UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STREET-WORKS DEVELOPMENT LLC and CRESTWOOD LOFT PARTNERS LLC,
Plaintiffs,

v.

JOHN H. RICHMAN,
Defendant-Third-Party Plaintiff,

v.

KENNETH NARVA, RICHARD HEAPES, and JEFFREY LEVIEN,
Third-Party Defendants.

MEMORANDUM DECISION

13 CV 774 (VB)

Briccetti, J.:

In this diversity action, plaintiffs Street-Works Development LLC ("Street-Works") and Crestwood Loft Partners LLC ("Loft") bring state law claims against defendant John H. Richman for a declaratory judgment and tortious interference with business relations.[1] Pro se defendant John H. Richman brings counterclaims, as well as claims against third-party defendants Kenneth Narva, Richard Heapes, and Jeffrey Levien (collectively with plaintiffs, "SWD"), for breach of contract, breach of fiduciary duty, constructive trust, and fraud. (Doc. #67).

SWD now moves to dismiss defendant's counterclaims and amended third-party complaint ("ATPC") for failure to state a claim. (Docs. ## 61, 68).

For the following reasons, the motion to dismiss is GRANTED.

The Court has subject matter jurisdiction under 28 U.S.C. § 1332.

[1] This is the Court's second Memorandum Decision in this case, having previously granted in part and denied in part defendant's motion to dismiss. (Doc. #26). Familiarity with that decision is presumed.

BACKGROUND

In deciding the pending motion, the Court accepts as true all well-pleaded factual allegations in the ATPC and defendant's opposition to the motion, and draws all reasonable inferences in defendant's favor.

In March and April of 2011, defendant and third-party defendants met to discuss a proposed partnership to develop and reposition undervalued properties. Defendant alleges during these meetings, third-party defendants "repeatedly represented themselves as very experienced developers." (ATPC ¶ 7). Specifically, defendant alleges:

- "During [defendant's] [] initial meeting with Kenneth Narva and Richard Heapes on March 8, 2011, about 5:00 PM in the 4th floor conference room at 30 Glenn Street, White Plains, New York 10603, Narva stated that he had been more than an architect and planner in certain projects he had been involved with. Narva claimed that over the past twenty-five years he had been the developer on and completed more than $1 Billion Dollars of mixed-use developments such as Blue Back Square, New Roc City and Ridgeway Center." (ATPC ¶ 8).

- At the March 8 meeting, Narva also claimed "he had seasoned employees with prior experience at other development companies" within his consultant companies, and that [he] could perform at a very high level assisting in all the developer's necessary tasks." (ATPC ¶ 10).

- At the March 8 meeting, "Heapes claimed . . . he had been the co-developer with Narva on Blue Back Square." (ATPC ¶ 11).

- "On March 15, 2011 about 2:30 PM, in the 4th floor conference room at 30 Glenn Street, White Plains, New York 10603, [defendant] met with Levien. Levien described his experience with real estate development and construction. In particular, Levien claimed to have more than 20 years of real estate development and construction experience including the development of a shopping center, condominiums and office buildings." (ATPC ¶ 14).

- "On April 7, 2011 about 1 PM in the 4th floor conference room at 30 Glenn Street, White Plains, New York 10603, [defendant] met again with Levien . . . [who claimed he] had seasoned employees with prior experience at development companies [] that could perform at a very high level assisting [SWD] in all the developer's necessary tasks." (ATPC ¶¶ 15, 17).

According to defendant, after agreeing to material terms at the March 8, 11, 15 and April 7, 2011, meetings, the parties finalized the partnership on April 15, 2011. (ATPC ¶¶ 18-20). Defendant alleges the written terms[2] called for him to receive "40% of the partnership profits and fees (cash flow) and the first $100,000 received off the top of the initial developer's fee." (ATPC ¶ 21). The agreement also contemplated equal status for all partners as "principals." (ATPC ¶ 18).

From April 2011 to September 2012, defendant claims he made multiple trips to New York and Connecticut to scout potential properties for plaintiffs, and further claims he advanced his expenses for the trips, "well in excess of $60,000." (ATPC ¶ 32).

On July 1, 2011, Street-Works executed a purchase and sale agreement ("PSA") for real property in Tuckahoe, New York. Defendant alleges he and third-party defendants intended to develop the property into forty-seven residential units, as well as a commercial retail space (the "Project"). (ATPC ¶¶ 33-34). Defendant also alleges that on June 26, 2012, Cigna Affiliates Realty Investment Group, LLC, offered to make an equity investment in the Project in the form of a non-binding Letter of Intent ("LOI"), and in August 2012, Principal Global Investors executed a "Principal Term Sheet" to provide a $10,440,000 construction loan for the Project. (ATPC ¶¶ 41, 44).

Defendant further alleges he and the third-party defendants agreed to proceed expeditiously with the Project's development in light of the contingent financing. (ATPC ¶ 46). But, third-party defendants' "incompetent and non-existent" performance as developers caused delays and unexpected costs for the Project. (ATPC ¶ 47).

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[2] Defendant appears to allege the partnership agreement was finalized on April 15, 2011, then again on November 10, 2011. While defendant alleges the agreement was formalized in writing on April 15, it is unclear from the ATPC whether the agreement was formalized in writing again on November 10. Defendant has not submitted with his ATPC or opposition any of the written agreements to which he refers.

According to defendant, in light of his unhappiness with third-party defendants' management of the Project, as well as third-party defendants' own concerns, the relationship between defendant and third-party defendants began to sour. Defendant alleges that in June 2012, without his consent, Street-Works assigned the PSA to plaintiff Loft, an entity in which defendant had no interest. (ATPC ¶¶ 65, 67). On October 3, 2012, Street-Works sent a cease and desist letter to defendant, informing him his services were no longer required, he was merely a consultant for the Project on an at-will basis, and demanding he stop holding himself out as a partner with the Project. (ATPC ¶ 77). On October 5, 2012, defendant responded, stating he was a partner in the Project. (ATPC ¶ 78).

On February 4, 2013, plaintiffs brought the instant action, claiming defendant's refusal to recuse himself from the Project caused Cigna to renege on closing the LOI, which ultimately resulted in the failure of the Project.

Defendant now brings counterclaims and third-party claims, alleging Street-Works and third-party defendants breached the partnership agreement, and their fiduciary duty to him as partners, by mismanaging the Project; were unjustly enriched when they assigned the PSA to Loft; and made fraudulent statements to him in the Spring of 2011.

DISCUSSION

I. Standard of Review

A. Rule 9(b)

Under Rule 9(b), when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "However, because courts 'must not mistake the relaxation of Rule 9(b)'s specificity requirement regarding condition of

mind for a license to base claims of fraud on speculation and conclusory allegations [,] . . . plaintiffs must allege facts that give rise to a strong inference of fraudulent intent.'" In re Agape Litig., 681 F. Supp. 2d 352, 361 (E.D.N.Y. 2010) (quoting Acito v. IMCERA Grp., Inc., 47 F.3d 47, 52 (2d Cir. 1995) (internal quotation marks and citations omitted)). A strong inference of fraudulent intent may be established either by facts showing defendant had both motive and opportunity to commit fraud, or facts constituting strong circumstantial evidence of conscious misbehavior or recklessness. Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 187 (2d Cir. 2004).

B. Rule 12(b)(6)

In deciding a Rule 12(b)(6) motion to dismiss, the Court evaluates the sufficiency of the operative complaint under the "two-pronged approach" announced by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). First, defendant's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." Id. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal,

556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Because defendant is proceeding pro se, the Court must construe his submissions liberally and interpret them "to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks omitted). "Even in a pro se case, however . . . threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation marks omitted). Nor may the Court "invent factual allegations" defendant has not pleaded. Id.

II. Existence of a Partnership

> "To demonstrate the existence of a partnership, a plaintiff must prove four elements: (1) the parties' sharing of profits and losses; (2) the parties' joint control and management of the business; (3) the contribution by each party of property, financial resources, effort, skill, or knowledge to the business; and (4) the parties' intention to be partners."

Kidz Cloz, Inc. v. Officially for Kids, Inc., 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004).

As to the first element, "[i]t is axiomatic that . . . a partnership [] include an agreement between the principals to share losses as well as profits." Kosower v. Gutowitz, 2001 WL 1488440, at *6 (S.D.N.Y. Nov. 21, 2001);[3] see also Dinaco, Inc. v. Time Warner, Inc., 346 F.3d 64, 68 (2d Cir. 2003) ("An indispensable essential of a contract of partnership . . . is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses." (quoting Steinbeck v. Gerosa, 4 N.Y.2d 302, 317 (1958)).

Defendant asserts he and third-party defendants agreed to share losses because their written agreement entitled defendant to receive "40% of the partnership profits and fees (cash flow)." (ATPC ¶ 21). Defendant argues an agreement to share cash flow is an agreement to

[3] Defendant will be provided with copies of all unpublished opinions cited in this decision. See Lebron v. Sanders, 557 F.3d 76, 79 (2d Cir. 2009).

share both profit and loss. Additionally, defendant argues he and third-party defendants manifested their intent to share losses when defendant incurred $60,000 in expenses scouting properties.

The Court disagrees.

To create a partnership, the partners "must agree, either expressly or impliedly, to share liability for the possible obligations, debts, and losses" of the partnership. Cosy Goose Hellas v. Cosy Goose USA, Ltd., 581 F. Supp. 2d 606, 622 (S.D.N.Y. 2008).[4]

Defendant has not adequately alleged an express agreement to share losses, as a written agreement entitling defendant to compensation from cash flow is simply an agreement to share in the purported partnership's net profits. Cash flow is defined as "[t]he movement of cash through a business, as a measure of profitability or liquidity," or "[t]he cash generated from a business or transaction," or "[c]ash receipts minus cash disbursements for a given period." BLACK'S LAW DICTIONARY 245 (9th ed. 2009). Given these definitions, defendant has plausibly alleged he and third-party defendants expressly agreed to deduct business expenses and any losses from defendant's share of profits. However, defendant has not plausibly alleged he and third-party defendants agreed defendant would be jointly responsible for "making good" future net losses incurred during the project. Steinbeck v. Gerosa, 4 N.Y.2d at 317. An agreement to share net profit is not enough to satisfy the law's demanding requirement that partners expressly agree how to proceed when losses exceed profits.

Defendant has also failed plausibly to allege the purported partners impliedly agreed to share losses. Construing the ATPC to raise the strongest argument, defendant asserts precise profit and loss allocation among partners is not required to form a partnership; rather, the law

[4] Cosy Goose Hellas v. Cosy Goose USA, Ltd. concerned the existence of a joint venture. 581 F. Supp. 2d 606 (S.D.N.Y. 2008). However, both a joint venture and partnership require an express or implied agreement between the parties to share losses.

will imply a loss sharing agreement in certain circumstances. However, this argument fails for two reasons.

First, the Court can only construe an implied agreement to share losses "in cases where there is no reasonable expectation among the parties that losses will result from a singular transaction or a limited series of business transactions." Cosy Goose Hellas v. Cosy Goose USA, Ltd., 581 F. Supp. 2d at 623 (collecting cases). Here, defendant asserts the alleged partnership was not a joint venture or created for a limited series of business transactions. Rather, defendant states the purpose of the partnership "was not a single real estate project but a continuing business involving multiple independent real estate projects." (Def.'s Opp. at 4).

Second, defendant's $60,000 advance for his business expenses does not demonstrate he impliedly agreed to bear the purported partnership's losses. See Dinaco, Inc. v. Time Warner, Inc., 346 F.3d at 68 (finding the parties had not agreed to share losses even though defendant provided administrative services to plaintiff and forgave plaintiff's past due rent). If "simply expending efforts to set up a [partnership] were sufficient to satisfy the essential element of sharing of losses, the requirement could nearly always be satisfied." Artco, Inc. v. Kidde, Inc., 1993 WL 962596, at *10 (S.D.N.Y. Dec. 28, 1993).

Defendant has failed plausibly to allege he and third-party defendants expressly or impliedly agreed to share losses. Thus, the ATPC does not sufficiently allege the existence of a partnership agreement.

III. Claims for Breach of Contract and Fiduciary Duty, and Constructive Trust

Defendant alleges third-party defendants breached the purported partnership agreement by their inadequate performance as developers on the Project; breached their fiduciary duty to him when they failed to act in his best interest as his partners; and claims he is entitled to a

constructive trust in the PSA, now assigned to Loft. These claims are all dependent upon the existence of a partnership agreement, confidential relationship, or fiduciary relationship between defendant and third-party defendants. See Fischer & Mandell LLP v. Citibank, N.A., 632 F.3d 793, 799 (2d Cir. 2011) ("Under New York law, a breach of contract claim requires proof of (1) an agreement, (2) adequate performance by the plaintiff, (3) breach by the defendant, and (4) damages."); Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 767 F. Supp. 1220, 1231 (S.D.N.Y. 1991), rev'd on other grounds, 967 F.2d 742 (2d Cir. 1992) (fiduciary duty exists when "one person has reposed trust or confidence in another who thereby gains a resulting superiority or influence over the first"); In re First Cent. Fin. Corp., 377 F.3d 209, 212 (2d Cir. 2004) ("New York law generally requires four elements for a constructive trust: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer . . . made in reliance on that promise; and (4) unjust enrichment.").

Defendant has failed sufficiently to allege a partnership agreement between him and third-party defendants. (See Section II, supra). Further, defendant's ATPC does not identify an agreement, fiduciary relationship, or confidential relationship, other than the alleged partnership, between him and third-party defendants.[5] As such, the ATPC does not state a claim for breach of contract, breach of fiduciary, or constructive trust. These claims are therefore dismissed.

IV. Claim for Fraud

Defendant has pleaded fraud with particularity; however, he has failed sufficiently to plead two elements of a claim for fraud, i.e., reasonable reliance and damages.

Defendant has met the heightened pleading standards of Rule 9(b), as the ATPC specifies

[5] Even if the Court were to construe an allegation of a fiduciary relationship between defendant and third-party defendants apart from the alleged partnership from defendant's ATPC, parties who participate in an arms-length transactions do not create fiduciary relationships. Solutia Inc. v. FMC Corp., 456 F. Supp. 2d 429, 447 (S.D.N.Y. 2006).

the "'who, what, when, where and how' of the alleged misstatements." In Re Ambac Fin. Group, Inc. Sec. Litig., 693 F. Supp. 2d 241, 275 (S.D.N.Y. 2010) (quoting Garber v. Legg Mason, Inc., 537 F. Supp. 2d 597, 614 (S.D.N.Y. 2008)). While the ATCP does not raise a particularly strong inference of fraudulent intent, construing defendant's ATPC to raise the strongest argument, defendant has drawn a sufficient connection between the fraudulent statements (third-party defendants' experience as developers) and third-party defendants' motive (to induce defendant, an experienced developer, into doing business with inexperienced individuals).

Despite defendant's satisfaction of Rule 9(b)'s pleading standards, he has not sufficiently pleaded the elements of fraud.

"Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." Wynn v. AC Rochester, 273 F.3d 153, 156 (2d Cir. 2001) (citing Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (1996)).

Defendant has plausibly alleged the first three elements. However, defendant has failed sufficiently to allege his reliance on the alleged falsities was reasonable. Reasonable reliance cannot be met where a party "has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means." Arfa v. Zamir, 76 A.D.3d 56, 59 (1st Dep't 2010), aff'd 17 N.Y.3d 737 (2011). "Only when matters are held to be peculiarly within defendant's knowledge[] [is it] said that plaintiff may rely without prosecuting an investigation," because plaintiff would have "no independent means of ascertaining the truth."

Crigger v. Fahnestock & Co., 443 F.3d 230, 234 (2d Cir. 2006). "Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament." Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1543 (2d Cir. 1997).

Because defendant himself was an experienced developer, he plainly had independent means to ascertain the truth regarding third-party defendants' experience as developers. Defendant admits he "had been the developer on real estate projects since he left graduate school in 1978," and claims he had "partnered with high net-worth individuals" and "successfully orchestrated over $3 Billion of real estate projects nationwide." (ATPC ¶ 40). Defendant also had first-hand knowledge of Heapes's experience as a developer, as Heapes had worked for defendant prior to 2011. (ATPC ¶ 11). Based on the allegations of the ATPC, defendant could have investigated third-party defendants' claims about their development experience on specific projects, as well as their claims regarding their consultant companies. That he failed do so means he cannot plausibly plead reasonable reliance on third-party defendants' alleged misstatements.

As to the fifth element of a claim for fraud, defendant claims third-party defendants' fraudulent statements caused him to suffer "compensatory, expectancy, special and punitive damages" in excess of $20 million. (ATPC ¶ 103). This allegation of damage fails for three reasons.

First, defendant is not entitled to receive lost profits for his fraud claim. See Solutia Inc. v. FMC Corp., 456 F. Supp. 2d at 453 ("New York law does not allow a plaintiff to recover expectancy damages in an action based in fraud.").

Second, defendant has not sufficiently stated his claim for special damages. Rule 9(g) requires an item of special damage to be "specifically stated." Fed. R. Civ. P. 9(g). A general monetary allegation stated in round numbers is generally not considered to reflect the specific damages required of special damages. See TADCO Constr. Corp. v. Dormitory Auth. of N.Y., 700 F. Supp. 2d 253, 274 (E.D.N.Y. 2010).

Lastly, defendant's estimation of damages is conclusory, as his only explanation for his $20 million in damages stems from his loss of "the opportunity to develop the Project and the minimum of $400 Million . . . of other properties." (ATPC ¶ 95). As discussed above, expectancy damages are not recoverable in an action for fraud, and defendant fails to articulate any other theory of damage in his ATPC.

Therefore, defendant has failed plausibly to allege reasonable reliance and damages, and his claim for fraud is dismissed.

V. Leave to Replead

A district court ordinarily should not dismiss pro se claims for failure to state a claim "without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (quoting Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir.1999)). A court must grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999).

By his own account, defendant is a sophisticated person who has already been granted leave to amend once after SWD initially moved to dismiss. (Docs. ##60, 66). Moreover, the ATPC and defendant's opposition to SWD's motion to dismiss—even liberally construed—

contain no allegations suggesting he has a valid claim that he has merely "inadequately or inartfully pleaded" and therefore should "be given a chance to reframe." Cuoco v. Moritsugu, 222 F.3d at 112.

Accordingly, the Court declines to grant defendant leave to replead.

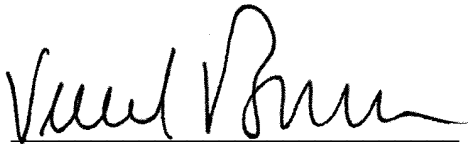
CONCLUSION

SWD's motion to dismiss is GRANTED.

The Clerk is instructed to terminate the motion (Docs. ## 61, 68), and terminate third-party defendants Kenneth Narva, Richard Heapes, and Jeffrey Levien.

Dated: February 3, 2015
White Plains, NY

SO ORDERED:



Vincent L. Briccetti
United States District Judge