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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

DANIEL GALE AGENCY, INC.,

Plaintiff,

- against -

MARK GRAUE, MIRIAM GRAUE, DONOVAN
& GIANNUZZI, LLP, BRYAN MCCROSSEN,
GURINDER SINGH, GUIRPREET KAUR,
PRIYA 98 ENTERPRISES INC., and PRIYA 98
REAL ESTATE, LLC,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 6335/10

Motion Sequence No. 005

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u> </u>
Briefs: Plaintiff's / Petitioner's	<u>3</u>
Defendant's / Respondent's	<u>4</u>

The defendants Donovan & Giannuzzi LLP and Bryan McCrossen move pursuant to CPLR 3211 (a) (7) to dismiss the plaintiff's fifth cause of action for its failure to state a cause of action upon which relief can be granted. Donovan & Giannuzzi LLP and Bryan McCrossen contend there was no contractual nor fiduciary relationship among them and the plaintiff; the defense attorneys are immune from liability for good faith acts taken in the course of representing the real estate sellers; the fraud claim against the sellers is merely a

breach of contract claim, to wit there was no actual fraud for the defense attorneys to aid and abet; there is no inference in the complaint the defense attorneys knew of and intended to aid the sellers in the commission of a fraud; the defense attorneys could not have been the proximate cause of an injury to the plaintiff; the complaint fails to plead its claims with particularity required by CPLR 3016 (b) and the claims against McCrossen should be dismissed because he was acting in a capacity as an employee of Donovan & Giannuzzi LLP. These defendants submit specific documents in support of their motion.

The plaintiff opposes the motion, and adds the attorney for Donovan & Giannuzzi LLP and Bryan McCrossen rejected the plaintiff's demands, and never responded to its notice of discovery and inspection. The plaintiff contends the fifth cause of action for aiding and abetting a fraud does not require a relationship among the plaintiff and Donovan & Giannuzzi LLP and Bryan McCrossen. The plaintiff asserts these defendants actively participated in fraud, and the plaintiff has sufficiently alleged a nexus between Donovan & Giannuzzi LLP and Bryan McCrossen and the fraud. The plaintiff avers it pled with sufficient particularity the underlying cause of action for fraud. The plaintiff points out it submitted documentary evidence to support its allegations Donovan & Giannuzzi LLP and Bryan McCrossen knew of and aided the sellers' fraud. The plaintiff maintains the failure of Donovan & Giannuzzi LLP and Bryan McCrossen to draft the contract of sale to include the plaintiff was the proximate cause of the plaintiff's damages. The plaintiff asseverates McCrossen has personal liability here.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion including the memoranda of law. The Second Department holds:

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v. Martinez*, 84 N.Y.2d at 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference (*see Leon v. Martinez*, 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26) *Ginsburg Development Companies, LLC v. Carbone*, 85 A.D.3d 1110, 1111, 926 N.Y.S.2d 156 [2nd Dept, 2011].

Moreover, the Second Department holds:

Although the complaint “fails to plead specific facts from which the existence of an attorney-client relationship, privity, or a relationship that otherwise closely resembles privity between the plaintiff[s] and [the defendants] may be inferred” (*Fredriksen v. Fredriksen*, 30 A.D.3d 370, 817 N.Y.S.2d 320), the complaint in this case sets forth in sufficient detail (*see* CPLR 3016[b]) facts which, if proven, would show that the defendants colluded with the majority members of Millennium Alliance Group, LLC (hereinafter MAG), *inter alia*, to freeze the plaintiffs out of MAG’s management and profit sharing and force them to surrender, at a reduced price, their minority membership interest in MAG. Such allegations fall within the narrow exception of “fraud, collusion, malicious acts or other special circumstances” under which a cause of action alleging attorney malpractice may be asserted absent a showing of actual or near-privity (*see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 595, 808 N.Y.S.2d 573, 842 N.E.2d 471, *quoting Estate of Spivey v. Pulley*, 138 A.D.2d 563, 564, 526 N.Y.S.2d 145; *cf. Fredriksen v. Fredriksen, supra; Griffith v. Medical Quadrangle*, 5 A.D.3d 151, 772 N.Y.S.2d 513).

Similarly, although the complaint fails to plead facts sufficient to establish that the defendants breached any fiduciary duty owed to the plaintiff (*see* CPLR 3016[b]; *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799

N.Y.S.2d 170, 832 N.E.2d 26; *Tal v. Superior Vending, LLC*, 20 A.D.3d 520, 799 N.Y.S.2d 532; *cf. Collins v. Telcoa Intl. Corp.*, 283 A.D.2d 128, 134, 726 N.Y.S.2d 679), it does make out a cause of action against the defendants alleging aiding and abetting a breach of fiduciary duty by the majority members of MAG (see *Kaufman v. Cohen*, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157; see also *Widewaters Herkimer Co., LLC v. Aiello*, 28 A.D.3d 1107, 817 N.Y.S.2d 790; *Operative Cake Corp. v. Nassour*, *supra* at 1021, 801 N.Y.S.2d 358; *Sahagen v. Kelley Drye & Warren*, 292 A.D.2d 298, 740 N.Y.S.2d 303)

Aranki v. Goldman & Associates, LLP, 34 A.D.3d 510, 511-512, 825 N.Y.S.2d 97 [2nd Dept, 2006].

This Court determines Donovan & Giannuzzi LLP and Bryan McCrossen have not met their CPLR 3211 (a) (7) burden to dismiss the plaintiff's fifth cause of action for its failure to state a cause of action. The Court finds the plaintiff has adequately alleged its allegations in the fifth cause of action, and met its CPLR 3016 [b] burden.

Accordingly, the motion is denied.

So ordered.

Dated: **September 21, 2011**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED
SEP 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE