Adler v Molner
2018 NY Slip Op 32380(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 154462/2017
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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MARC ADLER, ROBERT COHEN, PETER FORSSTROM, MICHAEL MCQUARY, AND JONATHAN M. DAVIDOFF, ESQ. d/b/a JMD SEPT QUALITY MEATS MIAMI, LLC.,

Index No.: 154462/2017

Plaintiffs,

-against-

DAVID MOLNER, NAOMI MOLNER a.k.a NAOMI MECKLER, JOESPH MELI, AND ADVANCE ENTERTAIMNENT, LLC,

Defendants,

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David B. Cohen, J.:

This is an action arising from an allegedly fraudulent scheme conceived by defendants to solicit investors to buy into various ticket reselling ventures related to Broadway shows and other music events.

Defendant David Molner moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against him.

BACKGROUND

According to the facts alleged in the second amended complaint (SAC) defendants Joseph Meli and David Molner were friends who were involved in the ticket resale industry (plaintiff's affirmation in opposition, Exhibit A, ¶ 14). The SAC also alleges that Meli was the owner of defendant Advance Entertainment, LLC (Advance), and that Molner was an investor, advisor and/or partner in Advance (*id.* at 18-20, 31). Advance would purportedly use investor funds to purchase tickets to high-profile concert events before the tickets went on sale to the public, and would then resell the tickets to corporate clients and high-profile customers at a markup.

Molner prepared PowerPoint presentations detailing investment opportunities in Advance's ticket purchase and resale business with respect to Grateful Dead and Adele concerts (respectively, the Grateful Dead Deal and the Adele Deal) (collectively, the Deals). Molner also prepared and distributed to plaintiffs funding agreements with respect to the Deals (*id.* at 56).

Plaintiffs Marc Adler, Robert Cohen, Peter Forsstrom, Michael McQuary and Jonathan M. Davidoff, Esq. d/b/a JMD Sept Quality Meats Miami, LLC. (Davidoff) (collectively, plaintiffs) each learned of Advance and Meli through Molner, and invested in the Grateful Dead Deal in 2015 and, subsequently, the Adele deal in 2016. Plaintiffs allege that the Grateful Dead Deal, while providing less of a return on investment than anticipated, nevertheless returned profits on each of their investments of approximately 37% (*id.* at 39-40, 53). Plaintiffs also allege that shortly thereafter, in 2016, Molner urged plaintiffs to roll their Grateful Dead Deal investments into the Adele Deal (*id.* at 37). Only Forsstrom rolled his investment over into the Adele Deal, though Adler, Davidoff, McQuary and Cohen ultimately made separate investments into the Adele Deal.

In January 2017, Meli was indicted for securities and wire fraud based on "an extensive ticket reselling scheme" (*id.* at 74) (the Scheme). Shortly after Meli's indictment, plaintiffs unsuccessfully demanded the return of their investments. Subsequently, Meli pleaded guilty to one count of securities fraud related to the Scheme, allocuting, in pertinent part, as follows:

> "[S]tarting in 2015 in New York, I misled investors, and I took inappropriate business by soliciting their investments with false documents. I represented to certain investors that I had formal written contracts to purchase bulk tickets to live events. Those formal contracts did not always exist as I represented"

(plaintiffs' opposition, exhibit H, at 22). While it is unclear whether Meli's allocution relates to the Deals, it is alleged that they were a part of the Scheme.

The SAC alleges that Meli was the director of the Scheme, that Meli solicited Molner to raise funds from the plaintiffs, and that Molner had the full knowledge that the Scheme was a fraudulent undertaking. It is also alleged that Meli either directed or coordinated with Molner to provide plaintiffs with false information about the Deals, that Molner was aware that the information was false, and that he knowingly provided the false information to plaintiffs.

Plaintiffs allege the following causes of action against Molner: (1) fraud; (2) fraud in the inducement; (3) unjust enrichment; (4) misrepresentation; (5) violations of Debtor and Creditor Law § 276; (6) negligence; and (9) aiding and abetting fraud.[1]

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action. "In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the

[1] The seventh cause of action for breach of contract is pleaded against Advance only. The eighth cause of action for fraud, which indicates that it is pleaded against Molner, Meli and Advance, seeks relief only as to Meli and Advance. Accordingly, these causes of action are not at issue in the present motion.

plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]; citing *Leon*, 84 NY2d at 87-88). In addition, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon,* 84 NY2d at 88 [internal quotation marks and citations omitted]).

