Lentini v 219 W. 20th Str. Corp.
2018 NY Slip Op 32181(U)
September 5, 2018
Supreme Court, New York County
Docket Number: 160470/2016
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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WILLIAM V. LENTINI, individually, and derivatively as a shareholder on behalf of 219 WEST 20TH STREET CORPORATION,

Index No. 160470/2016

Plaintiffs,

Motion Sequence No. 003

- against -

219 WEST 20TH STREET CORPORATION, and JOSEPH C. LENTINI,

Defendants.

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BRANSTEN, J.:

Plaintiff William V. Lentini brings this action individually and derivatively on behalf of plaintiff, and nominal defendant, 219 West 20th Street Corporation (219 Corp.), a joint real estate venture that William Lentini embarked on with his brother, defendant Joseph C. Lentini (collectively referred to as the "Brothers"). The five-count complaint asserts claims for: (1) an accounting; (2) a declaratory judgment as to William Lentini's percentage ownership in 219 Corp.; (3) unjust enrichment; (4) quantum meruit; and (5) dissolution of 219 Corp. In the second amended answer, Joseph Lentini asserts 32 direct and derivative counterclaims relating to four entities—William Capital Associates, Inc. (WCA), 219 Corp., Vector Whippany Associates, LP (Vector), ALL LLC (ALL LLC)—and a condominium, located at 210 Crown Oaks Way, Longwood, Florida (Crown Oaks or Condominium). The counterclaims are for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraud, fraudulent concealment, unjust enrichment, conversion, accounting and waste.

William Lentini now moves, pursuant to CPLR 3211, to dismiss the counterclaims.

I. Factual Allegations

According to William Lentini, he and Joseph Lentini are equal owners of 219 Corp., a closely held corporation that they formed with the intention of developing and managing a residential building located at 219 West 20th Street, New York, New York (the "Premises"). William Lentini alleges that "no stock certificates have ever been issued by the Corporation and there is now a dispute as to the principal owners' percentage interest in the corporation based upon the material disparity in capital contributions and responsibilities for the supervision and management of the Corporation." Complaint, ¶ 20.

In the second amended answer, Joseph Lentini raises numerous affirmative defenses and asserts 32 counterclaims relating to four different entities and one property. Unless indicated otherwise, the following facts are taken from the second amended answer and are presumed to be true for purposes of the instant motions.

A. WCA

WCA is a closely held New York corporation engaged in "the financing, purchase, sale and leasing of real estate." *Counterclaims*, ¶ 56. William Lentini alleges, in his

affidavit in support of the motion to dismiss, that he is, and always has been, the sole shareholder of WCA. However, Joseph Lentini alleges that, since 1973, he and William Lentini have been equal shareholders in WCA and that, as consideration for his ownership interest, he "contributed his time and experience to WCA at a reduced salary." *Id.*, ¶ 58. In his affidavit in opposition, Joseph Lentini alleges that, when he joined WCA, "[Joseph Lentini] was already a successful real estate broker and investor in [his] own right" and "[a]s such, [he] never would have been induced to leave a lucrative situation to join WCA without William Lentini's representation that [he] would be a 50% owner of the company." Joseph Lentini aff, ¶ 4. In addition, Joseph Lentini points to a 1997 foreclosure action that WCA brought, entitled *William Capital Associates, Inc. v River Square Realty Corp., et al.*, in the Supreme Court, New York County, under index No. 111801/1997 (River Square Litigation). In that action, WCA submitted: (1) post-trial, joint proposed findings, describing WCA as "a corporation owned by William and Joseph" (Joseph Lentini aff, ¶ 6 and exhibit A at 1); and (2) a statement from WCA's accountant, asserting that "William Capital, Inc. (William V. Lentini & Joseph C. Lentini) advanced $20,380.72" to the defendant-debtor during the pendency of the River Square Litigation. *Id.*, exhibit H, schedule D. WCA ultimately prevailed and the court rendered a judgment in the amount of $569,025.66. The fate of these proceeds underlies some of Joseph Lentini's counterclaims.

Joseph Lentini alleges that he and William Lentini agreed to "obtain an accounting of their respective debits and credits with respect to their various joint ventures and assets," before distributing the proceeds from the River Square Litigation. Counterclaim, ¶ 91. They directed their long-standing accountants to place the funds in an escrow account and not to distribute them until the accounting was completed. No accounting took place and Joseph Lentini alleges that William Lentini has made several unauthorized transfers from the escrow account, while denying Joseph Lentini access to WCA's books and records.

In addition, Joseph Lentini alleges that he and William Lentini "agreed to fund a pension account through WCA in which they would have equal pension value and benefits," but that "Joe's pension account was not properly funded at that same level as Bill's despite the parties' agreement to the contrary." *Id.*, ¶ 58. According to Joseph Lentini, the Brothers also agreed to share WCA's revenues and liabilities equally and agreed that each was entitled to reimbursement of expenses incurred in the furtherance of WCA's interests, "subject to the proviso that each Brother would defer a given reimbursement in the event taking same might impair WCA's ability to pay its legitimate expenses." *Id.*, ¶ 64. Joseph Lentini allegedly used his personal funds to pay WCA's liabilities and contributed substantial time and energy to the advancement of its interest. Joseph Lentini avers that he "deferred receipt of salary, bonus and/or expense reimbursement payments under the belief, engendered and fostered by [William Lentini];

that taking said payment would have, at the time they came due and owing to him, rendered WCA unable to meet all of its legitimate financial obligations." *Id.*, ¶ 66.

Joseph Lentini asserts counterclaims for: (1) breach of contract against William Lentini and WCA; (2) breach of the covenant of good faith and fair dealing against William Lentini and WCA; (3) breach of fiduciary duty against William Lentini; (4) fraud against William Lentini; (5) fraudulent concealment against William Lentini; (6) unjust enrichment against William Lentini; and (7) conversion against William Lentini.

B. 219 Corp.

Joseph Lentini alleges that: 219 West 20th Street Associates (219 Assoc.) is a New York general partnership, which "has governed the business relationship between and among the Brothers as owners of 219 Corp." (*id.*, ¶ 159); he and William Lentini hold equal ownership interests in both entities; and, "[i]n practice, the Brothers have treated 219 Corp. and 219 Assocs. as a single entity (219 Corp. and 219 Assocs. are hereinafter referred to collectively as '219') . . . ." *Id.*, ¶ 162. According to Joseph Lentini, he and William Lentini have had the following "mutual understanding[s] and agreement[s]" relating to 219: "that each is entitled to receive fifty percent (50%) of all of 219's net revenue, subject to the proviso that each Brother would defer receipt of a given payment in the event taking same might impair 219's ability to pay its expenses" (*id.*, ¶ 163); "that each must equally bear all of 219's expenses and liabilities on a 50% basis" (*id.*, ¶ 164);

and "that each is entitled to be reimbursed, in full, for legitimate expenses incurred by them individually in furthering their mutual interests in 219." *Id.*, ¶ 165. In addition, Joseph Lentini alleges "it was [his] understanding that, unlike WCA, 219's funds would not be used to fund—whether through the payment of capital contributions, the payment of expenses, or otherwise—any of the Brothers' other ventures." *Id.*, ¶ 175.

Joseph Lentini avers that on numerous occasions he has used personal funds to pay 219's expenses and that he "has deferred receipt of payment of any kind from 219 whether from salary, bonus and/or expense reimbursement payments under the belief – engendered and fostered by Bill – that taking said payment would have rendered 219 unable to meet all of its financial obligations to third parties." *Id.*, ¶ 171. In addition, Joseph Lentini alleges that William Lentini: made unauthorized use of 219's fund "to pay expenses of entities unrelated to 219 and its business" (*id.*, ¶ 180); wasted 219's assets by intentionally failing to pay property taxes on the Premises, causing 219 to "incur[] liability in the form of interest and additional monetary penalties, and . . . forc[ing it] to expend significant sums to redeem the [Premises] from tax lien sale" (*id.*, ¶ 185); obtained funding from third parties to make unnecessary improvements to the Premises; on April 1, 2012, "caused 219 to incur a $300,000 liability in the form of a purported 'mortgage' secured by the [Premises], with Bill as the purported mortgage lender" (*id.*, ¶ 189); "applied 219's available cash on hand to make distributions rather than apply that money to outstanding debt obligations" (*id.*, ¶ 192); and misappropriated "219 funds for

his own personal benefit" (*id.*, ¶ 194), including to pay personal credit card bills and attorneys' fees. Lastly, Joseph Lentini alleges that he and William Lentini each have a son who occupies an apartment at the Premises and that each son's apartment consists of two units. However, William Lentini has allegedly "gone to great lengths, and incurred great expense to 219, to provide a larger apartment" for his son (*id.*, ¶ 199), by "embark[ing] upon an irrational, obsessive and costly campaign to (a) renovate an apartment damaged by fire . . . and (b) evict the tenant presently residing there . . . ." *Id.*, ¶ 200.

Joseph Lentini alleges that William Lentini has refused to account to him for 219's funds and has denied him access to 219's books and records. Joseph Lentini asserts the following 219-related counterclaims: accounting (eighth counterclaim); breach of contract (ninth counterclaim); breach of the implied covenant of good faith and fair dealing (tenth counterclaim); breach of fiduciary duty (eleventh counterclaim); fraud (twelfth counterclaim); unjust enrichment (thirteenth counterclaim); conversion (fourteenth counterclaim); waste (fifteenth counterclaim); and fraudulent concealment (sixteenth counterclaim).

C. Vector

Vector is a New Jersey limited partnership formed in 1984. In 1988, 20 Whippany, Inc., a New Jersey corporation, became a general partner of Vector, while

William Lentini and Joseph Lentini were its limited partners. In 1994, 20 Whippany, Inc. became Vector's sole general partner and the Brothers its sole limited partners. William Lentini and Joseph Lentini allegedly each hold a 50% ownership interest in 20 Whippany, Inc., as well as in Vector.

"Vector owned and leased commercial real estate located at 20 Whippany Road, Morristown, New Jersey (the 'Vector Property')." *Counterclaims*, ¶ 272. According to Joseph Lentini, "[a]t some point prior to 1994, the tenant of the Vector Property stopped making its lease payments" (*id.*, ¶ 285) and "Bill unilaterally refused to make mortgage payments due and owing on the Vector Property." *Id.*, ¶ 287. This caused the Vector Property to go into foreclosure. By 1994, Vector was allegedly embroiled in five New Jersey state court actions and filed for chapter 11 bankruptcy (state court actions together with the bankruptcy, "1994 Litigations").

According to Joseph Lentini, William Lentini "needlessly increased the length and cost" of these litigations (*id.*, ¶ 289) and "spent excessive amounts of money on multiple law firms that obtained no results for Vector." *Id.*, ¶ 290. One of the law firms that William Lentini had retained, Dillon, Bitar & Luther, L.L.C., filed an action for unpaid fees against Vector and each of the Brothers individually in 2011 ("Fee Dispute"). According to Joseph Lentini, William Lentini "recklessly and unilaterally retained Fox Rothschild" to defend the suit (*id.*, ¶ 292), only to have "recklessly and unilaterally settled the Fee Dispute . . . for an exorbitant sum of money." *Id.*, ¶ 293.

Joseph Lentini alleges that these decisions were made over his objections and that William Lentini has denied him access to Vector's books and accounts and declined to account for its funds. Joseph Lentini asserts the following Vector-related counterclaims: breach of contract (seventeenth counterclaim); breach of the implied covenant of good faith and fair dealing (eighteenth counterclaim); breach of fiduciary duty (nineteenth counterclaim); unjust enrichment (twentieth counterclaim); and fraudulent concealment (twenty-first counterclaim).

D. ALL LLC

Joseph Lentini alleges that ALL LLC was formed in 2000 as a Florida limited company that owned and operated a self-storage facility in Dunnellon, Florida. Joseph Lentini was a member of ALL LLC. William Lentini was not. Nonetheless, Joseph Lentini alleges that the "Brothers had an agreement between and among themselves that they and [Joseph Lentini's son] collectively held a one third (1/3) ownership interest in [ALL LLC]" (*Counterclaims*, ¶ 331) and that they had an equal right to all distributions and were equally responsible for expenses. Joseph Lentini alleges that he used his personal funds to pay ALL LLC's expenses. He also states that, upon the sale of the self-storage facility, William Lentini received a $213,122.09 distribution. *Id, ¶340.* In addition, William Lentini allegedly received other distributions from ALL LLC, totaling $47,953.78. *Id, ¶343.* Joseph Lentini avers that he never received his share of these

distributions and asserts counterclaims for: breach of contract (twenty-second counterclaim); breach of the implied covenant of good faith and fair dealing (twenty-third counterclaim); breach of fiduciary duty (twenty-fourth counterclaim); unjust enrichment (twenty-fifth counterclaim); conversion (twenty-sixth counterclaim); and fraudulent concealment (twenty-seventh counterclaim).

E. Crown Oaks

Joseph Lentini alleges that, on August 2, 1983, he and William Lentini bought the Florida Condominium, intending it as a winter home for their parent. Instead, the property allegedly turned into "a base of operations for [the Brothers'] various joint business ventures in Florida." *Counterclaims*, ¶ 392. According to Joseph Lentini, he and William Lentini agreed that they were equal owners of Crown Oaks and "that each would be entitled to receive an equal one half (1/2) share of all of any and all rents that might be generated by Crown Oaks" (*id.*, ¶ 394) and that they "would jointly pay for Crown Oaks' expenses through an entity jointly and equally owned by the Brothers, to wit, WCA." *Id.*, ¶ 396. "Joe has [allegedly] expressed to Bill his desire to rent-out Crown Oaks so as to generate income for the benefit of both of the Brothers." *Id.*, ¶ 399. However, William Lentini has refused to do so and, "[n]otwithstanding the fact that Crown Oaks sits vacant, Bill also refuses to turn off the utilities to the Condominium." *Id.*, ¶ 401.

Joseph Lentini asserts the following Crown Oaks-related counterclaims: breach of contract (twenty-eighth counterclaim); breach of the implied covenant of good faith and fair dealing (twenty-ninth counterclaim); unjust enrichment (thirtieth counterclaim); waste (thirty-first counterclaim); and fraudulent concealment (thirty-second counterclaim).

II. Analysis

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dept 2004). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *Skillgames, LLC v Brody*, 1 A.D.3d 247, 250 (1st Dept 2003). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Id.* An "affidavit 'may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.'" *Thomas v. Thomas*, 70 A.D.3d 588, 591 (1st Dept 2010), quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976).

Where the motion to dismiss is based on documentary evidence, "the documentary evidence [must] utterly refute[] [the] 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). "To qualify as 'documentary,' the paper's content must be essentially undeniable and . . . , assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based." *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431, 432 (1st Dept 2014).

A. WCA (First through Seventh Counterclaim)

The parties dispute whether Joseph Lentini has standing to bring derivative claims on WCA's behalf. In addition, William Lentini contends that claims asserted against, or on behalf of, non-party WCA are not properly interposed in this action. Joseph Lentini counters that such counterclaims are properly interposed, because WCA is a person that he represents within the meaning of CPLR 3019 (a). In addition, the parties dispute whether the WCA-based counterclaims are sufficiently pleaded or time-barred.

When a claim is brought derivatively, "Business Corporation Law [BCL] § 626 (b) mandates that [the] shareholder[] . . . must demonstrate that [he] owned stock both when the lawsuit was brought and at the time of the transaction(s) of which [he] complain[s]." *Pessin v. Chris-Craft Indus.*, 181 A.D.2d 66, 70 (1st Dept 1992). The contemporaneous ownership rule "is to be strictly enforced." *Honzawa Holding Co. v.*

Hiro Enter. USA, 291 A.D.2d 318, 318 (1st Dept 2002).

"[T]he mere fact that the corporation did not issue any stock certificates does not preclude a finding that [a person] has the rights of a shareholder." *Matter of Pappas v Corfian Enters., Ltd.*, 22 Misc. 3d 1113(A), 2009 NY Slip Op 50109(U), *3 (Sup Ct, Kings County 2009) (Battaglia, J.), *affd* 76 A.D.3d 679 (2d Dept 2010); *see also Estate of Purnell v. LH Radiologists, P.C.*, 90 N.Y.2d 524, 532 (1997) (finding that, although not issued a stock certificate, the Plaintiff was, in fact, a shareholder in the corporation). "[I]t is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership." *See United States Radiator Corp. v. State of New York*, 208 N.Y. 144, 149-150 (1913). "[L]abor or services actually received by or performed for the corporation" constitutes "[c]onsideration for the issue of shares." BCL § 504 (a). However, a claimants' "fail[ure] to allege any basis upon which he might claim an actual, equitable or beneficial interest in any [corporate] shares" will result in dismissal for lack of standing. *Tal v. Malekan*, 305 A.D.2d 281, 282 (1st Dept 2003); *see also Roy v Vayntrub*, 15 Misc. 3d 1127(A), 2007 NY Slip Op 50868(U), *6 (Sup Ct, Nassau County 2007), citing *Barr v Wackman*, 36 N.Y.2d 371 (1975) ("failure to satisfy the . . . contemporaneous ownership requirement . . . is such a fundamental lack of capacity that it results in failure to state a cause of action").

Pursuant to CPLR 3019 (a), "[a] counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more

plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable." However, "[a] counterclaim may only be asserted on behalf of a defendant already a party to the action." *Bramex Assoc. v. CBI Agencies*, 149 A.D.2d 383, 385 (1st Dept 1989) (dismissing counterclaims seeking damages on behalf of a non-party entity, as well as the defendants, to the extent interposed on behalf of the entity); *see also Cherney v. Pilevsky*, 178 A.D.2d 263, 264 (1st Dept 1991) (stating that "counterclaims were properly dismissed[,] without prejudice to the commencement of a separate action, since counterclaims may not be interposed by non-parties"). In addition, "[w]here a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant." CPLR 3019 (d); *see also* CPLR 3012 ("[a] subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons").

Assuming the truth of Joseph Lentini's allegations, he has standing to pursue derivative claims on WCA's behalf. The second amended complaint alleges that Joseph Lentini owns 50% of the interest in WCA and that, as consideration for his ownership interest, he "contributed his time and experience to WCA at a reduced salary." Counterclaim, ¶ 58. This constitutes consideration for the alleged issue of shares (*see* BCL § 504 [a]) and, if true, "creates both the shares and their ownership." *Matter of Pappas*, 22 Misc 3d 1113(A), 2009 NY Slip Op 50109(U) at *3. Whether Joseph Lentini

has an ownership interest in WCA is not before the court on the instant, pre-answer motion to dismiss. Joseph Lentini need only allege a basis upon which he may claim "an actual, equitable or beneficial interest in any [WCA] shares," which he has done. *Tal*, 305 A.D.2d at 282; *see also Shui Kam Chan v. Louis*, 303 A.D.2d 151, 152 (1st Dept 2003) (applying the CPLR 3211 [a] [7] standard of review to find that plaintiff's "uncontroverted allegation that, as administratrix of her husband's estate, she ha[d] a 50% interest in [the corporation], [was] sufficient to give her standing to bring the . . . derivative suit").[1]

William Lentini points to various documents to support his assertion that he is, and always has been, WCA's sole shareholder. Specifically, he provides copies of: (1) his WCA stock certificate, dated August 1, 1969, showing that he holds 100 of 200 authorized no par shares (*see* William Lentini aff, exhibit C); (2) a Single Stockholder Corporate Designation of Banking Authority Application for WCA, dated December 27, 2007 (*see id.*, exhibit D); (3) a Form 1120 (Schedule G) of WCA's 2015 federal tax return (*see id.*, exhibit E); and (4) two faxes that William Lentini allegedly sent to Joseph

[1] Notably, WCA represented to the court in the River Square Litigation that Joseph Lentini and William Lentini were equal shareholders in WCA, which serves as evidence of "conduct among the parties reflecting . . . status for all as equal shareholders." *Matter of Estate of Purnell v. LH Radiologists*, 90 N.Y.2d 524, 532 (1997) (finding that "[t]he omission of issuance of stock certificates to petitioners [did] not displace [an] array of evidence which support[ed] shareholder status . . ."). However, on the instant motion, the court may not "assess the merits . . . of [these] factual allegations . . . ." *Skillgames, LLC*, 1 A.D.3d 247, 250 (1st Dep't 2003).

Lentini in 2001 and 2003, advising Joseph Lentini that he has no authority to act on WCA's behalf. *Id* at exhibits F and G. However, none of these documents "utterly refute[] plaintiff's factual allegations . . . ." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). The stock certificate demonstrates William Lentini's shareholder status, without disproving Joseph Lentini's. *See Kun v. Fulop*, 71 A.D.3d 832, 833 (2d Dept 2010) (internal quotation marks and citation omitted) ("[t]he mere fact that the corporation did not issue any stock certificates [to an individual] does not preclude a finding that [the individual] has the rights of a shareholder"). The various financial documents also fail to establish William Lentini's sole ownership as a matter of law, because "corporate and personal tax returns, bank loan documents, and financial statements. . . . even when filed with government agencies, are 'not in and of [themselves] determinative.'" *See Matter of Pappas*, 22 Misc. 3d 1113(A), 2009 NY Slip Op 50109(U) at *5, quoting *Matter of Heisler v. Gingras*, 90 N.Y.2d 682, 688 (1997); *see also Matter of Estate of Purnell v. LH Radiologists*, 90 N.Y.2d 524, 532 (1997); *Matter of Bhanji v. Baluch*, 99 A.D.3d 587, 587–588 (1st Dept 2012). Finally, William Lentini's faxes are not "essentially undeniable," and as such do not constitute documentary evidence. *See Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc.*, 120 A.D.3d 431, 432 (1st Dept 2014).

For the foregoing reasons, Joseph Lentini has sufficiently alleged his shareholder status in support of his derivative claims.

Nonetheless, the counterclaims relating to WCA must be dismissed, because they are not properly interposed in the instant action. The first and second counterclaims, for breach of contract and breach of the implied covenant of good faith and fair dealing against William Lentini and WCA, must be dismissed with respect to WCA, because Joseph Lentini failed to serve a summons and the second amended answer on WCA pursuant to CPLR 3019 (d) and 3012 (a). *See State of New York v International Asset Recovery Corp.*, 56 A.D.3d 849, 854 (3d Dept 2008) (dismissing counterclaim against non-parties, where the non-parties were not served with a summons and the answer asserting the counterclaim against them); *see also Linzer v. Bal*, 184 Misc. 2d 132, 136 (Civ. Ct., NY County 2000) (dismissing counterclaim pursuant to CPLR 3019 [d] and 3012 [a], where respondent failed to serve a non-party to the action against whom the counterclaim was asserted). The remaining derivative counterclaims for breach of fiduciary duty, fraud, fraudulent concealment, unjust enrichment and conversion (counterclaims three through seven, respectively) belong to WCA, which "[has] an existence separate and distinct from that of" Joseph Lentini. *Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (1980). WCA is not a party in this action. Therefore, counterclaims seeking to validate its rights are not properly asserted in the instant action. *See Cherney*, 178 A.D.2d at 264; *see also Bramex Assoc.*, 149 A.D.2d at 385; *Meier v. Holmes*, 282 A.D. 1030, 1030 (1st Dept 1953) (dismissing derivative counterclaim, as

one not properly interposed in that action, where the corporation was not a party to the action).

In addition, Joseph Lentini impermissibly commingles his direct and derivative claims. Generally, "[i]f there is any harm caused to the individual, . . . then the individual may proceed with a direct action. On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand." *Serino v. Lipper*, 123 A.D.3d 34, 40 (1st Dept 2014). Claims based on the lost value of a shareholder's investment are "quintessentially [] derivative claim[s] . . ." *Id.* at 41. Here, Joseph Lentini asserts the sixth counterclaim, for unjust enrichment, individually and derivatively on behalf of WCA. *See* Second Amended Answer at 30. In addition, the first and second counterclaims, which purport to be direct claims, commingle allegations of harm to the corporation with those to Joseph Lentini. For instance, the first counterclaim alleges that: William Lentini "fail[ed] to fund Joe's Pension Account on a pro rata basis" (*Counterclaim*, ¶ 107); William Lentini diverted WCA funds for personal expenses (*id.*, ¶ 109); and, as a result, Joseph Lentini, "as a shareholder of WCA, has suffered substantial monetary damages." *Id.*, ¶ 117. The breach of the implied covenant of good faith and fair dealing claim essentially duplicates these allegations. *See id.*, ¶¶ 118-122. Where, as here, claims "confuse a shareholder's derivative and individual rights," such claims must be dismissed. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985); *see also Yudell v. Gilbert*, 99 A.D.3d 108, 115 (1st Dept 2012).

Therefore, the first, second and sixth counterclaims are dismissed on this additional ground.

For the foregoing reasons, counterclaims one through seven are dismissed.

B. 219 Corp.

(i) Accounting (Eighth Counterclaim)

In addition to an accounting, the eighth counterclaim seeks dissolution of 219 Corp., pursuant to BCL § 1104 (*see* second amended answer at 38). William Lentini contends that, because his first and fifth causes of action seek the same relief, the counterclaim should be dismissed as duplicative. William Lentini does not cite any authority for this proposition, nor could the court locate any. Accordingly, to the extent that the instant motion seeks dismissal of the eighth counterclaim, it is denied.

(ii) Breach of Contract (Ninth Counterclaim)

William Lentini contends that the ninth counterclaim fails to sufficiently state the terms of the alleged agreement and its breach. In addition, he contends that 219 Corp. would be the correct counterparty to the alleged agreement with Joseph Lentini. Joseph Lentini counters by citing to the allegations of the second amended answer.

To state a claim for breach of contract, a party must allege "the existence of a contract, [his] performance thereunder, the [opponent's] breach thereof, and resulting

damages." *Harris v Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept 2010). "Vague and conclusory allegations are insufficient to sustain a breach of contract cause of action." *Marino v. Yunk*, 39 A.D.3d 339, 340 (1st Dept 2007); *see also Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (dismissing breach of contract claim because, plaintiff "only offer[ed] conclusory allegations without pleading the pertinent terms of the purported agreement, [leaving the court] to speculate as to the parties involved and the conditions under which [the] alleged . . . contract[s] [were] formed"); *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dept 1995) (internal citations omitted) (dismissing a breach of contract claim due to "plaintiff's failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability [was] predicated [and] whether the alleged agreement was, in fact, written or oral").

Here, the counterclaim for breach of contract is based on Joseph Lentini's "understanding that. . . 219's funds would not be used to fund . . . any of the Brothers' other ventures" (counterclaim, ¶ 175) and the Brothers' "express and/or implied mutual agreements with respect to 219" (*id.*, ¶ 214), including that: each would "receive fifty percent (50%) of all of 219's net revenue, subject to the proviso that each Brother would defer receipt of a given payment in the event taking same might impair 219's ability to pay its expenses" (*id.*, ¶ 163); they would share 219's expenses equally; and that they

would be entitled to reimbursement for all personal expenses incurred on behalf of 219. *See id.*, ¶¶ 164, 165.

The pleading fails to state "in nonconclusory language . . . the essential terms of the parties' . . . contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the rate of compensation." *See Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 234 (1st Dept 1994) (dismissing, without leave to replead, a breach of contract claim due to plaintiff's failure to allege those essential elements in the pleading); *see also Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dept. 1995). Failure to adequately describe the purported contract is grounds, in and of itself, for the dismissal of these claims.

In one particularly vague allegation, the second amended answer with counterclaims fails to even allege the existence of an agreement, and merely states that "*it was Joe's understanding* that . . . 219's funds would not be used to fund . . . any of the Brothers' other ventures." *Id.*, ¶ 175 (emphasis added). In addition, it is unclear whether the Brothers entered the alleged agreements in their individual or representative capacities. Moreover, the repeated reference to "express and/or implied mutual agreements with respect to 219" (*id.*, ¶¶ 213-222), conflates 219 Corp. and 219 Assoc., leaving the court "to speculate as to the parties involved and the conditions under which [these] alleged . . . contract[s] [were] formed." *Mandarin Trading Ltd.*, 16 N.Y.3d at

182. Therefore, these vague allegations are insufficient to sustain the counterclaim for breach of contract. *See Marino*, 39 A.D.3d at 340; *Matter of Sud*, 211 A.D.2d at 424; *Caniglia*, 204 A.D.2d at 234.

In addition, to the extent that Joseph Lentini alleges that he was entitled to a pro rata share 219 Corp's revenue, provided that such payment would not impair 219's ability to pay its expenses (*see Counterclaims*, ¶ 163), he never alleges that 219 could meet its expenses. He, therefore, fails to allege an essential element of the claim, namely, breach. *See Harris*, 79 AD3d at 426.

Accordingly, the ninth counterclaim is dismissed

(iii) Breach of the Implied Covenant of Good Faith and Fair Dealing (Tenth Counterclaim)

The parties dispute whether the tenth counterclaim for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim.

A claim for breach of the implied covenant of good faith and fair dealing will be dismissed "as duplicative of the breach-of-contract claim, [where] both claims arise from the same facts and seek the identical damages for each alleged breach." *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010).

Here, the tenth counterclaim makes no attempt to state an independent claim. Instead, it references the allegations of the breach of contract claim and seeks identical relief. *Compare Counterclaims* ¶¶210-223, *with Counterclaims*, 224-228. The tenth

counterclaim is, therefore, dismissed as duplicative. *See Amcan Holdings, Inc.*, 70 A.D.3d at 426.

(iv) Breach of Fiduciary Duty and Conversion (Eleventh Counterclaim and Fourteenth Counterclaim, respectively)

William Lentini contends that the eleventh counterclaim must be dismissed, because it fails to detail the acts and/or omissions constituting the alleged breach of fiduciary duty, as required by CPLR 3016 (b). In addition, he contends that, as an equal partner in the venture who chose not to participate in its management, Joseph Lentini may not now challenge William Lentini's decisions. Lastly, William Lentini contends that, to the extent the claim is derivative, it fails, because Joseph Lentini alleges personal injury only. Joseph Lentini counters that the factual allegations are sufficiently specific and support a derivative claim. He also argues that whether he and William Lentini had equal control over 219 Corp. is in dispute and not a matter for the court on the instant motion. The parties also dispute whether the second amended answer states a claim for conversion.

To establish a breach of fiduciary duty claim, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages. *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 700 (1st Dept 2011). Shareholders in a closely held corporation owe each other a fiduciary duty. *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 99 (1st Dept 2006). Additionally, corporate officers and

directors owe a fiduciary duty to the corporation. *Id.* "[T]he circumstances constituting the wrong [must] be stated in detail." CPLR 3016 (b).

Conversion is "the unauthorized assumption and exercise of the right of ownership over [property] belonging to another to the exclusion of the owner's rights." *Thyroff v Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 289 (2007) (internal quotation marks and citations omitted). "Where the property [alleged to have been converted] is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner. Thus, conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose." *Lemle v. Lemle*, 92 A.D.3d 494, 497 (1st Dept 2012) (internal quotation marks and citations omitted)

Here, the second amended answer sufficiently states claims for breach of fiduciary duty and conversion. Specifically, it alleges that William Lentini incurred additional debt on the property held by 219 Corp., without a valid business purpose and with William Lentini acting as the lender. *Counterclaims*, ¶¶ 189-193. It also alleges that William Lentini used corporate assets for: personal expenses, such as credit card bills and legal fees (*id.*, ¶¶ 194-195, 248); the benefit of his son (*id.*, ¶¶ 196-203); and the benefit of unrelated entities. *Id.*, ¶¶ 180-183. These allegations sufficiently state the acts and/or omissions constituting William Lentini's alleged breach of fiduciary duty, as well as the conversion claim against William Lentini. *See Lemle*, 92 A.D.3d at 497 (stating that it was error to dismiss conversion and breach of fiduciary duty claims, where the complaint

alleged "that plaintiff's siblings (1) falsified loan documents so as to eliminate millions of dollars in principal and interest they owed to the corporation; (2) used corporate funds to pay for personal vacation, shopping and other non-business-related expenses; and (3) used corporate funds to pay excessive compensation and benefits to themselves and other individuals who did little or no work for the corporation").

William Lentini's contention, that Joseph Lentini alleges injury to himself only and, therefore, cannot sue on 219 Corp's behalf, is without merit. The second amended complaint alleges that "[William Lentini] has improperly diluted [Joseph Lentini's] interest in 219" (*id.*, ¶ 191) and that "[Joseph Lentini], as a shareholder of [219 Corp.], has suffered substantial monetary damages." *Id.*, ¶ 233. Because the alleged damages stem from the lost value of Joseph Lentini's investment in 219 Corp., they are derivative. *See Serino*, 123 A.D.3d at 41; *see also Wolf v Rand*, 258 A.D.2d 401, 403 (1st Dept 1999) (finding that shareholder of closed corporation, suing for the "recovery of corporate assets and profits diverted from her in that status, . . . entitl[ed] her to sue only derivatively"). Therefore, Joseph Lentini is entitled to bring the breach of fiduciary duty claim on 219 Corp.'s behalf. In addition, the same holds true for counterclaims twelve through sixteen, which allege the same damages as counterclaim eleven.

To the extent that William Lentini relies on *Levine v Levine*, 184 A.D.2d 53, 59 (1st Dept 1992), for the proposition that a partner who does not participate in the management of the business, cannot later challenge the wisdom of the decisions made in

his absence, his reliance is misplaced. In *Levine*, the court decided a motion for summary judgment which determined that the business judgment rule precluded plaintiffs' breach of fiduciary duty claim against their partners. 184 A.D.2d at 58-59. It specifically found that the defendants were not personally interested in the complained-of transactions. *See id.* at 59-60. A "pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where[, as here,] those pleadings suggest that the directors did not act in good faith." *Lemle*, 92 A.D.3d at 497 (internal quotation marks and citations omitted). Therefore, *Levine* is inapplicable.

Accordingly, the motion to dismiss the eleventh and fourteenth counterclaims is denied.

(v) Fraud and Fraudulent Concealment (Twelfth Counterclaim and Sixteenth Counterclaim, respectively)

The parties dispute whether the fraud-based claims are pleaded with requisite particularity.

"To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (1st Dept 2014). Where the fraud claim is based on fraudulent concealment, a plaintiff must also show that the defendants had a duty to disclose material information based on a fiduciary relationship or under the special facts

doctrine. *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dept 2003). A fiduciary relationship exists between shareholders of a closed corporation. *Global Mins. & Metals Corp.*, 35 A.D.3d at 99. Additionally, corporate officers and directors owe a fiduciary duty to the corporation. *Id.* "[T]he circumstances constituting the [fraud] shall be stated in detail." CPLR 3016 (b). A party "need only provide sufficient detail to inform defendants of the substance of the claims." *Kaufman v Cohen*, 307 A.D.2d 113, 120 (1st Dept 2003) (stating that a fraud claim should not have been dismissed where plaintiffs "failed to specify the exact date, time or the precise contents of [alleged] misrepresentations, nor indicated how they came to rely on [the] statements").

Here, in support of the fraud claim, the second amended answer alleges that: "Bill made numerous representations of material fact to Joe, including, without limitation, the representation that the Brothers' capital account balances in 219 Corp. and 219 Assocs. were equal" (*Counterclaims*, ¶ 236); "the aforementioned representations were false at the time he made them" (*id.*, ¶ 237); "[a]s [William Lentini's] younger brother and life-long business partner, [Joseph Lentini] justifiably relied upon the aforementioned representations made by [William Lentini]" (*id.*, ¶ 238); and, "[Joseph Lentini], as a shareholder [of] 219 Corp. has suffered substantial monetary damages." *Id.*, ¶ 239. In support of the fraudulent concealment claim, the second amended answer states that "Bill knew and/or should have known that his acts and omissions with respect to 219 Corp. as

alleged herein – including, without limitation, his unauthorized withdrawal and/or use of 219 Corp. funds for own personal expenses, constituted material information to Joe, as an equal shareholder of the corporation." *Id.*, ¶ 256. In addition, it alleges that "[t]hrough his deliberate concealment as alleged herein, Bill induced Joe to trust Bill and to provide funds, among other things, under the good-faith – albeit mistaken – belief that Bill had, at all relevant times, acted in Joe's best interests with respect to 219 Corp." *Id.*, ¶ 261. These allegations state the requisite elements of the fraud-based claims and "provide sufficient detail to inform [plaintiffs] of the substance of the claims," despite failing to allege details, such as when the alleged misrepresentations and omissions were made. *Kaufman*, 307 A.D.2d at 120. Accordingly, the motion to dismiss the twelfth and sixteenth counterclaims is denied.

(vi) Unjust Enrichment (Thirteenth Counterclaim)

The parties dispute whether the unjust enrichment counterclaim should be dismissed as duplicative of the other counterclaims.

> "[U]njust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. . . . **An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim** . . . [I]f plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects."

Corsello v Verizon N.Y., Inc., 18 N.Y.3d 777, 790-791 (2012) (emphasis added).

Here, the unjust enrichment claim is based on the same facts as the preceding counterclaims and seeks identical damages as the claims for breach of fiduciary duty, waste and conversion. *Compare Counterclaims* ¶¶ 229-234, 245-254 *with Counterclaims*, ¶¶ 241-244. The thirteenth counterclaim is, therefore, dismissed as duplicative. *See Corsello*, 18 N.Y.3d at 790-791.

(vii) Waste (Fifteenth Counterclaim)

William Lentini contends that the fifteenth counterclaim must be dismissed because partners may not seek recovery against each other for the consequences of their management decision. In addition, he argues that, to the extent the claim is based on a 2012 loan, it is time-barred. Joseph Lentini counters that William Lentini is mistaken about the pertinent law.

Here, the Court initially notes that 219 Corporation and 219 Associates were governed as a single entity. *Counterclaims* ¶162. While the Counterclaims allege that the 219 Associates ran the corporation, the parties' rights under their partnership agreement cannot conflict with the corporation's functioning. *See Hochberg v. Manhattan Pediatric Dental Grp., P.C.*, 41 A.D.3d 202, 204 (1st Dept 2007). Therefore, a six-year statute of limitations applies to "an action by or on behalf of a corporation against a present or former director, officer or stockholder . . . to recover damages for waste . . . ." CPLR 213

(7). Therefore, to the extent that the claim is based on the 2012 loan (*see Counterclaims*, ¶ 189), it is not time-barred.

To the extent that William Lentini relies on *Levine*, 184 A.D.2d 53, to argue that Joseph Lentini cannot challenge his decisions, that reliance is misplaced. In *Levine*, the court determined that the business judgment rule precluded plaintiffs' breach of fiduciary duty claim under New York's partnership laws. 184 A.D.2d at 58-59.

Similarly, William Lentini's reliance on *Krulwich v Posner*, for the proposition that "partners may not claim against each other for the consequences of management decisions they make or fail to make," mistakenly ignores the context of that pronouncement. 291 AD2d 301, 303 (1st Dept 2002). The court in *Krulwich* was, again, addressing the rights of the parties under the Partnership Law. *See id.* It specifically noted that the result would have been different had the parties chosen to form a limited partnership and to vest control in one partner, to the exclusion of the other. *See id.*

To the extent that the Counterclaims address 219 Corporation, a New York corporation which is properly governed by a certificate of incorporation and corporate bylaws pursuant to BCL §402, neither authority is persuasive given that both William Lentini and Joseph Lentini rely on partnership law rather than corporate law. Therefore, neither *Levine* nor *Krulwich* are applicable such that they would require dismissal of the claim.

Accordingly, the motion to dismiss the fifteenth counterclaim, seeking damages for waste, is denied.

C. Vector (Seventeenth through Twenty-First Counterclaim)

William Lentini contends that all of the counterclaims, which stem from the 1994 Litigations and the 2011 Fee Dispute, are time-barred. In addition, he argues that the Fee Dispute is not actionable, because "partners may not claim against each other for the consequences of management decisions they make or fail to make." *Krulwich v. Posner*, 291 A.D.2d, 301, 303(1st Dept 2002). Joseph Lentini counters that the Fee Dispute is not time-barred.

A six-year statute of limitations applies to causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and fraudulent concealment. *See* CPLR 213 (1), (2), (8). Where a claim for breach of fiduciary duty seeks a "purely monetary" remedy, it is governed by the three-year statute of limitations. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009); CPLR 214 (4). "Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies." *Id.* Generally, the actions' commencement date "marks the timeliness of the counterclaims." *Proskauer Rose Goetz & Mendelsohn v. Munao*, 270 A.D.2d 150, 151 (1st Dept 2000); *see* CPLR 203 (d).

To the extent that the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and fraudulent concealment are based on the Fee Dispute, they are not time-barred. The Fee Dispute took place in 2011, whereas the instant action was commenced in 2016, well within the six-year statute of limitations.[2] *See Proskauer Rose Goetz & Mendelsohn*, 270 A.D.2d at 151; CPLR 213 (1), (2), (8). Because Joseph Lentini "primarily seeks damages", however, the breach of fiduciary duty claim is barred by the three-year statute of limitations. *See IDT Corp. v. Morgan Stanley Dean Witter Co*, 12 N.Y.3d 132, 139 (2009).

Lastly, as explained above, the court in *Krulwich* would have reached a different result if the parties had chosen to form a limited partnership. *See* 291 A.D.2d at 303 (stating "had the parties wanted to relieve [a party] of all management authority, they had merely to organize as a limited partnership, designating only [another party] as general partner). Vector is such a limited partnership, with William Lentini and Joseph Lentini as its sole limited partners. While it is alleged that they own an equal interest in Vector's general partner, 20 Whippany, Inc., it is unclear whether they have equal control over that entity. Therefore, *Krulwich* does not mandate dismissal of the Vector-related counterclaims.

Accordingly, the motion to dismiss the Vector-related counterclaims is granted with respect to the nineteenth counterclaim only.

[2] Notably, these counterclaims are identical to counterclaims alleged in the original answer.

D. ALL LLC (Twenty-Second through Twenty-Seventh Counterclaim)

William Lentini points out that Joseph Lentini seeks proceeds from the 2006 sale of ALL LLC's self-storage facility. Therefore, he argues, the ALL LLC-related counterclaims—for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, conversion and fraudulent concealment—are time-barred under the longest, applicable statute of limitations. Joseph Lentini does not dispute the accuracy of this assessment, but rather contends that "it would be inequitable" not to view ALL LLC "as part of the larger and continuing business venture of the Brothers that should be included within the accounting both sides have now requested." Defendants' brief at 21.

Here, the applicable statutes of limitations are either three or six years. *See* CPLR 213 (1), (2), (8); CPLR 214 (3), (4). As it is undisputed that Joseph Lentini's ALL LLC-related counterclaims arose in 2006, the twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh counterclaims are dismissed as time-barred.

E. Crown Oaks

(i) Breach of Contract and Breach of the Implied Covenant of Good-Faith and Fair Dealing (Twenty-Eighth Counterclaim and Twenty-Ninth Counterclaim, respectively)

William Lentini contends that the twenty-eighth and twenty-ninth counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing fail to state a claim and that the latter is duplicative of the former. Joseph Lentini counters that, under the liberal standards of a pre-answer motion to dismiss, both counterclaims are sufficiently pleaded.

Here, the breach of contract claim alleges that "Bill breached the Brothers' express and/or implied mutual agreements with respect to Crown Oaks, by, among other things, failing to share with Joe all financial information concerning Crown Oaks in Bill's possession" (*Counterclaims*, ¶ 407) and "failing to pay to Joe his rightful and lawful share of all income earned on account of Crown Oaks" (*id.*, ¶ 408). Joseph Lentini fails to provide anything beyond vague and conclusory allegations of a contract. Glaringly absent from the pleading is the allegation that the Brothers agreed to use Crown Oaks as an investment property. Joseph Lentini's "vague and conclusory allegations are insufficient to sustain a breach of contract cause of action." *Marino v. Yunk*, 39 A.D.3d 339, 340 (1st Dept, 2007). The counterclaim is, therefore, dismissed.

The breach of the implied covenant of good faith and fair dealing counterclaim is based on "Bill's [alleged] disavowal of Joe's ownership interest in Crown Oaks."

Counterclaims, ¶ 416. It is dismissed as duplicative of the failed breach of contract claim. *Amcan Holdings, Inc.*, 70 A.D.3d 423, 426 (1st Dept, 2010).

Therefore, the twenty-eighth and twenty-ninth counterclaims are dismissed.

(ii) Unjust Enrichment (Thirtieth Counterclaim)

To state a claim for unjust enrichment, a party must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012). William Lentini contends that the thirtieth counterclaim fails to state the elements of an unjust enrichment claim, as it makes no attempt to explain how William Lentini has been enriched at Joseph Lentini's expense, or how this was unjust. Indeed, the counterclaim "consist[s] of bare legal conclusions" and makes no effort to state the elements of unjust enrichment at all. *Skillgames, LLC*, 1 A.D.3d 247, 250 (1st Dept, 2003); *see Counterclaims*, ¶¶ 419-422. Therefore, the thirtieth counterclaim is dismissed.

(iii) Waste (Thirty-First Counterclaim)

William Lentini contends that the thirty-first counterclaim must be dismissed because the Condominium has not suffered any damage. Joseph Lentini counters that William Lentini's refusal to rent out the Condominium to generate income, as well as his

refusal to turn off the utilities of the vacant unit, constitute misuse and neglect of the property.

Waste is any "destruction, misuse, alteration, or neglect of premises by one lawfully in possession thereof to the prejudice of the . . . interest therein of another." *Gilman v Abagnale*, 235 A.D.2d 989, 991 (3rd Dept, 1997). However, not every omission or act of neglect constitutes waste. *See Staropoli v. Staropoli*, 180 A.D.2d 727, 727–728 (2d Dept, 1992) (finding "no showing that the failure to repaint caused damage to the structure, and thus, [the] failure to repaint the home [was] not . . . the type of omission or neglect which constitutes waste").

Here, Joseph Lentini neither alleges physical damage to the Condominium nor alleges that he is contributing to the cost of utilities. Joseph Lentini completely fails to show that the premises have been destroyed, misused, or neglected in any fashion. *Compare Gilman v. Abagnale*, 235 A.D.2d 989, 991 (3d Dept 1997) *with* Counterclaims ¶426 (alleging a failure to turn off utilities and refusal to rent out the condominium property). Joseph Lentini has not pleaded, and cannot show, that the decisions made by William Lentini have prejudiced Joseph Lentini at all. As such, Joseph Lentini has failed to state a claim for waste. *See Staropoli v. Staropoli*, 180 A.D.2d,727, 727-728 (2d Dept, 1992). Therefore, the thirty-first counterclaim is dismissed.

(iv) Fraudulent Concealment (Thirty-Second Counterclaim)

The thirty-second counterclaim for fraudulent concealment makes no attempt to provide factual allegations in support of the claim, much less to plead them with specificity. *See Counterclaims*, ¶¶ 427-437. It consists entirely of conclusory allegations of wrongdoing and is, therefore, dismissed. *Skillgames, LLC v. Brody* 1 A.D.3d 247, 250 (1st Dept, 2003).

F. Leave to Replead

Lastly, to the extent that Joseph Lentini seeks leave to amend the second amended answer, to correct any technical grounds for dismissal, the request is denied. A court will reject a request to replead where it is "unsupported by facts that would correct deficiencies in the pleadings and thereby render [its] claims actionable." *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 503 (1st Dept 2011) (internal quotation marks and citation omitted); *see also Travelers Ins. Co. v. Ferco, Inc.*, 122 AD2d 718, 719-720 (1st Dept 1986) ("[a]lthough leave to amend is freely given pursuant to CPLR 3025 (b), when leave is sought to amend pleadings properly dismissed pursuant to CPLR 3211 (a), the court must be satisfied that there are sufficient grounds to support the proposed amended pleadings"). Here, Joseph Lentini has neither cross-moved to amend nor has he provided a redline copy of any proposed amendment to the counterclaims. Accordingly,

leave to replead is denied at this time, however, should Joseph Lentini seek to amend the counterclaims at a later time then he is instructed to bring a formal motion.

Accordingly, it is hereby

ORDERED that the Plaintiff's motion to dismiss the Counterclaims is GRANTED IN PART and the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, thirteenth, nineteenth, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eight, twenty-ninth, thirtieth, thirty-first, and thirty-second counterclaims of the second amended answer are dismissed; and it is further

ORDERED that plaintiffs are directed to serve an answer to the second amended answer with counterclaims within 20 days after service of a copy of this order with notice of entry.

Dated: 9-5-18

ENTER: