Community Assn. of the E. Harlem Triangle, Inc. v Butts
2020 NY Slip Op 32163(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 656028/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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COMMUNITY ASSOCIATION OF THE EAST HARLEM TRIANGLE, INC. AND DERRICK TAITT,

Plaintiff,

- v -

REVEREND DR. CALVIN O. BUTTS III, JAMES HOWARD, CHARLES SIMPSON, VICTOR SOZIO, WINDELS MARX LANE & MITTENDORF LLP, ARIEL PROPERTY ADVISORS, LLC,ABYSSINIAN DEVELOPMENT CORPORATION

Defendants.

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INDEX NO. 656028/2018

MOTION DATE _____

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 37, 38, 39, 74, 75, 79

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 76, 80

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 51, 65, 66, 67, 68, 77, 81

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence number 002, defendants Windels, Marx, Lane & Mittendorf LLP (WM) and Charles Simpson (together, the WM defendants) move, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the claims against them in the First Amended Verified Complaint (the Complaint).[1]

[1] Plaintiff filed a motion (designated motion sequence number 005) to amend the complaint the day before oral argument, which was granted without opposition. (NYSCEF 78, Decision and Order). At the parties' request, the various motions to dismiss are deemed to

In motion sequence number 003, defendants Victor Sozio and Ariel Property Advisors LLC (Ariel) (together, the Broker defendants) move, pursuant to to CPLR 3211(a)(1), (5) and (7), to dismiss the claims against them in the Complaint.[2]

In motion sequence number 004, defendants Reverend Dr. Calvin O. Butts III, James Howard and Abyssinian Development Corporation (ADC) (together, the ADC defendants) move, pursuant to CPLR 3211(a)(7) to dismiss the claims against them in the Complaint.

Background

The following facts are alleged in the Complaint unless otherwise noted, and for the purposes of this motion, accepted as true.

In March 1994, defendant ADC and plaintiff the Community Association of East Harlem Triangle, Inc. (CAEHT) formed a joint venture agreement for the purpose of developing the property located at 160 East 125th Street (the Property) as a Pathmark supermarket (NYSCEF Doc. No. 72, First Amended Complaint [FAC] ¶12). The parties formed East Harlem Abyssinian Triangle Corp. (EHAT Corp.) to conduct the business of the joint venture and East Harlem Abyssinian Triangle Limited Partnership (EHAT LP) to own and develop the Property (*id.* ¶¶ 13, 16). EHAT Corp. was the general managing partner of EHAT LP, and CAEHT and ADC each held 50% of EHAT Corp.'s stock (*id.* ¶¶14-15). EHAT Corp. holds a 51% interest in EHAT LP and the New York City Economic Development Corporation holds a 49% interest in EHAT LP (*id.* ¶¶ 19).

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have been directed against the amended pleading (NYSCEF 79, Letter).

[2] The motions of the Ariel defendants and plaintiffs for sanctions against each other were denied from the bench at oral argument (NYSCEF 75, June 25, 2019 tr. at 6:5-11).

At a meeting of the EHAT Corp. board of directors (the Board), held March 2013, defendant James Howard, Senior VP of ADC and a director of EHAT Corp., initiated the first of several discussions with the Board regarding the sale of the Property (*id.* ¶¶ 21-22, 24). Thereafter, defendants Howard and Butts (Chairman of ADC) took a lead role in managing the sale of the Property on behalf of EHAT Corp., assisted by defendant Sozio of Ariel, a commercial real estate broker, and defendant Simpson, a partner in the WM law firm (*id.* ¶¶ 4, 6, 7, 26, 32, 39).

Beginning in October 2013, Derek Johnson of Integrated Urban Holdings, LLC (Integrated) started working with R. Donahue Peebles, Chairman and CEO of Peebles Corp. (Peebles Corp.), to submit an offer to acquire the Property (*id.* ¶ 27). Peebles Corp. had a real estate portfolio worth approximately $5 billion (*id.* ¶ 29). At a Board meeting held on or about November 25, 2013, Howard informed the Board that he had identified seven potential buyers of the Property, including Peebles Corp. and Extell Development Company (Extell) (*id.* ¶ 24).

