At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of October, 2020

P R E S E N T:

HON. PAMELA L. FISHER,
Justice.

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JOSEPH ZELIK,

Plaintiff,

- against -

Index No. 503950/17

261 LOFTS MANAGER LLC; CHAIM MILLER a/k/a HARRY MILLER; 261 C NOTEHOLDER LLC; YECHIEL SHIMON SPREI a/k/a SAM SPREI a/k/a SHIMMY SPREI; RELIABLE ABSTRACT CO. LLC; and YAKOV DECKELBAUM a/k/a JACOB DECKELBAUM,

Defendants.

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The following efiled papers read herein:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 75-76 |
| Opposing Affidavits (Affirmations) | 88 |

Upon the foregoing papers, defendants Reliable Abstract Co. LLC (Reliable) and Yakov Deckelbaum a/k/a Jacob Deckelbaum (Deckelbaum) (collectively, the Reliable defendants) move for an order, pursuant to CPLR 3211 (a) (7), dismissing the verified first amended complaint (amended complaint) of plaintiff Joseph Zelik.

Plaintiff commenced this action to recover damages arising from a $1.75 million loan made by plaintiff to partially finance the purchase of real property at 261 East 78th Street in New York. According to the amended complaint, plaintiff was approached for the subject loan by defendants Yechiel Shimon Sprei a/k/a Sam Sprei a/k/a Shimmy Sprei (Sprei) and Chaim Miller a/k/a Harry Miller (Miller). Plaintiff alleges that he agreed to make the loan based in part on his successful business dealings with Sprei and Miller in the past and upon the representation that 261 East 78 Lofts LLC (Lofts LLC), the entity seeking to purchase the subject property, was wholly owned by Miller and operated by Sprei. Plaintiff asserts, however, that Lofts LLC was actually owned by Lee Moncho (Moncho), with a 37.5% interest, and defendant 261 Lofts Manager LLC (Lofts Manager), which held a 62.5% interest. At the time plaintiff agreed to make the loan, the owner of the subject property, 261 East Realty Corporation (Realty Corp.), had filed for bankruptcy protection stemming from its default under certain mortgages encumbering the premises held by MB Financial Bank, N.A. (MB). According to the amended complaint, Realty Corp. (which was wholly owned by Moncho) negotiated a settlement agreement with MB whereby MB would accept $10.7 million in full satisfaction of its mortgage liens and, upon receipt of the funds, MB would assign the mortgages to a third party designated by Realty Corp. Plaintiff alleges that the Realty Corp. bankruptcy plan required Lofts LLC to raise more than $13 million, with $10.7 million to be used to satisfy the MB mortgages and the remainder of funds to be used to satisfy the claims of other creditors. The necessary funds were required to be raised on or

before February 28, 2014, in which event Lofts LLC would be able to acquire title to the subject property. Otherwise, the property would be sold at auction.

Lofts LLC sought loans totaling $10 million from affiliates of Madison Realty Capital (Madison), with the funds to be used to pay all but $700,000 of the amount due to MB.[1] After Madison agreed to loan $10 million to Lofts LLC (with the proceeds to be disbursed to MB) and after MB agreed to assign the MB notes and mortgages to Madison (the value of which exceeding the amount Madison had loaned to Lofts LLC by $2,275,486.32), Madison assigned the excess indebtedness of $2,275,486.32 in a separate mortgage to defendant 261 C Noteholder LLC (261 C), an entity formed by Sprei and/or Miller. Plaintiff alleges that, according to an intercreditor agreement, 261 C agreed that it would not assign its mortgage without the prior written consent of Madison.