Molner's Motion to Dismiss

1. *The Fraud, Fraudulent Misrepresentation and Fraudulent Inducement Claims (The First, Second and Fourth Causes of Action):*

The first, second and fourth causes of action sound in fraud, fraudulent inducement, and "misrepresentation."

> "To plead a cause of action for fraud, a party must allege the elements of a representation of a material existing fact, falsity, scienter, justifiable reliance and damages. In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016 (b) that the circumstances surrounding the fraud be pleaded in detail"

(*Bramex Assoc. v CBI Agencies,* 149 AD2d 383, 384 [1st Dept 1989]; *see also Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010] ["A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages"]).[2] The elements of a fraudulent inducement claim are essentially identical (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]).

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[2] CPLR 3016 (b) provides, in pertinent part:

> "Fraud or mistake. Where a cause of action or defense is based upon misrepresentation [or] fraud . . . the circumstances constituting the wrong shall be stated in detail."

A fraud claim has been pleaded sufficiently, pursuant to CPLR 3016 (b), when a complaint states "who made the misrepresentation to whom, the date the misrepresentation was made, and its content" (*E1 Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]). A fraud claim is insufficiently pleaded where "the words used by defendants and the date of the alleged false representations are not set forth" (*Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014]). That said, CPLR 3016 (b) does not require a plaintiff to plead the exact date, time or the exact words of the alleged fraudulent statements (see *Kaufman v Cohen,* 307 AD2d 113, 120 [1st Dept 2003] [holding that plaintiffs failure to "specify the exact date, time or the precise contents of (defendant's) statements" did not warrant dismissal]).

Additional facts relevant to these claims

Plaintiffs generally allege that, to persuade them to invest in the Deals, Molner falsely represented that he was a partner in (and advisor to) Advance, as well as an investor in the Deals. With respect to the Adele Deal, plaintiffs allege that, prior to their investment in the Adele Deal, Molner represented that Advance had entered into contracts with Adele's management to purchase premium tickets for Adele's North America concert tour when, in fact, no contracts existed. In addition, plaintiffs allege that Molner falsely represented that there were other large investors in the Adele Deal and that Advance had purchased insurance safeguarding plaintiffs' investments, when, in fact, no such large investors or insurance existed. Further, it is alleged that Molner actively concealed the real transactions underlying the Grateful Dead Deal in order to persuade plaintiffs to invest in the Adele Deal.

a. *Alleged misrepresentations by Molner to Adler*

Adler initially invested in the Grateful Dead Deal in 2015, which returned a profit on or about February 16, 2016. In an email dated January 4, 2016, Molner first presented the Adele

Deal to Adler, and asked whether Adler would like to roll his profits from the Grateful Dead Deal into the Adele Deal. Molner then presented Adler with a funding agreement for the Adele Deal (the Funding Agreement), which indicated that tickets for several Adele Concerts had already been purchased, and that insurance had been procured with respect to the ticket reselling opportunities. It is alleged that Molner drafted the Funding Agreement.

In addition, prior to his investing in the Adele Deal, Molner created a PowerPoint presentation (the Presentation), which described aspects of the Adele Deal, and noted that Molner was "a key advisor and investor in Advance" (*SAC*, ¶ 58). He then provided the Presentation to Adler. To support Molner's claim that he was an investor in the Adele Deal, on February 4, 2016, Molner sent Adler Advance's capitalization tables, which listed Molner as a significant co-investor in the Adele Deal. Further, Molner told Adler that several "large institutions" were participating in Advance's ticket business, and that Adler needed to quickly commit to the Adele Deal if he wanted in (*id.* at 61).

Based on the documents that Molner prepared, Molner's representations about Advance (and his relationship thereto), and Molner's representations about the Adele Deal, on or about February 25, 2016, Adler agreed to invest $200,000 in the Adele Deal. He signed the funding agreement on February 29, 2016.

Subsequently, on or about January 31, 2017, after Meli's indictment, Molner told Adler that he was not an investor in Advance, and that he had received compensation and advances on the Adele Deal from Advance in exchange for bringing investors into the Scheme (*id.* at 78). In addition, on or about February 19, 2017, Molner purportedly admitted to Adler that he knew Meli had lied about Advance's "financial and sales data," which he had previously represented were accurate (*id.* at 82).

b. *Alleged misrepresentations by Molner to McQuary*

McQuary was introduced to Molner by Adler. On February 22, 2016, Molner contacted McQuary and described the Adele Deal to him. During this discussion, Molner told McQuary that he was a partner in Advance, as well as its strategic advisor, and an investor in the Adele Deal.

Prior to McQuary's investment, Molner allegedly misrepresented to McQuary that Advance had an agreement with Adele's management team to purchase the first 15 rows of seats at each of her concerts at face value before they were available to the public (*id.* at 99). Molner also allegedly misrepresented that Advance had already purchased $4 million worth of Adele tickets at face value and wanted to purchase an additional $15 million more. Molner told McQuary that time was of the essence.

Based on the above, on February 26, 2016, McQuary signed a funding agreement and invested $200,000 into the Adele Deal through Advance.

c. *Alleged misrepresentations by Molner to Cohen*

Adler believed that Cohen, his friend, might be interested in investing in the Adele Deal. He provided Cohen with the information about the Adele Deal that he had received from Molner. Adler then introduced Cohen to Molner in February 2016. Prior to Cohen's investment into the Adele Deal, Molner sent Cohen the Presentation. Cohen was interested but inquired as to whether he would be given several tickets to an Adele concert as part of his prospective $100,000 investment. Molner confirmed that tickets would be made available to Cohen, but only if he invested $200,000.

After discussing the terms with Molner, on March 2, 2016, Cohen signed a Funding Agreement and invested $200,000 into the Adele Deal. Cohen never received any tickets.

d. *Alleged misrepresentations by Molner to Forsstrom*

Forsstrom was introduced to Molner in 2015, when he invested in the Grateful Dead Deal. On January 18, 2016, Molner emailed Forsstrom regarding the Adele Deal. Forsstrom was interested, and, on January 25, 2016, he emailed Molner, asking whether tickets had been purchased. Molner responded that "[w]eve closed on the first tranche, yes" (*id.* at 135). On February 7, 2016, Molner emailed Forsstrom, stating that "several guys" have invested "over $1mm" into the Adele Deal (*id.* at 136).

In addition, Molner sent an email to Forsstrom on February 8, 2016, stating, in pertinent part, as follows:

> "I am writing to invite you into our latest ticketing deal . . . .
>
> "My partner in these deals is a close friend of over 10 years . . . Joe Meli of Advance Entertainment. All he does is re-sell tickets. Today, the huge mark-up is in the secondary market for tickets . . . and then resells through a huge network of secondary brokers around the country.
>
> "We are in the process of closing on $15mm worth of Adele. . . .
>
> "The deal with Advance is: Investor gets 100% of his money back, plus 10% pref. Thereafter, everything is 50/50."

(*id.* at 138).

Based on the above, on February 15, 2016, Forsstrom invested a total of $100,000 in the Adele Deal, which included a rollover of his Grateful Dead Deal investment, as well as additional funds.

e. *Alleged misrepresentations by Molner to Davidoff*

Adler introduced Davidoff to Molner on May 19, 2015, and Molner convinced Davidoff to invest into the Grateful Dead Deal. As with the other plaintiffs, Davidoff alleges that on several occasions between 2015 and 2017, Molner represented that he was a partner to Meli and

Advance. Molner also provided Davidoff with general information about the Grateful Dead Deal and the Adele Deal. More specifically, prior to Davidoff's investment in the Adele Deal, Molner told Davidoff that tickets were purchased already and that Advance has secured insurance protecting the Adele Deal. It is also alleged that Davidoff relied on these representations when, on March 3, 2016, he invested in the Adele Deal.

In his motion, Molner argues that plaintiffs have (1) failed to allege any material misrepresentations made by Molner with sufficient specificity, (2) failed to allege knowledge of falsity with sufficient specificity, and (3) failed to allege proximate cause. Molner does not contest that plaintiffs have sufficiently pleaded reasonable reliance.

i. Fraud related to the Grateful Dead Deal

To the extent that plaintiffs allege fraud solely related to the Grateful Dead Deal, such claims are not sufficiently pleaded, as plaintiffs have not alleged that they suffered any damages as a result of the Grateful Dead Deal itself (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538 [1st Dept 2016], *aff'd* 29 NY3d 137 [2017] [the measure of damages on a fraud claim is "indemnity for the actual pecuniary loss *sustained* as the direct result of the wrong"]). Indeed, plaintiffs allege that they received a substantial return in investment from the Grateful Dead Deal.

Thus, Molner is entitled to dismissal of the fraud, fraudulent inducement and fraudulent misrepresentation claims in the SAC (the first, second and fourth causes of action), as well as the claim for aiding and abetting fraud (the ninth cause of action) to the extent that plaintiffs seek recovery for fraud based solely on claims arising from the Grateful Dead Deal.

ii. Material Misrepresentations

Given the allegations discussed above, plaintiffs have sufficiently pleaded the existence of material misrepresentations. Specifically, plaintiffs' allege that, prior to their investing with Advance, Molner materially misrepresented that (1) Advance had entered into an agreement with Adele's management to purchase certain tickets for her North American tour, (2) the tickets had already been purchased, (3) tickets and/or backstage passes would be made available to investors upon request, and (4) Advance had procured insurance protecting the investments.

Molner argues that plaintiffs have failed to plead with specificity as required by CPLR 3016 (b), because plaintiffs have not alleged the exact date, time or the specific content of each of Molner's statements. CPLR 3016 (b), however, does not require a plaintiff to plead the exact date, time or the exact words of the alleged fraudulent statements (see *Kaufman*, 307 AD2d at 120). Rather, to meet the requirements of CPLR 3016 (b), "a plaintiff need only provide 'sufficient detail to inform defendants of the substance of the claims'" (*id.* [citations omitted]; *see also Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008] ["section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct"]). Here, plaintiffs have sufficiently pleaded facts in sufficient detail to provide Molner with the substance of the claims against him.

Molner's reliance on *Gregor v Rossi*, 120 AD3d 447 (1st Dept 2014) is misplaced. Initially, *Gregor,* does not require the exacting specificity that Molner argues is needed to plead a claim for fraud. In addition, the facts in *Gregor* are inapposite to the facts here. In *Gregor*, the plaintiffs alleged that the defendant, a law firm, prepared documents on behalf of a fraudulent corporation, and that they relied on these documents to their detriment. The plaintiffs argued that the law firm defendant should, therefore, be liable for fraud and misrepresentation. The First

Department held, *inter alia*, that the complaint was not pleaded with sufficient specificity because it alleged that the plaintiffs invested in the fraudulent corporation prior to ever interacting with the law firm and, further, it did not allege that the plaintiffs invested any money in the fraudulent corporation after meeting with the law firm.

Here, on the other hand, the SAC contains factual allegations that Molner provided fraudulent documents and made material misrepresentations to plaintiffs with respect to Advance and the nature of the Adele Deal prior to their investment in Advance. Accordingly, the allegations in the SAC, as described above, meet the requirements of CPLR 3016 (b), in that they have sufficiently detailed Molner's alleged fraudulent misrepresentations in a manner that is sufficient to inform Molner of the substance of plaintiffs' claims (*Kaufman,* 307 AD2d at 120).

iii. Knowledge of falsity

Knowledge of falsity must be pleaded with particularity, setting forth facts from which the requisite knowledge may be inferred (*see Giant Group, Ltd. v Arthur Andersen LLP*, 2 AD3d 189, 190 [1st Dept 2003]).

Here, plaintiffs have sufficiently pleaded knowledge of falsity. Paragraph 82 of the SAC alleges that "Molner admitted that he knew that Meli lied about the financial and sales data that Molner represented to the Plaintiffs as being accurate." In addition, plaintiffs have repeatedly alleged that Molner knew that the information that he provided to them prior to their investing in advance was false (*see* SAC, ¶¶ 102, 149, 222). Such allegations are sufficiently specific to overcome the requirements of CPLR 3016 (b) (*see Black v Chittenden,* 69 NY2d 665, 668 [1986] [allegation that defendant's statements "'were false and were known by the defendant to be false when made by [defendant]' are sufficient to plead a defendant's knowledge of falsity"]).

Molner's argument that he was merely repeating information that he obtained from Meli, and that he was unaware of its falsity, is unpersuasive and unsupported by documentary evidence. At best, this argument merely raises a question of fact as to what Molner knew at the time he provided information to plaintiffs. Such questions cannot be resolved on a motion to dismiss (*see Lawrence v Miller,* 11 NY3d 588, 596–97 [2008] ["Because questions which cannot be resolved on a motion to dismiss are present and because a full record has not been developed, dismissal of the [complaint] is not warranted at this time"]).

iv. Causation

> "To establish a fraud claim, a plaintiff must demonstrate that a defendant's misrepresentations were the direct and proximate cause of the claimed losses. To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)"

(*Vandashield Ltd v Isaacson*, 146 AD3d 552, 553 [1st Dept 2017] [internal quotation marks and citations omitted]).

Here, plaintiffs have pleaded that Molner knew that he was making false statements and providing false information to them when he allegedly stated that (1) tickets and insurance had been procured and (2) their money would fund further ticket purchases and resale. In addition, it is alleged that Molner used the investment monies for his own personal gain, and, as a result, plaintiffs lost money. Accordingly, plaintiffs sufficiently allege that Molner made misrepresentations that induced plaintiffs to invest in Advance and that said misrepresentations directly caused the loss of their investment funds.

Molner, relying on *Laub v Faessel,* 297 AD2d 28 (1st Dept 2002), argues that plaintiffs have not sufficiently alleged loss causation. This argument is unavailing. In *Laub*, the First

Department held that the plaintiffs did not establish loss causation because the loss arose from defendant's claims of his own competence as a financial broker rather than from "misrepresentations of the financial condition of any of the companies whose stock he recommended to plaintiff" (*id.* at 31). Based on this, the First Department held that plaintiff had not established loss causation, in that there was no evidence that the defendant's misrepresentation about his qualifications caused plaintiff's investment losses.[3]

Here, while plaintiffs allege that Molner misrepresented his relationship with Advance – which by itself would be insufficient to establish loss causation – they also allege that Molner misrepresented Advance's financial and sales data, the nature of Advance's business operation, the existence and nature of its deals with performing artists, the existence of other large investors, the existence of investment protections, the nature of Advance's payout structure, and how plaintiffs' investments would be used. Such allegations relate directly to Advance's operations and financial condition and, therefore, plaintiffs have sufficiently alleged loss causation.

Given the foregoing, plaintiffs have sufficiently pleaded claims for fraud, fraudulent inducement and fraudulent misrepresentation with respect to the Adele Deal. Thus, Molner is not entitled to dismissal of that part of the first, second, and fourth causes of actions as they relate to the Adele Deal.

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[3] In addition, *Laub* was decided on summary judgment, which distinguishes it from the instant motion to dismiss (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015] ["In general, issues of proximate cause are for the trier of fact, and [defendant's] contention is unavailing at this procedural juncture. . . . *Laub v Faessel* . . . [is] distinguishable because [it] decided the proximate cause issue on summary judgment motions"]).

v. *Fraudulent omission*

A cause of action for fraudulent omission "'requires, in addition to the four foregoing elements (of fraudulent misrepresentation), an allegation that the defendant had a duty to disclose material information and that it failed to do so'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011], quoting *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). In other words, "an omission does not constitute fraud unless there is a fiduciary or 'special' relationship between the parties" (*Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 622 [1st Dept 2011]).

Molner argues that plaintiffs have failed to allege a cause of action for fraudulent omission because they have not alleged that he owed plaintiffs a duty to disclose. Specifically, Molner argues that he and plaintiffs merely engaged in arms-length commercial business transactions, and, in such transactions, no duty to disclose exists (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006] ["A fiduciary relationship does not exist between parties engaged in an arm's length business transaction"]).

In opposition, plaintiffs argue that, under the "special facts" doctrine, even if the parties were not involved in a fiduciary relationship, Molner still had a duty to disclose, and that he failed to disclose, *inter alia*, the nature of Advance's business operation, the existence and nature of its deals with performing artists, the existence of other large investors, the existence of investment protections, the nature of Advance's payout structure, and how plaintiffs' investments would be used.

"[A]bsent a fiduciary relationship between the parties, a duty to disclose arises only under the special facts doctrine where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Jana L. v West 129th St. Realty Corp.*, 22

AD3d 274, 277-278 [1st Dept 2005] [internal quotation marks omitted]). The special facts doctrine requires "satisfaction of a two-prong test: that the material fact was information peculiarly within [the] knowledge of [defendant], and that the information was not such that could have been discovered by [plaintiffs] through the exercise of ordinary intelligence" (*id.* [internal quotation marks and citations omitted]).

Molner argues that the special facts doctrine does not apply because plaintiffs have not alleged that his purported omissions were undiscoverable by plaintiffs through the exercise of ordinary intelligence. Molner notes that the SAC alleges that plaintiffs possessed Meli's email address and that, once in 2016, Adler met with Meli. Therefore, Molner reasons, plaintiffs' failure to allege that they spoke directly with Meli is fatal to their claim.

That said, plaintiffs have alleged that Molner was the primary contact person for Advance and, in that position, Molner actively dissuaded plaintiffs from inquiring into the specifics of the deal (*see e.g.* SAC ¶ 34 [Molner responded to concerns raised by Adler, Davidson and Forsstrom via email "saying that they were treading into the 'secret sauce' of the operation"]). In addition, it is alleged that Meli was a primary actor in the fraud, raising a question as to whether any queries plaintiffs might have posed to Meli would have alerted plaintiffs to facts sufficient to avoid the fraud (*see e.g., Andersen v Weinroth,* 48 AD3d 121, 136 [1st Dept 2007] [given the alleged fraudsters efforts to conceal the truth made inquiries into the truth behind the fraud of limited value]). Given the foregoing, at this early stage in the pleadings, the complaint, when viewed in a light most favorable to the plaintiffs, is sufficient to support a claim for fraudulent omission.

Thus, Molner is not entitled to dismissal of that part of the first, second, and fourth causes of actions premised upon fraudulent omissions related to the Adele Deal.

2. *The Unjust Enrichment Claim (The Third Cause of Action)*

To allege a claim for unjust enrichment, "[a] plaintiff must show 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" *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted])

Notably, "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [citation omitted]). In addition, "[a] nonsignatory to a valid contract . . . cannot be held liable for unjust enrichment when the claim covers the same subject matter as covered in the written agreement" (*Capone v Castelton Commodities Intl. LLC*, 148 AD3d 506, 507 [1st Dept 2017], citing *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012]).

Here, it is uncontroverted that Molner is a nonsignatory to the financing agreements between each of the plaintiffs and Advance. It is also uncontroverted that the financing agreements govern plaintiffs' investments into both the Deals, and the use of said investments.

Plaintiffs' unjust enrichment claim alleges that Molner was unjustly enriched when he personally received money from Advance that, pursuant to the funding agreements, should have been used by Advance to invest in the Deals. Accordingly, as the Deals are the subject matter of the financing agreements between plaintiffs and Advance, and plaintiffs' claim relates specifically to the use of funds pursuant to the Deals, plaintiffs may not bring an unjust enrichment claim against Molner based on this subject matter (*see Capone*, 148 AD3d at 507).

Thus, Molner is entitled to dismissal of the third cause of action for unjust enrichment.

3. *Violations of Debtor and Creditor Law § 276 (The Fifth Cause of Action)*

Debtor and Creditor Law (DCL) § 276 governs intentional fraudulent conveyances. It provides, in pertinent part, that:

> "Every conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

A cause of action alleging an intentional fraudulent conveyance must be pleaded with particularity (*NTL Capital, LLC v Right Track Rec., LLC,* 73 AD3d 410, 412 [1st Dept 2010]). However, "[d]irect evidence of fraudulent intent is often elusive. Therefore, courts will consider badges of fraud which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Pen Pak Corp. v LaSalle Nat. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997] [internal quotation marks and citation omitted]).

Here, the SAC fails to allege a violation of DCL § 276 with the requisite particularity. Plaintiffs allege that Molner transferred funds to his ex-wife, defendant Naomi Meckler, as a part of their divorce settlement, in a "secret or hasty fashion" (SAC, ¶ 282). Such a general allegation is insufficiently particular to support a claim under DCL § 276 (*see Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013] ["General statements by plaintiff that defendant 'hastily' paid her legal fees, and that the timing of those payments was 'suspect' . . . fail to support a cause of action for actual intent to defraud, even giving the plaintiff benefit of every possible favorable inference"]).

In addition, plaintiffs plead, upon information and belief, that Molner retained control of the money he transferred to Meckler as a part of their divorce. This allegation is insufficient to support a cause of action for actual intent to defraud because "where allegations of fraud are based on information and belief, the source of such information must be revealed" (*DDJ Mgt.,*

LLC v Rhone Group L.L.C., 78 AD3d 442, 443 [1st Dept 2010]). Plaintiffs provide no source for their belief.

Thus, as plaintiffs have failed to plead a violation of DCL § 276 with the requisite particularity, Molner is entitled to dismissal of the fifth cause of action as against him.

4. *The Negligence Claim (The Sixth Cause of Action)*

The sixth claim is entitled negligence, but the parties agree that it sounds in negligent misrepresentation.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the [imparted] information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

This claim is duplicative of the fraudulent inducement claim (*see Soni v Pryor,* 102 AD3d 856, 858 [2d Dept 2013] [a claim is duplicative where it "[arises] from the same facts and [does] not seek distinct and different damages" from another asserted claim]; *see also Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo,* 290 AD2d 399, 400 [1st Dept 2002] ["It is not the theory behind a claim that determines whether it is duplicative"]).

Plaintiffs do not allege any facts that would explain how Molner's alleged actions were negligent, rather than fraudulent. In addition, plaintiffs allege that their damages arise from "the fraud that was effectuated through Advance, which . . . is a result of Molner's conduct . . ." (complaint, ¶ 293).

As plaintiffs have made no meaningful distinction between their fraudulent misrepresentation and negligent misrepresentation claims, and the claims seek identical damages, the negligent misrepresentation claim is dismissed as duplicative.

5. *The Aiding and Abetting Fraud Claim (The Ninth Cause of Action)*

> "In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud. [A]ctual knowledge of the fraud may be averred generally. Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated"

Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co., 64 AD3d 472, 476 [1st Dept 2009] [internal quotation marks and citations omitted]; *see also Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 678, 679 [2d Dept 2017]).

As discussed above, plaintiffs have sufficiently alleged the existence of an underlying fraud, and that Molner had knowledge of the fraud.

Notably, in his motion, Molner does not address the element of substantial assistance. That said, a review of the SAC establishes that plaintiffs sufficiently alleged substantial assistance. Specifically, plaintiffs allege that Molner, in furtherance of the Scheme, prepared and distributed the Presentation and the financing agreements, and that plaintiffs relied on these documents in determining whether to invest with Advance. Such allegations are sufficient to allege that Molner substantially assisted in the Scheme.

Thus, Molner is not entitled to dismissal of the ninth cause of action for aiding and abetting fraud.

6. *Plaintiffs' request for leave to amend*

In their opposition to Molner's motion to dismiss, plaintiffs ask for leave to replead any causes of action that may be dismissed. In support, plaintiffs put forth a list of new information they have received relating to Molner, Meli and the Scheme. However, none of this new information is included as an exhibit to plaintiffs' opposition. In addition, it is noted that the new information, as described by plaintiffs, relates to the fraud claims, which the court has not dismissed. Accordingly, plaintiffs' request is denied.

The court has examined the remaining arguments of the parties and finds them to be unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant David Molner's motion, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the second amended complaint as against him is granted to the extent that the first, second, fourth and ninth causes of action, for fraud, fraudulent inducement, fraudulent misrepresentation and aiding and abetting a fraud are dismissed to the extent that they fail to state a claim with respect to the Grateful Dead Deal; and it is further

ORDERED that the third cause of action for unjust enrichment, the fifth cause of action for intentional fraudulent conveyance pursuant to Debtor and Creditor Law § 276, and the sixth cause of action for negligent misrepresentation are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Molner is directed to serve an answer to the second amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a conference in room 574, 111 Centre Street, New York, New York on NOVEMBER 21, 2018, at 9:30 AM/~~PM~~.

Dated: September 20, 2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.