

M E M O R A N D U M

NEW YORK SUPREME COURT - QUEENS COUNTY - CIVIL TERM PART 2

Present: Honorable, ALLAN B. WEISS, J.S.C

STEVEN HUANG, JOSEPH HUANG, TZU LI HSU
PEN FA LEE, ALFRED T.C. PENG and
VERONICA WAN as Administratrix of the
Estate of CHEE C. WAN, deceased

Plaintiffs,

-against-

FABIAN A. SY, FAS DEVELOPMENT CO., INC.
and 225 ASSOCIATES

Defendants.

DECISION & ORDER

Index No.: 15155/90

The plaintiffs, as partners of three partnerships, commenced this action, on behalf of themselves individually, against the defendant, Dr. Fabian A. Sy (hereinafter Dr. Sy), the managing partner of the partnerships, and the codefendants, FAS Development Co., Inc. and 225 Associates for an accounting and to recover damages based upon the defendant, Dr. Sy's fraud, breach of fiduciary duty and unjust enrichment.

When this action came before the court for a non-jury trial, the court was advised that the plaintiff, CHEE C. WAN, was deceased. Thus, the court granted the plaintiffs' motion to substitute as a plaintiff, VERONICA WAN as Administratrix of the Estate as Administratrix of the Estate of CHEE C. WAN, in place of the deceased plaintiff and amended the caption accordingly.

The trial was held from September 17, 2007 through October 22, 2007, and eight witnesses testified on behalf of the plaintiffs, to wit, the plaintiffs; Mrs. Jin S. Lee; and Eric A. Kreuter, a forensic accountant. The plaintiffs also

submitted documentary evidence and the defendant's, Dr. Sy's testimony taken at a deposition held in 1991. The defendants submitted some documentary evidence, but called no witnesses. The court also accepted post-trial memoranda of law from the parties (letters and arguments submitted after the date fixed for submissions were not considered).

Based upon the credible evidence adduced at trial, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In the spring of 1983 the defendant, Dr. Fabian A. Sy, solicited his longtime friends, neighbors and colleague, Dr. Lee and Mrs. Lee, to join him in investing in commercial real estate in Flushing. The Lees, at Dr. Sy's request, contacted other friends and neighbors Dr. Le Hieng (Steven) Huang (hereinafter S. Huang), Dr. Le Kiong (Joseph) Huang (hereinafter J. Huang) and Dr. Alfred T. C. Peng and introduced them to Dr. Sy at a gathering at the home of J. Huang. Dr. Sy told the potential investors that he had extensive knowledge, experience, and expertise in managing commercial real estate, pointed out the tax advantages to be gained and emphasized the potential for great profit, particularly in Flushing at that time. He assured the potential investors that he would manage the property and take care of all of the aspects of the partnership business because he practiced medicine only on a part time basis devoting about 20-50% of his time to his own real estate investments. Dr. Sy proposed two commercial properties in Flushing, one of which was 136-80-82 39th Ave. (hereinafter the 39th Ave. property) which he found and recommended as good investments. He took the prospective investors to inspect the two properties, after which they decided to invest with Dr. Sy in the 39th Ave. property.

Drs. Sy, Lee, S. Huang, J. Huang, and Peng and Romeo Sy (Dr. Sy's nephew) formed SHLP Associates (hereinafter SHLP) by

partnership agreement dated, August 1, 1983 to purchase, own and operate the 39th Ave. property. The property was purchased for \$850,000.00 and a closing took place on August 31, 1983 at which Dr. Sy with Joel Rabine Esq. of Rabin & Nickelsberg appeared for SHLP. The purchase was financed with a capital contribution of \$60,000.00 from each partner representing a 2/11ths share (except Romeo Sy who contributed \$30,000.00 representing 1/11ths share) and a \$600,000.00 loan from Citibank secured by a mortgage on the property on which mortgage each partner, except Romeo Sy, also assumed personal liability up to \$125,000.00.

In the spring of 1984, Dr. Sy approached the SHLP partners and proposed purchasing a 161 unit apartment building, known as 144-25 Roosevelt Ave., which he said would ultimately be converted to a co-operative. He told the SHLP partners to call their friends and relatives who might also want to invest. At a meeting with approximately 30 potential investors, Dr. Sy represented that he had vast experience and expertise in commercial real estate, pointed out the advantages of such an investment. He assured the investors that they did not have to do anything except invest capital, that there was already a management company managing the building and that he would oversee the property and take care of everything necessary to bring about the co-operative conversion. Dr. Sy presented a Schedule of Cash Flow Projections and a three page hand written financial summary he prepared, which he called a "pro forma" (plaintiff's Ex. 5), regarding the subject property. In addition to various financial information, the "pro forma" set forth the purchase price of the building as \$5,200,000.00 plus closing costs of approximately \$400,000.00, that a 5% vacancy rate would be maintained for the purposes of conversion resulting in a cash flow deficit in the operation of the property. As a result of the projected deficit, a yearly capital contribution of \$25,000.00 for a full share or \$12,500.00 for a half share, from

each partner was needed to make up for the deficit for the first four, and maybe five years, until conversion. A partnership agreement, dated November 1, 1984 was executed by 19 partners, including, inter alia, the plaintiffs, to form Empire Group Associates (hereinafter Empire Group), to purchase, own, operate and, later convert to cooperative, the Roosevelt Ave. property.

In November of 1984, Dr. Sy arranged a dinner at a Chinese restaurant to introduce the Empire Group partners to one another. The plaintiffs' testified that they waited for Dr. Sy, but he did not arrive until after dinner when the partners were in the process of leaving. They further testified that Dr. Sy rushed in, distributed copies of a letter and told the partners to sign it. Dr. Sy explained that an outside expert consultant with cooperative conversion experience was needed. Because the amount of the consultation fees of the purported consultant was left blank on the letter, the partners asked how much it would be. Dr. Sy told them it would only be "a fraction", "a couple of thousand", whereupon, 16 Empire Group partners, including the plaintiffs and Dr. Sy, signed 3 identical copies of the letter (hereinafter the Letter Agreement) as accepting its terms. The Letter Agreement, which defendants submitted as Exhibit B, provided in pertinent part that FAS Development, Inc. agreed to act as consultant in the purchase and acquisition of the Roosevelt Ave. property for which services the partnership would pay FAS Development, Inc. \$465,000.00. The plaintiffs testified that the Letter Agreement Dr. Sy distributed and the copies which they signed (plaintiffs' Exhibit 7) had blank spaces where the dollar amounts now appear (defendants Exhibit B).

Although the Empire Group partnership agreement and the Letter Agreement are both dated November 1, 1984, they were not executed simultaneously. Moreover, two Empire Group partnership agreements, with identical provisions were executed. The partnership agreement, (defendants' Exhibit C) dated November 1,

1984 executed by 19 partners was acknowledged on November 16, 1984 and did not include SHLP as a partner, but did include Thien S. Tan as partner. A partnership agreement (plaintiffs' Exhibit 6) dated November 1, 1985, was executed by 19 partners and acknowledged on July 17, 1985 and July 21, 1985 included SHLP as a partner, but not Thien S. Tan.

In or about the middle of 1985, Dr. Sy approached the Empire Group partners and informed them that he could not obtain sufficient financing to purchase Roosevelt Ave. property and needed an additional \$800,000.00 cash to complete the purchase. He suggested that they form SHLP Mortgage Associates (hereinafter SHLP Mortgage) to make an \$800,000.00 loan to Empire Group which would generate interest income to the SHLP Mortgage partners and be secured by a mortgage on the Roosevelt Ave. property.

SHLP Mortgage, comprised of S. Huang, J. Huang, Peng, Lee, Tser-Fu Huang, Edwina Sia-Kho, Rolando Sy, Lerma Guerro, Dr. Sy and SHLP Associates as partners, was formed by agreement dated July 1, 1985. SHLP Mortgage obtained the \$800,000.00 through a \$50,000.00 initial cash capital contribution from the eight individual partners totaling \$400,000.00, and the remaining \$400,000.00 from SHLP Associates, also a partner. SHLP Associates obtained \$400,000.00 through a loan from Astoria Bank secured by a mortgage on SHLP's 39th Ave. property. The closing on the Roosevelt Ave. property took place on July 25, 1985 at which Dr. Sy with Joel Rabine Esq. and John Nichelsberg Esq. appeared for Empire Group.

It is undisputed that Dr. Sy orchestrated the formation of the partnerships and acquisition of the real properties and that the partners did nothing more than provide the capital necessary for the acquisitions. Dr. Sy found the partnership properties, solicited the plaintiffs to invest, negotiated the terms of the sales of the real property and arranged and negotiated financing for the purchase. It is also undisputed that Dr. Sy did not

disclose, but rather, he refused to reveal the identity of the owners of the properties, the contents and/or terms of the contracts of sale, refused to allow any of the partners to have any information about or contact with the sellers and financial institutions and would not permit any partner to attend the two closings. Dr. Sy retained Rabin & Nickelsberg Esq., whom he claimed were the partnerships' attorneys, as well as Mr. Sherman, the accountant, without consulting with the partners. Dr. Sy alone consulted with Joel Rabine Esq. in all matters including drafting the partnership agreements and the Letter Agreement which were presented to the partners as a complete and final document.

The SHLP partnership agreement provided, in pertinent part, that each partner had a 2/11ths share except Romeo Sy who had a 1/11th share in the partnership (§ 5); that the partners would carry on the management and conduct of the partnership; and any partner, with consent, consent requiring 75% vote of the partners (§ 18), had the full authority to perform various acts in the operation maintenance and preservation of said property (§ 10 et seq.); that the partners shall not receive any salary or other compensation for services rendered on behalf of the partnership except as provided in the agreement (§ 7.4); that partners shall be reimbursed for actual expenses incurred in the administration of the partnership (§ 7.5); and that the partners will share the profits in proportion to their interest (§ 7.3), however, "...in consideration of the efforts of Fabian A. Sy...", he would receive an additional distribution (§16.1, 16.2.)

The Empire Group partnership agreement, on the other hand, gave Dr. Sy full, complete and unrestricted authority to manage and control all aspects of the partnership business and to make all partnership decisions including the supervision of the day to day operations of the partnership's real property. As compensation for his services Dr. Sy would receive \$2,500.00 per

month plus reimbursement for all actual, reasonable and appropriate expenses incurred in carrying out partnership business. Similarly, the SHLP Mortgage partnership agreement gave Dr. Sy total and unfettered control of the partnership and its assets.

Pursuant to the three partnership agreements, the principal office of each partnership was at Dr. Sy's home, and he was required to keep and maintain books and records of the capital contributions of the partners and the business transactions of each partnership and to make such books and records available to the partners upon request.

After formation of the partnerships, the partners did not hear from Dr. Sy or receive any reports, financial statements, or any other documents regarding the business of the partnerships. At the end of each year, the each partner received a federal K-1 tax statements containing one number representing the partner's respective share of the loss sustained by the partnerships.

In 1985, S. Huang's accountant asked for the financial documents underlying the K-1. S. Huang called Dr. Sy to ask for the documents, but Dr. Sy referred him to the accountant. S. Huang called the accountant, however, no books, records or financial statements were produced. Unable to get any financial records, S. Huang became suspicious. He demanded that Dr. Sy buy him out of the three partnerships. S. Huang sold his interest in Empire Group and SHLP Mortgage to Dr. Sy, however, he kept his interest in SHLP because he and Dr. Sy could not agree on the amount for the "buy out". S. Huang did not inform any of the partners of his suspicions, and neither Dr. Sy nor S. Huang informed the other partners of any of the three partnerships of the buy out although the SHLP partnership agreement (§ 12) required that partners be notified of an offer to sell partnership shares.

In 1987, Dr. and Mrs. Lee's accountant also requested

documents supporting the K-1, and, as before, Dr. Sy referred them to the accountant. They were also unable to obtain any records. In 1988 the Empire Group partners received Empire Group's Financial Statement for the year 1987. Upon seeing, inter alia, the expenditure of a \$100,000.00 consultation fee, the large negative cash flow, and a 25% rather than a 5% vacancy rate at the Roosevelt Ave. property, the Empire Group partners became concerned. They called a meeting to confront Dr. Sy and to demand that he rent the vacant apartments to reduce the large negative cash flow and to produce the books and records of the partnerships. Although Dr. Sy agreed to both demands, he did nothing.

In 1989 when the lease of the 39th Street property with the existing tenant was due to expire, a dispute between the partners arose as to a new tenant. Dr. Sy informed the partners that he had found an "international trading company" as a prospective tenant at \$200,000.00 per year rent with an option to buy for \$2,300,000.00 and presented to the partners for signature a lease which did not contain the name of any tenant. The plaintiffs testified that Alfred Peng had also found a tenant who offered better lease terms, but Dr. Sy refused to consider this offer. In addition, S. Huang contacted the existing tenant and learned that the tenant wanted to renew its lease and had offered to pay over \$300,000.00 in annual rent during its negotiations for renewal with Dr. Sy. The dispute could not be resolved by a vote of the partners because the partnership agreement required 75% of the total 11 shares to agree on any item and Dr. Sy through Romeo Sy controlled 3 (27.3%) of the 11 shares.

In 1990 the partners of SHLP and Empire, having become suspicious and distrustful of Dr. Sy, hired their own attorneys and accountant and were finally able to obtain some financial documents from Dr. Sy. The plaintiffs learned from the documentary evidence obtained that:

-Dr. Sy received \$44,000.00 as a consultation fee at the closing on the 39th Ave. property and approximately \$40,000.00 from the seller for services he performed for her;

-that he paid himself a management fee for the management of SHLP;

-that he reimbursed himself for unauthorized and/or non-business related expenses from SHLP's funds;

-that the true purchase price of the Roosevelt Ave. property was \$4,735,000.00 which was \$465,000.00 less than the \$5,200,000.00 stated on the pro forma;

-that the Letter Agreement the partners signed in the restaurant was not for a small fee and not for an independent expert consultant to aid in the co-operative conversion, but a \$465,000.00 fee for consulting services provided by FAS Development Inc., a business entity owned and controlled by Dr. Sy, in the acquisition of the Roosevelt Ave. property;

-that he used \$160,000 of Empire's funds to purchase Dime Savings Bank stock for himself;

-that he used Empire and SHLP funds to pay for his, his wife's and other family members' personal expenses and purchases and generally using the assets and funds of the partnerships as his own individual property for his own benefit.

As a result, the plaintiffs commenced this action in 1990 to remove Dr. Sy as the managing partner, for an accounting and to recover damages for, inter alia, Dr. Sy's fraud, breach of fiduciary duty and unjust enrichment. Upon commencement of the action, Dr. Sy stopped paying the mortgages and used SHLP funds to pay the attorneys fees incurred in the defense of this action. When Dr. Sy was finally removed as the managing partner in 1992, several mortgages on the real properties of the partnerships were in foreclosure. The partners attempted to save the properties by infusing new capital, however, Dr. Sy refused to make any contribution or to turn over the bank accounts of the

partnerships, yet he continued to collect SHLP tenant's rent. The remaining partners exhausted their money and the properties were lost.

The plaintiffs claim that Dr. Sy using his close personal friendship, professional relationship, common cultural and ethnic heritage and background, fraudulently induced the plaintiffs to invest large sums of money in the three partnerships making false and misleading representations and material omission as to the essential facts surrounding the transactions, his integrity and his knowledge and expertise in the operation of commercial real estate. Plaintiffs further claim that Dr. Sy breached his fiduciary duty to the plaintiffs by failing to disclose material facts, by engaging in self-dealing and fraudulent conduct in the formation, management and operation of the partnerships by, inter alia, failing to disclose material facts, taking, using and diverting the assets of the partnerships for his own personal use without authorization or justification which ultimately caused the loss of the partnerships' real property and the investments of the plaintiffs.

CONCLUSIONS OF LAW

Prior to the formation of a partnership, the individuals involved are merely parties to a contract to form a partnership and do not assume toward each other the fiduciary obligations of partners and generally, the rule of caveat emptor applies (see Silvin v. Jones, 138 Misc 234 [1930]; see also R.C. Gluck & Co. v. Tankel, 24 Misc.2d 841, 846 [NY Sup. 1960] aff'd 12 AD2d 339 [1961]). Nevertheless, during preliminary negotiations, each prospective partner has the duty to exercise toward the other prospective partners the highest integrity and good faith including the duty to fully and faithfully disclosure any information that could reasonably bear on the decision to enter into the venture (see Dubbs v. Stribling & Assocs., 96 NY2d 337,

340-341 [2001]; Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 [2006], lv denied 8 NY3d 804 [2007]; see also Tobias v. First City Nat. Bank and Trust Co., 709 F.Supp. 1266, [S.D.N.Y.,1989]). To prevail on a cause of action for fraud, the plaintiffs must establish a material misrepresentation or a material omission of fact, known to be false when made, to induce the plaintiffs to rely on it, reasonable reliance and resulting damages (see Lama Holding Co. v. Smith Barney, 88 NY2d 413, 421 [2003]; Jablonski v. Rapalje, 14 AD3d 484 [2005]; Shao v. 39 College Point Corp., 309 AD2d 850 [2003]). A fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information (Kaufman v. Cohen, 307 AD2d 113 [2003]; Swersky v. Dreyer and Traub, 219 AD2d 321, 326-328 [1996], appeal withdrawn 89 NY2d 983 [1997]). A duty to disclose material information may arise when there is a need to complete or clarify one party's partial or ambiguous statement, (see Junius Constr. Corp. v. Cohen, 257 NY 393, 400[1931]), or where there exists a fiduciary or confidential relationship between the parties (see Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 45 [2d Cir.1991]) and where one party has superior knowledge of facts which are not available or discoverable, with reasonable diligence, by the other party and the first party knows that the second party is acting on the basis of mistaken or inadequate knowledge (see Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 123 [2d Cir.1984]); accord Young v. Keith, 112 AD2d 625, 627 [1985]). Thus, where a fiduciary relationship exists, "the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive" (Whitney Holdings Ltd. v. Givotovsky, 988 F.Supp. 732, 748 [1997]).

With respect to the formation of the partnerships the plaintiffs have established that by false and misleading and

representations as to his competence and integrity and claims that he would manage the properties to protect their investment, that they had nothing to lose, Dr. Sy induced plaintiffs to enter into the partnerships. The plaintiffs have also established their claim for fraud based upon Dr. Sy's active concealment of material facts which he had the duty to disclose such as the fact that he, or the co-defendant corporations which he controlled, would receive a substantial "consultation fee". Not only did he fail to disclose, but in the case of the Empire partnership, he affirmatively misrepresented the actual purchase price of the Roosevelt Ave. property by incorporating his "consultation fee" in the purchase price. The plaintiff's trusted Dr. Sy based upon their relationship, as prospective co-investors and such reliance was reasonable. This was not an arms length transaction between sophisticated business men. Dr. Sy possessed superior knowledge and as a co-investor and prospective partner owed a duty to make full disclosure of all relevant facts (see Dubbs v. Stribling & Assocs., supra; Global Minerals and Metals Corp. v. Holme, supra; see also Tobias v. First City Nat. Bank and Trust Co., supra). In addition, Dr. Sy prevented the plaintiffs from learning the true nature of the transactions by withholding the name of the sellers of the property and preventing the plaintiffs from attending the closings. Even in the absence of a fiduciary relationship, an affirmative duty to disclose arises where one party's superior knowledge of facts renders the transaction inherently unfair unless those facts are disclosed (Swersky v. Dryer & Traub, 219 AD2d 321, 327 [1996]).

The plaintiffs, having established their cause of action, the burden shifts to defendants to establish the absence of fraud and that Dr. Sy fully disclosed all material facts (Global Minerals and Metals Corp. v. Holme, supra at 98; Blue Chip Emerald LLC v. Allied Partners, supra). The defendants failed to meet this burden.

Dr. Sy's conclusory claim that the partners knew and consented to the "consultation fees" and, in the case of the Empire Group partnership, that the plaintiffs knew that the consultation fee was incorporated in the purchase price is insufficient to satisfy his burden. Such claims are, in any event, unsupported by the credible evidence.

It is well settled that all partners are fiduciaries of one another and, as such, they owe "...a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. (citations omitted) This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interests of those owed a fiduciary duty. * * * [a fiduciary] is, therefore, mandated to single-mindedly pursue the interests of those to whom a duty of loyalty is owed." (Birnbaum v. Birnbaum, 73 NY2d 461, 466 [1989]). Where one partner takes on the role of a "manager" or "director" of a partnership, his obligation to deal fairly and openly and to disclose completely all material facts is heightened (Birnbaum v. Birnbaum, supra at 465 [1989]; Meinhard v. Salmon, 249 NY 458, 468 [1928]; Blue Chip Emerald LLC v. Allied Partners, supra). The managing partner is a trustee of any benefit or profit derived by him from any transaction connected to the formation, conduct or liquidation of the partnership or from the use of its property (Partnership Law §43[1]). A partner has an obligation to account to the partners and "...shall render on demand true and full information of all things affecting the partnership..." (Partnership Law § 42). The duty to account enunciated in Partnership Law § 42 is mandatory and requires that the managing partner account for any secret profits he made.

The partnership agreement is the basic document which sets forth the rights and duties of the partners among themselves Bogoni v.. Friedlander, 197 AD2d 281, 290 [1994], lv. to app.

den., 84 NY2d 803 (1994). Partners may include in the partnership agreement almost 'any agreement they wish' (Riviera Congress Associates v. Yassky, 18 NY2d 540, 548 [1966] quoting Lanier v. Bowdoin, 282 NY 32, 38 [1939]) including acts which would ordinarily constitute self-dealing. If the terms of the partnership agreement reflects that self-dealing was actually contemplated and authorized, it would not automatically be impermissible and deemed wrongful (see, Riviera Congress Associates v. Yassky, supra).

The partnership agreements in this case do not contain any provision which expressly or impliedly authorized or contemplated self-dealing by any partner. The credible evidence, plaintiffs' testimony and the documentary evidence, clearly established Dr. Sy's fraud and self-dealing and breach of fiduciary duty, including but not limited to, taking \$44,000.00 and \$465,000.00 consultation fees without the consent and knowledge of the partners; taking approximately \$40,000.00 from SHLP for services performed for the seller of the 39th Ave. property; paying himself a management fee for the management of SHLP without authorization of the partners and in derogation of the partnership agreement; reimbursements for unauthorized and/or non-business related expenses from SHLP's funds such as the payment of parking tickets; misappropriation of \$160,000 of Empire Group's funds to purchase Dime Savings Bank stock for himself and Empire Group and SHLP funds for his own personal use and benefit including diverted SHLP funds to pay for his legal expenses incurred in the defense of this action.

Where, as here, the claim against the managing partner is based upon allegations of fraud and self dealing, or when the managing partner makes decisions affected by an inherent conflict of interest the burden is upon the defendant to demonstrate the absence of fraud and to show affirmatively that the disputed acts are authorized, "...that no deception was practiced, no undue

influence was used, and that all was fair, open, voluntary and well understood (Matter of Greiff, 92 NY2d 341, 345 [1998] quoting Gordon v. Bialystoker Center and Bikur Cholim, Inc., 45 NY2d 692, 698-699 [1978]; see Sharp v. Kosmalski, 40 NY2d 119, 121-122 [1976]; Estate of Henry Paul, 105 AD2d 928 [1984]; Kantor v. Mesibov, 8 Misc.3d 722, 725 [NY Sup. 2005], aff'd 35 AD3d 543 [2006]). The defendant has failed to carry his burden of proof.

Generally, the profits and appreciation of their interests in the partnership business constitutes payment for the services rendered by partners. A partner is not entitled to compensation for acting in the partnership business except as provided by an express agreement (see Partnership Law § 40; Posner v. Posner, 280 AD2d 318, 319 [2001]; Levy v. Keslow, 235 AD2d 293, 294 [1997]).

With respect to the \$44,000.00 consultation fee Dr. Sy received from SHLP funds at the closing on the 39th Ave. property, there is no evidence, other than Dr. Sy's bare assertions, that the SHLP partners knew and authorized such fee.

With respect to the SHLP monthly management fees he paid to himself, the court rejects Dr. Sy's claims that despite the notation "management fee" on the checks, the payments were to reimburse him for actual out of pocket expenses and incidentals he incurred in carrying out the business of SHLP as being less than credible and unsupported by the evidence. The numerous checks (Exhibit 26) drawn on SHLP's account reflect that not only did Dr. Sy take \$500.00 per month as management fee, he also paid himself for claimed actual expenses such as tolls, parking, telephone, parking tickets and postage.

Nor is there any proof to support Dr. Sy's claim that the partners orally consented to pay him \$200.00 per month, later increased to \$500.00 per month, for expenses in addition to reimbursement for actual expenses. The SHLP partnership agreement expressly provides at ¶ 1.7 that a partner shall be entitled to

reimbursement only for "actual expenses". Any change to this provision must be by a consent of all of the partners (Partnership Law § 40[8]). There is no evidence of any such consent.

Dr. Sy urges that even if he paid himself unauthorized management fees, the court should find an implied contract for such fees inasmuch as he did all the work in regard to the management and operation of SHLP property, and that such fee is reasonable.

It is not for the court to rewrite the contract of the parties and create a specific obligation the parties themselves did not include (Tonking v. Port. Auth. of NY and NJ, 3 N.Y.3d 486, 490 [2004]; In re Matco-Norca, Inc., 22 AD3d 495, 496 [2005]). Moreover, the partnership agreement addressed the issue of compensating Dr. Sy's for managing the property by providing (§16.1, 16.2) that in addition to the compensation each partner was to receive from profits, Dr. Sy was to receive additional compensation, above his share in the partnership profits, for his management of the property.

With respect to the \$465,000.00 consultation fee in connection with acquisition of the Empire Group property, Dr. Sy's argument that the Empire Group partners agreed to the consultation fee by executing the Letter Agreement is also unavailing. As the SHLP partnership agreement, the Empire Group partnership agreement does not contain any provision which expressly or impliedly authorized or contemplated self-dealing and more particularly, authorize a consultation fee payable to anyone much less FAS Development, Inc., Dr. Sy's corporation. Therefore, to be valid and enforceable, such an agreement requires the consent of all the partners (Partnership Law §40[8]), after full and complete disclosure to the partners of the nature and import of the agreement (see Partnership Law §42; Birnbaum v. Birnbaum, supra; Meinhard v. Salmon, supra; Blue Chip

Emerald LLC v. Allied Partners, supra). The letter agreement was not executed by all 19 Empire Group partners and, thus, it is unenforceable pursuant to Partnership Law §40[8]).

Even if all of the partners executed the Letter Agreement, Dr. Sy has failed to meet his burden of establishing that he fully disclosure all material facts necessary for the partners to make an informed decision, that no undue influence was used, and that all was fair, open, voluntary and well understood at the time it was executed (see Matter of Greiff, supra; see Sharp v. Kosmalski, supra; Estate of Henry Paul, 105 AD2d 928 [1984]; Kantor v. Mesibov, 8 Misc.3d 722, 725 [NY Sup. 2005], aff'd 35 AD3d 543 [2006]). Absent full disclosure, such a transaction is voidable Global Minerals and Metals Corp. v. Holme, supra at 98; Blue Chip Emerald LLC v. Allied Partners, 299 AD2d 278, 279-280 [2002]).

In this regard, the court finds Dr. Sy's deposition testimony stating only that the letter was not blank when it was signed less than credible. The plaintiffs' testimony, which the court finds credible, that the Letter Agreement was blank as to the amount of the fee, that they signed based upon Dr. Sy's explanation of the nature of the document and the circumstances under which it was executed at the Chinese restaurant, clearly demonstrate that Dr. Sy misrepresented the purpose of the consultation fee and used his position of trust and confidence as a partner to obtain the signatures of the partners. The court finds that the Letter Agreement is unenforceable and void.

The plaintiffs also submitted into evidence copies of numerous checks drawn on SHLP and Empire Group's checking accounts, received from Dr. Sy during discovery, as proof of Dr. Sy's fraud and self-dealing by using the assets of the partnerships as his personal property, for his own benefit either by making direct payments to himself or to businesses he owned and controlled, paying his or his family's personal bills and

expenses and paying the expenses of business entities he owned and controlled. These checks include 3 checks from Empire's account totaling \$100,000.00 noted on the checks as "partial loan payment" to 225 Associates, a co-defendant and an entity owned and controlled by Dr. Sy and his brother; check to Macy's for a wedding gift; numerous checks made out either to cash or Fabian Sy from both SHLP's and Empire's accounts noted as reimbursements for tolls and parking, miscellaneous expenses or just expenses; checks to NYC Parking Violations Bureau for parking tickets; payments to New York Telephone for two separate telephone numbers; payments to U.S. Sprint; numerous checks to the Scarsdale Postmaster; 2 SHLP checks (\$2,000.00 + \$250.00) to Fabian Sy as repayment of loan; 2 SHLP checks to Fabian Sy (\$2702.46 + \$250.00) noted as 15% additional rent; two checks drawn on Empire's account for \$160,000.00 to purchase Dime Savings Bank stock for Fabian Sy, and three checks drawn on SHLP's account payable to Green & Zimmer, Esq. for the payment of Dr. Sy's attorneys fees in the defense of this action.

In response to this evidence, Dr. Sy asserts that all of these checks represent legitimate expenses or transactions of the partnerships and that he repaid the \$160,000.00 which was used to purchase the Dime Savings Bank stock.

There is no evidence to support Dr. Sy's claims. Dr. Sy never produced any books and records of any of the partnerships which he was required to keep, although the SHLP checks include payments to a bookkeeper. Even after the commencement of this action and for the 18 years that it has been pending, neither Dr. Sy nor the accountant produced any books and records. Dr. Sy also failed to produce any receipts for any claimed expenses, evidence of a loan by Dr. Sy to SHLP or to Empire, or evidence of a loan by 225 Associates to SHLP. The only reasonable inference to be drawn from such lack of documentary evidence is an intention to conceal his unauthorized and fraudulent activities.

With respect to the funds he appropriated for attorney's fees, the court finds that Dr. Sy is not entitled to be indemnified for the legal fees incurred in defending this action. SHLP Mortgage (§12 [d]) and Empire Group (§ 14[e]) partnership agreements provide that the partnership was to indemnify Dr. Sy for any attorneys fees incurred in litigation resulting from his actions, that the extent of the partnerships' responsibility in this regard is "to obtain insurance", however, indemnification for loss, expense, is expressly precluded when it is "...due to or arising from [Dr. Sy's] fraud or bad faith". Dr. Sy's defense of this action was necessitated by his own wrongdoing and breach of fiduciary duty, thus, it cannot be said that his actions were in good faith (see Donovan v. Rothman, 253 AD2d 627, 5629 [1998]; see also Gramercy Equities Corp. v. Dumont, 72 NY2d 560, 565-567 [1998]).

Despite the absence of books and records, the documentary evidence which was submitted together the testimony of the plaintiffs clearly demonstrate that Dr. Sy fraudulently and in breach of his fiduciary duty to his partners used the partnerships and its assets as his personal property for his own benefit without the knowledge or consent of his partners, that he engaged in self-dealing by placing his personal interests above and in conflict with those of the partnerships thereby violating his fiduciary obligations to his partners and causing the failure of the ventures and loss of the plaintiffs' investments.

DAMAGES

The measure of damages for fraud is indemnity for the actual pecuniary loss sustained as a result of the wrongful conduct or what is known as "out-of-pocket" rule (Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413 [1996]; Reno v. Bull, 226 NY 546, 553 [1919]). Such damages are intended to compensate plaintiffs for what they lost because of the fraud, not to compensate them for

what they might have gained had there been no fraud (see, Sager v. Friedman, 270 NY 472, 483 [1936]; Cayuga Harvester v. Allis-Chalmers Corp., 95 AD2d 5 [1983]). While there profits which would have been realized in the absence of fraud cannot be recovered as damages Foster v. Di Paolo, 236 NY 132 [1923]; AFA Protective Sys. v. American Tel. & Tel. Co., 57 NY2d 912 [1982]) there may be recovery of other consequential damages proximately caused by the fraud (see Lama Holding Co. v. Smith Barney Inc., supra) provided that they naturally flow from the fraud. The recovery of such consequential damages is limited to an amount necessary to restore the plaintiffs to the position they occupied before commission of the fraud (see Hotaling v. A.B. Leach & Co., 247 NY 84 [1928]; Alpert v. Shea Gould Climenko & Casey, 160 AD2d 67 [1990]).

To establish a claim for unjust enrichment, a plaintiff must establish that he/she performed services for the defendant at the defendant's request which resulted in the defendant being unjustly enriched. (see Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1972], cert denied 414 US 829 [1973]; see, 22A NY Jur 2d, Contracts, § 518, at 239). The plaintiffs performed no services for the defendant, Dr. Sy. Moreover, the claim for unjust enrichment, or quasi contract, as plead in this case is merely an alternative theory for recovery and duplicative of their claims of fraud and breach of fiduciary duty as they arose from the same facts and did not allege distinct and different damages (see Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski, 14 AD3d 644 [2005]; Bettan v. Geico Gen. Ins. Co., 296 AD2d 469, 470 [2002]; see also IDT Corp. v. Morgan Stanley Dean Witter & Co., 45 AD3d 419, 420 [2007]).

It is well settled that under appropriate circumstances, punitive damages may be awarded for fraud, although they are not appropriate in the "ordinary" fraud case (see Randi A.J. v. Long Island Surgi-Center, 46 AD3d 74, 79-82 [2007]). In order for such

an award to be appropriate, the defendant's conduct must have been malicious and reckless in its nature, evincing a high degree of moral culpability or moral turpitude, or such a high degree of moral turpitude or wanton dishonesty as to imply criminal indifference to civil obligations (see Giblin v. Murphy, 73 NY2d 769, 772 [1988]; Sharapata v Town of Islip, 56 NY2d 332, 335 [1982]; Cross v. Zybuero, 185 AD2d 967 [1992]). The defendant's conduct in this case was not sufficiently egregious to warrant an award of punitive damages (see Giblin v. Murphy, supra; Outside Connection, Inc. v. DiGennaro, 18 AD3d 634 [2005]; Zuccarini v. Ziff-Davis Media, Inc., 306 AD2d 404 [2003]).

The CPLR provides that prejudgment interest "shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with ... possession or enjoyment of[] property...." (CPLR § 5001[a]). Causes of action such as fraud, breach of fiduciary duty conversion and unjust enrichment qualify for the recovery of prejudgment interest under this section. (See Gibbs v. Breed, Abbott & Morgan, 181 Misc.2d 346, 354 [Sup.Ct 1999] rev'd on other grounds 279 AD2d 887 [2001]; Flamm v. Noble, 296 NY 262, 268 [1947]; Eighteen Holding Corp. v. Drizin, 268 AD2d 371, 372 [2000]). Prejudgment interest shall run "from the earliest ascertainable date the cause of action existed." (CPLR § 5001[b]). But, "[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single intermediate date." (Id.).

With respect to the cause of action for an accounting, the plaintiffs have abandoned this cause of action.

CONCLUSION

The plaintiffs have established that as a result of the defendant's, Dr. Sy's, breach of fiduciary duty by his fraudulent

acts and self-dealing, the plaintiffs lost their entire investment. Accordingly, plaintiffs are entitled to recover their actual pecuniary loss to restore them to the position they occupied before commission of the fraud which the court finds to be the amount of their total capital contributions plus interest.

Accordingly, it is

ORDERED that Dr. Steven Huang may enter judgment in his favor and against the defendants, Dr. Fabian A. Sy Fas Development Co., Inc. and 225 Associates in the amount of \$82,871.00, his capital contribution to SHLP Associates, together with interest from September 1, 1990 at the statutory rate. It is noted that Dr. S. Huang sold his interest in Empire Group Associates and SHLP Mortgage Associates back to Dr. Sy prior to the commencement of this action. It is further,

ORDERED that Dr. Joseph Huang may enter judgment in his favor and against the defendants, Dr. Fabian A. Sy, FAS Development Co., Inc. and 225 Associates in the amount of \$310,000.00, his total capital contribution to SHLP Associates, Empire Group Associates and SHLP Mortgage Associates, together with interest from September 1, 1990 at the statutory rate, and it is further

ORDERED that VERONICA WAN as Administratrix of the Estate of CHEE C. WAN may enter judgment in her favor as Administratrix of the Estate of CHEE C. WAN and against the defendants, Dr. Fabian A. Sy, FAS Development Co., Inc. and 225 Associates in the amount of \$173,000.00 the amount of her deceased husband's total capital contribution to Empire Group Associates, together with interest from September 1, 1990. at the statutory rate, and it is further

ORDERED that Dr. Pen Fa Lee may enter judgment in his favor and against the defendants, Dr. Fabian A. Sy, FAS Development Co., Inc. and 225 Associates in the amount of \$321,800.00, the amount of his total capital contribution to SHLP

Associates, Empire Group Associates and SHLP Mortgage Associates, together with interest from September 1, 1990, at the statutory rate, and it is further

ORDERED that Dr. Alfred T.C. Peng may enter judgment in his favor and against the defendants, Dr. Fabian A. Sy, FAS Development Co., Inc. and 225 Associates in the amount of \$271,300.00, his total capital contribution to SHLP Associates, Empire Group Associates and SHLP Mortgage Associates, together with interest from September 1, 1990 at the statutory rate, and it is further

ORDERED that Dr. Tzuli Hsu may enter judgment in his favor and against the defendants, Dr. Fabian A. Sy, FAS Development Co., Inc. and 225 Associates in the amount of \$173,500.00, his total capital contribution to Empire Group Associates, together with interest from September 1, 1990 at the statutory rate, and it is further

ORDERED that plaintiffs are also awarded one bill of costs and disbursements in an amount to be calculated by the Clerk of the Court and plaintiffs may enter judgment thereon.

The within constitutes the Decision and the Order of the Court.

Dated: February 28, 2008

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J.S.C.

attorneys next page
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