Plaintiff states that on February 27, 2014, after Lofts LLC secured $10 million in funding from Madison, Sprei approached plaintiff requesting a loan of $1.75 million. Plaintiff alleges that before finalizing and making the loan to Lofts LLC, he corresponded with Deckelbaum orally and in writing, arranging for Reliable to act as title insurance agent and as escrow agent to plaintiff for the loan transaction. According to plaintiff, Deckelbaum was a longtime business associate of Sprei and Miller and had advanced loans or monies to Sprei and Miller on several previous occasions. Plaintiff asserts that during oral discussions on February 27, 2014, Reliable agreed to act as plaintiff s agent in connection with the loan,

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[1]Plaintiff alleges that the bankruptcy settlement agreement prohibited Lofts LLC from borrowing more than $10 million.

and that plaintiff and Reliable agreed to an escrow agreement providing as follows: (1) plaintiff would wire the $1.75 million in loan funds to Reliable's bank account; (2) Reliable, as escrow agent, would hold plaintiff's loan funds in escrow for the benefit of plaintiff until (a) plaintiff received a recorded mortgage, (b) plaintiff received a title policy in his name insuring his mortgage lien on the subject property, (c) all documents were executed and finalized in connection with plaintiff's mortgage loan to Lofts LLC, and (d) all preexisting debts affecting the subject property had been refinanced with funds from parties other than plaintiff; and (3) Reliable would disburse plaintiff's loan proceeds so that the funds would be allocated to and used for the benefit of the subject property (i.e. toward the purchase of or renovation of the premises). After entering into the purported escrow agreement, plaintiff wired the funds to Reliable's bank account and emailed Deckelbaum on February 27, 2014, stating that "[p]er our understanding you will hold my $1,750,000.00 in escrow and will release same only after all documents are signed." Following plaintiff's transfer of the loan funds, Lofts LLC issued a note in favor of plaintiff in the amount of $1.75 million and, as additional security, 261 C assigned its mortgage to plaintiff. Plaintiff asserts that Lofts LLC made several interest payments on the loan before ultimately defaulting.

Plaintiff alleges that on or about January 24, 2014, prior to his transmission of loan funds into Reliable's account, Reliable loaned or advanced $1.15 million to Sprei and/or Miller and/or one of their affiliated entitities. Plaintiff maintains that after depositing the loan funds into Reliable's account, the Reliable defendants, in violation of the escrow

agreement, retained at least $535,000 of the loan funds in order to "repay" Reliable for a portion of the $1.15 million loan or advancement previously made to Sprei and/or Miller in January 2014.

Following the default of Lofts LLC on the subject loan, plaintiff commenced an action in Supreme Court, New York County to foreclose the 261 C mortgage. The foreclosure action was stayed pursuant to a bankruptcy proceeding brought by Lofts LLC. Fearing obstacles in bankruptcy court as a potential unsecured creditor (allegedly due to Lofts LLC's argument that the loan was unauthorized, that the loan was in contravention of Loft LLC's operation agreement and that the loan proceeds were never received by Lofts LLC), plaintiff settled his claim for $200,400, far less than the $1.75 million loaned to Lofts LLC.

Having relinquished in the bankruptcy proceeding any claim against Lofts LLC on the note and mortgage, plaintiff commenced the instant action against Sprei, Miller and other parties for claims which included fraud.[2] With respect to the Reliable defendants, plaintiff claimed violation of the purported escrow agreement in their retention of loan funds for themselves rather than disbursing the full amount to Lofts LLC for the purchase and/or benefit of the property and, additionally, breach of their fiduciary duty (as plaintiff's escrow agents) to disclose certain facts surrounding the relevant transactions involving the Realty Corp. bankruptcy and Lofts LLC's purchase of the subject property. In the amended

[2]This action has been discontinued against Lofts Manager, Miller and Sprei by notice of partial voluntary discontinuance dated March 6, 2019.

complaint, plaintiff alleges that Sprei made several false representations in order to induce plaintiff to make the loan including: 1) that Sprei and/or Miller (or affiliated entities) had raised millions of dollars in fresh equity capital (i.e. investments, not loans) and were spending $16 million to acquire the premises when in fact, no such fresh capital was raised and the property was not being purchased for $16 million; 2) that Sprei and Miller wholly owned Lofts LLC when in fact the entity was owned by Moncho and Lofts Manager; 3) that Lofts LLC had actual authority to borrow $1.75 million when in fact the organizational documents of Lofts LLC specifically forbade Lofts LLC from incurring any indebtedness in excess of $100,000 without first obtaining the express written approval of Moncho, Lofts Manager and an independent director of Lofts LLC, and no such approval was given; 4) that plaintiff would be granted or assigned a mortgage by an entity with actual authority to do so when in fact there was no authority or consent given for such assignment; and 5) that plaintiff's loan funds would be used to purchase and/or renovate the subject property when in fact Sprei knew that the funds, or a portion thereof, would be used to repay the Reliable defendants for their advance or for purposes unrelated to the premises.

Plaintiff claims that by virtue of their acting as agents of and legal counsel to Sprei and/or Miller and their intimate working relationship with them, the Reliable defendants knew that (i) Lofts LLC had purported to issue the promissory note to plaintiff without Moncho's knowledge and consent, and (ii) contrary to what Sprei had represented to plaintiff, Sprei and Miller, acting on behalf of Lofts LLC, had not raised millions of dollars

in fresh equity capital and Lofts LLC was not actually spending $16 million to purchase the subject property. Plaintiff maintains that had the Reliable defendants disclosed the truth of the representations concerning the transactions, he never would have agreed to loan Lofts LLC the money. In his amended complaint, plaintiff sets forth causes of action against the Reliable defendants for breach of fiduciary duty, fraudulent omission/concealment, breach of escrow agreement, conversion, conspiracy to commit fraud, aiding and abetting fraud and unjust enrichment.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Santaiti v Town of Ramapo*, 162 AD3d 921, 924-925 [2d Dept 2018]). The court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Deter v Acampora*, 207 AD2d 477, 477 [2d Dept 1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Although a complaint may be inartfully drawn, illogical or even informal, it will be "'deemed to allege whatever cause of action can be implied from its statement by fair and reasonable intendment'" (*Shields v School of Law, Hofstra Univ.*, 77 AD2d 867, 868 [2d Dept 1980]; quoting *Lupinski v Village of Ilion*, 59 AD2d 1050, 1050 [4th Dept 1977]).

As an initial matter, the instant motion to dismiss the amended complaint is not barred by "law of the case" as the result of a prior order by this court denying the Reliable defendants' motion to dismiss the original complaint and granting plaintiff leave to amend. The doctrine of law of the case "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" (*Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]; *see D'Amato v Access Mfg.*, 305 AD2d 447 [2d Dept 2003]; *Gilligan v Reers*, 255 AD2d 486 [2d Dept 1998]). Here, that portion of the court's prior order denying dismissal of the original complaint did not address the merits of the parties' arguments (*see Perron v Hendrickson/Scalamandre/Posillico [TV]*, 292 AD2d 361 [2d Dept 2002]). Further, since the original complaint was superseded by the amended complaint, rendering the sufficiency of the allegations in the original complaint academic (*see Chalasani v Neuman*, 64 NY2d 879 [1985]; *Titus v Titus*, 275 AD2d 409 [2d Dept 2000]; *Morris v Goldstein*, 223 AD2d 582, 583 [2d Dept 1996]), the law of the case doctrine does not preclude the court from entertaining defendants' motion to dismiss the amended complaint.

**Fraudulent Concealment**

Turning first to plaintiff's second cause of action for fraudulent concealment, to state such cause of action requires, in addition to the elements of fraudulent misrepresentation, an allegation that the Reliable defendants had a duty to disclose material information and that they failed to do so (*Wiscovitch Associates, Ltd. v Philip Morris Companies, Inc.*, 193 AD2d 542 [1st Dept 1993]). To state a legally cognizable claim of fraudulent misrepresentation,

the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept 1996]).

"An escrow agent owes the parties to the transaction a fiduciary duty" (*Greenapple v Capital One, N.A.*, 92 AD3d 548, 549 [1st Dept 2012]; *see Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003]). "'To prove the existence of an escrow agreement, it must be shown that there is (a) an agreement regarding the subject matter and delivery of the [funds], (b) a third-party depositary, (c) delivery of the [funds] to a third party conditioned upon the performance of some act or the occurrence of some event, and (d) relinquishment by [the grantor or depositor]'" (*Brassell v Harbourview Abstract, Inc.*, 163 AD3d 908, 910 [2d Dept 2018], quoting *Mortgage Elec. Registration Sys., Inc. v Maniscalco*, 46 AD3d 1279, 1281 [3d Dept 2007] [internal quotation marks omitted]).

Here, the complaint sufficiently alleges the existence of an escrow agreement and that a fiduciary duty was owed to plaintiff as a result. Contrary to the Reliable defendants' contention, plaintiff properly alleges the existence of a requisite prior obligation (to wit, an agreement to loan money in exchange for a note and mortgage) before the purported escrow agreement was formed. An escrow agent, as a fiduciary, "has a strict obligation to protect the rights of [the] parties' for whom he or she acts as escrowee" (*Greenapple*, 92 AD3d at

549; *quoting Grinblat v Taubenblat*, 107 AD2d 735, 736 [2d Dept 1985]). "[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989] [citations omitted]). When it comes to the escrow agent's attention that the depositor is being defrauded, its fiduciary relationship imposed upon it a duty to disclose the fraud to the depositor, and its failure to do so renders the escrow agent liable for the damages suffered by the depositor *(see Director Door Corp. v Marchese & Sallah*, 127 AD2d 735, 737 [2d Dept 1987]).

Plaintiff alleges in sufficient detail that the Reliable defendants worked closely with Sprei on the Lofts LLC transaction and had knowledge of Sprei's misrepresentations which were aimed at inducing plaintiff to make the loan. Plaintiff further properly alleges justifiable reliance. While there generally can be no claim of justifiable reliance where a party fails to allege that it exercised due diligence, inquired, sought pertinent information, or otherwise made use of means available to verify representations (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269 [2011]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2010]; *Stuart Lipsky P.C. v Price*, 215 AD2d 102 [1st Dept 1995]), a principal is entitled to rely on the representation of a fiduciary without making independent inquiries (*see Andersen v Weinroth*, 48 AD3d 121, 136 [1st Dept 2007]; *TPL Assoc. v Helmsley-Spear, Inc.*, 146 AD2d 468, 471 [1st Dept 1989]). The court finds that

plaintiff also adequately alleges that his damages were proximately caused by the omissions of the Reliance defendants. Plaintiff states that he was induced to make the loan based upon his belief that all funds would be used for the benefit of the property and that Lofts LLC had sufficient capital and liquidity to repay the loan, among other things. According to plaintiff's allegations, the default of Lofts LLC was caused in whole or in part by the diversion of the loan funds to the Reliable defendants to "repay" themselves for the prior advance and because of the inadequate amount of capital raised by Lofts LLC.

**Breach of Fiduciary Duty**

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *see Deblinger v Sani-Pine Prods. Co., Inc.*, 107 AD3d 659, 660 [2d Dept 2013]). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b)" (*Swartz v Swartz*, 145 AD3d 818, 823 [2d Dept 2016]; *see Deblinger,* 107 AD3d at 660).

In the amended complaint, plaintiff properly alleges a fiduciary relationship created by the escrow agreement. Assuming the truth of the allegations and employing a liberal interpretation, the court finds that the amended complaint also properly alleges misconduct by the Reliable defendants in diverting the loan proceeds to themselves and by concealing facts regarding the Lofts LLC's purchase of the subject property, including the financial

health of Lofts LLC, which induced plaintiff into proceeding with the loan. Plaintiff further adequately alleges damages resulting from such inducement, i.e the inability to recoup a substantial portion of the loan due to Lofts LLC's bankruptcy.

**Breach of Escrow Agreement**

The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (*see Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA, Lineas Aereas de Espana, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Plaintiff sufficiently alleges that the Reliable defendants breached the agreement by failing to disburse the loan funds in accordance with the escrow agreement, including using a portion of the proceeds intended for Lofts LLC to "repay" themselves which, as explained above, is alleged to have directly resulted in damages suffered by plaintiff due to Loft LLC's inability to repay the loan.

**Conversion**

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). Two key elements of conversion are the plaintiff's (1) legal ownership or an immediate superior right of

possession to a specific identifiable thing, and (2) the defendant's unauthorized dominion over the thing in question or interference with it, to the exclusion of the plaintiff's right (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]; *Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]; *Eight In One Pet Prods. v Janco Press, Inc.*, 37 AD3d 402, 402 [2d Dept 2007]). "An escrow agent's authority is derived solely from the escrow agreement, and a delivery of the property that is inconsistent with the terms of the agreement may constitute conversion" (*Miller v J.A. Keeffe, P.C.*, 276 AD2d 757, 757 [2d Dept 2000]). In the amended complaint, plaintiff adequately states a cause of action for conversion by alleging that he had a superior right to the loan proceeds in escrow and that the Reliable defendants exercised unauthorized dominion over the funds by stealing, pocketing or diverting all or part of the monies. The mere fact that the loan proceeds were not deposited into a segregated escrow account but into the Reliable defendants' business account does not make the proceeds unidentifiable (*see Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]). Further, contrary to the contention of the Reliable defendants, the conversion claim is not duplicative of the breach of escrow agreement claim as each are predicated on a separate duty owed by the Reliable defendants to plaintiff (i.e., contractual duty and duty of loyalty as fiduciary)(*see Connecticut N.Y. Light. Co. v Manos Bus. Mgt. Co., Inc.*, 171 AD3d 698, 700 [2d Dept 2019]).

***Civil Conspiracy to Commit Fraud/Aiding and Abetting Fraud***

Although a plaintiff "may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme" (*Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998] [citation omitted]; *see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 479 [2d Dept 2009]; *Gouldsbury v Dan's Supreme Supermarket*, 154 AD2d 509, 510 [2d Dept 1989]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 88 AD2d 50, 72 [2d Dept 1982], *affd* 59 NY2d 314 [1983]), New York "does not recognize civil conspiracy to commit a tort as an independent cause of action" (*Barns & Farms Realty, LLC v Novelli*, 82 AD3d 689, 691 [2d Dept 2011]). Accordingly, dismissal of the civil conspiracy claim is warranted.

To recover for aiding and abetting fraud, the plaintiff must plead "the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud" (*Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 1017 [2d Dept 2011]; *see Matter of Woodson*, 136 AD3d 691, 693 [2d Dept 2016]). Absent a fiduciary duty or some other independent duty owed by the alleged aider and abettor to the plaintiff, there is no duty to disclose, and, thus, the silence of an alleged aider and abettor does not constitute the requisite "substantial assistance" to sustain a claim for aiding and abetting fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]; *King v*

*Schonberg & Co.*, 233 AD2d 242, 243 [1st Dept 1996]). Here, plaintiff sets forth sufficient allegations that Sprei misrepresented salient facts about the Lofts LLC transaction in order to induce plaintiff to make the loan, that plaintiff justifiably relied on those representations due to his favorable prior business dealings with Sprei and that plaintiff suffered damages as a result of lending the monies based on the misrepresentations. Plaintiff also alleges that the Reliable defendants worked closely with Sprei on the Lofts LLC transaction and had knowledge of the misrepresentations. Insofar as plaintiff alleges a fiduciary relationship, the court finds that the Reliable defendants' silence in the face of a duty to disclose may be considered "substantial assistance" in the achievement of the alleged fraud by Sprei.

**Unjust Enrichment**

To state a cause of action for unjust enrichment, the plaintiff must allege that (1) the other party was enriched, (2) at the plaintiff'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 (*see Alan B. Greenfield M.D., P.C. v Long Beach Imaging Holdings, LLC*, 114 AD3d 888, 889 [2d Dept 2014]). Unjust enrichment is essentially a quasi-contractual claim where the law creates a contract in the absence of any agreement (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]). Plaintiff adequately alleges that the Reliable defendants enriched themselves by diverting a portion of the escrowed loan funds for their own benefit and that it is against equity and good conscience to allow the Reliable defendants to withhold the amount wrongfully diverted. Although plaintiff pleads a cause of action for breach of the

escrow agreement, a claim for unjust enrichment may be pleaded in the alternative where the validity of the contract may be disputed by a defendant on the merits (*see Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 439 [1st Dept 2014]; *Zuccarini v Ziff–Davis Media*, 306 AD2d 404, 405 [1st Dept 2003]).

As a result, Reliable defendants' motion to dismiss the complaint is granted only to the extent that the fifth cause of action for civil conspiracy is dismissed. The motion is denied in all other respects.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

Hon. Pamela L. Fisher, J.S.C.