On or about January 15, 2014, Integrated and Peebles Corp., (together Peebles/Integrated) jointly submitted a written offer to purchase the Property for $40 million to Butts, and mailed copies of the offer to Sozio and Simpson (*id.* ¶¶ 31-35). Thereafter, Sozio told Johnson that EHAT Corp. would accept an offer of $42 million, and Johnson responded that Peebles/Integrated would increase its offer to that amount (*id.* ¶ 36).

On or about February 12, 2014, Sozio sent Johnson a term sheet containing the terms that EHAT Corp. would agree to accept the $42 million offer (*id.* ¶ 37). After Johnson communicated his assent, Sozio told him that the offer had been forwarded to

Simpson, who would follow up with Johnson to memorialize the offer in a formal contract (*id.* ¶38). However, Johnson never heard from Simpson (*id.* ¶ 40).

On March 24, 2014, the Board held a meeting to consider an offer from Extell Development Company (Extell), a New York City based real estate development firm, to purchase the Property for $39 million (*id.* ¶ 42). Simpson, Howard and Sozio personally attended the meeting (*id.* ¶ 46). During the meeting, a CAEHT representative asked Howard whether there were any other offers to purchase the Property aside from that of Extell (*id.*). Before Howard could answer, however, Simpson falsely stated that Extell was the only party to show an interest in purchasing the Property (*id.*). Despite knowing this statement was untrue, neither Sozio nor Howard corrected Simpson at or after the meeting, or otherwise disclosed the higher Peebles/Integrated offer (*id.* ¶¶ 47-50).

Plaintiffs allege that the Peebles/Integrated offer was deliberately concealed from it because Simpson, WM, ADC, Butts, Howard, Sozio and Ariel had previously agreed upon a scheme to steer the Property to Extell (*id.* ¶¶ 72-74). In this connection, at the March 24, 2014 meeting, the Board also discovered that ADC had already received an advance payment from Extell in the amount of $2.5 million at an unspecified date prior to the meeting, which Simpson, Howard, Sozio and Butts had failed to disclose (*id.* ¶ 45). Additionally, at that meeting, plaintiffs learned that ADC had never informed Extell of plaintiffs' interest in the Property (*id.* ¶ 52).

In view of this new information, the meeting ended without a vote on the sale of the Property (*id.* ¶ 54). The Board met again on April 3, 2014 to discuss the sale, at which time Howard falsely denied that there were any other offers besides Extell's (*id.* ¶ 56). The Board deadlocked on the vote to approve the sale, with the four ADC-appointed directors voting in favor and the four directors appointed by CAEHT voting against (*id.* ¶ 58).

However, a majority of the Board voted in favor of the sale at an April 10, 2014 meeting, including Butts, who did not attend the meeting but voted by proxy (*id.* ¶ 59).

Plaintiffs allege that, as a direct and proximate consequence of the fraudulent concealment of the Peebles/Integrated offer, EHAT Corp. was damaged in the amount of $3 million, or the difference between the amount paid by Extell to purchase the Property and the market value of the Property (*id.*, ¶¶ 97, 104, 111, 118, 125). The Complaint sets forth 58 causes of action in various permutations against different combinations of the defendants, sounding in fraud, breach of fiduciary duty, and aiding and abet, together with a claim pursuant to Business Corporations Law (BCL) § 720 and a demand for punitive damages.

Discussion

For the following reasons, the motions are denied except to the extent of dismissing the aiding and abetting claims as against the ADC defendants, the BCL § 720 claims as against Butts and Howard, and the demand for punitive damages.

I. Fraud Claims

A. Out of Pocket Damages

All defendants challenge the fraud claims on the ground that plaintiffs have not alleged any damages available under that tort theory. Specifically, they argue that recovery of any loss resulting from the alleged concealment of the Peebles/Integrated $42 million offer is barred by the "out-of-pocket" rule. The Court of Appeals most recently reiterated the governing standard.

> "In New York, as in multiple other states, the true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the 'out-of-pocket' rule. Under that rule, damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained. There can be no recovery of profits which would have been realized in the absence of

> fraud. Moreover, this Court has consistently refused to allow damages for fraud based on the loss of a contractual bargain, the extent, and, indeed the very existence of which is completely undeterminable and speculative."

(*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142-43 [2017] quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996] [internal quotations omitted]).

