A CORPORATION DOES NOT OWE A FIDUCIARY DUTY TO ITS MEMBERS OR SHAREHOLDERS (FIRST DEPT).

The First Department, dismissing the complaint, noted that the breach-of-a-fiduciary-duty action was brought solely against the corporation, which does not owe its members or shareholders a fiduciary duty:

> "[I]t is well settled that a corporation does not owe fiduciary duties to its members or shareholders" ... . Here, while the complaint alleges that defendant's board of directors breached its fiduciary duty to plaintiff in refusing to approve the sale of certain units in the cooperative market to plaintiff, plaintiff brought this action solely against the cooperative corporation and thus, the complaint is dismissed. C & J Bros., Inc. v Hunts Point Term. Produce Coop. Assn., Inc., 2020 NY Slip Op 01454, First Dept 3-3-20

SANCTIONS IMPOSED FOR A DELAYED RESPONSE TO DISCOVERY DEMANDS WERE TOO SEVERE, EFFECTIVELY PRECLUDING PROOF OF COUNTERCLAIMS CENTRAL TO THE DEFENSE; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing the verdict in favor of plaintiff employees, determined the sanctions imposed upon the employer (appellants) for a delayed response to discovery demands were too severe and ordered a new trial. The plaintiffs alleged appellants breached oral employment contracts. The appellants in their counterclaims alleged plaintiffs breached their fiduciary duty by violating Securities and Exchange Commission (SEC) regulations and destroying and replacing handwritten notes about conversations with one of the appellants. The sanctions effectively prevented the appellants from demonstrating plaintiffs' violation of SEC violations and destruction of evidence:

> Pursuant to CPLR 3126, if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just." Although "[i]t is within the trial court's discretion to determine the nature and degree of the penalty," "[t]he sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" ... . Further, "the drastic remedy of striking a party's pleading . . . for failure to comply with a discovery order is appropriate only where [it is] conclusively demonstrate[d] that the non-disclosure was willful, contumacious or due to bad faith" ... .
>
> Although the court here did not strike a pleading, its ruling could fairly be viewed as having done so, since the precluded evidence was critical to the fiduciary duty claims. Moreover, the court's drastic sanctions were disproportionate to the alleged discovery malfeasance. It is unclear why a short continuance to give plaintiffs time to review the newly-produced documents would not have been a viable option, or why further curative instructions would not have sufficed. The record as a whole does not support a finding of willfulness or bad faith so as to justify the severe sanctions imposed ... . No basis exists to indicate that this was anything other than a disagreement over the scope of discovery. Indeed, the court at trial stated that the alleged discovery omissions "appear[] not to have been in bad faith." Beach v Touradji Capital Mgt., LP, 2020 NY Slip Op 00230, First Dept 1-14-20

THE COMPLAINT STATED A CAUSE OF ACTION TO DISGORGE LEGAL FEES PAID TO LAWFIRM WHICH IS ALLEGED TO HAVE REPRESENTED ADVERSE PARTIES IN THE SAME MATTER; THE ACTION TO DISGORGE FEES IS INDEPENDENT FROM ANY ACTION ALLEGING LEGAL MALPRACTICE OR BREACH OF A FIDUCIARY DUTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for forfeiture of legal fees on conflict of interest grounds:

> The complaint alleged that the plaintiff's decedent retained the defendant in 2005 to, among other things, analyze her ownership interest in Wilson [Corporation], including her right to certain retained earnings in the sum of $20 million. The complaint further alleged that, in January 2007, the defendant began acting as Wilson's corporate counsel, and, beginning in 2008, performed legal services for Wilson regarding the decedent's right to those retained earnings. * * *
>
> "An attorney who violates a disciplinary rule may be discharged for cause and is not entitled to fees for any services rendered" ... . A cause of action for forfeiture of legal fees based on an attorney's discharge for cause due to ethical violations may be maintained independent of a cause of action alleging legal malpractice or breach of fiduciary duty, and does not require proof or allegations of

damages … .

… [T]he complaint seeks forfeiture of legal fees paid to the defendant between January 2007 and August 2009 in connection with the plaintiff's decedent's claim against Wilson for retained earnings. The complaint alleges that the decedent retained the defendant in January 2007 to recoup the retained earnings from Wilson, that the defendant also represented and performed legal work for Wilson on that issue between 2008 and 2009, that the interests of the decedent and Wilson on that issue were adverse, and that the dual representation violated rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.0). The complaint further alleged that, as a result of its previous dual representation, the defendant was disqualified from representing the decedent's estate in a 2009 turnover proceeding against Wilson to collect the retained earnings. Contrary to the determination of the Supreme Court, these allegations are sufficient to state a viable cause of action to disgorge legal fees … . Baugher v Cullen & Dykman, LLP, 2019 NY Slip Op 04904, Second Dept 6-19-19

HANDWRITTEN PROVISION OF A LETTER OF INTENT CONTROLS, THE LETTER OF INTENT IS NOT A BINDING CONTRACT, BREACH OF A FIDUCIARY DUTY AND TORTIOUS INTERFERENCE WITH CONTRACT CAUSES OF ACTION PROPERLY DISMISSED IN THE ABSENCE OF A BINDING CONTRACT, UNJUST ENRICHMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE THE BENEFIT TO THE DEFENDANTS WAS UNIDENTIFIED (SECOND DEPT).

The Second Department determined that a letter of intent concerning the development of defendant-church's property was not a binding contract because of a handwritten provision. Because there was no binding contract, the fiduciary duty, joint venture, covenant of good faith, and tortious interference with contract causes of action were properly dismissed. The unjust enrichment cause of action was properly dismissed because the benefit allegedly received by defendants was not identified:

> "It is a fundamental principle of contract interpretation that when a handwritten or typewritten provision conflicts with the language of a preprinted form document, the former will control, as it is presumed to express the latest intention of the parties'" … . Here, there are inconsistent provisions in the letter of intent regarding whether the parties intended it to be a binding agreement. However, the parties modified the letter of intent, with a handwritten provision, to state that it is "not intended to constitute a binding contract." Accordingly, this handwritten provision controls over the conflicting printed provisions stating that the letter of intent will become binding after a period of five days … . …
>
> "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" … . A bare legal conclusion that it is against equity and good conscience to retain an unidentified benefit is insufficient to adequately allege that an asserted enrichment was unjust … . Here, the complaint does not identify the benefit the defendants allegedly obtained or explain why it is against equity and good conscience to allow the defendants to retain such benefit. FoxStone Group, LLC v Calvary Pentecostal Church, Inc., 2019 NY Slip Op 04916, Second Dept 6-19-19

RES JUDICATA APPLIES TO ISSUES WHICH COULD HAVE BEEN RAISED IN A SMALL CLAIMS ACTION, NO NEED TO PIERCE THE CORPORATE VEIL TO BRING A BREACH OF FIDUCIARY DUTY ACTION AGAINST A FORMER PARTNER IN A PROFESSIONAL CORPORATION, JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND RENDERED SUMMARY JUDGMENT WHERE NEITHER PARTY REQUESTED THAT RELIEF (SECOND DEPT).

The Second Department, modifying Supreme Court, determined: (1) although the Small Claims Act provides that collateral estoppel (issue preclusion) does not apply to fact-findings made in a small claims action, the doctrine of res judicata does apply to any issue which could have been, but was not, raised in the small claims action; (2) a breach of fiduciary duty cause of action does not entail piercing the corporate veil in a proceeding against a former partner in a professional corporation; (3) the judge should not have searched the record to render summary judgment when neither party requested that relief:

> … "[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary

relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" … . Contrary to the Supreme Court's finding, it is not necessary to pierce the corporate veil in order to maintain a cause of action alleging breach of fiduciary duty against former partners in a professional corporation. …

Since … neither party moved for summary judgment with respect to the counterclaims and none of the issues raised in the first, second, or third counterclaims were litigated in the summary judgment motion, or the small claims action, the Supreme Court should not have, in effect, searched the record and awarded the plaintiff summary judgment dismissing those counterclaims … . Weinberg v Picker, 2019 NY Slip Op 03400, Second Dept 5-1-19

DEFENDANT STATED VALID COUNTERCLAIMS FOR FRAUDULENT INDUCEMENT, BREACH OF FIDUCIARY DUTY AND NEGLIGENT MISREPRESENTATION IN THIS BREACH OF CONTRACT ACTION, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant had stated counterclaims for fraudulent inducement, breach of a fiduciary duty, and negligent misrepresentation in this breach of contract action:

> Sharbat's [plaintiff's] statements that he had "massive investors" who were prepared to invest in defendant and that he "had obtained high-value investors for [defendant] in Israel," while partially hyperbolic, make concrete factual representations that go beyond mere puffery. Simply stated, Sharbat asserted that he had investors lined up and ready to go, when in fact he had none. Since plaintiffs were retained by defendant to bring investors in, these statements constitute misrepresentations of material facts for purposes of the fraudulent inducement counterclaim … . …
>
> [The] allegations plead a broker-principal relationship sufficient to impose a fiduciary duty on plaintiffs vis-a-vis defendant … . Plaintiffs' fiduciary role carried with it a duty to disclose material facts … . …
>
> Defendant alleges that plaintiffs negligently misrepresented that they were able to represent it in obtaining investors and facilitating the issuance of securities to raise capital for it, that they were skilled in obtaining financing from "high-value investors," that they "had qualified, high-value investors who were to invest in [defendant]," and that plaintiffs themselves were qualified to invest in defendant. … These allegations state a counterclaim for negligent misrepresentation … . Solomon Capital, LLC v Lion Biotechnologies, Inc., 2019 NY Slip Op 02621, First Dept 4-4-19

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE FRAUD AND BREACH OF FIDUCIARY DUTY CAUSES OF ACTION, DEFENDANT PURCHASED THE PROPERTY FOR HERSELF WHILE ACTING AS PLAINTIFF'S REAL ESTATE BROKER (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment on the fraud and breach of fiduciary duty causes of action against defendant (Maureen), a real estate broker. The complaint alleged that Maureen purchased the property herself while acting as plaintiff's broker:

> "[A] real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal"… . "[I]n dealing with the principal, a real estate broker must act honestly and candidly, and the broker must disclose all material information that it may possess or obtain concerning the transactions involved"… . Moreover, "[w]here a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties" … . "A breach of this duty of loyalty by a real estate broker may constitute a fraud for which the broker is answerable in damages" … . Edwards v Walsh, 2019 NY Slip Op 01197, Second Dept 2-20-19

BREACH OF FIDUCIARY DUTY CAUSE OF ACTION MUST BE PLED WITH

PARTICULARITY (FOURTH DEPT).

The Fourth Department, in finding the breach of fiduciary duty cause of action was sufficiently pled, noted that the cause of action must be pled with particularity pursuant to CPLR 3016 (b). Cohen & Lombardo, P.C. v Connors, 2019 NY Slip Op 00755 [169 AD3d 1399], Fourth Dept 2-1-19

BREACH OF FIDUCIARY DUTY, FRAUD AND JUDICIARY LAW 487 ALLEGATIONS STEMMING FROM DEFENDANT LAW FIRM'S REPRESENTATION OF PLAINTIFF IN DIVORCE PROCEEDINGS DUPLICATED THE LEGAL MALPRACTICE ALLEGATIONS, THE COMPLAINT SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined that plaintiff's legal malpractice, breach of fiduciary duty, fraud and Judiciary Law 487 causes of action against the law firm which represented her in divorce proceedings should have been dismissed. The opinion is fact-specific. The legal issues mentioned include: the breach of fiduciary duty allegations were identical to the legal malpractice allegations and therefore required the "but for" element of legal malpractice (which was missing), and the fraud and Judiciary Law 487 claims were identical and duplicated the legal malpractice allegations, requiring dismissal. Knox v Aronson, Mayefsky & Sloan, LLP, 2018 NY Slip Op 09030, First Dept 12-27-18

IN THIS CPLR ARTICLE 4 PROCEEDING BROUGHT BY THE ATTORNEY GENERAL, THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE RESPONDENT NOT-FOR-PROFIT CORPORATION VIOLATED ITS FIDUCIARY DUTY AND THE NOT-FOR-PROFIT-CORPORATION LAW WITH RESPECT TO ITS AFFILIATE NOT-FOR-PROFIT CORPORATIONS AND WHETHER THE BUSINESS JUDGMENT RULE APPLIED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a decision too fact-specific to be fairly summarized here, determined issues of fact were presented about whether certain actions taken by respondent not-for-profit corporation (TLCN) breached its fiduciary duty to its not-for-profit corporation affiliate (Coburn) and violated the Not-for-Profit Corporation Law. The action was brought by the Attorney General in a special proceeding pursuant to CPLR article 4 which is similar to a summary judgment motion. The Third Department further held there were questions of fact whether the business judgment rule could properly be applied:

> … Supreme Court acted properly in ordering TLCN to adopt a conflict of interest policy … .
>
> … [I]nasmuch as Coburg is an independent corporation, TLCN may not operate Coburg in a manner inconsistent with Coburg's purpose, nor engage in related party transactions without complying with the relevant provisions of the Not-For-Profit Corporation Law. * * *
>
> Genuine issues of material fact exist as to whether respondents violated their duty to Coburg by improperly utilizing its surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest. …
>
> … [T]he business judgment rule has no place where corporate officers or directors take actions that exceed their authority under the relevant corporate bylaws … , or where they make decisions affected by an inherent conflict of interest… . There are issues of fact in the present record that preclude application of the business judgment rule, specifically regarding whether respondents exceeded their authority by improperly utilizing Coburg's surplus to benefit TLCN and its other affiliates and by engaging in related party transactions that were not in Coburg's best interest. Matter of The People of The State of New York v The Lutheran Care Network, Inc., 2018 NY Slip Op 08727, Third Dept 12-20-18