Kirschenbaum v De Baets
2020 NY Slip Op 33406(U)
October 16, 2020
Supreme Court, New York County
Docket Number: 653287/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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JASON KIRSCHENBAUM,

Plaintiff,

- v -

STEPHANE DE BAETS, THOSAPONG JURUTHAVEE, ELEVATED RETURNS, LLC, 315 EAST DEAN ASSOCIATES, INC., ASPEN DIGITAL, INC., ER MERRY WAY LP, ER GLOBAL, LLC, JOHN DOES 1-10,

Defendant.

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INDEX NO. 653287/2019

MOTION DATE 08/12/2019, 08/12/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 28, 33, 35, 36, 37, 41, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 29, 34, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 63, 67

were read on this motion to/for DISMISS.

Motion sequence nos. 001 and 002 are consolidated for disposition. Upon the foregoing documents, (i) Stephane De Baets, Elevated Returns, LLC, 315 East Dean Associates, Inc., Aspen Digital, Inc. f/k/a Aspen REIT Inc., ER Merry Way LP, and ER Global, LLC's (collectively, the **Moving Defendants**) motion to dismiss (Mtn. Seq. No. 001) the Amended Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted in part as set forth below, (ii) Jason Kirschenbaum's cross motion for leave to file a Second Amended Complaint is granted solely to the extent of the sixth cause of action for unjust enrichment, and (iii) Thosapong Jaruthavee's motion to dismiss (Mtn. Seq. No. 002) the Amended Complaint pursuant to CPLR §§ 301 and 302 for lack of personal jurisdiction is granted.

The Relevant Facts and Circumstances

The plaintiff Jason Kirschenbaum seeks compensation for his involvement in certain business ventures with the defendants. The Amended Complaint alleges that towards the end of 2015, Mr. Kirschenbaum began to discuss the formation of a Real Estate Investment Trust (**REIT**) with Mr. De Baets (NYSCEF Doc. No. 30, ¶ 15). On or around February 2016, Mr. Kirschenbaum allegedly met with Mr. De Baets and Mr. Jaruthavee at the Mercer Hotel in New York City to further discuss the creation of a single asset REIT and a joint venture allegedly ensued whereby Mr. De Baets and Mr. Jaruthavee would provide the initial assets in forming the REIT and Mr. Kirschenbaum would manage the assets (*id.*, ¶¶ 18-22).

On or about February 26, 2016, Mr. De Baets allegedly offered Mr. Kirschenbaum a 25% equity position in the joint venture, which would provide a compensation structure for the creation of a single asset REIT using the Sunset Tower Hotel in Los Angeles, California, in addition to other deals (*id.*, ¶¶ 23-24). Although Mr. Kirschenbaum does not expressly identify the joint venture that was allegedly formed in 2016, the pleadings suggest that the joint venture alleged is the entity Elevated Returns, LLC (**ER**) and/or ER Global, LLC (**ER Global**), of which Mr. Kirschenbaum ultimately seeks a 25% share (*id.*, ¶¶ 36, 73-74). Mr. Kirschenbaum alleges that Mr. De Baets is the Chief Executive Officer of ER and that Mr. Jaruthavee is its limited partner (*id.*, ¶¶ 5-6).

In sum, Mr. Kirschenbaum claims that he contributed significantly to the following projects with the defendants: (i) the formation of the Sunset Tower REIT, (ii) formation of Aspen Digital, Inc. (the **Aspen REIT**) and Aspen Coin, (iii) the acquisition of a certain interest in a company called

Securitize, (iv) the development of ER and ER Global, and (v) the capital raise for the acquisition of 21% of an entity called Seamico Securities (*id.*, ¶ 25).

With respect to the Sunset Tower Hotel, Mr. Kirschenbaum alleges that he spent nearly one year facilitating the creation of a related REIT by bringing in a law firm to act as counsel for the REIT formation, coordinating with legal counsel, and performing other due diligence (*id.*, ¶¶ 27-30). Although a Sunset Tower REIT was ultimately never formed, the Sunset Tower Hotel was sold for approximately $95 million and the defendants allegedly "agreed to pay [Mr. Kirschenbaum] $20,000 of all fee revenue received from the Sunset Tower Deal and indicated that [Mr. Kirschenbaum] would be paid well on their other dealings" (*id.*, ¶ 39).

Mr. Kirschenbaum also asserts that Mr. De Baets acquired the St. Regis Aspen Hotel (the **Hotel**) through the entity 315 East Dean Associates, Inc. (**East Dean**) and that the Aspen REIT was filed with the Securities and Exchange Commission in November 2017 to launch an initial public offering in connection with the Hotel (*id.*, ¶¶ 40-41). According to Mr. Kirschenbaum, he was and still is a member of the Aspen REIT (*id.*, ¶ 42). Although Mr. Kirschenbaum claims that he contributed $1 million to the Aspen REIT preliminary offering, he alleges that ER cancelled the public offering in February 2018 in order to remove him as a member of the Aspen REIT (*id.*, ¶¶ 43-45).

He further alleges that he was involved in the Aspen Coin project, whereby shares in the Hotel would be denominated in Aspen Coin, a special securitized token created for the Hotel's sale (*id.*, ¶ 48). Mr. Kirschenbaum claims that he was confirmed as a partner in the Aspen Coin

project in April 2018 and he attaches a supporting email with the subject line "Re: Updated Deck," dated April 17, 2018, wherein Mr. De Baets writes, "Please add jason [sic] as co-founder too [sic] Lets also pin down a call about who gets what . the [sic] sooner the better" (*id.*, ¶ 47; NYSCEF Doc. No. 31). The partners in Aspen Coin sought to raise $18 million for 19% of the Hotel, which was completed in October 2018 with Mr. Kirschenbaum's alleged contribution of over $1.36 million (NYSCEF Doc. No. 30, ¶¶ 49-54). Mr. Kirschenbaum asserts that Mr. Jaruthavee and East Dean would not have contributed $9 million to the Aspen Coin project but for his initial contribution (*id.*, ¶¶ 54-56).

Mr. Kirschenbaum also alleges that in November 2018, he, Mr. Jaruthavee, and Mr. De Baets made equal contributions to the company Securitize by using the fee from the Aspen Coin raise, which was 4% of the $18 million equity for Aspen Coin (*id.*, ¶ 58). Mr. Kirschenbaum claims he invested $1 million in Securitize either through or together with ER (*id.*, ¶ 66). Ultimately, as Mr. Kirschenbaum claims, the defendants: (i) failed to make any distributions from the monies invested with Securitize or his other investments, (ii) denied him the ability to liquidate or redeem his interests in the same, and (iii) denied his rightful ownership interest in unspecified joint ventures with the defendants (*id.*, ¶¶ 68-70).

On June 5, 2019, Mr. Kirschenbaum filed his Complaint asserting claims for (1) breach of contract, (2) breach of fiduciary duty, (3) breach of the covenant of good faith and fair dealing against Mr. De Baets, (4) unjust enrichment, (5) quantum meruit, and (6) an accounting (NYSCEF Doc. No. 1). On August 12, 2019, the Moving Defendants and Mr. Jaruthavee filed their respective motions to dismiss (NYSCEF Doc. Nos. 13, 20).

Thereafter, on September 24, 2019, Mr. Kirschenbaum filed an Amended Complaint alleging claims for (1) fraud against Mr. De Baets, (2) conversion, (3) breach of fiduciary duty, (4) breach of the covenant of good faith and fair dealing against Mr. De Baets, (5) unjust enrichment, (6) quantum meruit, (7) an accounting, and (8) a declaratory judgment (NYSCEF Doc. No. 30).

The court heard oral argument on the two motions to dismiss on February 26, 2020 and determined that the Mr. Kirschenbaum's Amended Complaint did not moot the defendants' motions because the motions to dismiss extended the time in which Mr. Kirschenbaum could amend his complaint as of right, which he did (CPLR § 3025 [a]; *STS Mgt. Dev. v NY State Dept. of Taxation & Fin.*, 254 AD2d 409 [2d Dept 1998]). As Mr. Kirschenbaum had only filed an Amended Complaint in opposition to the two motions to dismiss, the court permitted him to file supplemental opposition papers pursuant to a so-ordered stipulation, dated February 26, 2020 (the **Stipulation**; NYSCEF Doc. No. 42).

Mr. Jaruthavee was also granted permission to file supplemental materials pursuant to the Stipulation. Mr. Jaruthavee's motion to dismiss is based on, *inter alia*, the court's alleged lack of jurisdiction over him because he is a Thai national living in Bankgok, Thailand, and has never resided at 56 Leonard Street, New York, New York, the address where he was served (NYSCEF Doc. No. 22, ¶¶ 4-8). Mr. Kirschenbaum then filed his opposition to the instant motions and cross-moved for leave to file a Second Amended Complaint.

In his Second Amended Complaint, Mr. Kirschenbaum seeks to add a claim for breach of a certain letter agreement (the **Agreement)**, dated March 22, 2016, by and between Mr.

Kirschenbaum and Mr. De Baets, pursuant to which both individuals, ER and any affiliate of ER, would form an advisory company to generate advisory fee income related to the creation of a single asset REIT to be listed on the NASDAQ, the underlying real estate being the Sunset Tower Hotel (NYSCEF Doc. No. 3 at 1).[1]

The Agreement provides that Mr. Kirschenbaum would be entitled to 50% of any advisory fee paid to the advisory company if a successful listing occurred and that the arrangement would remain in place for future successful deals (*id.*). The advisory company would be formed simultaneously with the Sunset Tower deal and Mr. Kirschenbaum would be entitled to 25% of the founders' equity issued in connection with the formation of the advisory company (*id.* at 2).

Significantly, the Agreement also provides that:

> … ***if we are not successful on the first try/deal I will terminate/dissolve this Advisory Company (that we formed) due to unsuccessful results and the Advisory Company and the listing of additional single asset REITs, will no longer exist you [sic] and there will be no such partnership or agreements in connection with the formation of the Advisor Company*** … Other than agreeing to form the new Advisory Company and its stated fees as well as the equity percentages defined herein, ***nothing in this letter is intended to create a partnership or joint venture between the parties hereto*** nor is it intended to make either party the agent of the other for any purpose whatsoever … Your and our participation in the proposed Initial Listing is voluntary and either you or we may terminate our respective participation at any time.

(*id.* [emphasis added]).

[1] Although the Agreement was attached to the Complaint, then removed when Mr. Kirschenbaum filed his Amended Complaint, and also omitted as an attachment to the Second Amended Complaint, this document nevertheless constitutes documentary evidence that forms part of the record on these motions to dismiss.

Discussion

I. Motion Sequence 001 (the Moving Defendants' Motion to Dismiss the Amended Complaint and Mr. Kirschenbaum's Cross Motion for Leave to File a Second Amended Complaint)

The Moving Defendants initially sought to dismiss the original Complaint pursuant to CPLR § 3211 (a)(1) and (7). As the Amended Complaint was filed in response to the defendants' motions, the court will incorporate the Amended Complaint into the record and analyze the sufficiency of the amended pleading on the instant motions to dismiss (*Uptown Healthcare Mgt. Inc. v Allstate Ins. Co.*, 117 AD3d 542 [1st Dept 2014] [when amended pleading submitted in response to pre-answer motion to dismiss, provident course of action is to incorporate amended pleading into the record and analyze the sufficiency of the amended pleading on the motion]).

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

As concerns leave to amend, pursuant to CPLR § 3025 (b), a party may move to amend its pleadings at any time by leave of court, which shall be freely given absent prejudice or surprise upon such terms as may be just, so long as the proffered amendment is not palpably insufficient or clearly devoid of merit (*Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015]).

A. The First Cause of Action (Fraud Against Mr. De Baets)

A claim for fraud requires a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A claim for fraud is also subject to the heightened pleading standard under CPLR § 3016 (b).

Here, Mr. Kirschenbaum alleges that Mr. De Baets knowingly made a false representation that Mr. Kirschenbaum's portion of the 4% fee from the Aspen Coin raise would be invested in Securitize, when instead, Mr. De Baets converted Mr. Kirschenbaum's contribution into his own (NYSCEF Doc. No. 30, ¶¶ 77-80). However, earlier in the Amended Complaint, Mr. Kirschenbaum simply asserts that he and Mr. De Baets contributed equally to Securitize by splitting 4% of the Aspen Coin raise (*id.*, ¶ 58). In light of these contradictory pleadings, Mr. Kirschenbaum fails to plead with particularity facts that permit a reasonable inference of fraudulent misconduct by Mr. De Baets (*see Eurycleai Partners,* 12 NY3d at 559). Nor does Mr. Kirschenbaum allege any facts to show that he reasonably relied on any of Mr. De Baets' alleged misrepresentations. Rather, Mr. Kirschenbaum only asserts bare and conclusory allegations of fraud, without any supporting details, which cannot satisfy the requirements of CPLR § 3016 (b) (*see Stein v Doukas*, 98 AD3d 1024, 1025-1026 [2d Dept 2012] [dismissing fraud claim for bare and conclusory allegations of the same]). Accordingly, Mr. Kirschebaum's first cause of action for fraud as alleged in the Amended Complaint must be dismissed.

To the extent that in the Second Amended Complaint, Mr. Kirschenbaum also alleges that Mr. De Baets made three additional misrepresentations: (i) that Mr. Kirschenbaum would continue to

receive his equity interests in the advisory company to the REIT, (ii) that the parties' partnership structure continued to be intact after each "apparent downturn," and (iii) that Mr. Kirschenbaum's contribution of $1,360,000 to the Aspen Coin raise was necessary for Mr. Kirschenbaum to maintain his equity interests and for other defendants to contribute capital to the raise, this is still insufficient (NYSCEF Doc. No. 55, ¶ 92). These additional allegations do not state a claim for fraud because the sum and substance of the new misrepresentations are impermissibly predicated upon the continued performance of the Agreement, namely that Mr. Kirschenbaum was entitled to equity in the advisory company (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] [fraudulent inducement claim can only be premised on insincere promise of future performance when alleged false promise is collateral to existing contract]).

In fact, the overlapping nature of the fraud and contract claims become apparent as Mr. Kirschenbaum acknowledges that he relied upon Mr. De Baets' misrepresentations "to enter into the [Agreement] and subsequently affirm their partnership terms throughout the term of their relationship" (*id.*, ¶ 98). As Mr. De Baets' purported misrepresentations are not collateral to the Agreement, Mr. Kirschenbaum fails to state a claim for fraudulent inducement in either the Amended Complaint or the Proposed Second Amended Complaint and this branch of his cross motion to amend this claim is also denied.

B. The Second Cause of Action (Conversion)

The elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of the

plaintiff's rights (*Colavito v NY Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). When a claim for conversion is asserted for money only, the funds must be specifically identifiable and subject to an obligation to be returned or treated in a particular manner (*Matter of Clark*, 146 AD3d 495, 496 [1st Dept 2017]) [citations omitted]).

Mr. Kirschenbaum alleges that he contributed over $1.36 million to Aspen Coin, and that the fee from the Aspen Coin raise was put towards a contribution in Securitize (NYSCEF Doc. No. 30, ¶¶ 40, 54-57). Mr. Kirschenbaum further alleges that the defendants were obliged to return his funds by way of a distribution or an opportunity to liquidate or redeem his interests in either Aspen Coin or Securitize (*id.*, ¶ 86). However, Mr. Kirschenbaum does not explain how his invested funds were subject to any obligation to be returned and whether such obligation was conferred by contract or another manner (*see also Lindgrove v. Schluter & Co., Inc.*, 256 NY 439, 444 [1931] [defendants are not obliged to issue dividends as a matter of law because the directors of a corporation owe a duty to shareholders to declare dividends when it is in the best interests of the corporation to do so]). In addition, Mr. Kirschenbaum does not identify the funds he seeks to have returned as required to state a claim for conversion (*Manufacturers Hanover Trust Co. v Chemical Bank,* 160 AD2d 113, 124 [1st Dept 1990] [money can be subject of conversion claim only if "specifically identifiable and segregated"]). An alleged breach of contract is insufficient to serve as a predicate for a claim of conversion (*Markov v Spectrum Group Intl., Inc.*, 136 AD 3d 413, 413 [1st Dept 2016]). Accordingly, the second cause of action for conversion must be dismissed.

Nothing alleged in the Second Amended Complaint remedies the foregoing defects (NYSCEF Doc. No. 55, ¶¶ 100-105) and the branch of the Mr. Kirschnebaum's cross motion to amend his conversion claim is therefore denied.

C. The Third Cause of Action (Breach of Fiduciary Duty)

It is well settled that a corporation does not owe a fiduciary duty to its members or shareholders (*Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012]). However, members of a joint venture owe fiduciary duties to each other for the duration of the joint venture (*Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278, 279 [1st Dept 2002]).

Here, however, Mr. Kirschenbaum cannot sustain any claim for breach of fiduciary duty by the Moving Defendants (*Stalker, supra*). Inasmuch as the Mr. Kirschenbaum alleges that he formed a joint venture with the defendants which forms the basis for a breach of fiduciary duty by the individual defendants, the claim fails because the parties' Agreement expressly provides that, "nothing [therein]… is intended to create a partnership or joint venture between the parties hereto nor is it intended to make either party the agent of the other for any purpose whatsoever" (NYSCEF Doc. No. 3, at 2).

In any event, a joint venture requires a mutual promise by the parties to share in the profits and losses of a business, and Mr. Kirschenbaum does not allege that he and Mr. De Baets agreed to share in both the profits and losses of any potential joint venture (*Slabakis v Schik*, 164 AD3d 454, 455 [1st Dept 2018] [indispensable element of joint venture is mutual promise of parties to

share in profits and losses of business]). Accordingly, the third cause of action for breach of fiduciary duty is dismissed.

There are no additional allegations in the Second Amended Complaint in support of the fiduciary duty claim to remedy the foregoing issues and, therefore, the branch of the cross motion to amend the breach of fiduciary claim is denied.

D. The Fourth Cause of Action (Breach of the Covenant of Good Faith and Fair Dealing against Mr. De Baets)

The obligation of good faith and fair dealing implied in every contract requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Education Testing Serv.*, 87 NY2d 384, 389 [1995], citing *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]). The existence of a contract is axiomatic to any claim for breach of the covenant of good faith and fair dealing.

In the Amended Complaint, Mr. Kirschenbaum does not reference any agreement between the parties that would establish the existence of any contract upon which to ground a claim for breach of the implied covenant of good faith and fair dealing.

In the Second Amended Complaint, Mr. Kirschenbaum does incorporate the Agreement into his pleadings and, as further discussed below, sufficiently alleges a valid contract to form the basis for breach of its implied covenant. He also alleges that Mr. De Baets breached the implied covenant by "failing to accurately inform Plaintiff of the revenues received for the projects he worked on and actively deceiving and misleading Plaintiff by furnishing him with false

information concerning said revenues in order to deprive Plaintiff of the compensation to which he was entitled" (NYSCEF Doc. No. 55, ¶ 105).

However, Mr. De Baets' purported failure to advise Mr. Kirschenbaum of revenues generated from projects did not injure any of his rights under the Agreement because, as discussed, the Agreement did not provide for any payment based upon revenue. Instead, under the Agreement, Mr. Kirschenbaum was to be compensated in two ways: (i) 25% equity in an advisory company and (ii) 50% of any advisory fee paid to the advisory company (NYSCEF Doc. No. 3 at 1). In any event, as discussed in connection with the proposed new breach of contract claim, *infra,* the allegations in support of this proposed new claim are palpably insufficient. Accordingly, Mr. Kirschenbaum fails to state a claim for breach of the implied covenant of good faith and fair dealing and this claim is dismissed.

E. The Fifth Cause of Action (Unjust Enrichment)

The elements of unjust enrichment are "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

In sum and substance, Mr. Kirschenbaum alleges that he contributed significantly to a number of projects: the Sunset Tower deal, creation of the Aspen REIT and Aspen Coin, the acquisition of a certain interest in Securitize, development of ER/ER Global, and a capital raise for the acquisition of Seamico Securities (NYSCEF Doc. No. 30, ¶ 25). More specifically, Mr.

Kirschenbaum asserts that he contributed $1 million to the Aspen REIT, $1.36 million to Aspen Coin, and invested $1 million in Securitize, and that the defendants have denied him any ability to liquidate or redeem his interests in the same (*id.*, ¶¶ 43, 54-55, 66). According every favorable inference to Mr. Kirschenbaum, as the court must on a motion to dismiss, Mr. Kirschenbaum has sufficiently alleged that the defendants were unjustly enriched through his monetary contributions to the Aspen REIT, Aspen Coin, and Securitize and, thus, states a claim for unjust enrichment.

Although the Moving Defendants assert that the unjust enrichment claim is duplicative of the Mr. Kirchenbaum's breach of contract claim, the parties' Agreement does not apply to any projects other than the Sunset Tower REIT and the unjust enrichment claim may be sustained insofar as Mr. Kirschenbaum seeks damages for projects other than the Sunset Tower REIT. Accordingly, the fifth cause of action for unjust enrichment is sustained and to the extent that the Second Amended Complaint pleads a cause of action for unjust enrichment, the claim as alleged therein survives.

F. The Sixth Cause of Action (Quantum Meruit)

A claim for quantum meruit requires (i) the performance of services in good faith by the plaintiff, (ii) acceptance of those services by the defendant, (iii) with an expectation of compensation for the services, and (iv) the reasonable value of the services (*Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]).

Mr. Kirschenbaum fails to state a claim for quantum meruit with respect to the Sunset Tower REIT because he could not expect compensation for the same when the Agreement specifically provided for payment upon a successful listing of the REIT which did not occur (NYSCEF Doc. No. 30, ¶¶ 27-30, 38).

To the extent that Mr. Kirschenbaum allegedly performed services in connection with the Aspen REIT and Aspen Coin, these assertions also fail to support a claim in quasi-contract as the Statute of Frauds requires that any agreement, promise or undertaking to "negotiat[e] the purchase, sale, exchange, renting or leasing of any real estate or … of a business opportunity" is void unless it is in writing and Mr. Kirschenbaum fails to allege the existence of any valid written agreement regarding his services related to these projects (General Obligations Law § 5-701 [a] [10]).

Finally, Mr. Kirschenbaum fails to allege what, if any, services he provided to the defendants in relation to Securitize and Seamico projects, other than his alleged personal investments and he also fails to identify the reasonable value any such services might be worth (*see* NYSCEF Doc. No. 30, ¶¶ 57-66). Accordingly, the sixth cause of action for quantum meruit is dismissed. The Second Amended Complaint does not contain any additional allegations as to what services Mr. Kirschenbaum rendered to the defendants or their value and his cross motion to amend the quantum meruit claim is, therefore, denied.

G. The Seventh Cause of Action (Accounting)

An accounting is an action at equity, which requires that a trust or fiduciary relationship exist between the parties (*Terner v Glickstein & Terner, Inc.*, 283 NY 299, 301 [1940]). For the reasons set forth above, Mr. Kirschenbaum failed to plead any factual basis for finding a fiduciary relationship between the parties such that his seventh cause of action for an accounting must be dismissed and his cross motion to amend this claim is also denied.

H. The Eighth Cause of Action (Declaratory Judgment)

Pursuant to CPLR § 3001, a declaratory judgment renders a final judgment as to the rights of the parties regarding a justiciable controversy. When a party brings a motion to dismiss a declaratory judgment, the only issue to determine is whether a proper case has been presented to invoke the court's jurisdiction to make a declaratory judgment, and not whether the movant is entitled to a declaration in its favor (*Hallock v State*, 32 NY2d 599, 603 [1973]).

Mr. Kirschenbaum's declaratory judgment cause of action seeks a declaration that he is a "rightful member of the various entities and joint ventures" as described in the Amended Complaint (NYSCEF Doc. No. 30, ¶¶ 111-114). However, this claim is barred by the documentary evidence – i.e., the Agreement – which specifies that (i) the Agreement would terminate if the parties were unsuccessful in listing the Sunset Tower REIT (i.e., "if we are not successful on the first try/deal") and (ii) that nothing therein was "intended to create a partnership or joint venture between parties" (NYSCEF Doc. No. 3 at 2). Stated differently, Mr. Kirschenbaum's ultimate claim to a 25% equity interest in the formation of an advisory company, either ER or ER Global, is resolved by the express terms of the Agreement and there is

no basis to maintain a declaratory judgment under these circumstances (*Walsh v Andorn*, 33 NY2d 503, 507-508 [1974] [declaratory judgment serves practical end to stabilize a dispute over present or prospective obligations and a declaratory judgment should not be employed where there is no necessity to do so]). Likewise, Mr. Kirschenbaum fails to identify a justiciable controversy over his claim to a share in any other purported projects with the defendants. Accordingly, the eighth cause of action for a declaratory judgment is dismissed and his cross motion to amend this claim is denied.

A. Plaintiff's Cross Motion to Add a Claim for Breach of Contract

The well-settled elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

In the Second Amended Complaint, Mr. Kirschenbaum alleges that he entered into several enforceable agreements with Mr. De Baets and ER, including the Agreement, but fails to identify any specific breach of said agreements by the two defendants (NYSCEF Doc. No. 55, ¶¶ 83-88). In addition, the purported breach of contract claim is flatly contradicted by the documentary evidence, namely the Agreement itself. As discussed above, the Agreement provides that Mr. Kirschenbaum would be compensated with 50% of any advisory fee paid to the advisory company and 25% equity in the advisory equity, but only upon a successful listing of the REIT on the NASDAQ, which did not occur (*id.*, ¶ 44; NYSCEF Doc. No. 3, at 1-2). Furthermore, the Agreement specifies that an unsuccessful first listing would result in dissolution of the advisory company and that no further partnership or agreements would exist in relation to the advisory

company (NYSCEF Doc. No. 3 at 2). In other words, the failure to list the Sunset Tower REIT on the NASDAQ automatically resulted in dissipation of the contemplated advisory company and any rights conferred under the Agreement in relation to the advisory company.

To the extent that Mr. Kirschenbaum also submits emails that purportedly indicate that the Agreement applies to other business ventures with the defendants, the court cannot consider evidence that lies outside the four corners of the Agreement because the Agreement is unambiguous on its face (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] [unambiguous agreement "must be enforced according to the plain meaning of its terms"]). Put simply, the Agreement by its terms cannot apply beyond the failed Sunset Tower REIT listing.

In addition, Mr. Kirschenbaum's conclusory allegations that he entered into multiple enforceable agreements with Mr. De Baets and ER rings hollow because Mr. Kirschenbaum does not specify any other contracts that the parties entered into or the specific provisions that were allegedly breached (*see Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [dismissing breach of contract claim for plaintiff's failure to allege, in a non-conclusory manner, essential terms of purported contract, specific provisions that were breached, and whether contract was oral or written]). Accordingly, that branch of the cross motion for leave to add a claim for breach of contract is denied.

II. Motion Sequence 002 (Mr. Jaruthavee's Motion to Dismiss the Amended Complaint)

Mr. Jaruthavee brings a separate motion to dismiss the Amended Complaint under CPLR §§ 3211 (a)(1), (7), and (8). Pursuant to CPLR § 3211 (a)(8), a court may dismiss an action if it

lacks jurisdiction over the defendant and it is the plaintiff's burden to present sufficient evidence to demonstrate jurisdiction (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017] [citations omitted]).

Mr. Jaruthavee argues that the Amended Complaint should be dismissed for lack of jurisdiction because (i) the court lacks personal jurisdiction over him under either CPLR § 301 or § 302, and (ii) personal service was improper as Mr. Kirschenbaum did not deliver the service papers to Mr. Jaruthavee at his actual place of business, dwelling place, or usual place of abode. Service on Mr. Jurathavee was made by leaving a copy of the summons and complaint in this action with the doorman of 56 Leonard Street, New York, NY (NYSCEF Doc. No. 24). According to Mr. Jurathavee, he has never resided at this address, but that it is condominium owned by his daughter through a limited liability company in which she is the sole member (NYSCEF Doc. No. 22, ¶ 8). In fact, Mr. Jurathavee claims he has never lived in New York, does not own any real estate in New York, directly or otherwise, and has never leased any property in New York (*id.*, ¶¶ 5-8).

A. Personal Jurisdiction Under CPLR § 301

Under CPLR§ 301, a court may exercise general jurisdiction over a defendant where the defendant's ties to New York "are so 'continuous and systematic' as to render them essentially at home in the forum state" (*Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011], quoting *International Shoe Co. v Washington*, 326 U.S. 310, 317 [1945]). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's

domicile" (*Goodyear*, 654 US at 924). The burden of establishing jurisdiction over a defendant lies with the plaintiff (*Ying Jun Chen v Lei Shi*, 19 AD3d 407 [2d Dept 2005]).

Here, Mr. Kirschenbaum fails to establish general jurisdiction over Mr. Jaruthavee pursuant to CPLR § 301 because Mr. Jaruthavee is a Thai national who is not – and has never been -- domiciled in New York (NYSCEF Doc. No. 47, ¶ 2; NYSCEF Doc. 48; *see IMAX Corp. v Essel Group*, 154 AD3d 464, 465-466 [1st Dept 2017] [explaining that "New York courts may not exercise general jurisdiction against a defendant under the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state"]).

B. Personal Jurisdiction Under CPLR § 302

CPLR § 302 allows a court to exercise personal jurisdiction over a defendant where it transacts business within the state, commits a tortious act in the state, or commits a tortious act without the state causing injury to person or property within the state. Unlike general jurisdiction under CPLR § 301, specific jurisdiction under section § 302 "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction" (*Goodyear*, 564 US at 919). In other words, "the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum" (*Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S Ct 1773, 1780 [2017] [internal quotation marks and citation omitted])

All Mr. Kirschenbaum alleges with respect to Mr. Jaruthavee's transaction of business in New York in the Amended Complaint is that Mr. Jaruthavee invested in the Aspen Coin project and in Securitize, but it is unclear whether these projects were conducted from or enter into in New

York and whether Mr. Jaruthavee actively participated in any business transactions related to these investments in New York (NYSCEF Doc. No. 30, ¶¶ 54-58). Mr. Kirschenbaum also alleges that Mr. Jaruthavee is a limited partner in ER, but Mr. Jaruthavee attests that he has never held any type of ownership interest in ER (*compare* NYSCEF Doc. No. 30, ¶ 6 *with* NYSCEF Doc. No. 22, ¶ 9). In any event, even if ER somehow submitted to jurisdiction of a New York court, this does not mean that Mr. Jaruthavee is equally subject to this court's jurisdiction simply by virtue of his membership in that entity (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004], citing *Baran Computer Servs., Ltd. v First Bank of Maury County*, 143 AD2d 63, 64 [2d Dept 1988] [a party's status as officer of a corporate defendant that might be subject to jurisdiction in New York did not render the party personally subject to such jurisdiction]).

To the extent that Mr. Kirschenbaum argues that Mr. Jaruthavee committed a tortious act in New York by attending one meeting in which he allegedly discussed the creation of a REIT, a single meeting is insufficient to establish personal jurisdiction because there lacks a substantial relationship between the meeting and Mr. Kirschenbaum's surviving claim for unjust enrichment (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [a court may exercise long arm jurisdiction over a defendant only where its activities are purposeful and there is a substantial nexus between the transaction and the claim asserted]).

As Mr. Kirschenbaum fails to establish personal jurisdiction over Mr. Jaruthavee under CPLR §§ 301 and 302, the court declines to address whether Mr. Kirschenbaum also lacks jurisdiction over Mr. Jaruthavee for improper service under CPLR § 308 (2). Accordingly, the Amended Complaint is dismissed as against Mr. Jaruthavee for lack of personal jurisdiction pursuant to

CPLR §§ 301 and 302 and the allegations in the Second Amended Complaint do nothing to cure this jurisdictional deficiency.

For the avoidance of doubt, inasmuch as Mr. Kirschenbaum seeks leave in his memorandum of law (NYSCEF Doc. No. 53 at 9) to add Mr. Jaruthavee's daughter, Ravipan Jaruthavee, to the pleadings in this action, this request is denied because Mr. Kirschenbaum did not properly seek such relief in his cross-motion or include Ms. Jaruthavee in the proposed Second Amended Complaint.

Accordingly, it is

ORDERED that the Moving Defendants' motion to dismiss (Mtn. Seq. 001) is granted solely to the extent that the first cause of action for fraud, second cause of action for conversion, third cause of action for breach of fiduciary duty, fourth cause of action for breach of the covenant of good faith and fair dealing, sixth cause of action for quantum meruit, seventh cause of action for an accounting, and eighth cause of action for a declaratory judgment are dismissed without prejudice; and it is further

ORDERED that the plaintiff's cross motion (Mtn. Seq. 001) for leave to file a Second Amended Complaint is granted solely to the extent of the sixth cause of action for unjust enrichment; and it is further

ORDERED that the plaintiff is directed to serve his proposed Second Amended Complaint, with respect to the sixth cause of action only and excluding defendant Mr. Jaruthavee, within 10 days of this decision and order; and it is further

ORDERED that Mr. Jaruthavee's motion to dismiss (Mtn. Seq. 002) the Amended Complaint for lack of personal jurisdiction is granted pursuant to CPLR §§ 301 and 302.

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10/16/2020
DATE

ANDREW BORROK, 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