The Appellate Division, First Department outlined the procedure for determining whether out-of-pocket damages exist, and for calculating them:

> "First, the plaintiff must show the actual value of the consideration it received. Second, the plaintiff must prove that the defendant's fraudulent inducement directly caused the plaintiff to agree to deliver consideration that was greater than the value of the received consideration. Finally, the difference between the value of the received consideration and the delivered consideration constitutes 'out of pocket' damages."

(Kumiva Grp., LLC v Garda USA Inc., 146 AD3d 504, 506 [1st Dept 2017]). Based on these and other authorities, defendants urge that plaintiffs suffered, at most, a lost opportunity or lost profit. They contend that, under the out-of-pocket rule, all such losses to be inherently speculative and nonrecoverable as a matter of law.

The court concludes that this interpretation overstates the law. *Connaughton* can best be read as holding that the loss of a contractual bargain or profits is nonactionable only *if* the losses are in fact "completely undeterminable and speculative" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d at 142-143). The *Connaughton* Court observed that, although the plaintiff stopped solicting potential buyers for his restaurant concept in reliance on defendant's fraud, "the complaint fails to allege that, in doing so, *he rejected another prospective buyer's offer* to purchase the concept" (*id.* at 143 [emphasis supplied]). Other cases have also highlighted a plaintiff's inability to identify a specific offer alternative offer as a factor justifying dismissal (*see, e.g, Rather v CBS Corp.*, 68 AD3d 49, 59 [1st Dept 2009] [plaintiff "never identified a single opportunity with *specified terms that*

was actually available to him and which he declined to accept because of (defendant's) actions"] [emphasis supplied], *lv to appeal denied*, 13 NY3d 715 [2010]).

Recovery under the rule is precluded only where no alternative offer is outstanding, or where plaintiff is seeking "profits" comprised of the indeterminable future earnings that might have flowed from an alternative deal (*see, e.g.*, *Southwestern Invs. Group, LLC v JH Portfolio Debt Equities, LLC*, 169 AD3d 1510, 1511 [4th Dept. 2019] quoting *Connaughton*, 29 NY3d at 143 ["the allegation that (plaintiff) lost the enhanced collections on the portfolios that defendants purportedly told it that it could receive under the terms of the financing arrangement is a 'quintessential lost opportunity, which is not a recoverable out-of-pocket loss'"]). Here, in contrast, there was a concrete offer made within a few weeks of the closing, memorialized by a written term sheet, which defendants effectively rejected on plaintiff's behalf by their alleged deception.

Under *Kumiva*, plaintiffs will be entitled to submit nonspeculative proof demonstrating that they were induced "to deliver consideration [the Property] that was greater than the value of the received consideration [$39 million]" by proffering evdience of the market value of the Property at the time of the sale (*Kumiva*, 146 AD3d at 506). Although the court has not located any cases involving a real estate seller fraudulently induced to part with its property at lower price due to the concealment of a better offer, the First Department's decision in *Bernstein v Kelso & Co.*, 231 AD2d 314 (1st Dept 1997) is instructive. In *Bernstein*, the plaintiff alleged that the management employees of a company schemed with a potential buyer to sell the company at the lowest price that the principal and other shareholders would accept, furnishing confidential information to aid the buyer in obtaining the most favorable offer for itself (*id.* at 318-319). The Court found it irrelevant that the plaintiff ultimately made an overall "profit" from the transaction, noting

that the plaintiff was not seeking the undeterminaable future profits that might generated by the company after the sale (*id.* at 388). Rather, the plaintiff "sought to recover the difference between the price he received in the sale of the company and the price he would have received had his employees and [the buyer] not deceived him" (*id.* at 322).

While defendants insist that plaintiffs are seeking an impermissble "gain" over the price they received for the Property, that is not the case. Plaintiffs allege that they suffered a net loss by parting with a property worth $42 million for only $39 million. While in *Kumiva*, the alleged loss arose from the buyer's cash overpayment for the property (corporate stock),[3] a loss may also be established, as in *Bernstein*, by demonstrating that the seller has been underpaid for its property (*see also Electron Trading, LLC v Morgan Stanley & Co. LLC,* 157 AD3d 579, 582 [1st Dept 2018] [dismissing fraud claim where complaint did "not allege that plaintiff was defrauded into relinquishing to defendant the ATS for value less than its worth"]).

Accordingly, defendants' contention that an out-of-pocket loss may never be established by a sale at a deflated price is erroneous. None of the cases on which they rely are to the contrary. In *Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666 (1st Dept 2017), the plaintiffs alleged that they were fraudulently induced to sell at a lower price where the defendant concealed the true identity of the buyer, a competitor business (*id.* at 667). The Court merely held that the purchase price that would have been agreed upon, had the buyer's identity been known, was speculative (*id.*). Furthermore, the Court noted that there was no "suggestion that the agreed price was unfair, as it was voluntarily accepted by plaintiffs, who had their own financial advisors, as the result of a competitive

[3] Although the Court ultimately dismissed the plaintiff's claim in *Kumiva*, the determination was made only after discovery at the summary judgment stage and was based upon the plaintiff's failure to submit proof of the company's actual value on the date of the sale.

bidding process and was $20 million higher than the next highest bid" (*id.*). By comparision, in this case there was an agreed upon purchase price, and plaintiffs were deprived of any bidding process by the alleged concealment.

Sardanis v Sumitomo Corp., 279 AD2d 225 (1st Dept 2001), is distinguishable for the same reasons as *Norcast*. In that case, the plaintiff alleged that the defendants obtained a unfair advantage in negotiating its purchase of copper by concealing their unlawful use of plaintiff's confidential information (*id.* at 288). The Court noted that the plaintiff sold the copper for more than it had paid, and its claim that it might have obtained an even higher price for the copper in absence of the deception was speculative (*id.* at 230).

In short, the out-of-pocket rule does not bar plaintiffs' fraud claims. At a mininum, plaintiffs will be permitted to submit evidence of the Property's true market value on the date of the sale and recover the difference between that amount and the price it received, if any. Furthermore, the court concludes that plaintiffs may be entitled to recover the full $3 million difference between the price received and the Peebles/Integrated offer, even if that offer exceeded the Property's market value. As illustrated by the cases discussed above, the Courts' concerns regarding a plaintiff's receipt of "profits" appear to be directed at those rooted in speculation, such as future earnings, rather than capital appreciation or gains arising from a single, discrete sale of property pursuant to an offer at a fixed price. And as noted in *Cayuga, supra* (cited by *Connaghton*), the out-of-pocket rule was not meant to be "an inflexible rule categorically precluding damages based on the market value of plaintiff's [property] because such value would include some element of profit" (*Cayuga*, 95 AD2d at 24).

Finally, defendants assert that the Peebles/Integrated offer was speculative by reason of the possibility that the buyer could have walked away, or that any alleged deal would be barred by the statute of frauds. However, the authorities discussed above do not require proof of an irrevocable or consummated offer as a predicate to recovery, only a prospective one setting forth reasonably definite terms.

B. Intent to Defraud

The ADC defendants also argue that plaintiffs fail to allege that defendants possessed the requisite intent to defraud. In particular, they contend that there are no allegations indicating their motive for steering the sale to Extell or suggesting how they benefitted in any way. They also point out that the Broker defendants would be working against their own interest in a commission by procuring a sale at a lower price.

In a fraud claim, the element of scienter is the one "element most likely to be within the sole knowledge of the defendant and least amenable to direct proof" (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [1st Dept 2003]). Accordingly, plaintiffs "need only allege specific facts from which it is possible to infer defendant's knowledge of the falsity of its statements" (*id.* at 99). A defendant's knowledge of a corporate fraud or its concealment may be deduced by his or her position and responsibilites in the organization (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 493 [2008]). And while fraudulent intent may "be divined from surrounding circumstances" (*Oster v Kirschner*, 77 AD3d 51, 56 [1st Dept 2010]), it is generally a question that cannot be resolved on a motion to dismiss (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428 [1st Dept 2015]).

Plaintiffs explicitly allege that both Butts and Howard were aware of the Peebles/Integrated offer throught their interactions with each other, their counsel and the

brokers, and either falsely denied or concealed its existence. At this stage of the action, that is sufficient to demonstrate their knowledge for the purpose of the fraud claim. Although their motives are not made clear by the pleadings, "corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]). The court also rejects defendants' related contention that Butts' knowledge of the fraud has been insufficiently pled. That also may be reasonably inferred given the allegations regarding his position within the organization and interactions with Howard, whether or not he attended any particular meeting at which Howard spoke.

II. Aiding and Abetting

The Broker defendants contend that the aiding and abetting claims are not sufficiently particularized as against them. A defendant aids and abets a fraud or breach of fiduciary duty when he or she provides substantial assistance by affirmatively assisting, helping to conceal or failing to act when required to do (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]). Plaintiffs' allegations regarding defendants' communications with the ADC defendants and counsel, and their attendance at board meetings, adequately support the claim at this pre-discovery stage.

The ADC defendants challenge the aiding and abetting claims as duplicative of the primary claims of breach of fiduciary duty. The court agrees that they are redundant insofar as they charge Butts and Howard with aiding and abetting their own conduct as the primary violators. Plainiffs do not meaningfully counter this argument other that to suggest it should be permitted to plead in the alternative. Thus, the claim is dismissed only as to the ADC defendants.

III. Civil Conspiracy

The motions to dismiss the claim for civil conspiracy are denied. "Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted 'to connect the actions of separate defendants with an otherwise actionable tort'" (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020], quoting *Alexander & Alexander of N.Y. v Fritzen,* 68 NY2d 968, 969 [1986]). To state a claim under that theory, "the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury" (*Cohen Bros. Realty Corp.*, 181 AD2d at 404). The Complaint sufficiently outlines the parties joint efforts to steer the Property to a lower bidder to plaintiffs' detriment.

IV. Breach of BCL § 720

The claim for monetary damages under BCL § 720 against the ADC defendants is dismissed. "The section may not be utilized to obtain a money judgment in action at law" (*Ali Baba Creations, Inc. v Cong. Textile Printers, Inc.*, 41 AD2d 924, 924 [1st Dept 1973]). The cases cited by plaintiffs either pre-date these authorities or did not involve claims brought pursuant to BCL § 720.

V. Punitive Damages

Plaintiffs' demand for punitive damages is dismissed. As the First Department explained:

> "Punitive damages are not available in the ordinary fraud and deceit case, but are permitted only when a defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations. Mere commission of a tort, even an intentional tort requiring proof of common

> law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant"

(*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011] [internal quotatons and citations omitted]). Despite the claim of fraud, the Complaint does not ascribe an evil motive for the defendants' steering the Property to a particular buyer. Furthermore, the fraud claim was not directed at the general public (*Vandashield Ltd. v Isaacson,* 146 AD3d 552, 555 [1st Dept 2018]).

VI. Statute of Limitations

A. Fraud/Legal Malpractice

The WM defendants assert that plaintiffs' claims against them are barred by the three-year statute of limitations for professional malpractice under CPLR 214(6). They argue that plaintiffs have characterized their cause of action as fraud merely to circumvent the time-bar by taking advantage of the six-year limitations period of CPLR 213(8). Emphasizing that the WM defendants were acting the capacity as plaintiffs' counsel, they contend that the essence the Complaint is that Simpson failed to inform his clients of material information in context of his legal representation.

The New York State Legislature amended CPLR 214(6) in 1996 to address the effect of decisions that "abrogat[ed] and circumvent[ed]" the original legislative intent by allowing actions that were technically malpractice actions to proceed under a six-year contract statute of limitations (Revised Assembly Memo in Support, Bill Jacket, L 1996, ch 623). The legislative history explains that "where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years . . . regardless of whether the theory is based in tort or in a breach of contract" (*In re R.M. Kliment & Frances Halsband, Architects*, 3 NY3d 538, 541-542 [2004]). Accordingly,

a purported fraud claim against an attorney will be dismissed if it actually sounds in legal malpractice (*Kinberg v Garr*, 60 AD3d 597, 597 [1st Dept 2009]). Thus, if all the WS defendants did was breach the Rules of Professional Conduct by negligently failing to keep plaintiffs apprised of developments regarding the Property or providing them with information, then they would be entitled to dismissal.

Defendants' analysis, however, disregards plaintiffs' key allegation that Simpson deliberately lied about the existence of additional offers. Regardless of whether the mispresentation was made in the course of the WM defendants' legal representation, the alleged deception takes the claim out of the realm of mere negligence. The time-bar will not apply where there exists a fraud claim that is in essence "sufficiently distinct" from a claim of legal malpractice (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 70 [1st Dept 2015]). The fact that a fraud against a client might *also* constitute a departure from the standard of reasonable care, or that plaintiffs might assert other claims that are mere malpractice, does not render the entire Complaint untimely.

Epiphany Community Nursery School v Levey, 171 AD3d 1 (1st Dept 2019), does not require a different result. There, the Court upheld the dismissal of a fraud claim against an accounting firm on the ground that it was, in fact, duplicative of an untimely malpractice claim (*id.* at 11). Although the decision recited that "defendants" made false material representation (*id.* at 8), it does not appear that those parties included the accountant. Notably, the lower court specifically distinguished between the malpractice and fraud claims, and found that the former were time barred, and the latter were deficient for failure to allege justifiable reliance – not that they were duplicative (*Epiphany Community Nursery School v Levey*, 2017 WL 3386267, *6-9; n.16 [Sup Ct, NY County 2019]). In any event, there is no indication that the First Department intended to overrule

Johnson and hold that every fraud claim asserted against an attorney is subject to the limitations period for malpractice.

B. Breach of Fiduciary Duty

The breach of fiduciary duty claims are also timely as pled. As with a legal malpractice claim, "where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139, citing *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003], *rearg denied*, 12 NY3d 889 [2009]). Defendants do not dispute this rule, but rather argue that there was no fraud, or that the damages sought are not available in a fraud claim. Those contentions have already been rejected by the court.

C. Officer and Directory Liability

As to the defendant directors Butts and Howard, pursuant to CPLR 213(7), the action is timely regardless of the underlying legal theory. That section provides for a six-year limitations period in "an action by or on behalf of a corporation against a present or former director, officer or stockholder . . . to procure a judgment on the ground of fraud . . . or to recover damages for waste or for an injury to property" (*see Roslyn Union Free Sch. Dist. v Barkan*, 16 NY3d 643, 652 [2011]). The conveyance of the Property for significantly under market value would constitute waste or an injury to property, even if no fraud were alleged.

The court disagrees, however, with plaintiffs' contention that they would be entitled to the benefit of the CPLR 213(7) limitations period as against the WM defendants on the theory that the attorneys aided and abetted the director defendants in the breach of their duties. That section supplants a shorter limitations period only where its "specific

language . . . encompasses a particular claim" (*id.* at 648). CPLR 213(7) does not encompass claims against outside counsel.

VII. In Pari Delicto

The Broker defendants assert that all claims against them are barred by the doctrine of in pari delicto because defendants Butts and Howard, as directors of EHAT, were participants in the alleged fraud. "The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 452 [2010]). "Traditional agency principles play an important role in an in pari delicto analysis" (*id.* at 465). As such, an agent's act performed within the scope of its authority is presumptively imputed to its principal (*id.*). "The risk of loss from the unauthorized acts of a dishonest agent falls on the principal that selected the agent" because "[a]fter all, the principal is generally better suited than a third party to control the agent's conduct" (*id.*). The doctrine has its most obvious application where "a willful wrongdoer is suing someone who is alleged to be merely negligent" but may also apply where both parties act intentionally (*id.* at 464).

However, an "adverse interest" exception to the doctrine applies "where the agent [has] totally abandoned his principal's interests and is acting entirely for his own or another's purposes" (*id.* at 466, quoting *Center v Hampton Affiliates, Inc.*, 66 NY2d 782, 784-85 [1985]). The exception is narrowly applied to cases involving "outright theft or looting or embezzlement—where the insider's misconduct benefits only himself or a third party; *i.e.*, where the fraud is committed against a corporation rather than on its behalf" (*id.* at 466-67). "It cannot be invoked merely because [the insider] has a conflict of interest or because he is not acting primarily for his

principal" (*id.* at 466). Accordingly, "[a] fraud that by its nature will benefit the corporation is not 'adverse' to the corporation's interests, even if it was actually motivated by the agent's desire for personal gain" (*id.* at 467). Under the exception, the "crucial distinction is between conduct that defrauds the corporation and conduct that defrauds others for the corporation's benefit" (*id.* at 467-68).

