SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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HAI YANG LIU,

Plaintiff,

-against-

88 HARBORVIEW REALTY, LLC, CHEUNG YEUNG, YAN ZHUANG, JIA XI QUI a/k/a QUI JAI XI, QIAN HE, individually and as the Administratrix of the estate of You Laing Chen,

Defendants.

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DECISION AND ORDER
Index No.: 652063/2014

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

In this motion sequence 001, plaintiff Hai Yang Liu ("Liu") moves for partial summary judgment as to counts 1 (breach of contract), 2 (declaratory judgment), 3 (estoppel), and 5 (conversion). Plaintiff also seeks (1) an order declaring that he is 5% owner in defendant entity 88 Harborview Realty, LLC; (2) $442,327.50 in money damages; and (3) an inquest on additional damages, including punitive damages arising from an alleged breach of fiduciary duty. Plaintiff's attorney prepared a Rule 19-a Statement ("Liu Rule 19-a, ¶ ___") but virtually all of the facts asserted therein are disputed. The available documentary evidence does not resolve many of the material issues of the fact presented here. The motion shall be denied.

I. FACTS

In 1998, plaintiff Hai Yang Liu ("Liu") emigrated from China to the United States with the substantial assistance of You Laing Chen ("Chen"), a dentist who emigrated from the same town as Liu years earlier (NYSCEF Doc. No. 66). Chen passed away in April 2009 (Doc. 93, ¶ 7). His estate is a defendant in this action (defendants' counter-statement of material facts ¶¶ 29, 31) ("Chen Rule 19-a, ¶__")[1].

On September 18, 2002, a deed was granted for the property located at 2977 Fulton Street, Brooklyn, NY (Property), naming plaintiff Liu as grantee (Liu Rule 19-a, ¶ 1). Chen disputes whether Liu was a nominal owner of the Property. Defendants contend that beginning on September 18, 2002 or earlier, Liu and Chen entered into an oral agreement (Agreement) by which

[1] "Parties' Rule 19-a, _____" refers to both Liu Rule 19-a and Chen Rule 19-a (Docs. No. 87 and 98). "Doc. ___" refers to the location of documents filed in this case in the New York State Courts Electronic Filing System.

Chen would use Liu's name as a nominal owner of certain property, debt, and accounts, for his own benefit (Chen Rule 19-a, ¶¶ 1, 33-34).[2] As part of the alleged Agreement, a bank account (Liu Account) was opened in Liu's name. Defendants maintain the account was held for the benefit of Chen. As evidence of this arrangement defendants note that Liu provided Chen with a book of blank checks that he pre-signed thereby giving Chen access to the account (Chen Rule 19a, ¶¶ 39-41). Also, on September 18, 2002, a mortgage was taken on the Property in Liu's name. The parties dispute whether it was Liu or Chen who actually made payments on the mortgage (*id.* ¶ 2).

When the Property was sold on November 21, 2005 for $305,790.64, Liu was listed on the deed as grantor, and proceeds of the sale were deposited into the Liu Account (Parties' Rule 19-a, ¶¶ 5, 13). Chen was listed as the grantee but defendants contend this was a "change in record name" only (Parties' Rule 19-a, ¶¶ 5-8). There was no closing and the account into which the funds were deposited was controlled by Chen (Chen Rule 19-a, ¶ 13). From 2002 to 2005, Chen and his wife Qian He did not declare any rental income on their tax returns (Parties' Rule 19-a, ¶¶ 5-8). They did, however, begin reporting rental income in 2006, once the Property was owned by Chen (Parties' Rule 19-a, ¶¶ 9, 11).

Defendant 88 Harborview Realty, LLC ("88 Harborview"), established on August 22, 2005 (Doc. No. 93, ¶ 13) issued a membership certificate for five membership units in Liu's name dated December 23, 2005. The units were paid for by checks dated between December 2, 2005 and February 1, 2006 aggregating to $300,000 from the Liu and another account (Doc. No. 33), but defendants contend that Chen is the beneficial owner and owner-in-fact of those units (Parties' Rule 19-a, ¶¶ 14-15). Certificates were also issued in the names of Lu Tao Chen, Yuan Pan, Zhang Pan and Tian Ping Zhang. All five certificates are dated December 23, 2005 and include the notation "Inherit You Liang Chen" (Doc. No. 106) which defendants claim evidences Chen's beneficial ownership and ownership-in-fact (Chen Rule 19-a, ¶ 15). The membership certificate was signed by all of the managing members of 88 Harborview, including Chen and defendant

[2] Defendants claim that in 2001 Liu lacked the funds to purchase property. As of 2001 Liu owed Chen $45,000 in connection with a loan he got from Chen to defray the cost of Liu's emigration (Doc. No. 46, p. 40). Between 1998 and 2002, Liu worked as a chef in Chinese restaurants earning $2,200 per month, paid in cash (Chen Rule 19-a ¶45). On his 2003 federal tax return Liu reported no wage income, $19,800 related to the Property in rental income and no federal taxes due (Doc. No. 65).

Cheung Yeung[3] (Parties' Rule 19-a, ¶¶ 17-18). 88 Harborview filed K-1 statements with the Internal Revenue Service, listing Liu as 5% owner for the years 2006-2015, although defendants contend that Liu "refused to accept the K-1's and protested the issuance of the K-1 for the year 2009" (Parties' Rule 19-a, ¶ 20).

Liu claims that he is owed a distribution in the amount of the $300,000 capital contribution associated with his membership (Parties' Rule 19-a, ¶ 22). Defendants contend the distributions at issue have been placed in a separate bank account maintained by 88 Harborview pending the outcome of this case (*id.*). 88 Harborview has paid profits to the other members, but to date has not paid any profits associated with the units in dispute (Parties' Rule 19-a, ¶ 23).

On July 23, 2010, Chen's widow who is also the administratrix of his estate, defendant Qian He sold the Property for $350,000, according to the deed and the tax return for the Chen estate. The purchase price for the Property is listed as $380,000 on the tax return for the estate of Chen (Parties' Rule 19-a, ¶¶ 25-28).

II. LEGAL STANDARD

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every

[3] Chen was a founder and the majority member and managing member of 88 Harborview (Doc. No. 93, ¶¶ 1 & 5; 2, ¶ 5).

favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

III. ARGUMENTS

A. Plaintiff's motion in support

Plaintiff Liu argues that he has presented admissible evidence establishing that he is a member of 88 Harborview and is therefore entitled to summary judgment on this motion. Liu has proffered his membership certificate in 88 Harborview and corresponding operating agreement (Doc No. 37]), K-1s filed with the IRS (Doc No. 39]), as well as a separate internal list of members (Doc No. 36]). Because plaintiff has established that he is a member, he is entitled to a declaratory judgment to that effect, and should be paid his share of the profits. In addition, 88 Harborview is liable for breach of contract and conversion. (mem at 12-13) Without citing to any evidence, plaintiff also argues that because Qian He claimed Liu's shares in 88 Harborview, she is liable for tortious interference with the contract between Liu and 88 Harborview (*id.* 14-15). Liu requests leave to amend his complaint to add this claim.

With regard to defendant Qian He's counterclaims, plaintiff argues that she has no proof of an agency arrangement. Although she claims that the money used to invest in the Property was money that her late husband obtained from the sale of a restaurant in Montana, such a sale does not appear on Chen and He's joint tax returns, nor does He provide any other proof of the sale, or that Chen gave money to plaintiff. For He to succeed on her counterclaims would mean enforcement of an illegal contract through which He and Chen would have laundered their unreported income (*id.* at 15, citing *Carr v Hoy*, 2 NY2d 185 [1957]); *Stone v Freeman*, 298 NY 268, 271 [1948]; *Bonilla v Rotter*, 36 AD3d 534 [1st Dept 2007]).

Plaintiff also argues that He is estopped from claiming that the funds plaintiff invested in 88 Harborview belonged to her late husband because such a representation would be contrary to the representations made by Chen and He on their joint tax returns (*id.* at 18, citing *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009] ["A party to litigation may not take a position contrary to a position taken in an income tax return."]; *Meyer v Insurance Co. of America*, 1998 WL 709854 [SDNY 1998]). The tax documents show that Chen purchased the Property in 2005 for $385,000, and realized a loss of $35,000 when the Property was later sold (mem at 20-21, Doc. No. 63). He cannot now argue that her husband already owned the property and that the 2005 sale was not an actual sale, having received tax benefits from the loss. Chen and He also did not report rental income until 2006, and so He is estopped from arguing otherwise (mem at 21).

Plaintiff also argues that the membership certificate "expresses the contract" between the company and the individual members (*id.*, citing *Peets v Manhasset Civil Engineers*, 4 Misc2d 683, 688 [Sup Ct Nassau County] ["It [the stock certificates] expresses the contract between the shareholders and the corporation and his co-shareholders."]). Since the membership certificate is unambiguous, parol evidence may not be permitted to show that it is false (*id.* at 22, citing *Cooper v Cooper & Clement, Inc.*, 198 AD2d 812 [4th Dept 1993]).

Finally, plaintiff claims entitlement to a declaratory judgment that he is a member of 88 Harborview and entitled to a pro rata share of future distributions, as well as a monetary judgment in the amount of $425,000 ($300,000 capital contribution + $125,000 in prejudgment interest) (*id.* at 24). Plaintiff also contends he is owed $7,925 from the sale of two condominium units, and $9,402.50 on the sale of Yeung's condominium unit (*id.* at 25).

B. Defendants' Opposition

In opposition, defendants argue that although the documents presented by plaintiff may be relevant, they do not entitle plaintiff to summary judgment as their evidence raises triable issues of fact. First, there are four other membership unit holders who assigned their interests back to Chen's estate or beneficiary when asked to do so (Docs. No. 106; 98, ¶ 69; and 116). Second, plaintiff did not have the funds to purchase the Property or the membership stake in 88 Harborview, and has an uncertain memory of the Property transaction. Third, plaintiff's testimony regarding a loan to purchase the Property is contradicted by the affidavit of Chen's first wife, Chen Sai Zhu Chen. Fourth, Cheung, the managing member of 88 Harborview testified during his deposition that

plaintiff did not assert ownership over the units until a year after Chen's death (Chen Rule 19-a, ¶ 58).

Regarding parol evidence, defendants argue that the operative document is not the membership certificate, but the Operating Agreement, and "notwithstanding the general merger clause in the Operating Agreement, the document is incomplete (and therefore ambiguous) on its face" (opp at 9, Doc. No. 99). The Operating Agreement refers to a Schedule A, "but there is no Schedule A" *(id.)*. Plaintiff himself goes outside the four corners of the agreement by looking to a handwritten list of members and the Membership Certificate (*id.*). "Defendants are arguing that the Operating Agreement is not a complete and fully integrated expression of the parties' intention and transaction, notwithstanding the boilerplate merger clause, and therefore extrinsic evidence is admissible" (*id.* at 10, citing *Mullen v Washburn*, 224 NY 413 [1918]). Defendants also argue that "the Parole [sic] Evidence Rule never bars extrinsic evidence concerning a collateral oral agreement where the written contract is not intended on its face to cover the collateral agreement" (*id.* at 10-11, citing *Traders National Bank of Rochester v La skin*, 238 NY 535 [1924]). "An oral collateral contract is admissible, even in the face of a merger clause, where: a) the agreement is collateral in form, b) the oral agreement does not contradict the written contract, and c) the oral [agreement] is an agreement that the parties would not ordinarily be expected to embody in the written contract" (*id.* at 11, citing *Theatrical Service*). All of these facts are true in this instance. The side agreement with a non-member is necessarily collateral in nature and would not be expected to be embodied in the written contract (*id.* at 12). The collateral agreement does not contradict the membership certificate, but rather "confirms the accuracy of the certificate" (*id.*).

Defendants argue that the portion of the membership certificate stating, "Inherit You Liang Chen" must be explained by extrinsic evidence (*id.*at 12-13), especially given that the holders of the other four membership certificates prepared in the same manner signed their shares over to Chen's estate or heirs following his death (*id.* at 13).

Regarding plaintiff's estoppel arguments, defendants argue that He has not taken a position inconsistent with the tax returns, no tax liability was avoided it is plaintiff's burden to show that plaintiff was the source of funds, and plaintiff seeks a windfall by arguing estoppel (*id.* at 14).

C. Plaintiff's Reply

In reply to defendants' first point, any side agreement to hold title to the Property creates an interest in real estate and is void pursuant to the statute of frauds. Use of the proceeds of the

sale of the Property constitutes a continuation of the same agreement and is likewise void (reply at 2). Defendants do not dispute in their opposition that the court cannot enforce an illegal contract, nor that the act of investing unreported and untaxed income through another person would constitute an illegal contract (reply at 3). For example, defendants contend that Chen invested the money he made from selling the Montana restaurant in the Property through Liu. However, that income is not reported on Chen's tax returns. During the time the Property was held under Liu's name, Chen did not pay taxes on rental income or capital gains. It is not plaintiff's burden to show that Chen was involved in an illegal tax scheme, but defendants' burden to rebut plaintiff's prima facie case for entitlement to summary judgment.

As to defendants' second point, plaintiff argues that defendants' proposed parol evidence is hearsay that contradicts an unambiguous agreement. Defendants misconstrue the cases they cite to improperly support their position. First, while defendants cite *Vermont Teddy Bear* for the proposition that "the Parol Evidence Rule finds its greatest (and strictest) application" when applied to carefully negotiated contracts between sophisticated parties, they cite no caselaw for the proposition that parol evidence is permitted when dealing with less sophisticated, unambiguous contracts (reply at 5). Defendants cite *Mullen* for the proposition that "extrinsic evidence is admissible to aid the Court in discovering the particulars" (opp at 10). However, what the court actually said is that the purpose of parol evidence, if admitted, is "not to enable the court to hear what the parties said, but to enable it to understand what they wrote as they understood it at the time" (244 NY at 421). Defendants also cite *Theatrical Supplies* with regard to its discussion of collateral agreements, but as in that case, here the alleged collateral agreement contradicts the written agreement (946 NYS2d 69 at *2 ["Cases in which an agreement is found to be wholly independent and collateral are relatively rare."]). The alleged contract is not collateral and would be expected to be part of the written contract because it changes who the party to the agreement is. Where contracts involve a nominal and beneficial owner, contracts use language like "as agent for" to indicate that information. "One would only expect such an agreement to be oral, instead of written, if the purpose of the agreement was to commit a fraud" (reply at 7).

Plaintiff also point out that defendants concede they are estopped from taking a position inconsistent with their tax returns (reply at 8). They have not opposed the portion of plaintiff's motion seeking to conform it to the evidence, nor that they should be held jointly and severally

liable for judgment (reply at 9). Finally, plaintiff complains that defendants' counter-statement of fact is "argumentative, conclusory, and based upon hearsay and speculation" (reply at 10-15).

IV. Discussion

There can be no dispute that Liu has legal title to five (5) units of 88 Harborview as is evidenced by the membership certificate that bears his name (Doc. No. 37). This fact is not dispositive as the issue to be decided is whether there was an oral side agreement between Liu and Chen reserving beneficial ownership of the units to Chen and, if so, whether Liu is obliged to assign those units to Chen's estate. The primary evidence of the oral agreement consists of the following: (i) deposition testimony and an affidavit from Cheung Yeung, a founder and managing member of 88 Harborview, that he knew the money for Liu's shares came from Chen since he managed the company's finances, that there were four other membership holders who assigned their interests to Chen's estate once he died, and that plaintiff did not assert ownership over the units until a year after Chen's death (Yeung aff, Doc. No. 93, ¶¶ 9, 14-15, 22); (ii) deposition testimony from Chen's wife Qian He that she knew plaintiff did not have the money to purchase the Property in 2002 or the membership stake in 88 Harborview in 2005 (Sferazza affirmation, exhibit A [Doc. No. 100]); and (iii) testimony from the plaintiff regarding a loan to purchase the Property that is contradicted by the affidavit of Chen's first wife, Chen Sai Zhu Chen (*compare* NYSCEF Doc No. 122 *with* Doc. No. 92).

The parol evidence rule does not bar extrinsic evidence concerning a collateral oral agreement where the written contract is not intended on its face to cover the collateral agreement (*see Traders National Bank of Rochester v La skin*, 238 NY 535 [1924]). Evidence of an oral collateral contract is admissible, even in the face of a merger clause, where: a) the agreement is collateral in form, b) the oral agreement does not contradict the written contract and c) the oral agreement is an agreement that the parties would not ordinarily be expected to embody in the written contract (*id.* at 540). Cases in which an agreement was found to be wholly independent and collateral are relatively rare (*see Theatrical Service and Supplies v Gram Products*, 946 NYS 2d 69 at *2, Sup Ct Suffolk Co [2012]). Such may be the case here. First, the alleged agreement is collateral in form as it is an understanding between two individuals unrelated to the affairs of the company. Second, nothing in the alleged oral agreement contradicts the written agreement. Liu is the record owner of the units. However, under the terms of the side agreement, Liu purportedly held them for the benefit of Chen and has an independent obligation to assign the units

to Chen's estate. Indeed, this intention may be reflected on the face of the five certificates issued at the same time in the names of plaintiff Liu and non-parties Lu Tao Chen, Yuan Pan Zheng and Tian Ping Zhang (Doc. No. 106). Each of these certificates contain the legend "Inherit You Liang Cheng." Notably all of these certificate holders except Liu transferred his interest in 88 Harborview to Chen's estate. Third, the collateral oral agreement at issue here would not be expected to be embodied in the operating agreement. If the agreement exists, it is between a member and a non-member for the non-member providing to be the member of record for the benefit of another. The existence or non-existence of the alleged collateral agreement cannot be decided on this motion. A trial to determine the facts is required unless the evidence to be considered is excludable as a matter of law.

Plaintiff asserts that any purported oral agreement for Liu to hold title to the Property for Chen's benefit is barred by the statute of frauds (reply at 2) as codified at General Obligations Law § 5-703(3). The statute states:

> "A Contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith[.]"

This provision does not apply because this case concerns ownership of units in a limited liability company. Those units do not constitute interests in personal, not real property.

The parol evidence rule does not apply because the alleged collateral oral agreement is separate from the 88 Harborview operating agreement. Defendants do not claim that the oral agreement alters the terms of the operating agreement in any way. The written contract is not intended on its face to cover the collateral oral agreement (*see Traders Nat'l Bank of Rochester v La skin*, 238 NY 535 [1924]).

Regarding the claim that defendant He as administratrix of Chen's estate is estopped from claiming the funds Liu invested in 88 Harborview belonged to Chen's estate since Chen's widow asserted contrary facts in the estate's 2010 tax return, Liu has not made out a prima facie case of unclean hands, much less shown there are no material issues of fact sufficient to avoid a trial. For example, Liu has not demonstrated that there was any obligation to report and, if so, that there are any estate taxes due (*see Rotuba Extruders*, 46 NY2d at 231 [holding that summary judgment should be denied where there is any doubt as to the existence of triable issues of fact]).

A. Count 1 – Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

It is undisputed the plaintiff was a member of 88 Harborview held units in that entity and has not received distributions that he would be entitled to as a member pursuant to Article VII of the operating agreement (*see* NYSCEF Doc No. 37 at Art. VII). However, defendants assert that another oral agreement, collateral to the contract, exists and obligates Liu to relinquish ownership in the units to Chen's estate.

B. Count 2 – Declaratory Judgment

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (Civil Practice Law and Rules 3001). "Under the principle that a court may legitimately exercise judicial discretion by declining declaratory relief where the plaintiff has another adequate remedy, courts have held that a declaratory judgment action should normally not be entertained when a full and adequate remedy is already provided through other judicial proceedings, such as . . . an action for breach of contract" (NYJUR DECLJUDS § 13). In this case, plaintiff has pleaded a cause of action for breach of contract. The court need not consider the additional remedy of declaratory judgment.

C. Count 3 – Estoppel

Plaintiff does not properly assert estoppel as a cause of action, but merely argues that the defendants should be estopped from arguing anything that contradicts the information stated in the estate tax returns. This count shall be dismissed pursuant to CPLR 3211(a)(7).

D. Count 5 – Conversion

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Colavitov New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton,* 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

Plaintiff's arguments as to conversion rest entirely on the breach of contract claim. Plaintiff has therefore not met his burden in establishing that he is entitled to summary judgment on conversion. In any event, 88 Harborview has held the funds at issue ($425,000) in an escrow account (Chens' Rule 19-a, ¶ 22; Goldfinger affirmation 28-29).

E. Qian He's Counterclaims

The plaintiff also appears to seek summary judgment on Qian He's counterclaims, which seek (1) a declaratory judgment declaring that any monies invested or contributed by plaintiff to 88 Harborview are an investment for the benefit of the Estate of You Liang Chen and that plaintiff has no interest or rights in that investment; (2) plaintiff breached a fiduciary duty to the estate; (3) plaintiff breached his agency agreement with Chen and his estate; (4) plaintiff committed fraud as against Qian He. The request is not properly presented. Further, the request must be denied in view of the above discussion.

F. Motion to Conform Complaint with Evidence per CPLR 3025 (c)

Plaintiff also seeks to amend the complaint pursuant to CPLR 3025 (c) to add a cause of action against Qian He for tortious interference with the contract. No formal motion and proposed amended complaint has been provided. CPLR 3025 (c) states that "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances."

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). In general, justification is a function of a number of circumstances, including the means employed, the nature of the rights interfered with and the relation between defendants and the parties to the contract (*see* Restatement, Second, Torts, § 767. Economic interest or justification is a defense to a claim of tortious interference with contract (*see Foster v Churchill*, 87 NY2d 744 [1996]). An economic interest sufficient to constitute justification does not require a strict ownership interest (*see E.F. Hilton Int'l Assocs. v Shearson Lehman Bros. Holding, Inc.*, 281 AD2d 362 [1st Dept 2001]). To overcome such defense, plaintiff must establish "either malice on the one hand, or fraudulent or illegal means on the other" (*id.*). The evidence upon which the request to amend is based is a letter that He sent to 88 Harborview demanding that proceeds from Liu's shares be distributed to the estate or placed in escrow (Doc. No. 42). There is also deposition evidence that both He and Chen's first wife believed that Liu's shares in 88 Harborview belonged to Chen, and each asked Liu to transfer the shares (*see* Doc. No. 92). This evidence does not bespeak malice or employment of either fraudulent or illegal means and Liu makes no such allegation. The request is denied.

For the reasons stated above, the motion is DENIED; and it is

ORDERED that counsel for the parties shall appear at a pre-trial conference at Part 49, Courtroom 252, on Tuesday, December 10, 2019 at 9:30 AM at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: October 30, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.