

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X		<b>TRIAL/IAS PART 12</b>
<b>EAGLE CAL SC, INC.,</b>	<b>Plaintiff,</b>	<b>INDEX # 600178/17</b>
<b>-against-</b>		<b>Mot. Seq. 6</b>
<b>SIYOUN MAHFAR &amp; ASSOCIATES, INC. and</b>		<b>Mot. Date 10.22.18</b>
<b>SMA EQUITIES, LLC,</b>		<b>Submit Date 1.25.19</b>
	<b>Defendants.</b>	
-----X		

The following papers and memoranda of law were read on this motion :

E File Docs Numbered

Notice of Motion, Affidavits (Affirmations), .....	131
Answering Affidavits (Affirmations).....	186
Reply Affidavit.....	212

Plaintiff Eagle Cal SC, Inc. moves<sup>1</sup> by notice of motion pursuant to CPLR 3212 for an order granting summary judgment (1) on its first and second causes of action sounding in breach of contract, including statutory interest against Siyoun Mahfar & Associates, Inc. (SM & Associates) and (2) on its sixth cause of action sounding in conversion, including punitive damages and statutory interest, as against defendant SMA Equities and (3) on its seventh cause of action for unjust enrichment, including punitive damages and statutory interest, against SMA Equities. Plaintiff also seeks dismissal of defendant’s affirmative defenses.

Familiarity with the court’s prior orders in this action is presumed. In sum, plaintiff Eagle Cal and two other parties, Siyoun Mahfar and SM & Associates were partners in a limited partnership known as Hillel Associates, LP (Hillel), a real estate investing firm owning property located at 255 East Houston Street, New York, NY 10002. SM & Associates was the general

<sup>1</sup> The court will accept Eagle Cal’s memorandum in support of its motion despite the fact that it exceeds the court’s page limit by some 14 pages and appears to employ an undersized font.

partner with certain responsibilities under the applicable partnership agreement. The partnership agreement provided that profits would be distributed according to the interest held by each, entitling Eagle Cal to 50% of such profits. In October of 2011, ownership of the subject property was transferred to a tenancy in common between plaintiff Eagle Cal, Suffolk MS, LLC, and Sina Mahfar, an individual.

On April 28, 2015, Eagle Cal sold its tenant in common ownership interest in the property to non-parties SMBRO Rivington, LLC and SMSIS Rivington, LLC.

By letter dated February 3, 2016, defendants' counsel, Seligson, Rothman & Rothman, advised the plaintiff that a lawsuit involving damage to property owned by Hillel had settled. The letter, signed by Alexander W. Seligson, stated:

"The lawsuit entitled *Hillel Associates LP v. 265 East Houston LLC*, New York County Index No. 0108209/2010 has been resolved, with a settlement balance to plaintiff in the amount of \$647,859.00 after payment of legal fees, costs and disbursements of the lawsuit and *the outstanding management fee*.

"As you know, Eagle Cal SC, Inc. has not yet satisfied its post-closing obligation payment of \$1,250,000 to SMA Equities.

"It is proposed that Eagle Cal's share of the settlement (i.e. \$323,929.93) be credited toward its post-closing obligation. Unless we hear from you otherwise, we will so instruct our clients. The balance of Eagle Cal's post-closing obligation will be reduced to \$926,070.07."

Plaintiff brought suit to collect its portion of the settlement proceeds. By order dated January 5, 2018, the court dismissed the defendant's counterclaims concerning the alleged post-closing obligation as the property was sold in 2015 by the tenants in common and not by Hillel. However, SM & Associates' claims to an offset against the settlement amount based on management fees owing on the subject property continued.

On or about May 30, 2018, defendants made an offer pursuant to CPLR 3220 to liquidate damages conditionally and allow judgment against them in the amount of \$307,959.85, together with costs to date. To the court's knowledge, plaintiff did not accept the CPLR 3220 offer.

"It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974] ), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993])."

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; see also *Fairlane Financial Corp. v. Longspaugh*, 144 A.D.3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 A.D.3d 18 [2d Dept 2015]).

A plaintiff establishes a breach of contract action by demonstrating the existence of a contract between the parties, performance by the plaintiff, breach by the defendant and damages resulting from the breach. (*JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 [2d Dept 2010]). Contract language which is clear and unambiguous must be enforced according to its terms. (*W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 [1990]).

In support of this motion, plaintiff annexes the affidavit of Darius (Joseph) Meraj, the president and sole officer of Eagle Cal. Significantly, Mr. Meraj explains that at the time that the property was transferred to the tenancy in common in 2011, the management rights of the property were transferred to two individuals - Sina Mahfar and Sassan (Samy) Mahfar. Mr. Meraj explains that as a result of discovery in this case, it was disclosed that \$106,625.00 was deducted from Eagle Cal's portion of the settlement proceeds before arriving at the \$323,929.93 amount referenced in the Seligson letter of February 3, 2016. Mr. Meraj states that the fees were purportedly incurred after the property was transferred by Hillel in 2011 and after SM & Associates no longer had management rights with respect to the property. He states that Eagle Cal has paid in full all management fees for the subject property preceding October 1, 2011.

Mr. Meraj further states that as a result of discovery in this action, it was determined that on January 13, 2016, counsel for Hillel in the underlying lawsuit wire transferred the amount of \$307,959.85 to the Seligson firm.

Plaintiff also annexes the affidavit of Suzzane McCombs, who corroborates much of the history laid out in the Meraj affidavit.

In opposition, defendants attach the affidavit of Sina Mahfar, the shareholder and principal of SM & Associates. He explains the history of the ownership of the various family entities at issue in this litigation, including that both he and his brother, Samy Mahfar, are part owners of both defendants SM & Associates and SMA Equities. He states that Eagle Cal is owned by his uncle Jack Mahfar and that Jack's brother-in-law Darius Meraj is the president.

Sina Mahfar states that “[b]ecause Eagle Cal is based in California and [Jack] has resided in Switzerland for the last 30 years, my brother and I, through Associates, have been exclusively responsible for the management of our jointly-owned properties, including the property at issue in this case, 255 East Houston Street, New York, New York.” He further states that with respect to other real estate investment ventures, “Associates has always managed the properties, while Eagle Cal is a passive investor” and that pursuant to the tenancy in common agreement, “my brother and I retained Associates to continue managing the Property, as it had done for the last decade.” In December 2012, the tenants in common formed 255 E. Houston Manager, LLC to manage the tenancy.

Sina Mahfar further explains that the tenants in common, first through Hillel and later through 255 E. Houston Manager, remitted to SM & Associates asset management fees equal to \$30,000 per year and property management fees of \$1,500 per month. He attaches a general ledger from AM & Associates showing the receipt of these monthly fees from October 1, 2011 and continuing into 2017.

Defendants also annex a memorandum drafted by Suzane McCombs for Samy Mahfar (with a copy to Darius Meraj) in March of 2011, which makes a proposal for both property management fees and annual asset management fees relating to the property then owned by Hillel. Defendants also attach emails and invoices from 255 E. Houston Manager LLC to the plaintiff, along with an email chain between Darius Meraj and employees of SMA Equities evidencing ongoing disagreements over the payment of management and asset fees. Additionally, defendants attach a number of invoices issued from defendant SM & Associates to 255 E. Houston Manager concerning site visits to the property during the period of October 2013 to January of 2015. Finally, defendants attach a “Vendor Ledger” indicating fees paid to SM & Associates for a property designated as “hillel” or “255ehou.” Defendants argue that Eagle Cal has not paid its share of the management fees for the property from January 2013 through the date of the sale of its interest in 2015.

Upon review of the record, the court finds that the plaintiff has established its entitlement to summary judgment on the issue of breach of the partnership agreement with respect to the failure to distribute Eagle Cal’s share of the proceeds from the *Hillel Associates LP v. 265 East Houston LLC* settlement and its entitlement to statutory interest upon the breach. Defendants SM & Associates has failed to raise a triable issue of fact with respect to its breach of the partnership agreement. However, the court finds that a trial on the issue of damages is necessary. Plaintiff variably requests judgment in the amount of \$430,554.93 (\$323,554.93 + \$106.625.00), or \$414,584.85 (\$307,959.85 + \$106.625.00). Plaintiff’s own submissions raise questions of fact concerning the amount of damages. Additionally, defendants posit a different, yet defensible, calculation wherein after attorney’s fees and expenses from the Hillel litigation are deducted from the settlement amount, Eagle Cal would be entitled to no more than \$377,292.50. This amount disregards any offset for the disputed management fees.

The record does not support the defendants' claims for an offset in the instant action. It is undisputed that the tenancy in common agreement vests management of the property in Sina and Samy Mahfar. There is record evidence suggesting that they did so through SM & Associates, a defendant in this action. However, by its own ledger, SM & Associates was paid its management fee.

That non-party 255 E. Houston Manager may be owed Eagle Cal's share of the management fee, which clearly remains in dispute, does not justify a set-off in this action. Indeed, defendants submit a January 2013 email exchange wherein a representative of SMA Equities wrote to Darius Meraj indicating that "[w]e received your checks today. They are made out to the wrong payee [and] should be payable to 255 E. Houston Manager LLC. Please send new checks." Samy Mahfar later adds "the 255 E Houston Manager LLC is the TIC entity that we set up based on all the attorneys (including yours) suggestion to better fortify the TIC, why would you sent money to my entity?? . . . [p]lease issue checks to 255 East Houston Manager, LLC." The exchange makes clear that, among other things, the management fees for the subject property are at issue. Whether 255 E. Houston Manager may have an outstanding claim for management fees against Eagle Cal is not at issue in this case. Without more, the court must observe the corporate formalities devised by the parties themselves.

Next, plaintiff seeks summary judgment on its claims of conversion and unjust enrichment as against SMA Equities. The evidence in support of these claims is sparse, at best.

"Conversion is any unauthorized exercise of dominion or control over someone else's property that interferes with and is in defiance of the superior possessory right of the owner or another person" (*Torrance Constr., Inc. v. Jaques*, 127 A.D.3d 1261, 1263 [2015] [internal quotation marks and citation omitted]; see *Thyoff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 288–289 [2007]; *State of New York v. Seventh Regiment Fund*, 98 N.Y.2d 249, 259 [2002] ). Where the property alleged to have been converted is money, "it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Salatino v. Salatino*, 64 A.D.3d 923, 925 [2009], lv. denied 13 N.Y.3d 710, 2009 WL 3428015 [2009] [internal quotation marks and citation omitted]; see *Lemle v. Lemle*, 92 A.D.3d 494, 497 [2012]; *Key Bank of N.Y. v. Grossi*, 227 A.D.2d 841, 843 [1996] ). Accordingly, "conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose" (*Lemle v. Lemle*, 92 A.D.3d at 497; see *Hoffman v. Unterberg*, 9 A.D.3d 386, 388 [2004]; *Meese v. Miller*, 79 A.D.2d 237, 243 [1981] ). (*E. Schodack Fire Co. v. Milkewicz*, 140 A.D.3d 1255, 1256 [3d Dept 2016]; see also *CSI Group, LLP v. Harper*, 153 A.D.3d 1314 [2d Dept 2017]; *Ehrlich v. Froehlich*, 72 A.D.3d 1010 [2d Dept 2010]).

"The elements of unjust enrichment are that the defendants were enriched, at the

plaintiff's expense, and that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered (*see Old Republic Natl. Tit. Ins. Co. v. Luft*, 52 A.D.3d 491). 'The essence of unjust enrichment is that one party has received money or a benefit at the expense of another' (*Goldman v. Simon Prop. Group, Inc.*, 58 A.D.3d 208, 220, quoting *City of Syracuse v. R.A.C. Holding*, 258 A.D.2d 905, 906)." (*County of Nassau v. Expedia, Inc.*, 120 A.D.3d 1178, 1180 [2d Dept 2014]). And the critical inquiry is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. (*Georgia Malone & Co., Inc. v. Reider*, 19 N.Y.3d 511 [2102]).

In order to establish that SMA Equities exercised dominion and control over the funds at issue, plaintiff argues that "[d]efendants admit that Seligson Rothman & Rothman, who sent the February 3 letter, is SMA Equities attorney and takes instructions from SMA Equities." In support of this assertion, plaintiff relies on the following exchange at the deposition of Samy Mahfar:

- "Q. Who does Seligson, Rothman & Rothman take instructions from as to what is done with the money?  
A. Once we figure out what we can do with it, it would probably be me or my brother [i.e. Sina Mahfar]  
Q. If you called Mr. Seligson today and told him to transfer the money to Eagle Cal, he would take that instruction from you?  
A. I believe so."

The suggestion that the Seligson firm would take instruction with respect to the money from either Samy or Sina Mahfar does not demonstrate that SMA Equities exercised dominion or control over specifically identifiable property or was otherwise enriched thereby. This is especially apparent considering the overlapping ownership of SM & Associates and SMA Equities by both Mahfar brothers. Certainly, the Seligson firm can have more than one client. Thus, on close review, plaintiff's submissions do not meet the standard for summary judgment on these claims. For these same reasons, plaintiff has not established its entitlement to punitive or exemplary tort damages.

For the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion for summary judgment on its first and second causes of action is **granted** with respect to liability and this matter is continued for trial on the issue of damages; and it is further

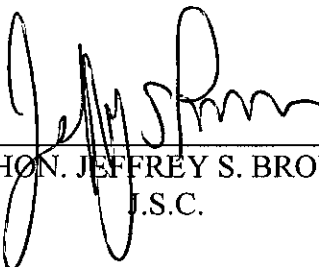
ORDERED, that the plaintiff's motion for summary judgment on its sixth and seventh causes of action is **denied**; and it is further

ORDERED, that the plaintiff's motion for summary judgment on defendant's affirmative defense of set-off is **granted**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
March 13, 2019

ENTER :



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J.S.C.

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**ENTERED**

MAR 14 2019

NASSAU COUNTY  
COUNTY CLERK'S OFFICE