Determining what constitutes a "benefit" to the corporation can be problematic. On the one hand, "[s]o long as the corporate wrongdoer's fraudulent conduct enables the business to survive—to attract investors and customers and raise funds for corporate purposes" the adverse interest exception does not apply (*id.* at 468; *see Concord Capital Mgt., LLC v. Bank of Am., N.A.*, 102 AD3d 406, 406 [1st Dept 2013], *lv to appeal denied* 21 NY3d 851 [2013] ["(a)lthough the complaint alleges that plaintiffs' former executives looted plaintiffs, it also alleges that the corrupt executives' scheme brought millions of dollars into plaintiffs' coffers and allowed plaintiffs to survive for a few years"]). On the other hand, "the mere continuation of a corporate entity does not per se constitute a benefit that precludes application of the adverse interest exception" insofar as "[t]he agent may prolong the company's legal existence so that he can continue to loot from it" (*Conway v Marcum & Kliegman LLP*, 176 AD3d 477, 478 [1st Dept 2019]).

The Broker defendants contend that the $39 million purchase price received for the Property was a "benefit." Plaintiffs counter that the sale constituted a net loss of $3 million. The dispute over the true value of the property therefore creates a question of fact over whether plaintiffs benefitted from the sale. The court cannot hold, as a matter of law, that the conveyance of a significant asset for millions of dollars less than it is worth was a benefit merely because plaintiffs obtained *some*

money for it. There is at least a colorable argument that the sale constituted a form of corporate waste akin to looting.

Romanoff v Romanoff, 2014 WL 4805573 [Sup Ct, NY County 2014] *aff'd* 148 AD3d 614 [1st Dept 2017]) is distinguishable. In that case, the corporate entity received a benefit through a property foreclosure settlement agreement which released it from $9 million in debt, resolved a $16 million judgment against it, and provided it with a $245,000 payment (*id.*). Although the corporation transferred the property for substantially less than its market value, neither the trial court nor the Appellate Division held that the deflated purchase price as a "benefit" to the corporation (*Romanoff*, 2014 WL 4805573, *9; Romanoff v Romanoff, 148 AD3d 614 [1st Dept 2017]). Rather, both courts pointed to the terms of the setttlement agreement as the benefit. (*Romanoff*, 2014 WL 4805573, *11; 148 AD3d at 616). No comparable benefit has been identified here.

Defendants argue that plaintiffs have failed to allege that either Butts or Howard benefitted from the fraud. However, as noted, it is sufficient that the alleged fraud benefits either the insider or a third party at the expense of the corporation (*Kirschner*, 15 NY3d at 467). The Complaint alleges that Extell received the Property at a discount and that the Broker defendants benefitted from a commission.

VIII. Business Judgment Rule

It is premature to rule on the applicability of the business judgment rule as to the ADC defendants' conduct. Although the rule would ordinarily shield them from liability in such a routine decision concerning the sale of a corporate asset, defendants are entitled "adduce evidence of self-dealing, fraud, or other acts

constituting a breach of fiduciary duty sufficient to overcome the business judgment rule" (*Parker v Marglin*, 56 AD3d 374, 374 [1st Dept 2008], citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). Accordingly, resolution of the issue is not appropriate at the pleading stage, as questions of fact exist "involving the condition or state of the defendants' minds, which can be proved or judged only through evidence" (*Bryan v W. 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992]).

The court has considered the parties' remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that defendants Windels, Marx, Lane & Mittendorf LLP and Charles Simpson's motion to dismiss the Complaint is granted, in part, to the extent that plaintiffs' demand for punative damages is dismissed; and it is further

ORDERED defendants Victor Sozio and Ariel Property Advisors LLC's motion to dismiss the Complaint is denied; and it is further

ORDERED that defendants Reverend Dr. Calvin O. Butts III, James Howard and Abyssinian Development Corporation motion to dismiss the Complaint is granted, in part, to the extent that the aiding and abetting claims as against all three defendants and the BCL § 720 claims as against Butts and Howard, and the demand for punitive damages are dismissed; and it is further

ORDERED that defendants are directed to serve answers to the First Amended Verified 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 preliminary conference virtually on July 13, 2020 at 11 am.

Motion Seq. No. 02:

6/29/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

Motion Seq. No. 03:

6/29/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		x DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

Motion Seq. No. 04:

6/29/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE