SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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Andejo Corporation dba Seaport Watch Company, Fulton Market Retail Fish Inc. dba Simply Seafood, Apple Mac & R Corp. dba Macmenamins Pub, Roslu Corp. dba Bergins Beer & Wine, Lakous Inc, dba Pizza On The Pier, Ainolahpek, Inc. dba Athenian Express, Seaport Novelties, Gifts & News Ltd. dba Seaport News, Ry-Allie Candy Corp. dba Nutcracker Sweets, Waxology Inc. dba Waxology, Hot Dogs Del Mar, Inc. dba Nathan's Famous, Andrew Huestis dba The New York Shell Shop, and View of The World Products, Inc. dba View of the World,

Plaintiffs,

-against-

South Street Seaport Limited Partnership, Seaport Marketplace, L.L.C., DLA Piper (US), DLA Piper NY LLP, Rosenberg Feldman Smith LLP, Edward Shapiro, Booth Street Food Corp. dba Yorkville Packing House, Salad Mania, Inc. dba Salad Mania, The Howard Hughes Corporation, General Growth Properties, and Stephen M. Rosenberg,

Defendants.

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Index No.: 655410/16

Motion Seq Nos.: 005, 006, 007, 008

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence numbers 005 through 008 are consolidated for disposition.

Plaintiffs, commercial tenants who formerly conducted business at the South Street Seaport ("Seaport"), seek compensation from other such tenants for breach all of these parties' agreement to jointly prosecute a lawsuit against their mutual landlord, and for other alleged tortious conduct. Plaintiffs also allege tortious conduct by their former landlord, and the

landlord's counsel, and plaintiffs' former counsel. All of the defendants move to dismiss the complaint (CPLR [a] [1], [5], [7]).

I. Background

The Parties

Plaintiffs, and defendants Salad Mania, Inc. d/b/a Salad Mania ("Salad") and Booth Street Food Corp. d/b/a Yorkville Packing House ("Booth"), were commercial tenants (together, the "Tenant Group" or the "Tenants") at the Seaport. Defendant Edward Shapiro ("Shapiro") is an officer and an owner of Booth and Salad, as well as the guarantor of certain of Booth and Salad's rent obligations (together, the "Shapiro Defendants").

Defendants Rosenberg Feldman Smith LLP ("RFS"), a law firm, and Stephen M. Rosenberg, a partner of that firm (the "RFS Defendants"), were counsel for the Tenant Group from August 2004 until April 2, 2012. Plaintiffs contend that they hired Rosenberg's former law firm to represent them against their landlord, Defendant South Street Seaport Limited Partnership ("Landlord" or "the Landlord"). Shortly thereafter, Rosenberg left that firm, Todtman, Nachamie, Spizz & Johns, P.C., and formed, RFS, which then represented the Tenant Group.

South Street Seaport Limited Partnership was the landlord for the various commercial premises once occupied by the respective members of the Tenant Group. Plaintiffs allege that defendants General Growth Properties, Inc. and The Howard Hughes Corporation own Landlord, and that defendant Seaport Marketplace, LLC is the Landlord's general partner and managing agent (together with Landlord, the "Seaport Defendants"). Plaintiff alleges that DLA Piper LLP (US) and DLA Piper NY LLP ("DLA Piper Defendants") were counsel for all of the business entities mentioned in this paragraph.

The Amended Complaint

This action was commenced on or about October 11, 2016. This motion addresses the amended complaint ("Complaint"), filed after defendants' made an earlier motion to dismiss. Plaintiffs allege that, in 2004, when the Tenants were considering filing a lawsuit against Landlord, Shapiro recommended Rosenberg as counsel to represent the Tenant Group. In August 2004, the plaintiffs entered into a Joint Claim Agreement with each other, and with Salad and Booth, entitled "South Street Seaport's Tenants' Association Joint Claim Agreement (the "JCA"), which was drafted by Rosenberg in collaboration with Shapiro.

In the JCA, the Tenants that executed the agreement, defined in the JCA as "Tenants," each agreed to share both the expenses in prosecuting the lawsuit against Landlord and any recovery received from Landlord (Felix Moving Affirmation, Exhibit "B", at 1 [the Tenants agreed to "pool their claims and share in any recovery, payment or compensation of any nature paid by" Landlord]). Paragraph Four of the JCA prohibits a Tenant from individually settling "any claim" with Landlord. Paragraph Four also provides that any Tenant that violated the settlement prohibition would be required to contribute "any compensation or the value of any other consideration received by such Tenant or paid or given for the benefit of such Tenant" to the Tenant Group (JCA, ¶ 4).[1] Paragraph Six of the JCA (the "Rent Exception Provision"), also prohibits a Tenant from settling with Landlord "except in connection with a settlement or compromise made on behalf of the Tenants." The Rent Exception Provision requires a Tenant to pay to the Committee for the benefit of other Tenants any "recovery payment, credit or

[1]The JCA provides that the Tenants shall form a committee to represent them in asserting their claims (JCA ¶ 2).

settlement" received by such tenant *other than rent relief or a forgiveness of rent arrears* [emphasis supplied]. Thus, the Rent Exception Provision explicitly excludes from the settling Tenant's contribution requirement "any rent relief or forgiveness of rent arrears" (JCA, ¶ 6).

Plaintiffs allege that, prior to the JCA's execution in August 2004, Shapiro and Rosenberg did not discuss with them the inclusion in the JCA of the Rent Exception Provision, or its implications. Plaintiffs further claim that, based on Shapiro and Rosenberg's representations about the JCA, plaintiffs understood that any settlement consideration of rent relief, or forgiveness of rent arrears, that a Tenant received from Landlord belonged to the Tenant Group. Plaintiffs allege that they would not have entered into the JCA, retained Rosenberg, or jointly commenced the lawsuit against Landlord had they been advised of Rosenberg and Shapiro's current interpretation of the JCA, as permitting a Tenant to individually settle rent arrears claims without the Tenant Group's consent or without paying the settlement's value to the group. Plaintiffs contend that Rosenberg and Shapiro were fiduciaries to plaintiffs and, thus, obligated to explain their interpretation of the JCA.

Plaintiffs also claim that they were not provided copies of the JCA prior to being asked to sign it, and that Shapiro and Rosenberg intentionally placed the Rent Exception Provision in an inconspicuous place in the JCA, "buried" in the middle of a paragraph, and in a place where a reader would not expect it, in order to avoid detection by the Tenants. Plaintiffs allege that they relied on Shapiro and Rosenberg to coordinate and draft the JCA, and to advise them, as Shapiro was the Tenant Group's representative to Rosenberg.

Plaintiffs further contend that, prior to the JCA's execution in August 2004, Shapiro and Rosenberg also did not disclose to them: (1) that Rosenberg either gave, or agreed to provide, a

referral fee to Shapiro, who is not an attorney, to induce plaintiffs to retain Rosenberg and his firm (the "Referral Fee Agreement"); or (2) that Salad and Booth, Shapiro's businesses, owed large sums in rent arrears to Landlord that were personally guaranteed by Shapiro, or explain the implications of this to the Tenant Group. Plaintiffs allege that, had they known of those things, they would not have entered into the JCA, retained the RFS Defendants, or commenced the group lawsuit.

In 2004, the Tenant Group members commenced an action in Supreme Court, New York County, against Landlord (the "Andejo Case" or "Andejo"),[2] in which they complained of Landlord's breaches of their respective leases and commission of tortious acts against the Tenants. In 2005, while the Andejo Case was being litigated, Shapiro settled a holdover case that Landlord commenced, in the Civil Court of the City of New York, against "EDDIE SHAPIRO t/a Seaport Beer." The proceeding concerned a cart or carts that Shapiro had not removed from the Landlord's premises after the expiration of a lease (the "L&T Court Proceeding").[3] Plaintiffs allege that, in exchange for Shapiro's earlier referral of the Tenant Group to Rosenberg and RFS, RFS did not bill the Shapiro Defendants for legal work on the L&T Court Proceeding.

Moreover in 2005, Landlord was litigating nonpayment proceedings in the Civil Court against certain Tenant Group members, including Booth and Salad. Plaintiffs contend that, at

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[2] The Andejo Case was filed under Index No. 603707/04.

[3] The L&T Court Proceeding (Index No. 65612/05) culminated in a settlement agreement in 2005, signed by Shapiro and Landlord, in which Shapiro consented to a warrant of eviction of the cart, with the warrant stayed for a year, during which time Shapiro was required to pay use and occupancy (Felix Moving Affirmation, Exhibit "G").

this time, the RFS Defendants recommended that the Tenant Group agree to Landlord's requests to consolidate those proceedings with the Andejo Case. Those proceedings were consolidated, as counterclaims, in the Andejo Case. Plaintiffs assert that the RFS Defendants agreed to recommend the consolidation, even though it was not in plaintiffs' best interests, in exchange for Landlord's grant of a valuable extension of Shapiro's cart lease in the L&T Court Proceeding. Plaintiffs allege that the recommendation was to the detriment of the Tenant Group, and that RFS failed to disclose to them the additional discovery, litigation fees, costs and time issues that they would, and did, incur due to the consolidation. In addition, plaintiffs claim that, due to the consolidation, they were unable to obtain beneficial discovery from the nonpayment proceeding against Booth, where trial was imminent, while Booth was afforded an additional three years to run its profitable business at the Seaport, without rent, as it was not evicted in the proceeding.

In 2007 Shapiro and Salad jointly commenced an action against Landlord in Supreme Court, New York County, alleging that Landlord converted and illegally evicted food and beer push carts or kiosks (the "2007 Case").[4] Plaintiffs believe that the 2007 Case settled in 2008, and that the Shapiro Defendants received from Landlord $100,000 in rent reductions, as well as forgiveness of the attorneys' fees owed, the value of which, plaintiffs allege, should have been contributed to the Tenant Group. Plaintiffs allege that the Shapiro Defendants' failure to do so was a breach of their obligations to the plaintiffs, under the JCA, causing plaintiffs to incur damages (Complaint, ¶ 163).

Plaintiffs allege that the RFS Defendants concealed from plaintiffs their representation of

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[4] The 2007 Case was filed under Index No. 108522/07.

Shapiro and Salad in the L&T Court Proceeding and the 2007 Case, and the settlements of those cases, and counseled Shapiro to do the same so that he could retain the value of the settlements, instead of paying the Tenant Group under the JCA. Plaintiffs contend that RFS provided the Shapiro Defendants with legal representation in those matters as payback for the earlier Referral Fee Agreement, and concealed information about the existence of those cases in order to defraud plaintiffs. Plaintiffs allege that RFS's representation of the Shapiro Defendants in these separate matters was a conflict of interest, and that had plaintiffs received appropriate disclosure about the other cases, they would not have agreed to continue the Andejo Case, or to consolidate the landlord-tenant court proceedings with Andejo. Plaintiffs claim that, due to the concealment, they did not become aware of the L&T Court Proceeding or the 2007 Case until 2016.

Plaintiffs also allege that RFS intentionally and improperly billed the Tenant Group for representing the Shapiro Defendants in the separate matters, and concealed this by billing the Tenant Group as if the work had been performed in the Andejo Case. Plaintiffs state that the invoicing was a breach of RFS's fiduciary duty, or contractual obligations, to plaintiffs, and that plaintiffs were harmed as they paid the bills, and because the RFS attorneys' focus on the 2007 Case was to the "extreme detriment of the Andejo matter" (Complaint, ¶ 162).

In 2009, while the Andejo Case was being litigated, Landlord and General Growth Properties, Inc. filed for Chapter 11 bankruptcy with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Proceeding"). The Andejo plaintiffs submitted a claim in the proceeding and, in 2010, the bankruptcy court confirmed a reorganization plan.[5]

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[5] The Bankruptcy Court confirmation of reorganization was prior to the Shapiro Defendants' settlement of the Andejo Case, and so did not address claims arising from that

On April 2, 2012, by Order of the Court (Hon. Marcy S. Friedman, J.S.C.), RFS was permitted to withdraw as counsel for the Andejo Case plaintiffs. Plaintiffs cross-moved for a determination that the discharge of RFS was for cause and for disclosure from RFS. The cross-motion was denied as untimely, without prejudice to the Andejo Case plaintiffs to separately move for relief.

On June 11, 2013, Landlord and counsel for the Shapiro Defendants represented to this Court, in the Andejo Case, that they had reached a settlement, and later entered into a written settlement agreement (the "2013 Settlement Agreement"). Plaintiffs claim that, despite their efforts, the Landlord and the Shapiro Defendants were not willing to provide plaintiffs with a copy of the 2013 Settlement Agreement. Plaintiffs allege that Landlord knew about the JCA and should have arranged to pay over or credit to the Tenant Group the value of all of the settlements with the Shapiro Defendants, and that Landlord's failure to do so, and their actions in inducing the settlements, constituted tortious interference with the JCA.

After a lengthy trial in the Andejo Case, the remaining Andejo plaintiffs' claims were dismissed. Landlord prevailed on its counterclaims against plaintiffs in the Andejo Case, for unpaid rent and attorneys' fees, with the issue of the amount of attorneys' fees referred to a special referee for a hearing. Plaintiffs claim that, through that 2016 hearing, they learned of the settlements in the L&T Court Proceeding and the 2007 Case.

Plaintiffs' First Cause of Action, asserted against the Shapiro Defendants, is for breach of the JCA resulting from the L&T Court Proceeding, the 2007 Case, and the Andejo Case

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settlement.

settlements (the "Three Settlements"). In their Second Cause of Action, for unjust enrichment, plaintiffs allege that the Shapiro Defendants failed to pay the value of the Three Settlements to the Tenant Group, and also were unjustly enriched because they had avoided the payment of attorneys' fees, or other costs, due to the Referral Fee Agreement.

The Third Cause of Action, for breach of fiduciary duty, is asserted against the Shapiro Defendants and the RFS Defendants, based on their alleged concealment of facts prior to the execution of the JCA, and their conduct after the JCA was executed. The Fourth Cause of Action, for fraudulent inducement, asserted against Rosenberg and Shapiro alone, concerns their alleged pre-JCA conduct.

The Fifth Cause of Action, for aiding and abetting fraudulent inducement and aiding and abetting breach of fiduciary duty, is alleged against Rosenberg and Shapiro. Plaintiffs incorporate the earlier allegations of the Complaint, and add that Rosenberg and Shapiro worked "hand-in-hand" in aiding and abetting each other in defrauding and breaching fiduciary duties to plaintiffs, and that plaintiffs were damaged.

The Sixth Cause of Action is for malpractice and breach of contract against the RFS Defendants. Plaintiffs allege that, during RFS Defendant's representation of the plaintiffs in the Andejo Case, they did not exercise the degree of care, skill, competence, integrity and diligence required of attorneys and violated ethical rules of practice resulting in damages.[6] The Seventh Cause of Action, is against the Seaport Defendants and the DLA Piper Defendants, for tortious

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[6]By Decision/Order, dated February 16, 2018 [Index No. 151002/15], this Court, among other determinations, granted the motion by RFS to dismiss the Tenants' causes of action for legal malpractice, breach of contract and fraudulent inducement.

interference with the JCA.

II. Discussion

Defendants move, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the Complaint. CPLR 3211 (a) (1) permits dismissal of a claim "where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intl.*, 80 AD3d 448, 450 [1st Dept 2011] [citation and internal quotation marks omitted]). On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, a complaint is to be given a liberal construction, the allegations assumed to be true, and the plaintiff is to be afforded favorable inferences that may be drawn (*Simkin v Blank*, 19 NY3d 46, 52 [2012]). Such deference is not accorded to bare legal conclusions, allegations that are inherently incredible, or "claims flatly contradicted by documentary evidence " (*id.* at 52 [internal quotation marks and citation omitted]). Allegations that are "vague, speculative and unsupported by any facts" are not sufficient to maintain a cause of action (*Jones v Voskresenskaya*, 125 AD3d 532, 534 [1st Dept 2015]). The complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011] [citation and internal quotation marks omitted]).

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [citation and internal quotation marks omitted]).

The Shapiro Defendants

1. Breach of Contract and Unjust Enrichment.

The Shapiro Defendants argue that the portion of plaintiffs' breach of contract and unjust enrichment claims against them, based upon the settlements, of the L&T Court Proceeding in 2005, and the 2007 Case in 2008, are time-barred. The elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The statute of limitations for the claim is six years (CPLR 213 [2]), and "accrues at the time of the breach," even in cases where damages are not sustained until later and the "injured party may be ignorant of the existence of the wrong or injury" (*Ely–Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403 [1993] [internal quotation marks omitted]).

"Under New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts pled in the alternative, a six-year statute of limitations applies" (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]). In pleading unjust enrichment, a party must plead that the defendant was enriched at the complaining party's expense, and that "it is against equity and good conscience to permit [the allegedly enriched party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Such a claim "is available only in unusual situations when the defendant has not breached a contract nor committed a recognized tort, but circumstances create an equitable obligation running from the defendant to the plaintiff"

(*Maya NY, LLC v Hagler*, 106 AD3d at 585).

In support, the Shapiro Defendants provide a copy of the L&T Court Proceeding settlement agreement, and sworn affidavits concerning the 2008 settlement of the 2007 Case.[7] Plaintiffs do not dispute the case settlement dates, but argue that the correct statute of limitations is CPLR 213 (8)'s two-year discovery accrual, as defendants failed to inform plaintiffs of the settlements and fraudulently withheld information about the existence of these cases, tolling the statute of limitations. CPLR 213 (8) is not a bar to dismissal of the breach of contract or unjust enrichment claims because, by its terms, it does not apply to such claims.

Plaintiffs argue that the statute of limitations is tolled by the doctrine of equitable estoppel, as the Shapiro Defendants were fiduciaries to plaintiffs, and did not disclose to plaintiffs that the L&T Court Proceeding and the 2007 Case had settled. While "a defendant may be estopped from pleading the statute of limitations where the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" courts consider equitable estoppel to be an "extraordinary remedy" (*Ross v Louise Wise Servs., Inc.*, 28 AD3d 272, 282 [1st Dept 2006] [internal quotation marks and citation omitted], *affd as mod*, 8 NY3d 478 [2007]). Moreover, "a plaintiff may not rely on the same act that forms the basis for the claim—the later fraudulent misrepresentation must be for the purpose of concealing the former tort" (*Ross v Louise Wise Servs., Inc.*,, 8 NY3d at 491; *see generally Kaufman v Cohen*, 307

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[7] Defendants contend, and plaintiffs do not dispute, that the Complaint alleges that the L&T Court Proceeding breach of contract claim accrued the last day of September 2005, so the latest date for the timely commencement of this action was September 30, 2011, six years later. Concerning the 2007 Case, defendants picked the last day of 2008 as the settlement date, making that portion of the contract and unjust enrichment claims time-barred as of December 31, 2014.

AD2d 113, 122 [1st Dept 2003].

As discussed further below, plaintiffs allegation of a fiduciary relationship with Shapiro is conclusory, and insufficiently pleaded. In addition, plaintiffs do not plead later conduct by the Shapiro Defendants intended to conceal their earlier conduct or deter plaintiffs from filing a complaint. Plaintiffs' substantive claims include that the Shapiro Defendants and RFS, tortiously failed to disclose RFS's role in representing Shapiro, and the settlements in the L&T Court Proceeding and the 2007 Case, the very basis for their estoppel argument. Consequently, to the extent that plaintiffs seek damages against the Shapiro Defendants for the value of the settlements in the L&T Court Proceeding and the 2007 Case, their contract and unjust enrichment claims are dismissed as time-barred.

Even if these claims were not time-barred, neither Booth nor Salad, the JCA signatories, and also Tenants under the JCA, were parties to the 2005 L&T Court Proceeding. Shapiro, who settled the proceeding, is not liable under the JCA for any of the settlements, because he is not a party to the JCA, as he signed the agreement as president of Booth and Salad, and not in his individual capacity (*Herman v Ness Apparel Co.*, 305 AD2d 217, 218 [1st Dept 2003] ["A person who signs a writing solely as a corporate officer is not personally obligated on any contract evidenced by the writing"]). Plaintiffs argue that Shapiro is a party to the JCA because: (1) during the Andejo Case, and in connection with RFS's representation of plaintiffs, Shapiro used RFS as his personal attorney and RFS billed the Tenant Group for its work for Shapiro; (2) the L&T Court Proceeding, the 2007 Case and Shapiro's promissory note were litigated as part of the Andejo Case by RFS, with Shapiro's knowledge; and (3) Shapiro benefitted from the 2013

Settlement Agreement, as it absolved him from $142,000 in personal liability upon which Landlord already had judgment. In support, plaintiffs submit what they state is correspondence with the court on matters relating to L&T Court Proceeding, the 2007 Case and Shapiro's promissory note, and billing records and documents, to demonstrate that the RFS Defendants billed plaintiffs. However, assuming, arguendo, the truth of plaintiffs' assertions as to that conduct, plaintiffs fail to demonstrate how the conduct demonstrates Shapiro's agreement to be bound to the JCA, or to provide legal authority to demonstrate that he was bound.

Moreover, without citation to legal authority, plaintiffs argue that Shapiro is "subject to" the JCA because in Booth and Salad's respective leases with Landlord, Shapiro guaranteed their rent obligations to Landlord. Plaintiffs fail to demonstrate that Shapiro's separate guarantee to the Landlord demonstrates his agreement to be bound by the JCA. Finally, plaintiffs provide no factual allegations to support their conclusory assertion that Shapiro was bound to the JCA as the alter ego of Booth or Salad, as they make no nonconclusory corporate veil piercing allegations (*see Ishin v QRT Mgt., LLC*, 133 AD3d 449, 451 [1st Dept 2015]). Consequently, the contract and unjust enrichment claims are dismissed as to Shapiro.

The Shapiro Defendants also argue that the 2013 Settlement Agreement did not breach the JCA, and that plaintiffs suffered no damages due to any such breach, because the settlement consideration was a reduction of rent arrears, as permitted under the Rent Exception Provision, and Landlord did not pay any money. Furthermore, in the 2013 Settlement Agreement, the consideration acknowledged by Booth and Salad, and defined as "Rent Claims," includes unpaid

rent and attorneys' fees.[8]

The Shapiro Defendants submit Shapiro's affidavit, in which he states that he was "kicked out" of the Tenant Group, before trial, in the Andejo Case; and more importantly, an email, dated April 2012 (Felix Moving Affirmation, Exhibit, I), that provides that it is from the "Group Committee" and informs Shapiro that the Tenant Group's incoming counsel would not be able to represent Booth and Salad, and that Shapiro had to make arrangements for new counsel ("Non-Performance Email"). The Shapiro Defendants convincingly argue that the Complaint should be dismissed because plaintiffs do not allege their own performance of the JCA, which they also allegedly breached by kicking Booth and Salad out of the Tenants Group before commencement of the May 21, 2013 Andejo Case trial. Other than to object to this Court's consideration of Shapiro's affidavit, it is difficult to decipher whether plaintiffs address this argument, but they neither allege in the Complaint nor contend in opposition that they performed as the Non-Performance Email conclusively demonstrates that Booth and Salad were excluded from joint representation by plaintiff's counsel in the Andejo Case. As such, the contract claim as to the Shapiro Defendants must be also be dismissed given plaintiffs do not allege in the Complaint either that they performed their obligations under the JCA, or that their performance was excused (*Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500 [1st

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[8]By decision and order dated November 16, 2011, Justice Friedman granted the Landlord summary judgment against all the tenants, including Booth and Salad, as to liability on the counterclaims for unpaid rent, utilities and services as well as attorney's fees which constituted additional rent charges under the subject leases in the Andejo Case.

Dept 2011]).[9]

Plaintiffs' unjust enrichment claim is duplicative of the breach of contract claim, as the claims are predicated on the same facts. Furthermore, assuming the absence of the JCA, plaintiffs do not adequately allege facts, or explain, the inequity of permitting the Shapiro Defendants to retain the benefits from the Three Settlements. The claim is also dismissed as to Shapiro, who was not a party to the JCA.[10]

2. Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699–700 [1st Dept 2011]). The First Department has held that a fiduciary duty claim is subject to heightened pleading standards concerning particularization (*Berardi v Berardi*, 108 AD3d 406, 407 [1st Dept 2013]; *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]).

Plaintiffs claim that the Shapiro Defendants, and the RFS Defendants, breached their fiduciary duties, prior to the execution of the JCA in August 2004, by failing to disclose: (1) the Referral Fee Agreement; (2) Salad and Booth's large rent arrears, for which Shapiro was personally obligated, and the conflict of interest that this would cause in litigation; and (3) the

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[9] Given that defendants challenge plaintiffs' failure to duly plead performance under the JCA, and plaintiffs have neither seriously opposed this argument nor moved to amend the complaint to cure the deficiency, it leads to the inescapable conclusion that plaintiffs did not substantively perform under the JCA.

[10] Booth was not a litigant in the 2007 Case.

insertion into the JCA and the significance of the Rent Exception Provision. After the JCA was executed, plaintiffs claim that these defendants breached fiduciary duties to plaintiffs by failing to: (1) disclose that RFS represented Shapiro in the L&T Court Proceeding in 2005, and Shapiro and Salad in the 2007 Case, and that those cases settled; (2) disclose the downside of the consolidation recommendation in terms of discovery and additional litigation costs, or the conflict of interest, as the recommendation was made to obtain a favorable outcome for Shapiro in the L&T Court Proceeding; (3) credit the value of the settlements as required under the JCA; and (4) properly bill the Tenant Group. Plaintiffs also contend that RFS breached its fiduciary duties to plaintiffs by counseling Shapiro to conceal the existence of the 2007 Case, and RFS's legal representation in that case, and by litigating the Andejo Case in a manner that favored the interests of Landlord, or the Shapiro Defendants, in exchange for Shapiro's earlier referral of the Andejo Case to Rosenberg.

Plaintiffs allege that they justifiably relied on all of this conduct; that they were induced by the pre-JCA conduct to enter the JCA, retain Rosenberg and RFS, and commence the Andejo Case; and that the remainder of the conduct induced them to continue Andejo, consolidate the landlord-tenant court nonpayment proceedings, and to otherwise litigate the Andejo Case in the manner that they did. Plaintiffs allege that they would not have done any of these things, and would have sought to obtain the value of the Three Settlements, and were damaged thereby.

The Shapiro Defendants raise the statute of limitations for breach of fiduciary duty, which is three years when the substantive remedy sought is purely monetary, or six years for an equitable remedy (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139

[2009]). The claim accrues when a plaintiff first suffers a loss (*see id.* at 140), and the two-year discovery accrual rule of CPLR 213 (8) rule may apply to fraud-based breach of fiduciary duty claims (*see Kaufman v Cohen*, 307 AD2d at 122–23). If CPLR 213 (8) applies, the inquiry as to when a plaintiff could, with reasonable diligence, have discovered the fraud "'turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred'" (*id.*, 307 AD2d at 122–23 [citations omitted]).[11]

Based on the money damages plaintiffs seek, the Shapiro Defendants argue that a three-year statute of limitations applies to the breach of fiduciary duty claim, and that the claim is time-barred as to the settlements of the L&T Court Proceeding and the 2007 Case, because the latest accrual date for the claims relating to these settlements is 2008, when plaintiffs allege that the 2007 Case settled. Using December 31, 2008 as an accrual date, these defendants argue that statute of limitations ran no later than December 31, 2011.

The Shapiro Defendants also submit the March 26, 2012 affirmation of plaintiffs' current counsel, Mr. John L. O'Kelly ("O'Kelly 2012 Affirmation"), which was submitted to this court in the Andejo Case, as part of plaintiffs' cross-motion for a determination that RFS has been discharged for cause. "[P]rior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211(a) (1)" (*Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 80 [1st Dept 2003]). In the O'Kelly 2012 Affirmation, O'Kelly

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[11] To the extent that plaintiffs raise equitable estoppel regarding other claims, the doctrine is inapplicable for the reasons already discussed.

argued that RFS should be discharged for cause because Shapiro, a non-lawyer, received or had been promised a referral fee for the Andejo Case, and that there was a known conflict of interest, as Booth and Salad were not similarly situated to the other plaintiffs, due to Booth and Shapiro's large rent arrears and Shapiro's personal liability therefor, which plaintiffs discovered in 2004 or 2005. This affirmation demonstrates plaintiffs' knowledge about these matters more than two years before the 2016 filing of this action. Even with the benefit of CPLR 213 (8)'s discovery accrual rule, to the extent that plaintiffs assert breach of fiduciary duty, or fraud claims based upon this conduct, those portions of plaintiffs' claims are time-barred and dismissed.

The Shapiro Defendants argue that plaintiffs do not allege a basis for the Shapiro Defendants' fiduciary duty to them, and that none exists. For the CPLR 213 [8] discovery accrual rule to apply to a fiduciary duty claim, there must be sufficient allegations to demonstrate a fiduciary relationship. Such a relationship arises "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal quotation marks and citation omitted]). While the existence of a fiduciary relationship may be a fact specific endeavor (*Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 561 [2009]), a nonconclusory basis to impose such a duty must be pleaded. Plaintiffs do not sufficiently plead such a basis. The Complaint does not contain an averment of Shapiro's agreement to take on a fiduciary role, or facts demonstrating his control over the conduct or resources of the plaintiffs, or a close relationship with plaintiffs when the JCA was signed, or after, or of plaintiffs' prior course of dealings with Shapiro, or that Shapiro has professional expertise upon which plaintiffs

relied, or other indicia of a fiduciary relationship (*see e.g. EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d at 20-22).

Plaintiffs also do not point to legal authority to demonstrate that a fiduciary duty arose by virtue of Booth and Salad's status as co-litigants in the Andejo Case. Assuming, arguendo, Shapiro's alter ego status concerning Booth and Salad (although, as discussed above, plaintiffs' pleading does not include actual facts demonstrating this status), if Booth and Salad, as co-litigants, were not fiduciaries to plaintiffs, their owner also would not be one. Consequently, CPLR 213 (8) does not apply to the breach of fiduciary duty claims against the Shapiro Defendants which, with regard to the L&T Court Proceeding and the 2007 Case, are time-barred as to the Shapiro Defendants. Where the basis for a fiduciary duty is not sufficiently alleged, the breach of fiduciary duty claim is also dismissed for failure to state a cause of action. To the extent that plaintiffs seek tort damages for the settlement Shapiro received in the L&T Court Proceeding, dismissal is also warranted, as Shapiro was not a signatory to the JCA.

3. Fraud In the Inducement

The Shapiro Defendants argue that plaintiffs' fourth cause of action, for fraud in the inducement, asserted against Shapiro and Rosenberg, should be dismissed as time-barred and based on documentary evidence concerning the settlements. The Complaint's basis for the fraudulent inducement claim is defendants' conduct prior to the signing of the JCA. Plaintiffs also contend that, while Rosenberg and Shapiro discussed paragraph four of the JCA, which requires contribution of individual settlements to the Tenant Group, they did not discuss the added Rent Exception Provision, buried in the JCA and not contained in earlier drafts, or explain

its potential implications in light of Booth and Salad's large rent arrears. Plaintiffs contend that these omissions were of material matters, and that, had they known about these undisclosed facts, they would not have entered the JCA, retained Rosenberg, or proceeded as a group for years of litigation in Andejo. Plaintiffs claim that the Shapiro "defrauded the . . . plaintiffs . . . breached . . . fiduciary obligations to [plaintiffs], engaged in impermissible conflicts of interest, engaged in malpractice and/or breached . . . contractual obligations to the . . . plaintiffs" resulting in damages of eight years of litigation with its "attendant costs and lost opportunities," and (Complaint, ¶¶ 199, 208).

"A cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence, have discovered it" (*Kaufman v Cohen*, 307 AD2d at 122–23 [internal quotations marks and citation omitted]; CPLR 213 [8]).

The Shapiro Defendants argue that there were no damages from the Three Settlements, because the Shapiro Defendants did not receive a payment from Landlord, but only a reduction in rent arrears. They further argue that plaintiffs are attempting to enforce the JCA, except for its Rent Exception Provision, but that such selective enforcement, or rescission, of a single provision in the JCA, is not available under the law, because the JCA is not a divisible agreement.

With respect to the Rent Exception Provision, the fraudulent inducement claim must be dismissed against the Shapiro Defendants. Without the portion of the claim alleging omissions concerning arrears and the Referral Fee Agreement, the cause of action centers mostly on

plaintiffs' claim that the Shapiro Defendants committed what is, essentially, fraud in the execution of the JCA, through the later, undisclosed, insertion of the Rent Exception Provision in August 2004, and that the Shapiro Defendants owed a duty to inform plaintiffs about the content of the JCA, and its potential ramifications. As plaintiffs did not adequately plead facts to demonstrate a fiduciary relationship with Shapiro, no reasonable reliance is demonstrated, because plaintiffs could simply have read the JCA, a relatively short agreement, in order to detect and understand the Rent Exception Provision, a relatively straightforward provision (*Stortini v Pollis,* 138 AD3d 977, 978 [2d Dept 2016]; *Vulcan Power Co. v Munson*, 89 AD3d 494, 494 [1st Dept 2011]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008]; *compare Hetchkop v Woodlawn at Grassmere, Inc.*, 116 F3d 28, 30 [2d Cir 1997] [claim survived where party claimed that other party caused distraction at signing of agreement and, during the distraction, switched the agreement]). Finally, in opposition, plaintiffs claim that there were many other acts of fraud committed by the Shapiro Defendants and the RFS Defendants over the years. However, the Complaint indicates that the fraudulent inducement claim is directed at conduct involved with the execution of the JCA (Complaint, ¶¶ 197-209). Assuming, arguendo, that Booth and Salad had an implied good faith duty to disclose the Three Settlements under the JCA, that duty would be contractual.

3. Aiding and Abetting Breach of Fiduciary Duty and Fraud

The Shapiro Defendants argue that the aiding and abetting breach of fiduciary duty claim is time-barred. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated

in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d at 125). Viable claims for the recovery of damages for the aiding and abetting of a tort rest upon the existence of the underlying tort (*see e.g. Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 1017 [2d Dept 2011]. "A claim that a person aided and abetted a tort is governed by the same statute of limitations that is applicable to the underlying tort allegedly aided and abetted" (*Pomerance v McGrath*, 124 AD3d 481, 484 [1st Dept 2015] [citation and internal quotation marks omitted]).

The Shapiro Defendants argue that the aiding and abetting claim is time-barred pursuant to CPLR 213 (8), as the fraud-based claims are based upon alleged events that occurred in 2004, when the JCA was executed, and the 2012 O'Kelly Affirmation shows that plaintiffs had knowledge of the conduct in 2004. In opposition, plaintiffs argue that Shapiro and Rosenberg worked to aid and abet the fraudulent efforts of the other, by knowingly withholding material information from the tenants concerning the Rent Exception Provision, the Referral Fee Agreement, and the Booth and Salads's rent arrears, in order to induce the Tenants to sign the JCA, retain Rosenberg and commence Andejo. Plaintiffs further argue that Shapiro withheld information about the settlements in order to induce defendants to continue with the Andejo Case, and to forego enforcement of the JCA provisions against the Shapiro Defendants with respect to the settlements, which plaintiffs otherwise would not have done.

It appears that all of plaintiffs' assertions speak to Shapiro's alleged failure to disclose, and "the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Kaufman v Cohen*, 307 AD2d at

126). As discussed above, since Shapiro owed no fiduciary obligations to plaintiffs, this claim must be dismissed.

The RFS Defendants

Plaintiffs' claims against their former counsel, the RFS Defendants, are for: (1) breach of fiduciary duty; (2) fraud in the inducement; (3) aiding and abetting Shapiro's alleged fraud in the inducement and breach of fiduciary duty; and (4) legal malpractice/breach of contract. The RFS defendants move to dismiss based on documentary evidence and the insufficiency of plaintiffs' claims. In the alternative, they move to dismiss the claims as time-barred.

1. Conduct after RFS was Relieved as Counsel

The RFS Defendants characterize plaintiffs' claim as for the loss of damages relating to the Three Settlements. Regarding the 2013 Settlement Agreement, the RFS Defendants provide a court order demonstrating that RFS was relieved as counsel for plaintiffs on April 2, 2012. Consequently, RFS, argues, it cannot be held liable for any claim based on the 2013 Settlement Agreement. As there is no dispute that, as of 2012, the RFS Defendants no longer represented any member of the Tenant Group, to the extent that plaintiffs predicate any of their claims on the RFS Defendants' conduct after that date, those claims are dismissed.

2. The 2007 Case

As counsel to plaintiffs in the Andejo Case, the RFS Defendants were fiduciaries to plaintiffs. Plaintiffs complain that RFS also represented Salad and Shapiro in commencing and settling the 2007 Case, without advising plaintiffs. Plaintiffs contend that the RFS Defendants concealed that conduct, and also advised Shapiro to conceal from plaintiffs the representation

and the settlement, demonstrating purposeful concealment by plaintiffs' fiduciary, the RFS Defendants, as opposed to a mistake. Plaintiffs contend that they only learned of the settlement in 2016, through the Andejo Case attorneys' fees hearing.

RFS argues that plaintiffs are not entitled to the settlement proceeds because the three-year statute of limitations for breach of fiduciary duty accrued no later than December 1, 2008, when the 2007 Case settled, or when RFS was relieved as counsel in April 2012, but either way ran by April 2, 2015. These Defendants contend that CPLR 213 (8)'s two-year discovery rule does not aid plaintiffs, because the 2012 O'Kelly Affirmation demonstrates plaintiffs' knowledge of the 2007 Case, as well as the improper billing associated therewith.

It is undisputed that RFS drafted the JCA, paragraph 4 of which, along with the Rent Exception Provision, prohibit Tenants from individually settling any claim with the Landlord. Plaintiffs allege that while the Andejo Case was being litigated, in addition to representing plaintiffs, RFS also represented Salad, a signatory to the JCA, in settling the 2007 Case against Landlord. Plaintiffs claim that this was a conflict of interest, and that they suffered damages that include the loss of the value of the settlement, by RFS purposely concealing its representation of Shapiro in the 2007 Case, and advising Shapiro to do the same. Plaintiffs also claim that RFS fraudulently billed them for work performed for the Shapiro Defendants in other cases, by hiding the charges on the Tenant Group bills, to compensate the Shapiro Defendants for the prior referral.

The RFS Defendants also submit Smith's affidavit to demonstrate that the 2007 Case was settled with no money recovered by Shapiro and Salad; however, the RFS Defendants have not

submitted a copy of the relevant portions of the settlement agreement, which is the best evidence of what it provides, and also have provided no excuse as to why the agreement was not submitted. In arguing that plaintiffs are improperly seeking partial rescission by asking the court to enforce the JCA, except for the Rent Exception Provision, the RFS Defendants implicitly argue that only money payments were to be contributed under the JCA. Indeed, the RFS Defendants point to persuasive legal authority that supports the proposition that rescission of only a portion of a contract is permissible only where a contract is divisible. However, assuming, that partial enforcement of the JCA to exclude the Rent Exception Provision is impermissible, this still is not entirely dispositive of plaintiffs' claim, as the RFS Defendants failed to attach a copy of the settlement agreement in the 2007 Case, which may conclusively provide if any consideration was paid "other than rent relief or a forgiveness of rent arrears" under the JCA. However, claims of conflict of issue, improper billing to benefit Shapiro or his companies, Salad and Booth, and allegations concerning the consolidation, were the actual bases for plaintiffs' cross-motion dated March 26, 2012, to discharge the RFS Defendants for cause in the Andejo Case.[12] Therefore, plaintiffs cannot take advantage of the two-year discovery rule to revive these claims which are time-barred.

3. The L&T Court Proceeding

To the extent that defendants seek dismissal of plaintiffs' claim for damages in the amount of the value of the 2005 settlement between Shapiro and the Landlord in the L&T Court Proceeding, the motion is granted because, as discussed above, Salad and Booth were not parties

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[12] See. 2012 O'Kelly Affirmation, at ¶¶ 20, 21, 22, 27, 28, 29, 30, and 31.

to that case and Shapiro was not a party to the JCA. As this portion of the Complaint is dismissed, it is unnecessary to reach the RFS Defendants' other arguments concerning the 2005 settlement. Therefore, the breach of fiduciary duty claim is dismissed.

4. Fraudulent Inducement

Based on the 2012 O'Kelly Affirmation, discussed above, to the extent that the fraudulent inducement claim is predicated on allegations regarding the Referral Fee Agreement, the rental arrears, and Shapiro's liability for those arrears, that portion of the claim is dismissed as time-barred. The RFS defendants have demonstrated that plaintiffs' other alleged pre-JCA omissions are also time-barred. The RFS Defendants argue that plaintiffs knew of the RFS Defendants' insertion of the Rent Exception Provision in August 2004, as that provision was in "plain sight" for literally twelve (12) years, including about four (4) yeas after Mr. O'Kelly became plaintiffs' counsel, prior to commencing this action, in this contentious dispute spanning almost fifteen (15) years. It is inherently incredible to argue that plaintiffs and Mr. O'Kelly did not read the Rent Exception Provision, at the very least in March 2012, when they vigorously argued their cross-motion to dismiss RFS Defendants for cause, which repeatedly referenced the terms of the JCA and alleged breaches thereof by Shapiro and the RFS Defendants (2012 O'Kelly Affirmation, at ¶¶ 22, 23, and 24).

5. Legal Malpractice

By Order, dated February 16, 2018, this Court granted the motion by RFS to dismiss plaintiffs' complaint alleging legal malpractice, breach of contract and fraudulent inducement as against Rosenberg and RFS (*Fulton Market Retail Fish, Inc. v Todtman Nachamie Spizz &*

Johns, P.C. (Sup Ct, NY County, index No. 151002/2015 ["2015 Malpractice Action"]). Although the claims for legal malpractice herein would be barred by the statute of limitations, plaintiffs argue that the claims in this action against the RFS Defendants relate back to the 2015 Malpractice Action. However, without deciding this relation-back issue, given that the 2015 Malpractice Action was dismissed, plaintiffs' malpractice cause of action asserted herein against Rosenberg and RFS is dismissed.[13]

6. Aiding and Abetting Fraud and Breach of Fiduciary Duty

As the fraud and breach of fiduciary duty claims against the Shapiro Defendants have been dismissed, any claim that RFS aided and abetted their conduct also fails and is dismissed.

The Seaport Defendants[14]

The Seaport Defendants and the DLA Piper Defendants seek to dismiss plaintiffs' claim that they tortiously interfered with the JCA, as time-barred and for failure to state a claim, among other grounds. The elements of a claim for tortious interference are: (1) the existence of a valid contract between plaintiffs and a third party; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification or excuse;

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[13]Plaintiffs' sixth cause of action is denominated "Malpractice/Breach of Contractual Obligations". However, to the extent that plaintiff alleges breach of contract, such cause of action is duplicative of plaintiffs' cause of action for legal malpractice and, as such, is likewise dismissed.

[14] Plaintiffs do not allege conduct by the Seaport Defendants that would serve as inducement to plaintiffs not to file an action, other than silence, which is not a basis for estoppel against these defendants (*Ross v Louise Wise Servs., Inc*, 8 NY3d at 491).

(4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *see IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464, 465 [1st Dept 2016] ["plaintiff has not established that Baker McEvoy's conduct was without excuse and/or justification, an element of the claims for tortious interference with a contract"). The cause of action is subject to a three-year limitations period (CPLR 214 [4]), which begins to run when a plaintiff first suffers actual damage resulting from the tortious conduct (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). This claim is time-barred if it accrued earlier than three years prior to October 16, 2016.

The Seaport Defendants and the DLA Piper Defendants argue that the tortious interference claim, to the extent it is based upon the L&T Court Proceeding and the 2007 Cases, is time-barred because the alleged injury occurred more than three years before the Complaint was filed. Plaintiffs do not contest that, if measured from the date of the settlement of the L&T Court Proceeding and 2007 Case, the statute would have run, but argue that the statute of limitations accrued later, because plaintiffs only learned of the settlements in 2016.[15] However, by its own language, CPLR 218 (3) does not apply to tortious interference claims. Consequently, recovery based on the settlements in those two actions is time-barred.

The Seaport Defendants argue that the Andejo Case was settled with Salad and Booth on June 11, 2013, and that the documentation was completed by July 3, 2013. Plaintiffs allege that

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[15] Adding a reasonable period of time after the settlements for the Shapiro Defendants to pay over the settlement proceeds to the Tenant Group, as plaintiffs argue, does not save the claim regarding the earlier settlements, where there are years between those settlements and the 2016 commencement of this action.

the settlement occurred later, and that they were not aware of the terms of it until January 2017, despite the fact that the plaintiffs were advised in open court and on the record that settlement was occurring on June 11, 2013.

Notwithstanding the above, plaintiffs have not adequately plead lack of justification as a necessary element. Moreover, the underlying breach of contract claim has been dismissed. Concerning the justification element, it appears that the JCA was entered into by a group of potential plaintiff litigants, covering disputes against their mutual landlord, the Seaport Defendants, in order to pool resources, or as a strategy to attempt to better their odds in litigation. However, while not dispositive alone, the JCA is not an agreement concerning a business transaction, as is the typical case in a tortious interference claim, as a lawsuit is not a business venture, but a means for injured plaintiffs to seek compensation. As is well known, a lawsuit for damages is, by nature, an adversarial endeavor as to the plaintiff and defendant. Plaintiffs' claim rests on the proposition that a defendant must either defend a suit in a manner that does not interfere with an agreement among plaintiffs about how they want to conduct their litigation, or be liable in tort. This is an untenable proposition. Lack of justification is not demonstrated based upon the Seaport Defendants' efforts to settle their own lawsuits, and any suit brought against them, in a manner that suited their own best interests, as such conduct does not lack justification. To adopt plaintiffs' position would essentially serve to permit the contracting plaintiffs to control the litigation options of the opposing parties, that are not bound to the

contract, in ongoing lawsuits or other adversarial proceedings.[16]

Furthermore, as Shapiro was not a party to the JCA, there was no contract between him and plaintiffs with which a third party might interfere. For all of the aforementioned reasons, the tortious interference claim is dismissed against the Seaport Defendants, their general partner, and their counsel, the DLA Piper Defendants.

Other than what has been discussed above, the Complaint does not allege a separate basis for a tortious interference claim against The Howard Hughes Corporation and General Growth Properties, Inc., which allegedly own the Landlord. Under these circumstances, the claim against The Howard Hughes Corporation and General Growth Properties, Inc. is dismissed.[17] This Court has considered the parties other arguments, except those improperly raised for the first time in reply, and finds them to be unpersuasive.

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[16] Plaintiffs also do not demonstrate a legal basis upon which to impose an obligation upon the Seaport Defendants to arrange for payments of settlements or contributions to the Tenant Group. They also do not adequately demonstrate how the Seaport Defendants, or their counsel, general partner or owners induced Booth and Salad not to make any required payments under the JCA.

[17] As the tortious interference claims are dismissed against the DLA Piper Defendants and the Seaport Defendants, it is unnecessary to reach their other arguments, such as: res judicata based upon the bankruptcy proceeding; the inactive status of some of the plaintiff corporations; that the L&T Court Proceeding and 2007 Cases were publically filed, with plaintiffs' then-counsel also representing the RFS Defendants in the other actions; or that ethical considerations would have prevented the Seaport Defendants from communicating directly with the plaintiffs, who were represented by counsel.

CONCLUSION

For the foregoing reasons, it is

ORDERED, that the motion by defendants Rosenberg Feldman Smith LLP and Stephen M. Rosenberg to dismiss the Amended Complaint (Motion Sequence No. 005) is granted with prejudice, except for that portion of the Amended Complaint concerning the alleged breach of fiduciary duty as to the 2007 Case under Index No. 108522/07, is denied without prejudice and with leave to renew upon proper papers including a copy of the alleged settlement agreement and the subject leases which define rent and additional rent claims including rent, utilities, and attorney's fees; and it is further

ORDERED, that the motion by defendants Howard Hughes Corporation, General Growth Properties, South Street Seaport Limited Partnership and Seaport Marketplace LLC to dismiss the Amended Complaint (Motion Sequence No. 006) is granted with prejudice; and it is further

ORDERED, that the motion by defendants Booth Street Food Corp. d/b/a Yorkville Packing House, Salad Mania, Inc. d/b/a Salad Mania and Edward Shapiro to dismiss the Amended Complaint (Motion Sequence No. 007) is granted with prejudice; and it is further;

ORDERED, the motion by defendants DLA Piper LLP (US) and DLA Piper NY LLP to dismiss the Amended Complaint (Motion Sequence No. 008) is granted with prejudice.

Dated: December 28, 2018

ENTER:

J.S.C. SHLOMO HAGLER
J.S.C.