. Co. v Transatlantic Reins. Co., 69 AD3d 71, 81 [1st Dept 2009] [same].) The court must accordingly read the Helfman Settlement (releasing Fuks's claims against Helfman) together with the Letter Agreement (releasing Fuks's claims against Shomron concerning the payment of funds to Helfman or his alleged use or assignment of such funds). As these claims have been released, they cannot now be resurrected in support of the causes of action against Shomron for breach of contract and breach of fiduciary duty.

The sixth cause of action accordingly will be dismissed.

The Relief Sought by Fuks

In her affidavit in opposition, Fuks seeks "affirmative relief, pursuant to CPLR 3212 (f)" in the form of "a continuance" pending completion of the special referee hearing in Actions 1 and 2 or further discovery in this action. This request is denied, as discovery is complete in this action, and Fuks makes no showing in support of her claim that "facts essential to the opposition are currently unavailable until the parties complete the Referee Hearings." (Fuks Aff. In Opp. ¶ 2 [b].) (See generally Tavarez v Herrasme, 140 AD3d 453 [1st Dept 2016].)

[5] By letter agreement, dated May 15, 2012, R&L by Shomron and Helfman confirmed that R&L owed $543,240 to Helfman pursuant to the Helfman Settlement, and Helfman agreed to escrow that amount pending resolution of the Rottier Action. (Fuks Aff. In Opp., Exh. 27.) By stipulation, dated April 3, 2013, in the action by Helfman against Rottier, Helfman agreed to pay $75,000 to Rottier out of the escrowed funds, and Helfman and Rottier released all claims against each other to date. (Id., Exh. 29.)

Fuks also requests leave to amend the complaint "to conform to the evidence" and "to cure the complaint from any ambiguities inferred by Shomron." (Id. ¶ 2 [c].) This request is unaccompanied by a proposed amended complaint. Nor, for the reasons stated above, does Fuks plead a cause of action that "is not palpably insufficient or clearly devoid of merit" based on the allegations set forth in paragraphs 6 and 7 of her affidavit in opposition and the accompanying exhibits. (See generally MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010].)

The court has considered Fuks's remaining contentions and finds them to be without merit. It is time for this saga to end. The remaining causes of action of the complaint will accordingly be dismissed with prejudice, and leave to amend will be denied.[6]

Shomron's Request for Sanctions

Finally, Shomron requests sanctions, pursuant to 22 NYCRR Part 130, based on Fuks's allegedly false representation in her affidavit in opposition that Justice Stackhouse modified his September 27, 2006 decision to delete the finding that Yoram Fuks, with Mali Fuks's complicity, committed fraud by failing to disclose Yoram Fuks's interest in the entities that purchased R&L's shares for four apartments. Paragraph 11 of Fuks's affidavit in opposition states, in relevant part:

> "Judge Stackhouse made his findings not knowing that witness Zer received inducements by Shomron to testify at trial. Indeed, on or about August 20, 2008, Justice Stackhouse sua sponte amended his findings, deleting any references that Yoram and I committed fraud. In particular, Justice Stackhouse deleted, "~~This Court is persuaded that Yoram Fuks committed fraud, and Mali Fuks was complicit in that fraudulent conduct and further breached her fiduciary duty as Ruth Shomron's partner in~~

[6] The papers filed by both Fuks and Shomron on this motion greatly exceeded the page limits set forth in the Commercial Division Rules and the Part 60 Practices and Procedures. Although the court entertained this motion, in the event any further motions are brought in any remaining pending actions before this court, they will be rejected unless they comply with these Rules and Practices.

~~R&L Realty Associates.~~" (Exhibit 37). At best, there is a question of fact and law as to whether the Interlocutory Judgment may continue to stand."

In his reply affirmation, Shomron's attorney contends that both the Appellate Division and the Special Referee assigned to hear the remaining issues in Actions 1 and 2 have rejected Fuks's assertion that Justice Stackhouse modified his 2006 decision as asserted above. In particular, Halperin submits evidence that appears to demonstrate that Fuks attempted to include the allegedly modified decision in the record on her appeal of Justice Stackhouse's September 27, 2006 decision, and that Shomron successfully moved to strike the document from the record, asserting in an affidavit to the Appellate Division that Justice Stackhouse's draft markings were made in facilitation of settlement discussions between the parties that ultimately were unsuccessful, and were never intended to be final. (See Halperin Reply Aff. ¶¶ 8-18.) In a decision dated November 12, 2009 (id., Exh. A), the Appellate Division granted a motion by Shomron to strike "an alleged revised decision of the court below . . . ." The Special Referee also held that the allegedly modified decision was inadmissible, ruling that he was "not persuaded the handwritten markings that are made by Justice Stackhouse were made at the time the decision was rendered," and that "the decision bearing such markings cannot be viewed as a final decision of Justice Stackhouse . . . ." (Nov. 20, 2012 Tr., at 4 [Halperin Reply Aff., Exh. B].) Fuks's counsel did not dispute at the oral argument that Justice Stackhouse never modified his decision.

Fuks's assertion in her opposition papers that Justice Stackhouse modified his 2006 decision, and her failure to bring the Appellate Division's determination with respect to that alleged modification to this court's attention, raise a serious issue as to whether Fuks has engaged in frivolous conduct within the meaning of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR). A hearing on whether sanctions should be imposed on Fuks and/or

her attorneys, Albert Lawler of Lawler Mahon & Rooney, LLP, and Levi Huebner of Levi Huebner & Associates, PC, will therefore be held at the time of resolution of Actions 1 and 2, the sole remaining actions before this court.[7]

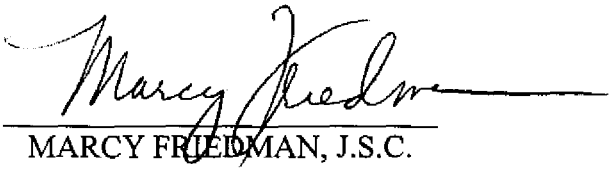
It is according hereby ORDERED that the motion of defendant Ruth Shomron, as wind-up partner of R&L Realty Associates, for summary judgment is granted to the extent that the first, second, third, and sixth causes of action are dismissed with prejudice;[8] and it is further

ORDERED that the application of plaintiff Mali Fuks for further discovery and for leave to amend is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
September 14, 2016



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[7] In directing a sanctions hearing, the court notes that, at the time Mr. Lawler, then a newly-incoming attorney, submitted an order to show cause in Action 2 for leave to renew Fuks's 2009 motion to vacate the November 2006 interlocutory judgment, the court declined to sign the order to show cause, cautioning him that, given the history of these proceedings, he must take care to avoid conduct lacking conduct lacking legal or factual basis. (See Sept. 11 2014 Decision in Action 2, at 12.) Mr. Lawler nonetheless filed the motion to renew, and this court, after hearing the motion, set the matter down for a sanctions hearing. (Id. at 12-13.) The sanctions issue was settled before the hearing date. Mr. Lawler represents on the instant motion that he is co-counsel to Mr. Huebner, and that Mr. Huebner drafted the papers in opposition to the motion. (Aug. 25, 2016 Tr., at 14-15.) Mr. Huebner, the latest in a long line of counsel for Fuks in the various actions before this court, filed a notice of appearance, dated January 22, 2016, and his signature appears on the opposition papers filed on this motion.

[8] As previously noted, the remaining causes of action were discontinued by stipulation of the parties, dated Feb. 16, 2016 (NYSCEF No. 79).