Vandashield LTD v Isaccson
2015 NY Slip Op 31782(U)
September 18, 2015
Supreme Court, New York County
Docket Number: 652183/2014
Judge: Shirley Werner Kornreich

SHIRLEY WERNER KORNREICH
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------x

VANDASHIELD LTD, ORCHID ASSETS S.A., ORCHID SECURITIES LTD., MAURICE GOLKER, MARK MORRIS, HAL BERETZ, RAPHAEL GIDRON, KUBERA INVESTMENTS LTD., MEXBRIDGE LTD., AVISAR, LTD., DAVID TENDLER, BALFORD ADVISORS LTD., CERES ADVISORS LTD., KELLERTON CORP., BERNITZ 1998 SETTLEMENT, HAROLD EDNA 2001 SETTLEMENT, ROTHEM PENSION SCHEME, and SATURN INVESTMENTS SARL.,

Plaintiffs,

Index No. 652183/2014

-against-

DECISION & ORDER

MARK ISACCSON, STRATIGIC DEVELOPMENT PARTNERS, LLC, GREAT COURT CAPITAL and IVAN BERKOWITZ,

Defendants.

----------x

SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001 and 003 are consolidated for disposition.

Defendants move (Sequence 001) to dismiss the complaint based on the statute of limitations, documentary evidence, failure to state a cause of action, standing and lack of pleading particularity. CPLR 3211(a) (1), (3), (5) & (7) & 3016(b). Defendants further move (Sequence 003): to dismiss the action based upon forum non-conveniens [CPLR 327] and failure to join necessary parties [CPLR 3211 (a)(10)]; for a protective order [CPLR 3103]; to vacate orders of this court dated April 2 and May 4, 2015; and to dismiss plaintiffs' claims for fraud, breach of fiduciary duty and breach of contract for failure to state a claim and failure to particularize. CPLR 3211 and 3016. Plaintiffs oppose. For the reasons that follow, Motion Sequence 001 is granted in part and denied in part and Motion Sequence 003 is denied.

The complaint contains the following causes of action, numbered here as in the complaint: 1) breach of fiduciary duty; 2) fraud in the inducement and fraud; 3) breach of contract; 4) constructive trust; 5) unjust enrichment; and 6) accounting.

I. Background

As this is a motion to dismiss, the following facts are taken from the complaint, documentary evidence, and plaintiffs' affidavits.

Defendants Strategic Development Partners (Strategic) and Great Court Capital, LLC (Great Court) are alleged to be Delaware corporations that transact business in New York. The complaint states that Great Court is the alter ego of Strategic, defendant Isaacson is the founder and CEO of Strategic and Great Court, and defendant Berkowitz is a principal of those entities.[1] Isaacson and Berkowitz (collectively, Individual Defendants) are New York residents.

On October 6, 2006, Strategic entered into an agreement (Loan Agreement) to loan $13 million (Loan) to a South African diamond mining company called "Manhattan Operations Douglas (Proprietary) Limited (Manhattan)" (Manhattan). Dkt 25.[2] The Loan was to be advanced in two installments and repaid within two years of the final installment. *Id.* The Loan Agreement provides that Manhattan would issue warrants to Strategic to purchase stock in

---

[1] Isaacson's moving affidavit (Isaacson Aff, Dkt 14) states that he is the sole member of Strategic and that he and Berkowitz are the only two members of Great Court, whose correct name is Great Court, LLC. However, it appears that the Individual Defendants previously have claimed to be officers and directors of Strategic. They submitted unsigned affidavits in a case entitled *Manhattan Operations Douglas Proprietary Limited v Strategic Development Partners*, High Court of South Africa (Witwatersrand Local Division), Case Number 14259/2007 (2007 SA Case), in which they claim to be CEO and Chairman, respectively, and each a director of Strategic. Isaacson Aff, Ex CC & DD, Dkt 43 & 44. If the two entities are New York limited liability companies, it would be odd for them to have directors.

[2] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

"Newco", a company to be formed to acquire, *inter alia*, all of Manhattan's "ordinary shares", which Strategic and Manhattan "envisaged" would be listed on the London stock exchange.[3] The Loan Agreement provides that it is governed by the laws of the Republic of South Africa "in all respects (including its existence, validity, interpretation, implementation, termination and enforcement)." Although the Loan Agreement is signed by Strategic, plaintiffs present documents in which Strategic and Isaacson asserted that Great Court Capital, LLC, made the Loan and an unsigned affidavit of one of Great Court's principals, which says the same thing.[4] On that basis, plaintiffs contend that their claims are properly asserted against Great Court. Affidavit of John Harris (Harris Aff), Dkt 64, ¶22.

The record reflects that Strategic, as assignor, and some of the plaintiffs, as assignees (Assignees),[5] entered into separate assignment agreements with Strategic (each an Assignment, collectively, Assignments), in which Strategic assigned participating interests in its rights, title

---

[3] The Loan Agreement defines "Newco" as " a new company which may be formed, for purposes of acquiring all of the ordinary shares in the Borrower and/or the business of the Borrower and/or its affiliates. It is further envisaged that Newco will be formed for purposes of listing on AIM." "AIM" is defined as "the Alternative Investment Market of the London Stock Exchange." The listing of Newco's shares on the London exchange was defined as a "Qualified Event", which entitled the holder of warrants to acquire Newco's shares on the terms and conditions set out in a document annexed to the Loan Agreement.

[4] Strategic claimed in its company resume and Isaacson claimed in his personal resume, that Great Court was the lender. Dkt 77 & 78. In addition, Allen G. Schwartz is a Vice President and director of Strategic. Dkt 42. He sent an email from a Great Court email account on October 26, 2006, which states that "we are providing Strategic financing thru a debenture totaling $13M and subsequent financing and listing on the AIM." Dkt 41.

[5] Vandashield Ltd. (Vandashield), Orichid Assets S.A. (Orchid Assets), Maurice Golker, Mark Morris, Hal Beretz, Raphael Gidron, Kubera Investments Ltd. (Kubera), Mexbridge Ltd (Mexbridge), David Tendler, Balford Advisors, Ltd. (Balford), Ceres Advisors, Ltd., Kellerton Corp., Bernitz 1998 Settlement, and Harold Edna 2001 Settlement. There is no copy of the Assignment from Strategic to plaintiff Rothem Pension Scheme in the record.

and interest in the Loan and its "Subject Matter", which was defined as security and warrants. Dkt 18. The Assignees collectively loaned a total of $4.466 million of the $13 million Loan to Manhattan and agreed to the terms of the underlying Loan Agreement. *Id.* The Assignments provide that they are to be construed and interpreted according to the laws of South Africa. *Id.*

It is undisputed that the plaintiffs all are sophisticated investors. Two of the plaintiffs, Hal Beretz and David Tendler are New York residents. The remainder are residents of, or entities formed in, foreign countries.

The motion to dismiss for lack of standing against Orchid Assets, Kubera and Mexbridge, is granted. The Complaint admits these plaintiffs assigned their interests in the Loan to other plaintiffs.[6] Plaintiffs do not oppose this relief so long as defendants recognize the assignments as valid. As defendants are arguing that the assignments were effective to divest these plaintiffs of an interest in this action, such recognition is implicit.

The Assignments provide that Strategic was the Assignees' agent for the following purposes:

> [to] accept and give notices under and in terms of the Subject Matter on its behalf and to give such waivers and consents as it in its sole discretion, acting reasonably, may deem fit and to do whatever is necessary from time to time to protect, preserve and enforce the Subject Matter; and
>
> [to] give notice for the release of funds to itself or to Manhattan for purposes of its funding obligations in terms of the Loan Agreement.

Id.

Plaintiffs admit that the misrepresentations allegedly made to induce the Loan "occurred

---

[6] The complaint alleges that Orichid Assets assigned its interest to Orchid Securities Ltd. (Orchid Securities), Kubera assigned its interest to Saturn Investments SARL (Saturn), and Mexbridge assigned its interest to Avisar, Ltd. (Avisar). Dkt1, Complaint, ¶¶ 10, 15 & 16.

before Defendants undertook a fiduciary duty to protect and preserve the Loan for Plaintiffs' benefit." Dkt 53, Plaintiffs' Memorandum of Law in Opposition (Ps' MOL), pp 9-10. The Parties, however, agree that Strategic was the Assignees' agent with respect to dealing with the Loan. Thus, any fiduciary duty arising from the agency relationship began when the Assignments were executed and was limited to actions taken to fund the Loan and protect the rights of the Assignees to repayment.

Defendants point to the following language in the Assignments for the proposition that plaintiffs' fraud and fraudulent inducement claims relating to the Loan & Assignment are barred:

> 2.5. To the extent permissible by law no party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the contract and/or whether it was negligent or not.

Dkt 18. But, plaintiffs allege concealment and affirmative misrepresentations arising from the period before they entered into the Assignments (Pre-Loan) and from the period after the Loan went into default. Specifically, the complaint alleges a Pre-Loan claim for concealment of a conflict of interest. Complaint, ¶36. The conflict allegedly arose from an agreement, contained in an October 6, 2006 letter between Strategic and Manhattan (Engagement Letter). Isaacson Aff, Ex R, Dkt 32. Essentially, the Engagement Letter provided that Strategic would assist Manhattan with a "Qualified Event", a defined term meaning: 1) securing equity investment via a public offering for a new company to be formed; or 2) securing investors to loan money to Manhattan, its subsidiaries or the new company. *Id.* In return, for equity financing through the public offering, Strategic would be paid a fee for the gross amount of capital obtained as a result of the public offering, plus warrants equal to 5% of the value raised from the offering to purchase stock at the public offering price. Cash raised through warrants exercised by an investor participating in the Loan were included in the equity financing fee. Strategic's fee for arranging

debt financing was to be warrants to acquire stock equal in value to 5% of the gross amount of the debt financing Strategic secured.

Isaacson's moving affidavit avers that plaintiffs knew about the Engagement Letter before they entered into the Assignments through Pinchas Rothem, a principal of two of the plaintiffs, Mexbridge and the Rothem Pension Scheme. Isaacson Aff, pp 22-23. Isaacson says that Rothem solicited the investments of all of the plaintiffs other than Saturn. *Id.* Annexed to Isaacson's affidavit as Exhibit Z is a June 18, 2007 email to Rothem from Alan Schwartz of Great Court enclosing a list of the Assignees that Rothem brought in (12 of the 18 plaintiffs) and the amounts they had loaned. Dkt 40. Isaacson says that he and Berkowitz never spoke to any of the plaintiffs before they entered into the Assignments, except for Beretz and Tendler, to whom they spoke after Rothem solicited their participation. Isaacson Aff, p 22.

In an October 26, 2006 email from Great Court that was copied to Rothem, Schwartz disclosed the existence of the Engagement Letter:

> our firm has signed an Engagement Letter with Manhattan. We have been engaged by Manhattan in relation to a transaction that will conclude in a listing on the Alternative Investment Market ("AIM") in London.

Dkt 41. Mason and Farkas, advisors to Saturn, claim that neither they nor Saturn knew about the Engagement Letter [Dkt 57 & 58], and neither Saturn nor its predecessor, Kubera, are on the list of Loan participants brought in by Rothem [Dkt 40]. In any event, the complaint's allegation that plaintiffs were unaware of the Engagement Letter must be accepted as true for purposes of this motion. The fact that Rothem was told of an Engagement Letter does not conclusively prove that plaintiffs knew about the Engagement Letter or its terms, particularly as Rothem has not submitted an affidavit.

In addition to concealing the conflict of interest presented by the Engagement Letter, plaintiffs claim that defendants made affirmative Pre-Loan misrepresentations. They allege that they were told that defendants were participating in the Loan on the same basis as plaintiffs, yet Strategic did not lend money to Manhattan. The complaint, however, does not specify who said this, to whom it was stated or when and attributes the statement to all of "the defendants". Two declarations submitted by Saturn's advisors, Mason and Farkas, state that they "understood" that Strategic and the Individual Defendants were lending a significant share of the Loan. Dkt 57 & 58. Farkas and Mason provide no particulars concerning from whom they "understood" this, particularly since it was Kubera, not Saturn, who made the subject loan. Other alleged Pre-Loan representations relate to the sufficiency of the collateral for the Loan, the financial health of Manhattan, defendants knowledge about the South African diamond mining business, and due diligence defendants allegedly conducted on Manhattan. Again, there are no specifics as to these alleged misrepresentations, i.e., who made them and to whom.

The only document in the record that might amplify the complaint on these alleged Pre-Loan representations is a deal profile that Isaacson admits was sent to all of the investors in the Loan. Isaacson Aff, ¶20 & Ex V (Deal Profile), Dkt 36. The Deal Profile describes the Loan transaction, but not the Engagement Letter. It also contains a disclaimer, which states, "neither SD Partners, Great Court Capital nor Manhattan can be held liable for any errors or omissions contained in this report." Dkt 36, p 1. The Deal Profile says that as of March 2005, Manhattan was profitable and had "positive cash flow." Dkt 36, pp 5 & 6. However, in an unsigned affidavit that Isaacson annexed to his moving affidavit, he states that Manhattan was not "in a positive cash flow situation" when the Loan was made in 2006. Isaacson Aff, Ex CC, Dkt 43, ¶¶ 13.1 & 20.4. An inference could be made that the statement about Manhattan's profitability and

cash flow in the Deal Profile that Strategic and, apparently, Great Court (based on the disclaimer) provided was false, although it can be argued that it speaks of an earlier time period and contains a disclaimer of errors and omissions. On the other hand, a deliberate false statement is not an error.

Isaacson contends that prior to the Assignments, all of the Assignees were provided with documentation concerning Manhattan's finances and operations, as well as information about the collateral agreements that secured the Loan. Isaacson Aff, pp 22 -23. An email indicates that Mason received copies of Manhattan's financials from Great Court before Kubera (Saturn's predecessor) executed its Assignment. Isaacson Aff, Compare Ex BB, Dkt 42 & Ex D, Dkt 18. Isaacson also says the collateral and security agreements annexed to his affidavit were provided to plaintiffs before the Assignments were executed. Isaacson Aff, Exs L-P, AA & BB, Dkt 26-30 & 41-42.

In 2008, defendants told plaintiffs that Manhattan would not repay the Loan or proceed with the public offering, and that defendants were litigating against Manhattan on plaintiffs' behalf in South Africa (SA Litigation). Complaint, Dkt1, ¶3. Plaintiffs allege that in breach of their fiduciary duty as agent, defendants concealed that in the SA Litigation to recover on the Loan, they had joined their private, conflicting claims arising from the Engagement Letter (Non-Loan Claims). Complaint, ¶¶ 44 & 46.[7] Essentially, plaintiffs' theory is that if the smaller Loan

[7] The complaint, ¶46, alleges:

> Specifically, the litigation involved private claims by Defendants for recovery of $167,252,508 in "Investor Warrants," $4,732,426 in "Debt Financing Warrants," $52,900,110 in "Equity Financing Warrants," $9 million as a "Cash Fee," $1,177,939 as "the Commission" and Defendants' monthly retainer of $75,000 (collectively, "The Undisclosed Private Claims").

claim had been pursued on its own, it would have been more successful and less costly to pursue, and that as its agent, Strategic had a conflict of interest with respect to the Non-Loan Claims, which it had a duty to disclose. Plaintiffs say they might have obtained independent counsel if they had known.

In July and August 2010, Mason and Farkas attempted to go to Strategic's New York office to review court documents relating to the SA Litigation. Dkt 57-63. Isaacson rebuffed them. *Id.* Plaintiffs allege that this was a breach of fiduciary duty. On January 25, 2011, using Strategic stationery, Berkowitz wrote to Farkas stating:

> I can confirm that we are at present involved in litigation to enforce our rights pursuant to the loan agreement signed on October 23, 2006 with Manhattan Operations Douglas Pty Ltd. I can also confirm that I have personally reviewed the documents related to the litigation.

Dkt 63. Plaintiffs use this statement to support their fraud and breach of fiduciary duty claims against Berkowitz. They say it concealed the Non-Loan Claims. However, this statement was made only to Saturn.

On August 16, 2011, Strategic's counsel sent a letter to plaintiffs enclosing an unsigned letter from Strategic (August 2011 Letter) and a proposed settlement agreement between Strategic and the Assignees. Complaint, ¶46 & Exs A-C thereto, Dkt 2-4. While Isaacson did not sign the August 2011 Letter, plaintiffs attribute it to him since the letter directs that any inquiries be made to Isaacson. Dkt 3. Paragraph 6 of the proposed settlement agreement stated that Manhattan had agreed to pay just under $8 million, which is referred to in the complaint as the "Purported Settlement Amount", over a 42 months period and that Strategic would be retaining "the first settlement monies" to reimburse itself for expenses. Dkt 4. The August 2011 Letter reiterates:

> when you participated in the loan portion of the MOD [Manhattan] transaction, you signed an agency agreement with Strategic Development Partners, LLC ("SD Partners") [Strategic] vesting all rights and decision making in SD Partners. On our mutual behalf, we have diligently and doggedly pursued justice in this case [the SA Litigation].

Dkt 3. The August 2011 Letter also said that the settlement would return approximately 60% of the principal loaned to Manhattan by the Assignees, which would be reduced to 40% net after expenses. *Id.* The complaint alleges that plaintiffs' share of the SA Settlement was "less than $1.8 million of the $4.466 million they had loaned" and excluded interest. Complaint, ¶48.

On September 19, 2011, in response to questions posed by plaintiffs' present counsel, who then was acting for the Jesselson Foundation, another lender, defendants' counsel claimed that he could not provide a copy of the settlement agreement because it was under "strict confidentiality requirements." Complaint, ¶51, & 9/19/11 Letter from Michael Wexelbaum to John Harris, p, 2. While plaintiffs allege that this was a misrepresentation, it was made not to them, but to the Jesselson Foundation, which is not a plaintiff in this action. Farkas' declaration says that "we continued to be told that the South African litigation file was restricted to litigants." He fails to say by whom. Mason's affidavit says, vaguely, that **defendants** tried to hide the settlement "from us as supposedly 'confidential under South African law....'" [emphasis added]. At most, the complaint contends that Saturn was the only plaintiff who heard this from somebody at an unspecified point in time.

Subsequently, plaintiffs investigated the SA Litigation and obtained a copy of the settlement agreement, which they state was "freely available" to them. Complaint, ¶¶ 46-54. They discovered that in May 2011, the SA Litigation was settled for $20 million (SA Settlement, Dkt 5, Ex D to Complaint), not $8 million, as set forth in the proposed settlement papers Strategic sent with the August 2011 Letter. The SA Settlement provided that it "shall be

governed and interpreted in accordance with" the laws of South Africa and "shall fall within the exclusive jurisdiction" of its High Court. It also recited that the SA Litigation involved two case numbers: 09/43319 and 10/37627, brought by Strategic in the Gaubend High Court. Complaint, Ex D, Dkt 5, pp 4, 5 & 14. The SA Settlement listed all of the claims made and the damages sought by Strategic, including the Non-Loan Claims. Dkt 5. It required Manhattan to pay $20 million to Strategic in a series of payments, beginning with $1.5 million to be paid by June 15, 2011 (1st Payment). *Id.* This is the money that comprises plaintiffs' alleged damages.

The complaint pleads various torts relating to defendants' actions in connection with the SA Litigation and SA Settlement (each an SA Tort, collectively SA Torts or SA Tort claims). Plaintiffs claim that defendants affirmatively misrepresented: the amount of the SA Settlement; that the Settlement was confidential under South African law;[8] and that expenses incurred in the SA Litigation were borne on plaintiffs' behalf, when in fact they also were for defendants' expenses and/or attributable to defendants' Non-Loan Claims. The complaint further alleges, upon information and belief, that the expenses were inflated and included "personal travel of the individual defendants and their families to South Africa...." Complaint, ¶5(g). Moreover, plaintiffs claim that defendants failed to disclose information concerning the SA Litigation prior

[8] The SA Settlement provides that it is confidential, "save to the extent that" it was made "an Order of Court..." and "save that Manhattan or SD Partners will be entitled to disclose" its terms to "its funders, employees and clients." Defendants claim that "its funders" refers only to Strategic's funders, not Manhattan's, and therefore excludes plaintiffs, who funded Manhattan in connection with the Loan and Assignments. However, the SA Settlement provides that it would be made "an order of court" and, by its terms, it was not confidential to the extent that it was a court order. Clearly this was so, as plaintiffs admit they obtained it "freely."

to the SA Settlement, information which plaintiffs had requested, and that defendants concealed that they took the 1st Payment. Complaint, ¶42.[9]

On September 23, 2011, plaintiffs advised defendants' counsel that they were aware of the terms of the SA Settlement. Affirmation of John Harris (Harris Aff), Dkt 64, ¶6. Defendants argue that the SA Torts are time-barred since plaintiffs should have been aware of the SA Settlement terms in 2006 or 2007 because the SA Litigation case file was publicly available. Plaintiffs counter that the 2009 case number in the SA Settlement belies this assertion.

The SA Litigation documents that defendants annex to their moving papers as proof of inquiry notice in 2006 relate to the 2007 SA Case, which was brought by Manhattan against Strategic in the High Court of South Africa (Witwatersrand Division), a different court from the SA Settlement court. Dkt 43 & 44. According to these papers, which contain unsigned affidavits by Isaacson, Berkowitz and Schwartz, it appears that Strategic filed a counterclaim involving the Loan and the Engagement Letter. Although the affidavits are not signed, they have a printed jurat date in 2008. As previously noted, the 2007 SA Case was not resolved by the SA Settlement, which settled 2009 and 2010 cases in the Gaubend High Court. Defendants assert, in reliance on the affidavits, that because the 2007 SA Case was publicly filed, plaintiffs were on inquiry notice in 2006 or 2007. Clearly, however, they could not have checked a 2007 case file in 2006. Nor was it reasonable for plaintiffs to have checked the court file in 2007 or 2008 when, as defendants admit, plaintiffs were relying on Strategic to act as their agent. Further,

---

[9] Paragraph 42 alleges: "Defendants did not provide written reports or documentation regarding the South African litigation or provide the Plaintiffs with any documents from that case, despite their requests. Defendant Isaacson later sought to justify the absence of written reports by claiming that verbal reports were 'easier to manage' since the South African litigation was 'so complex, the regulations so ever changing and the timelines ever moving.'"

Mason contends that in the summer of 2010, in response to requests to look at the litigation file, Isaacson told him that Saturn would be held "strictly responsible" for meddling in the SA Litigation and that if it was unhappy with telephone information, it could commence legal action. Dkt 57.

As of June 22, 2012, the plaintiffs, other than Orchid Securities and Avisar,[10] entered into a settlement agreement with Strategic, Isaacson and Berkowitz (2012 Settlement), which essentially settled the SA Settlement dispute. Isaacson Aff, Ex F, Dkt 20. This 2012 Settlement provided that its "Whereas" clauses were incorporated by reference, were substantive terms, and were agreed to in their entirety by Strategic and the Settling Parties.[11] One Whereas clause provided that pursuant to the Assignments, "the Settling Parties appointed Strategic as their agent in connection with the Loan Agreement and the Subject Matter thereof ...."

Other Whereas clauses recited that: 1) the Settling Parties had reviewed the terms of the SA Settlement; 2) Strategic asserted certain Non-Loan Claims in the SA Litigation; 3) Strategic represented that it had advanced legal fees and expenses in connection with the SA Litigation (defined as "Expenses"); 4) Strategic represented that after time-consuming and expensive litigation, it had negotiated the SA Settlement of $20 million, which included the Non-Loan Claims, as well as claims related to the Loan; and 5) there was a dispute between the Settling

---

[10] Orchid Securities, and Avisar were not parties to the 2012 Settlement Agreement. Although Kubera also is not named, the predecessors in interest of the signing parties are defined as "Settling Parties," and Kubera is the predecessor to Saturn, who was a party to the 2012 Settlement.

[11] The 2012 Settlement provides that "[t]he contents of the 'Whereas' clauses of this Agreement are hereby incorporated by reference herein and made a part of the substance of this Agreement, and Strategic and the Settling Parties hereby acknowledge and accept in their entirety and confirm and agree to the provisions thereof, including but not limited to those provisions pertaining to the Assignment Agreements."

Parties, Strategic, Isaacson and Berkowitz concerning the SA Litigation, the Non-Loan Claims, the SA Settlement, the Expenses and the proposed apportionment and distribution of the proceeds of the SA Settlement among the Settling Parties, other participants in the Loan and the parties on whose behalf the Non-Loan Claims were asserted, including Strategic.

In ¶2 of the 2012 Settlement, the Settling Parties approved the SA Settlement and agreed "to accept the settlement payments set forth below in full and final satisfaction of their respective participation interests in the Loan made to Manhattan." The Settling Parties reserved their right to challenge the SA Settlement if all payments contemplated by ¶4 of the 2012 Settlement were not made.[12]

Paragraph 4 of the 2012 Settlement required Strategic to pay to the Settling Parties' attorneys, within ten days of receipt, 35.13% of the amounts to be paid by Manhattan pursuant to the SA Settlement (Settlement Percentage), with the exception of payments Strategic received before January 1, 2012.[13] Schedule A listed two payments by Manhattan as "Paid," but only one paid before January 1, 2012. The only pre-January 1, 2012, payment was $1.5 million, the 1st

---

[12] Paragraph 2 provides:

> Without waiver of their right to challenge the terms, sufficiency or propriety of the Litigation Settlement, if all payments contemplated by Paragraph 4 of this Agreement are not made, the Settling Parties, in consideration of such payments, hereby jointly, severally and collectively approve of the Litigation Settlement [SA Settlement] and agree to accept the settlement payments set forth below in full and final satisfaction of their respective participation interests in the Loan made to Manhattan pursuant to the Loan Agreement.

[13] The 2012 Settlement explicitly provided that the Settling Parties "***shall not be entitled to receive***" 35.13% of the monies received by Strategic under the SA Settlement prior to January 1, 2012. [emphasis added]

Payment made on June 15, 2011, that plaintiffs now accuse defendants of wrongfully pocketing. Isaacson and Berkowitz jointly and severally guaranteed the Settling Parties' Settlement Percentage in the event that Strategic did not turn it over after receiving it from Manhattan.

The 2012 Settlement contained mutual general releases, except for claims arising under the 2012 Settlement itself. Thus, in ¶3A (Release), the Settling Parties, their predecessors, successors and assigns, which included all of the plaintiffs in this action, released Strategic, Isaacson and Berkowitz from all claims except those arising from the 2012 Settlement from the beginning of the world through June 22, 2012 (Pre-2012), including claims for breach of contract, fraud, fraudulent concealment, fraudulent misrepresentation, fraudulent inducement of the 2012 Settlement, breach of fiduciary duty, and unjust enrichment.[14] In accordance with ¶2, the Release reserved Settling Parties' right to challenge the SA Settlement, ***if*** Strategic failed to make all payments contemplated by ¶4 of the 2012 Settlement. As previously noted, Strategic agreed in ¶4 that it would turn over the Settlement Percentage ***of any monies paid by Manhattan under the SA Settlement.***[15] In other words, according to ¶3, the Release bound the Settling Parties unless Strategic failed to pay the Settlement Percentage of monies received from Manhattan. If Strategic failed to do that, then plaintiffs could raise Pre-2012 Claims, including

---

[14] In ¶3(B), Strategic, Isaacson and Berkowitz mutually released the Settling Parties.

[15] ¶3(D) provides as follows: "Anything to the contrary set forth in this Paragraph 3 notwithstanding, it is hereby expressly understood and agreed by and between the parties hereto that the releases contained in Paragraphs 3(A) and 3(B) of this Agreement shall not become effective, and shall be of no force or effect, unless and ***until the settlement proceeds outlined in Paragraph 4 hereof are paid in full*** to the Settling Parties. In the event of such non-payment in full, the approval of the [SA] Settlement referenced in Paragraph 2 above shall be deemed withdrawn." [emphasis added]

the SA Torts and the 1st Payment. Importantly, the Release said it was binding ***if Manhattan failed to pay Strategic*** under the SA Settlement.

Confusingly, ¶6 provided that nothing in the 2012 Settlement limited, waived or restricted the Settling Parties' claims against Strategic and the Individual Defendants, or Strategic and the Individual Defendants' defenses:

> ... In addition, ***in the event of any future litigation*** between Strategic, Isaacson and Berkowitz and the Settling Parties ***with respect to the Loan, the Loan Agreement, the Assignment Agreements and the Litigation Settlement, nothing contained in this Agreement shall in any way limit, restrict, waive or prejudice any and all claims the Settling Parties may have against Strategic, Isaacson and Berkowitz, or any defenses that Strategic, Isaacson and Berkowitz may have or possess with respect to any claims that may be asserted against them by the Settling Parties.*** It is understood and agreed that Strategic, Isaacson and Berkowitz are not admitting, conceding or confessing any liability to the Settling Parties except for payments due pursuant hereto upon actual receipt of settlement payments from Manhattan pursuant to the Litigation Settlement. [emphasis added]

It is unclear how ¶6 can be harmonized with the 2012 Settlement's Release.[16] The Release said Pre-2012 claims could only be asserted if Strategic failed to pay the Settlement Percentage. Paragraph 6 said that nothing in the 2012 Settlement limited, restricted, waived or prejudiced any claims the Settling Parties had against the defendants (other than Great Court).

Plaintiffs' opposition contends that, notwithstanding the Release, they can raise any claims now, including Pre-2012 claims, because Strategic has not pursued Manhattan diligently for payments due under the SA Settlement. They argue that ¶¶ 6 & 7(a) permit them to claim that defendants were unjustly enriched by the 1st Payment "in the event of a subsequent lawsuit between the parties (permitted only in the event of a default in payment)" and to sue defendants

[16] Perhaps for that reason, Defendants' motion is not predicated on the Release.

"on any theory if (a) Manhattan Douglas failed to make all the required payments and (b) Defendants thereafter did not pursue the defaulted borrower in a timely fashion for payment." Plaintiffs' Memorandum of Law (Ps' MOL), Dkt 53, pp 5 & 19, & Harris Aff, Dkt 64, ¶11.

Paragraph 7(a) of the 2012 Settlement provides:

> (a) In the event that Manhattan breaches the Litigation Settlement [SA Settlement] and is in default thereunder for non-payment of the settlement payments due pursuant to the schedule in Attachment A hereto, then and in that event, ***Strategic shall have the right and option, but not the obligation***, at its sole cost and expense, ***to seek to enforce the Litigation Settlement and effect collection of the settlement payments*** due from Manhattan pursuant thereto. Strategic shall pay to the Settling Parties thirty-five and thirteen hundredths (35.13%) percent of amounts collected. ***So long as Strategic exercises its right and option to pursue Manhattan to enforce the Litigation Settlement and uses its best efforts in a timely fashion to pursue the rights and remedies available thereunder, the Settling Parties shall forbear from commencing legal action or instituting litigation against Strategic, Isaacson and Berkowitz with respect to the Loan, the Loan Agreement, the Assignment Agreements, the Litigation Settlement and the Expenses. In the event of non-payment by Manhattan*** of any amount due under Attachment A hereto, the ***Settling Parties shall be entitled to full and timely access to information and documents*** pertaining thereto, including, but not necessarily limited to, correspondence, court papers and other writings in connection therewith. [Emphasis supplied]

Paragraph 7(a) allows plaintiffs to pursue Pre-2012 claims if Strategic fails to use best efforts, yet only breach of the 2012 Settlement is excluded from the Release.

Defendants rely on ¶7(a), which gave Strategic the "right and option, but not the obligation" to sue Manhattan. Defendants further rely on ¶7(b) for the proposition that, if Strategic did not pursue Manhattan, using best efforts in timely fashion, plaintiffs' sole remedy would be to pursue Manhattan at their own expense. Paragraph 7(b) does not say that. It says

that plaintiffs had the right to ask Strategic for permission to pursue Manhattan and, if Strategic said no, to ask a court for permission:

> ***In the event that: (i) Strategic elects not to exercise its right and option to pursue Manhattan for the non-payment of monies due pursuant to the Litigation Settlement; or (ii) Strategic does not use its best efforts in a timely fashion to pursue Manhattan*** for payment of monies due pursuant to the Litigation Settlement, then and in that event, ***upon the written request of one or more of the Settling Parties, Strategic shall advise the requesting Settling Party or Parties in writing within ten (10) business days thereof whether it consents to permitting the Settling Parties to pursue Manhattan*** - whether in the name of Strategic or by assignment - for any unpaid monies due and owing pursuant to the Litigation Settlement. ***In the event that Strategic does not consent, the issue*** of whether the Settling Party or Parties are entitled to proceed against Manhattan ***shall be submitted to the courts*** of South Africa or other court of competent jurisdiction for determination, with Strategic and the Settling Party or Parties each reserving their rights to argue regarding choice of law, venue and jurisdiction....In the event that a Settling Party or Parties is permitted to proceed against Manhattan, they shall do so at their sole cost and expense. [Emphasis supplied]

This gives plaintiffs the right, but not the obligation, to obtain permission to pursue Manhattan. It does not create a condition precedent to other remedies.

In the 2012 Settlement, Isaacson and Berkowitz guaranteed Strategic's payment of the Settlement Percentage, but not Manhattan's payments under the SA Settlement. Their guarantee provided:

> It is expressly understood that this Guaranty does not constitute a guaranty of payment by Manhattan to Strategic, but only a guaranty that Strategic will forward to the Settling Parties that portion of the funds received by Strategic from Manhattan as to which the Settling Parties have an interest under the Agreement.

On June 30, 2013, Manhattan defaulted in making payments under the SA Settlement. Complaint, ¶7. Plaintiffs' attorney alleges that defendants did nothing after that to pursue legal

remedies against Manhattan. Harris Aff, Dkt 64, fn 2. It is undisputed that the Settling Parties never made a written request to pursue Manhattan themselves. Instead, plaintiffs brought this action. Harris Aff, Dkt 64, ¶18.

To counter the charge that Strategic did not diligently pursue Manhattan, Isaacson avers that Strategic refrained in the exercise of good business judgment. Dkt 14, Isaacson Aff, ¶¶ 21-27. He says that Manhattan holds a license for the diamond mines from the Republic of South Africa, which would revert to South Africa if Manhattan were liquidated. He further avers that pursuing Manhattan would put it into liquidation or cause it to file for "Business Rescue", which would require Manhattan to have creditor-approved investment capital in place within 30 days of filing, failing which Manhattan would be forced into liquidation. *Id.* Isaacson contends that it is sound business judgment to give Manhattan time to operate the mines and pay the SA Settlement, instead of forcing Manhattan into liquidation, which would cause the SA Settlement payments to cease. *Id.* Isaacson tacitly admits that Strategic chose not to pursue legal remedies against Manhattan, albeit with an explanation.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Fraud & Breach of Fiduciary Duty – CPLR 3016 & CPLR 3211(a)(7)[17]

The fraud and breach of fiduciary duty claims can be divided into Pre-Loan claims and SA Torts. CPLR 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, or breach of trust, "the circumstances constituting the wrong shall be stated in detail." The purpose of the rule "is to inform a defendant with respect to the incidents complained of." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). The provision requires only that the misconduct be stated in sufficient detail to clearly inform the defendant of the conduct complained of, and should not be interpreted to prevent the assertion of a claim where it would be impossible to state in detail the circumstances constituting fraud. *Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 (1st Dept 1997), citing *Jered Contr. Corp. v NYC Tr. Auth.*, 22 NY2d

[17] Although the point heading in defendants' memorandum of law speaks only of CPLR 3016, the body argues that plaintiffs failed to plead wrongdoing and damages, necessary elements of claims for fraud and breach of fiduciary duty.

187, 194 (1968). With respect to fraud, the required particulars include the persons to whom the alleged misrepresentations were made, where they were made and when. *Fariello v Checkmate Holdings, LLC*, 82 AD3d 437 (1st Dept 2011); *Mountain Lion Baseball, Inc. v Gaiman*, 263 AD2d 636, 638 (3d Dept 1999).

The elements of a fraud claim are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing plaintiff to rely upon it, plaintiff's justifiable reliance on the misrepresentation or material omission, and injury. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Where a fiduciary relationship exists, the failure to disclose facts which one is required to disclose constitutes actual fraud, if the fiduciary has intent to deceive. *Kaufman v Cohen*, 307 AD2d 113, 120 (1st Dept 2003); *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 459 (1st Dept 2009).[18]

The element of justifiable reliance is lacking where a sophisticated party enters into an arms-length transaction and, with the exercise of ordinary intelligence, could have protected

[18] The parties cite New York precedents regarding breach of fiduciary duty and fraud. The court agrees that New York law applies to claims grounded in breach of fiduciary duty and fraud by New York fiduciaries because they are conduct-regulating bodies of tort law. In tort cases, New York uses "interest analysis" choice of law and applies the law of the jurisdiction having the greatest interest in resolving the particular issue involved. *Elson v Defren*, 283 AD2d 109, 115 (1st Dept 2001). If conduct regulating rules conflict, New York courts usually apply the law of the place where the tort occurred because that jurisdiction has the greatest interest in regulating behavior that takes place within its borders. *Elson*, 115. Although the Loan, Assignments and SA Settlement contracts are governed by South African law, a clause designating the law applicable to interpretation of a contract does not govern tort claims. *Knieriemen v Bache Halsey Stuart Shields, Inc.*, 74 AD2d 290, 293 (1st Dept 1980); *Fantis Foods, Inc. v Standard Importing Co.*, 63 AD2d 52, 58 (1st Dept 1978). A Delaware corporation that maintains its principal place of business in New York is considered a New York domiciliary for choice of law purposes. *Elson*, 116. Here, the alleged wrongful conduct by Strategic and the Individual Defendants occurred in New York and they are New York domiciliaries.

itself through due diligence concerning the transaction. *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 207 & fn 15 (1st Dept 2012). Moreover, pleading a claim for fraudulent concealment arising from a fiduciary or confidential relationship requires setting forth that the defendant had a duty to disclose material information. *Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 (1st Dept 2007) (motion to dismiss granted where no support for conclusion that fiduciary relation existed).

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss. *People v Grasso*, 50 AD3d 535 (1st Dept 2008), *affirmed* 11 NY3d 64 (2008). A fiduciary relationship exists when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship. *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005), citing *Restatement [Second] of Torts* §874, Comment (a). A fiduciary has a duty to disclose a conflict of interest. *EBC I, Inc., 20.*

Unless there are special circumstances giving rise to a confidential relationship of trust, an arm's length business relationship does not create a fiduciary duty. *V Ponte & Sons v American Fibers Intl.*, 222 AD2d 271, 272 (1st Dept 1995). Nonetheless, a fiduciary relationship may arise "between contracting commercial parties, such as, for example, when one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party." *ECB I, supra*; *Calvin Klein Trademark Trust v Wachner*, 123 F Supp2d 731, 734 (SDNY 2000).

Moreover, an agent owes a fiduciary duty to his principal. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 416 (2001). An agent must at all times exercise the utmost good faith and loyalty in the performance of his duties and act in accordance with the highest principles of

morality. *Id.* He is prohibited from seeking to acquire any indirect advantage from performing services for the principal, and must disgorge the value or proceeds of anything received in violation of his fiduciary duty. *Id.*

1. Pre-Loan Claims

The Pre-Loan claims involve concealing the Engagement Letter and misrepresenting Manhattan's financial health, the collateral, defendants' knowledge of diamond mining, defendants' investment in Manhattan, and their due diligence. With respect to concealment, plaintiffs state that "although Plaintiffs' allege that Defendants made various misrepresentations to induce the Loan, those misrepresentations occurred before Defendants undertook a fiduciary duty to protect and preserve the Loan for Plaintiffs' benefit." Dkt 53, Ps' MOL, pp 9-10 [emphasis in original]. In addition, plaintiffs admit that their damages for breach of fiduciary duty were not "sustained until May 2011 when Defendants actually benefitted themselves financially by attributing to themselves the majority of the settlement amount, pocketing the initial $1.5 million paid and forcing Plaintiffs to expend substantial resources to learn of Defendants' settlement-related claims." *Id*, p 10-11.

Indeed, plaintiffs have not stated claims for breach of fiduciary duty or fraudulent inducement arising from concealment of the Engagement Letter prior to the Assignments since the fiduciary duty did not arise before plaintiffs participated in the Loan through the Assignments. Consequently, defendants had no fiduciary duty or obligation to disclose the Engagement Letter at that time, and there could be no fraudulent concealment that induced the Loan or breach of fiduciary duty prior to the Assignments. Although the Engagement Letter was peculiarly within Strategic's knowledge, it did not present a conflict of interest before the SA Litigation began. Plaintiffs admit that the alleged conflict arose when Strategic asserted the

Non-Loan Claims in the SA Litigation, took the 1st Payment and allocated the Expenses to plaintiffs. As a result, plaintiffs have not stated Pre-Loan claims for breach of fiduciary duty and fraudulent inducement based upon concealment of the Engagement Letter.

Also, the Pre-Loan claims based on fraudulent misrepresentation are dismissed for failure to plead justifiable reliance. Plaintiffs fail to allege that defendants had specialized knowledge that would justify their reliance on defendants' representations concerning the advisability of entering into the Assignments. Even if the Deal Profile misrepresented Manhattan's financial condition, plaintiffs do not present facts from which it could be inferred that the collateral, the security and Manhattan's financial condition were peculiarly in defendants' knowledge before plaintiffs entered into the Assignments.

With respect to the alleged misrepresentation that defendants were loaning money on the same basis as plaintiffs, the gravamen of this fraud is that defendants concealed the Engagement Letter, which the court has ruled is not actionable. The damage about which plaintiffs complain is that defendants joined the Non-Loan Claims for breach of the Engagement Letter and allocated too great a portion of the SA Settlement to them. The alleged damage does not arise from defendants' failure to loan money to Manhattan. It arises from their pursuit of the Non-Loan Claims in the SA Litigation.

Further, with respect to the Individual Defendants, Pre-Loan misrepresentations are not pled with particularity. As noted above, except for statements in the Deal Profile that were sent to all investors, plaintiffs fail to plead who made the representations. Although it can be inferred that Strategic and Great Court made Pre-Loan misrepresentations in the Deal Profile, plaintiffs have failed to state who made the other statements to them.

An evidentiary showing that the claim can be supported would be required for repleading. *Morgan v Prospect Park Associates Holdings, L.P.*, 251 AD2d 306 (2d Dept 1998), quoting *Cushman & Wakefield, Inc. v John David, Inc.*, 25 AD2d 133, 135 (1st Dept 1966). Plaintiffs fail to make such a showing, merely requesting leave to replead in a footnote of their memorandum of law and not submitting a proposed amendment. There is no support for an amendment.

2. SA Tort Claims

The SA Tort claims allege misrepresentations that: defendants were earnestly litigating against Manhattan in the SA Litigation, the SA Settlement was $8 million, it was confidential, and $1.5 million in Expenses were incurred on plaintiffs' behalf. In addition, the SA Torts Claims are based on fraudulent concealment of information about the SA Litigation, including that Strategic joined Non-Loan Claims with the claims to recover the Loan. Plaintiffs seek the same damages for the SA Tort claims and the Pre-Loan claims -- unfair allocation of the Expenses and taking the 1st Payment for Expenses at the time of the SA Settlement.

While defendants do not concede that they had a fiduciary duty, plaintiffs sufficiently pleaded a claim that Strategic was their agent from the time the Assignments were executed with respect to collecting and preserving the Loan. The Assignments provide that Strategic was to act on plaintiffs' behalf with respect to the Loan and there is no doubt that Strategic and Isaacson told Saturn that it could not meddle or interfere with Strategic's handling of the SA Litigation.

Plaintiffs have stated a claim that Strategic had a fiduciary duty as their agent with respect to suing Manhattan to collect the Loan, had superior access to information about the SA Litigation, and fraudulently concealed a conflict of interest. *Sokoloff v Harriman Estates Dev. Corp.*, *supra*; *EBC I, Inc.*, *supra*; *Calvin Klein Trademark Trust v Wachner*, *supra*. As a result, a claim for fraudulent concealment lies. *Kaufman v Cohen*, *supra*; *Mandarin Trading Ltd. v*

Wildenstein, *supra*. The court must accept as true that the pursuit of the Non-Loan Claims relating to the Engagement Letter created a conflict of interest and was a substantial factor in lowering plaintiffs' share of the SA Settlement. With respect to failure to provide documents, there is evidence that Isaacson and Berkowitz, on behalf of Strategic, dissuaded Saturn's advisors from looking at the SA Litigation papers, which fraudulently concealed the alleged conflict of interest from Saturn.

With respect to fraudulent misrepresentation, there is evidence that Strategic misrepresented the amount of the SA Settlement when it sent the proposed settlement agreement to plaintiffs with the August 2011 Letter. Although defendants claim that plaintiffs could have (and did) discover the true amount by checking the court file, this ignores that Strategic had a fiduciary duty to be truthful and honest in all respects. While there are factual issues regarding Saturn's suspicions a year earlier, when the Individual Defendants dissuaded their advisors from looking at the court file, which might lead a trier of fact to infer that Saturn was no longer relying on Strategic's loyalty, Saturn still has stated a claim because all inferences must be drawn in its favor on a motion to dismiss. Further, Saturn's suspicions cannot be imputed to the remaining plaintiffs. Moreover, there are allegations that the Expenses were inflated and improperly allocated to plaintiffs. Finally, there are allegations that the Expenses were used to fund personal trips for the Individual Defendants' families, which is sufficient to state claims for breach of fiduciary duty and fraudulent concealment against the Individual Defendants.

In regard to the statement about the SA Settlement's confidentiality, it was not made to plaintiffs, and Saturn does not attribute it to anyone. Therefore, the representation is insufficiently particularized to support a claim of fraud or breach of fiduciary duty. Similarly, the statement that defendants were litigating on plaintiffs' behalf was true. The real import of

that allegation is that it concealed that Strategic also was litigating on its own behalf, which is actionable conduct.

3. Claims against Individual Defendants

Defendants seek dismissal of the SA Tort claims against the Individual Defendants, arguing they acted in the scope of their authority as agents of Strategic and plaintiffs do not allege sufficient facts to pierce Strategic's corporate veil. However, a corporate officer may be held individually liable for the commission of separate tortious or predatory acts. *Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 (1978); *Konrad v 136 East 64th St. Corp.*, 246 AD2d 324 (1st Dept 1998). A director or officer who participates in a fraud and profits from it will not be shielded from personal liability. *Ackerman v Vertical Club Corp.*, 94 AD2d 665, 666 (1st Dept 1983), appeal dismissed 60 NY2d 644 (1983).

Here, plaintiffs have sufficiently alleged that the Individual Defendants participated in the SA Torts and personally profited from them. Isaacson personally refused to give information to Saturn. With respect to Berkowitz, he assisted Isaacson in dissuading Saturn from coming to New York to look at the SA Litigation file, which leads to the inference that he participated in concealing facts that Strategic should have disclosed. And, they both are alleged to have inflated the Expenses to pay for their personal travel.

4. Claims against Great Court

Turning to Great Court, defendants contend that it is a separate corporate entity with no duty to plaintiffs. Plaintiffs counter that defendants have stated that Great Court made the Loan and they at least should have discovery to uncover the relationship between Great Court and Strategic. The complaint alleges in conclusory fashion that Great Court is Strategic's alter ego.

A court may pierce the corporate veil where necessary to prevent fraud or to achieve equity. *Billy v Consolidated Machine Tool Corp.*, 51 NY2d 152, 163 (1980). The party seeking to disregard the corporate form must show a transaction injurious to the plaintiff caused by direct intervention of one corporation into the management of the other, to such an extent that separate incorporation can be ignored *Id.*; see also *Morris v State Dept of Taxation & Fin.*, 82 NY2d 135, 141-142 (1993). The following factors should be considered:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Wm. Passalacqua Builders v Resnick Developers S., 933 F2d 131, 139 (2d Cir 1991).

The claims against Great Court are dismissed. Plaintiffs have not alleged any facts to show a transaction injurious to them as a result of Great Court's intervention in the management Strategic. *Billy, supra*. There are no allegations to support the claim that Strategic's separate entity status was used to perpetrate a fraud on plaintiffs. Before they entered into the Assignments, plaintiffs possessed the Loan Agreement, which conclusively showed that it was between Manhattan and Strategic. The SA Settlement conclusively proves that Strategic, not Great Court, was involved in the SA Litigation and the SA Settlement. If defendants represented to others that Great Court made the Loan, plaintiffs knew better from the time of the

Assignments, which incorporated the Loan Agreement. Then too, if Strategic gave its share of the SA Settlement to Great Court, it still was not the cause of plaintiffs' alleged damages.

B. Statute of Limitations for Breach of Fiduciary Duty and Unjust Enrichment

This action was commenced on July 16, 2014. Dkt 1. Defendants contend that the applicable statute of limitations is three years for unjust enrichment and breach of fiduciary duty involving injury to property.[19] Defendants' Moving Memorandum of Law (Ds' MOL), Dkt 46, Point I. As the court has dismissed the Pre-Loan Claims for breach of fiduciary duty, the only statute of limitations questions relate to breach of fiduciary duty involving the SA Torts and unjust enrichment. As discussed above, the SA Torts are for fraudulent breach of fiduciary duty.

A cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year statute of limitations. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009); *Kaufman v Cohen*, 307 AD2d 113, 119 (1st Dept 2003). It runs from the time of the breach, or two years from the time a litigant knew or with reasonable diligence could have discovered it, if that is later than six years from the breach. *Kaufman*; *supra*; CPLR 213(8) & 203(g). As with other torts in which damage is an essential element, a claim for breach of fiduciary duty is not enforceable and does not accrue until damages are sustained. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 140. The time when a plaintiff could have discovered the

[19] Contradictorily, defendants argue that the applicable statute of limitations is governed by South African law because of the choice of law provisions in the Assignments and Loan Agreement, but then say that statutes of limitation are governed by the forum, i.e., NY, because they are procedural rules. In addition, defendants posit that under the borrowing statute, CPLR 202, with respect to non-residents, the action must be timely under both NY law and the law where the harm occurred, which is where the plaintiffs reside. However, as previously mentioned only two plaintiffs reside in NY, yet defendants rely exclusively on NY law. Defendants do not offer evidence as to the statute of limitations in the other plaintiffs' countries of origin.

facts with reasonable diligence, is a mixed question of law and fact. *Trepuk v Frank*, 44 NY2d 723, 724-725 (1978). "Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute." *Sargiss v Magarelli*, 12 NY3d 527, 531 (2009), citing *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 (1957). "Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts." *Sargiss*, at 532.

The statute of limitations for unjust enrichment pleaded as an alternative to a tort is the same as the statute of limitations for the underlying tort. *Maya NY, LLC v Hagler*, 106 AD3d 583 (1st Dept 2013). A claim for unjust enrichment accrues upon the occurrence of the wrongful act giving rise to the right of restitution. *Kaufman v Cohen, supra.* Here, the underlying tort is breach of fiduciary duty involving fraud. The statute of limitations for such a claim is six years, or two years from inquiry notice. *Id.*

Plaintiffs argue that their unjust enrichment and breach of fiduciary claims are predicated solely on aspects of the 2011 SA Settlement: the 1st Payment to Strategic from the SA Settlement that Strategic took in May 2011 and the inflated Expenses of the SA Litigation that Strategic allocated to plaintiffs. They point out that, pursuant to the 2012 Settlement, the statute of limitations was tolled beginning on June 22, 2012, less than three years after the monies were retained in 2011. Ps' MOL, Dkt 53, pp 8 & 10.[20]

[20] Schedule A to the 2012 Settlement says that Manhattan paid the $1.5 million in June 2011, not May.

Defendants reply that Strategic's prosecution of the SA Litigation was known to plaintiffs as early as 2006 or 2007, when the SA Litigation filings were a matter of public record, and expired in 2010 before the tolling agreement in the 2012 Settlement. Ds' MOL, Point I.

The claims are timely. The statute of limitations for both claims is six years. The claims accrued in 2011 when the claimed damages were sustained and the alleged unjust taking occurred. The statute of limitations was tolled in 2012 and the action was brought in 2014. Moreover, as noted above, the SA Settlement involved cases brought in 2009 and 2010, less than six years before the action was filed; there is no basis for defendants' assertion that plaintiffs were on inquiry notice in 2007, when they has a right to rely on the fact that Strategic was acting as their agent with respect to the Loan.

E. Accounting

Defendants move to dismiss the accounting claim on the grounds that: there is no fiduciary relationship between the parties; Strategic already accounted for Manhattan's payments under the 2012 Settlement; plaintiffs have an adequate remedy at law for breach of the 2012 Settlement; and plaintiffs did not make a demand. The sixth cause of action seeks an accounting of the Expenses Strategic allocated under the SA Settlement, not Manhattan's payments thereunder, and it alleges that plaintiffs made a demand. Complaint, ¶¶ 111-116.

The motion to dismiss the accounting claim is denied with respect to Strategic, but granted as to the other defendants. The court has already ruled that Strategic had a fiduciary duty with respect to the Expenses under the SA Settlement. The court must accept as true plaintiffs' allegation that a demand was made. Accounting for Strategic's allocation of Expenses has nothing to do with the Strategic's accounting for Manhattan's payments pursuant to the 2011

Settlement. On the other hand, the defendants other than Strategic have no fiduciary obligation to account for the Expenses. Pursuant to the Assignments, Strategic was the agent.

D. Failure to State a Claim for Unjust Enrichment

Under New York law, the basis for a claim of unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff. *Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 (2012).

> [U]njust enrichment is not a catchall cause of action to be used when others fail." Id. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.

Id. [internal citations omitted]

Here, the unjust enrichment claim is dismissed because plaintiffs allege the same conduct and damages for fraud and breach of fiduciary duty, recognized torts. The unjust enrichment claim is predicated on the alleged wrongful taking of the 1st Payment, the same basis for the breach of fiduciary duty and fraud claims. Complaint, ¶¶108 and 109. While defendants urge that South African Law applies because the unjust enrichment claim sounds in quasi contract under the Assignments, breach of fiduciary duty and fraud practiced by a fiduciary are conduct regulating torts governed by New York law. See Discussion, Part A, *supra*.

E. Failure to State a Claim for Constructive Trust

The complaint alleges that in the Assignments defendants promised plaintiffs to act as their agents with respect to the Loan, that defendants secretly and wrongfully kept the 1st Payment from the SA Settlement for themselves, and that a constructive trust should be imposed

on defendants for the $1.5 million and "any future funds received by defendants from Manhattan until the Loan has been paid off in full." Complaint, ¶¶ 102-105.

The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise (express or implied), a transfer in reliance thereon, and unjust enrichment. *Bankers Sec. Life Ins. Soc'y v Shakerdge*, 49 NY2d 939 (1980); *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 (1st Dept 2010). However, the elements are not rigidly applied and a constructive trust can be imposed to satisfy the demands of justice even in the absence of a promise or a transfer in reliance upon it. *Kaufman v Cohen*, 307 AD2d 113, 127 (1st Dept 2003). "Unjust enrichment ... does not require the performance of any wrongful act by the one enriched." *Simonds v Simonds*, 45 NY2d 233, 242 (1978). An innocent party may be a constructive trustee. *Id.* What is required is that the circumstances are such that, in equity and good conscience, the party should not retain it. *Id.* Defendants argue that constructive trust is not a remedy recognized under South African Law and that only Strategic received the SA Settlement proceeds. Ds' Memo of Law, Point IV.

The constructive trust claim is dismissed. As discussed, unjust retention is a tort governed by New York law, unjust enrichment does not lie and constructive trust duplicates plaintiffs' tort claims with respect to the 1st Payment. With respect to future payments, constructive trust does lie since a transfer to defendants or unjust retention of monies has not been alleged to have occurred.

F. Failure to State a Claim for Breach of the 2012 Settlement

The complaint alleges that defendants breached the 2012 Settlement by failing to provide full and timely information and documents. Complaint, ¶ 98. Defendants move to dismiss the claim on the grounds that they have provided plaintiffs with information about their efforts to

collect from Manhattan and plaintiffs must forbear from suit because they did not exercise their right, pursuant to ¶7(b), to request permission to pursue Manhattan themselves. Ds' MOL, Point III. Plaintiffs counter that they were not given all of the information they requested, including correspondence declaring a default, court documents, and financial and cash flow statements from Manhattan.

The motion to dismiss this breach of contract claim is denied. Paragraph 7(a) of the 2012 Settlement entitles the Settling Parties to full and timely access to information and documents in the event that Manhattan failed to pay on time. The court must accept as true the allegations that plaintiffs have received no communications from Strategic to Manhattan and have been "stonewalled." Harris Aff, Dkt 64, ¶¶ 9-18; Complaint, ¶¶ 96-100. The forbearance agreement in ¶7(a) applies only to Pre-2012 claims, i.e., "with respect to the Loan, the Loan Agreement, the Assignment Agreements, the Litigation Settlement [SA Settlement] and the Expenses." It does not apply to claims for breach of the 2012 Settlement, which is excluded from the Release as well. Further, as previously noted, ¶7(b) does not state that plaintiffs have to forbear from suing for breach of the 2012 Settlement unless they request permission to pursue Manhattan. Paragraph ¶7(b) says that plaintiffs may request permission to sue Manhattan, if Strategic elects not to, or does not do so using best efforts in timely fashion. Paragraph 7(b) does not state that plaintiffs must avail themselves of that remedy in order to sue for breach of the obligation to provide information and documents.

In their reply memorandum, for the first time, defendants claim that plaintiffs have not been damaged by the failure to provide them with information. The complaint demands damages in an amount to be determined at trial. Complaint, ¶100. Plaintiffs need discovery

before they can state whether the lack of information has damaged them, as all of the documents and information allegedly withheld would be in defendants' hands.

G. Damages – Punitive & Cap

The prayer for punitive damages is dismissed. "To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another. *Gamiel v Curtis & Riess-Curtis, P.C.*, 16 AD3d 140, 141 (1st Dept 2005); *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 203-204 (1990) (punitive damages allowed for conduct with high degree of moral culpability, such as wantonly and willfully causing injury or manifesting conscious or reckless disregard of the rights of others). Here, defendants' alleged conduct does not rise to that level. While they are accused of fraud and breach of fiduciary duty in misallocating SA Settlement monies and concealing a conflict, those actions are insufficiently egregious to warrant punitive damages.[21]

The motion to dismiss plaintiffs' claim for interest is denied. On their claims for breach of contract, breach of fiduciary duty and fraud, plaintiffs demand the remaining balance due them on the Loan, plus interest. Defendants move to dismiss on the ground that in the 2012 Settlement, plaintiffs agreed to a cap on damages that did not mention interest.

Plaintiffs counter that ¶¶ 3(D) and 6 of the 2012 Settlement provide that the Release is not effective until defendants have "remitted the full amount due." Actually, as noted in the

[21] It is unnecessary to address defendants' arguments concerning the prohibition on punitive damages under South African law. With respect to the tort claims, South African law does not apply, as stated Part A above, and claims for breach of the 2012 Settlement are governed by New York law.

Background section, ¶¶ 2 and 3 say that the Release is effective if Strategic pays the Settlement Percentage of the payments due under ¶4, i.e. the Settlement Percentage of payments received from Manhattan. However, ¶6 says that in a future lawsuit between the parties, nothing in the 2012 Settlement waives, modifies or limits any of plaintiffs' Pre-2012 claims, which would include interest on claims for repayment of the Loan, the SA Settlement and the Expenses.

The motion to dismiss the request for interest is denied. A contractual provision which limits damages is enforceable unless the special relationship between the parties, a statute, or public policy imposes liability. *Peluso v Tauscher Cronacher Prof'l Eng'rs, P.C.*, 270 AD2d 325 (2d Dept 2000).[22] However, the 2012 Settlement is ambiguous. Paragraph 6 appears to contradict the cap with respect to Pre-2012 claims. Accordingly, the court cannot rule as a matter of law that plaintiffs are not entitled to interest based on the cap.

H. Forum Non-Conveniens

The bases for the forum non-conveniens motion are that the claims for breach of fiduciary duty, fraud and fraudulent inducement arising from the Loan and Assignments should not be heard in New York because they involve witnesses and evidence in South Africa, are governed by South African law which it would be a burden for this court to interpret, require Manhattan as a party because it supplied misleading documents prior to the Assignments, and require Rothem as a party because he knew about the Engagement Letter. In addition, defendants contend that New York does not have a substantial nexus with the action, and it will be a hardship for them to defend here, particularly as some documents were destroyed in a flood.

[22] The cases cited by plaintiffs regarding the requirement of an explicit waiver of statutory prejudgment interest are inapplicable.

The motion is denied. The Pre-Loan claims for breach of fiduciary duty, fraud and fraudulent inducement have been dismissed. Therefore, Manhattan and Rothem are not necessary parties. The court has ruled that South African Law does not apply to the SA Torts relating to the SA Litigation and Settlement. The remaining claims for fraud, breach of fiduciary duty, and breach of the 2012 Settlement involve alleged concealment and misrepresentation of the terms of the SA Settlement, allocation by Strategic of the SA Settlement and the Expenses, and breach of the obligation to provide documents and diligently pursue Manhattan after the 2012 Settlement, which took place in New York. All of those claims involve the conduct of Strategic, Isaacson and Berkowitz. They are in New York. Their conduct as fiduciaries and the New York choice of law provision in the 2012 Settlement give New York both a substantial interest in and a nexus to the litigation. All of those claims are governed by New York law, as noted above. To the extent that litigation papers from the South African litigation file relate to the alleged conflict of interest that arose when Strategic joined the Non-Loan Claims, defendants may avail themselves of the publicly available documents. Defendants do not need jurisdiction over Manhattan to prove what they did to enforce or allocate the SA Settlement.

I. Motion to Vacate Orders

Defendants seek to vacate prior disclosure orders on the ground that the names of the other lenders are not germane to plaintiffs' claims. This relief is denied. The court already has sanctioned defendants' counsel, Mr. Hilton, for failing to abide by these orders (he no longer represents Berkowitz), on the ground that the orders were willfully and contumaciously disobeyed for the purpose of delay. Dkt 139 & 142, pp 36-41. CPLR 3101 provides that there shall be full disclosure of all evidence material and necessary to the prosecution of an action. Material and necessary should be interpreted liberally to require disclosure of information that is

"sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable." *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 (1968). The other lenders may well have information that will bear on Strategic's efforts to secure repayment of the Loan after the 2012 Settlement and the allocation of the SA Settlement and Expenses. It is reasonable for plaintiffs' to use this information to prepare for trial.

J. Order of Trial

CPLR 603 provides that:

> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

Paragraph 7(a) of the 2012 Settlement provides that plaintiffs shall forbear from suing on the Pre-2012 claims in the event that Strategic exercises its right and option to pursue Manhattan using its best efforts in timely fashion. As the bulk of plaintiffs' claims relate to Pre-2012 Claims, i.e., allocation of the SA Settlement and Expenses, the issue of whether Strategic has used it best efforts in timely fashion, should be resolved first. If that issue is resolved in Strategic's favor, most of plaintiffs' claims will be mooted. At this juncture, discovery will be limited to Strategic's efforts to pursue Manhattan, which will include access to all documents relating to those efforts, after which the court will refer the issue of whether Strategic used its best efforts in a timely fashion to a Special Referee. Accordingly, it is

ORDERED that defendants' Motion Sequence 001 to dismiss the complaint is granted to the extent of dismissing the following: 1) the portions of fraud and breach of fiduciary duty defined as Pre-Loan in Part A of the decision, 2) unjust enrichment, 3) constructive trust, 4) punitive damages, 5) the accounting claim against Isaacson and Berkowitz, and 6) all claims

against Great Court, LLC (sued incorrectly as Great Court), and the motion is otherwise denied; and it is further

ORDERED that, pursuant to CPLR 603, discovery at this juncture will be limited to defendants' efforts to pursue Manhattan for payment on the SA Settlement; and it is further

ORDERED that Motion Sequence 003 is denied.

Dated: September 18, 2015

ENTER: