SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA CRANE** **PART** **60M**

Justice

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SAGE SYSTEMS, INC.

Plaintiff,

- v -

LISS, MICHAEL

Defendant.

---X

INDEX NO. 653523/2020

MOTION DATE 05/02/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Plaintiffs Sage Systems, Inc. ("Sage") and S-L Properties ("S-L"), a general partnership between Sage and Robert Liss, now deceased, bring this action against defendant Michael Liss, the executor of Robert Liss' estate (the "Estate"), alleging that he interfered with Sage's ability to wind up and terminate S-L, and that he breached the sublease agreement between S-L and Robert Liss (the "Sublease"). The five-count complaint asserts causes of action for: (1) contractual indemnification; (2) unjust enrichment; (3) conversion; (4) breach of the Sublease; and (5) attorneys' fees.

Defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3), (5) and (7). Plaintiffs cross-move for leave to amend the complaint to add claims for breach of fiduciary duty and violations of the Debtor Creditor Law ("DCL").

I. Background

On February 17, 1984, Robert Liss and Sage entered into a partnership agreement to form S-L (the "Partnership Agreement") (*see* NYSCEF Doc No. 7, Partnership Agreement). S-L then acquired the shares for the tenth floor (the "Premises") of a commercial cooperative building, located at 246 West 38th Street, New York, New York, and entered into a proprietary lease for the Premises (the "Prime Lease"), dated February 21, 1984 (*see* NYSCEF Doc No. 1, complaint, ¶¶ 8, 10).

In pertinent part, the Prime Lease provides, in paragraph 40 of the rider (the "Rider"), that "references herein to the Lessee shall be deemed to include the executors . . . of the Lessee" and that the Prime Lease "shall apply to bind and enure to the benefit of . . . the Lessee and the executors . . . of the Lessee" (NYSCEF Doc No. 33, Prime Lease, Rider, ¶ 40). In addition, paragraph 28 of the Rider provides for reimbursement of Lessor's expenses, including "reasonable attorney's fees and disbursements" incurred in connection with "performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on [Lessee's] default . . . ." (*id.*, ¶ 28).

Pursuant to the Partnership Agreement, Sage and Robert Liss subleased portions of the Premises from S-L and then subleased their respective portions to commercial subtenants (complaint, ¶¶ 11-12). Robert Liss subleased his portion of the Premises from S-L (the "Liss Use Area") pursuant to the Sublease, dated January 1, 1985 (*id.*, ¶ 13; NYSCEF Doc No. 8, Sublease).

In pertinent part, the Sublease provides that it "is in all respects subject and subordinate to the terms and conditions of the Prime Lease" and that it binds the sublessee (i.e, Robert Liss) to "perform each and every term, condition, covenant and provision of the Prime Lease upon the part of the lessee therein described to be kept and performed, during the term of this Sublease, to

the extent that the same shall apply to Sublessee or the Demised Premises . . . ." (Sublease, ¶ 4 [a]). In addition, the Sublease specifically incorporates, by reference, certain provisions of the Rider, imposing the obligations of those provisions on S-L and Robert Liss, with S-L taking the place of "Lessor" or "Landlord," and Robert Liss taking the place of "Lessee" or "Tenant," whenever those terms appear in the Rider (*id.*, ¶ 4 [b]). Among these specifically incorporated paragraphs includes paragraph 28, and not paragraph 40 (*id.*). In pertinent part, the Sublease provides that the "Sublessee . . . will take good care of the fixtures contained in the Demised Premises and will, at its own cost and expense, maintain and repair the fixtures that may become damaged or defective during the term of this Sublease" and that, "[u]pon the expiration of the term of this Sublease, Sublessee shall surrender possession of the Demised Premises in good order and condition with all appliances, fixtures and equipment, if any, in good repair and order" (*id.*, ¶ 6).

In May 2010, Robert Liss sued Sage for an accounting in an action entitled *Liss v Sage Systems, Inc.*, under index No. 107019/2010 (the "Liss Action") (*see* NYSCEF Doc No. 29, Chekijian aff, ¶ 12). Sage asserted counterclaims, including for contractual indemnification for the legal fees it incurred during the Liss Action (*see id.*, ¶ 13). The pertinent indemnification provision of the Partnership Agreement provides as follows:

> The Partnership and the other Partners shall be indemnified and held harmless by each Partner from and against any and all claims, demands, liabilities, costs, damages, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed by a Partners which is not performed in good faith or is not reasonably believed by such Partner to be in the best interests of the Partnership and within the scope of authority conferred upon such Partner under this Agreement, or which arises out of the fraud, bad faith, willful misconduct or negligence of such Partner" (Partnership Agreement, § 13.02 [b]).

In June 2010, Sage sued Robert Liss in an action entitled *Sage Systems, Inc. v Liss*, under Index No. 650745/2010 (the "Sage Action"). Sage sought indemnification, pursuant to section 13.02 [b] of the Partnership Agreement, in connection with a 2006 action that Robert Liss had brought to dissolve S-L. That had been dismissed (*see* Chekijian aff, ¶ 14; NYSCEF Doc No. 15, complaint in the Sage Action).

Robert Liss died on February 2, 2011 (complaint, ¶ 17). In case of death of one of the partners, the Partnership Agreement provides, in pertinent part as follows:

> "SECTION 12.01. Dissolution. The Partnership shall be dissolved and its business wound up upon the happening of any of the following event, whichever shall first occur:
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> ***
>
> (b) the death . . . of any Partner . . . (any such Partner being hereinafter referred to as the 'Defaulting Partner' and the other Partner being hereinafter referred to as the 'Surviving Partner');
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> ***
>
> SECTION 12.02. Termination. (a) In the case of a dissolution of the Partnership pursuant to clause (b) of Section 12.01, the Surviving Partner shall have the option to purchase the Partnership Interest of the Defaulting Partner in accordance with the provisions of Section 11.01 (a), and the Partnership shall be liquidated upon the closing of said purchase. . . .
>
> (b) In all other cases of dissolution of the Partnership, the business of the Partnership shall be wound up and the Partnership terminated as promptly as practicable thereafter . . ." (Partnership Agreement, §§ 12.01, 12.02)

If the Liquidating Partner chooses to purchase the Defaulting Partner's partnership interest, the Partnership Agreement sets forth the calculation of the "Fixed Price" for the purchase (*id.*, § 11.01 [a]). Should the Surviving Partner choose not to purchase the Defaulting Partner's interest, then, under subsection 12.02 (b), the Surviving Partner must wind up the business of the partnership. This requires "each of the following [to] be accomplished": (1) the "prepar[ation of] a statement setting forth the assets and liabilities of the Partnership as of the

date of dissolution"; (2) the liquidation of the partnership's property; (3) the allocation of any gain or loss to the partners; and (4) the distribution of any available net cash, in order of priority, to: the payment of debts, a reserve for any contingent or unforeseen liabilities, and a pro rata distribution to the partners (*id.*, § 12.02 [b]).

In addition, the Partnership Agreement provides as follows:

> SECTION 12.03. Liquidating Partner. (a) The term 'Liquidating Partner' shall mean . . . (ii) or in the case of a termination of the Partnership pursuant to clause (b) of Section 12.01 hereof, the Surviving Partner.
>
> (b) The Liquidating Partner is hereby irrevocably appointed as the true and lawful attorney in the name, place and stead of each of the Partners, such appointment being coupled with an interest to make, execute, sign, acknowledge and file with respect to the Partnership all papers which shall be necessary or desirable to effect the dissolution and termination of the Partnership in accordance with the provisions of this Article. . . . Notwithstanding the foregoing, each Partner, upon the request of the Liquidating Partner, shall promptly execute, acknowledge and deliver all such documents, certificates and other instruments as the Liquidating Partner shall reasonably request to effectuate the proper dissolution and termination of the Partnership, including the winding up of the business of the Partnership (*id.*, §12.03).

The Partnership Agreement states that it "shall be binding upon . . . and shall inure to the benefit of the parties hereto and, except as otherwise provided herein, their respective executors, administrators, legal representatives, heirs, successors and assigns" (*id.*, § 13.07).

According to Sage's president, Shahen Chekijian, "[i]n March, 2011, Sage elected to purchase Robert Liss' partnership interest, pursuant to Section 12.02 (a) of the Partnership Agreement" (Chekijian aff, ¶ 27). By letter dated April 7, 2011, Christopher Raimondi, awaited the appointment of Michael Liss as the executor of the Estate and anticipated his retainment to represent the Estate as its attorney, responded to Sage's election, "at the request of Michael Liss" (NYSCEF Doc No. 39 at 1). Mr. Raimondi informed Sage that prior to the appointment of an

executor, there was no one who could bind the Estate. However, he also assured Sage that, given its "elect[ion] to purchase the Liss Partnership Interest, . . . neither Mr. Liss, nor the Estate, [would] renew or enter into any sublease that will hinder the Estate's ability to deliver the Liss use area vacant at the time of closing" (*id.* at 2). On June 20, 2011, the Estate appointed Michael Liss, Robert Liss' son, as executor of the Estate (NYSCEF Doc No. 34, Certificate of Appointment of Executor).

In April 2015, the Estate filed an amended complaint in the Liss Action, that added a claim for specific performance. The Estate sought to compel Sage to liquidate S-L pursuant to the Partnership Agreement (NYSCEF Doc No. 9, amended complaint in the Liss Action). In its amended answer, dated June 24, 2015, Sage asserted counterclaims for: (1) specific performance, an order that directed the Estate to vacate the Premises and transferred Robert Liss' partnership interest (the "Liss Partnership Interest") to Sage, pursuant to its election under section 12.02 (a) of the Partnership Agreement; (2) breach of contract; (3) preliminary injunction that directed the Estate to vacate the Premises and to remove third parties that the Estate had improperly subleased; and (4) contractual indemnification for, among other things, "the delay in failing to close the transfer of the Robert Liss partnership interest to Sage Systems, Inc." (NYSCEF Doc No. 10, amended answer in the Liss Action, ¶ 48).

In November 2015, Sage allegedly learned, for the first time, that the Estate had entered into new subleases for the Liss Use Area during discovery. Specifically, the Estate allegedly produced copies of the subleases during discovery in the Liss Action (*see* Chekijian aff, ¶ 19; NYSCEF Doc No. 35 [copies of subleases between the Estate and various third parties, dated November 1, 2012, February 25, 2013, September 27, 2013 and September 30, 2013]).

In August 2016, S-L filed a petition in Civil Court, New York County, under Index No. 070845/2016, against the Estate and the subtenants that occupied the Liss Use Area, and sought their removal from the Premises, and fair market use and occupancy damages (the "Eviction Proceeding") (NYSCEF Doc No. 21). By decision and order dated December 6, 2016, the court (Hon. Carol Ruth Feinman) denied petitioner's motion and the Estate's cross motion for summary judgment, without prejudice, to renew after a determination of identical issues in the Liss Action (NYSCEF Doc No. 22.)

By Decision and Order dated August 22, 2018, in the Liss Action, Justice Barbara Jaffe denied the Estate's motion for summary judgment—except as to dismissal of Sage's counterclaims for breach of contract and a preliminary injunction—and granted Sage's cross motion for summary judgment on its counterclaim for specific performance (NYSCEF Doc No. 36). The court entered an order and judgment, dated April 9, 2019, on April 19, 2019. It terminated the Estate's rights to possession of the Liss Use Area, directed the Estate to immediately vacate the Liss Use Area, and to deliver it free and clear of all occupants to Sage. Upon delivery of the Liss Use Area, the court directed Sage to pay the Estate the Fixed Price of $469,169.92. (NYSCEF Doc No. 36.) By decision and order dated September 10, 2019, the Appellate Division, First Department, unanimously affirmed the August 22, 2018 decision, stating, in pertinent part that "[t]he court correctly declined to dismiss the indemnification counterclaim" (NYSCEF Doc No. 37).

On November 25, 2019, the Estate surrendered possession of the Liss Use Area and transferred the Liss Partnership Interest to Sage (*see* NYSCEF Doc No.14).

By decision and order dated May 8, 2020 in the Sage Action, Justice Jaffe granted Sage's motion for summary judgment, and found that the Estate was contractually bound to "indemnify

[Sage] for its expenses incurred in defending itself in [2006 dissolution] action" (NYSCEF Doc No. 38). Sage entered a money judgment for $80,608.04 on August 18, 2020 (the "Sage Judgment") (*id.*).

On July 31, 2020, plaintiffs commenced this action.

II. Analysis

A. Defendant's Motion to Dismiss

i. Dismissal Pursuant to CPLR 3211(a) (1) and (3)

The parties dispute first, whether an accounting is a prerequisite to this action; and second whether, pursuant to the terms of the Partnership Agreement, Sage's election to purchase the Liss Partnership Interest prevents it from now obtaining an accounting and meeting that prerequisite. The parties also dispute whether Sage's purchase of the Liss Partnership Interest terminates the partnership. Defendant contends that it did and, therefore, S-L lacks capacity to commence this action and the court must dismiss its claims. Plaintiffs respond that nothing in the Partnership Agreement bars this action, because liquidation pursuant to section 12.02 (a) does not constitute termination of the partnership, that, according to them, section 12.02 (b) describes. Plaintiffs argue that section 12.03 (b) of the Partnership Agreement empowers Sage to wind up S-L and that this action is in furtherance of that objective.

CPLR 3211 (a) (1) provides for dismissal of a cause of action, where "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [internal citation omitted]). CPLR 3211 (a) (3) provides for dismissal where "the party asserting the cause of action has not legal capacity to sue" (CPLR 3211 [a] [3]), such as in the case of entity that no

longer exists (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279-280 [1st Dept 2006] [explaining that the question of whether a nonexistent corporations is a proper party to bring suit is an issue of legal capacity]); *Tower Mineola Ltd. Partnership v. Potomac Ins. Co. of Ill.,* 14 Misc 3d 1238[A], 2007 NY Slip Op 50418[U], *15 [Sup Ct, NY County 2007] [dismissing a limited partnership "as a party plaintiff in [an] action, as [the] entity lack[ed] a legal existence and, hence, lack[ed] the legal capacity to maintain [an] action"]).

Here, irrespective of the provisions of the Partnership Agreement, plaintiffs' failure to seek an accounting, does not require dismissal of the action.

> While it is well settled that absent an accounting an action at law may not be maintained by one partner against another, such proscription only applies if the claim for damages cannot be determined without an examination of the partnership's books. Hence, the absence of an accounting will not bar an action brought by a partner against another if the alleged wrong involves a partnership transaction which can be determined without an examination of the partnership books" (*Le Bel v Donovan*, 96 AD3d 415, 416 [1st Dept 2012] [internal quotation marks and citations omitted]).

That is the case here. Plaintiffs seek to hold defendant accountable for his conduct after dissolution of the partnership. The complaint alleges that defendant exceeded his authority as executor of the Estate when he subleased the Liss Use Area and that he breached the Sublease by surrendering the Liss Use Area in a state of disrepair (*see* complaint, ¶¶ 1,2, 43-82). Neither wrong requires an examination of the partnership's books for its resolution. Therefore, plaintiffs' failure to seek an accounting first does not warrant dismissal of this action (*see Le Bel*, 96 AD3d at 416 [affirming denial of motion to dismiss based on the "plaintiff's failure to bring a predicate action for an accounting," where the "plaintiff's primary claims at law [could] be resolved absent an accounting" and an accounting merely provided "a method by which to calculate the amount of monetary damages").

However, defendant correctly argues that S-L lacks capacity to sue.

Partnership Law defines "[t]he dissolution of a partnership" as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business" (Partnership Law § 60). Following dissolution, the partnership exists solely to wind up the affairs of the partnership. Once the winding up is completed, the partnership terminates. (*See* Partnership Law § 61; *Lai v Gartlan*, 46 AD3d 237, 245 [1st Dept 2007]; *Bayer v Bayer*, 215 App Div 454, 473 [1st Dept 1926].) Parties are generally free to contract for, among other things, the manner of dissolution and the winding up of their partnerships (*see Lai*, 46 AD3d at 244) and "when the agreement between partners is clear, complete and unambiguous, it should be enforced according to its terms" (*Cole v Macklowe*, 99 AD3d 595, 595 [1st Dept 2012] [internal citation omitted]).

In this case, contrary to plaintiffs' contentions, subsection 12.02 (b) is not the sole method that provides for termination of the partnership. Section 12.02 unambiguously states two methods of termination. Each subsection sets forth an alternate path for termination of the partnership (*see Bank of Am., N.A. v PSW NYC LLC*, 29 Misc 3d 1216[A], 2010 NY Slip Op 51848[U], *8 [Sup Ct, NY County 2010] [finding that all of the subsection related to the subject identified in the title of the section, where, among other things, "none of the subsections . . . [we]re individually titled"). The first method allows for termination following dissolution due to the death of a partner – it gives "the Surviving Partner . . . the option to purchase the Partnership Interest of the Defaulting Partner" for a fixed price (*id.*, § 12.02 [a]). Should the Surviving Partner pursue this path, "the Partnership shall be liquidated upon the closing of said purchase" (*id.*, § 12.02 [a]). No further winding up is necessary. Should the Surviving Partner pursue the alternate path, then he must wind up the business of the partnership, liquidate its assets, and

make appropriate distributions (*id.*, § 12.02 [b]). Both paths lead to the liquidation and, therefore, the termination of the partnership (*see* Partnership Law § 61; *Lai*, 46 AD3d at 245; *Bayer*, 215 App Div at 473).

Sage elected to terminate pursuant to subsection 12.02 (a). It obtained a judgment in its favor, directing the Estate to transfer the Liss Partnership Interest to Sage (NYSCEF Doc No. 13). The sale closed on November 25, 2019 (NYSCEF Doc No.14). Pursuant to the unambiguous terms of the Partnership Agreement, this effected the liquidation and, concomitantly, the termination of the partnership (Partnership Agreement § 12.02 [a]; Partnership Law § 61; *Lai*, 46 AD3d at 245; *Bayer*, 215 App Div at 473). As a nonexistent entity, S-L lacks capacity to sue (*see Tower Mineola Ltd. Partnership,* 14 Misc 3d at *15).

Accordingly, to the extent defendant's motion to dismiss is based on S-L's lack of capacity, the court grants the motion and dismisses S-L's claims for breach of the Sublease and attorneys' fees (fourth and fifth causes of action, respectively).

ii. Dismissal Pursuant to 3211(a) (5)

a. Res Judicata, Collateral Estoppel and Judicial Estoppel

Defendant contends that the court must dismiss the complaint because of res judicata and collateral estoppel, because Sage or S-L, as a party in privity with Sage, previously raised the same claims and/or issues in the Sage Action, the Liss Action, and the Eviction Proceeding. Defendant contends that Sage had a full and fair opportunity to litigate these matters to final resolution and may not relitigate them now. Defendant also argues that res judicata bars Sage, who prevailed on its argument in the *Liss Action* - that Sage could purchase the Liss Partnership Interest - from seeking additional damages had it pursued termination of the partnership under subsection 12.02 (b) at the time.

Sage refutes the argument. Neither res judicata nor collateral estoppel apply, because: (1) the Sage Action dealt with claims entirely unrelated to the claims in this action; (2) the court did not address Sage's indemnification claim in the *Liss Action*; and (3) the Eviction Proceeding did not involve Sage as a party, thus the denial of summary judgment lacked merit.

Equally inapplicable, Sage argues, is judicial estoppel. Sage's claims in the action seek to hold defendant liable for his delay in vacating the Liss Use Area. consistent with Sage's previous argument in the Liss Action - that Sage, as the surviving partner, could purchase the Liss Partnership Interest. Sage also argues that it could not seek indemnification for the Estate's continued subleasing of the Liss Use Area in the Liss Action, because it did not discover this fact until after it had filed its amended answer in that action.

Under the doctrine of res judicata, or claim preclusion, if a court has determined a claim on the merits in a prior action between the same parties, or those in privity with them, "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [internal quotation marks and citation omitted]). Collateral estoppel, or issue preclusion, "is somewhat narrower" and requires "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue" (*Matter of Hofmann*, 287 AD2d 119, 123 [1st Dept 2001] [internal quotation marks and citation omitted]). Judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*All Terrain Props. v Hoy*, 265 AD2d 87, 93 [1st Dept 2000] [internal quotation marks and citation omitted]).

Here, neither res judicata nor collateral estoppel require dismissal of Sage's claims.

The indemnification claim in the *Sage Action*, while also based on section 12.02 (b) of the Partnership Agreement, sought indemnification for damages from Robert Liss' bad faith in his pursuit of judicial dissolution of S-L in 2006 (*see* NYSCEF Doc Nos. 15, 38). Sage's present claim for indemnification relies on defendant's refusal to sell the Liss Partnership Interest, and his subleasing of the Liss Use Area. That these claims do not "aris[e] out of the same transaction or series of transactions," means that res judicata is irrelevant (*Matter of Hunter*, 4 NY3d at 269; *see also Singleton Mgt. v Compere*, 243 AD2d 213, 216 [1st Dept 1998] [finding that res judicata not applicable, where the claims "(were) not the same or identical causes of action, but, rather, wholly separate and distinct legal wrongs, giving rise to different causes of action"]).

The court, in the Eviction Proceeding, denied S-L's summary judgment motion as premature, but did not address the merits of the parties' arguments. The court denied the motion without prejudice (*see* NYSCEF Doc No. 22). Thus, the issue of whether the Estate could possess the Liss Use Area, in the absence of a court order to the contrary, "has not been fully litigated" and "collateral estoppel is inapplicable" (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept 2007]). Similarly, the res judicata inapposite, as the matter was not "brought to final conclusion" (*id.*).

In the Liss Action, the court granted summary judgment on Sage's specific performance counterclaim. The court also dismissed its breach of contract and preliminary injunction counterclaims (NYSCEF Doc No. 36). However, at issue is whether prior courts decided if: (1) Sage was entitled to a prompt closing, following its election to purchase the Liss Partnership Interest; and (2) whether Sage was entitled to damages for the delay. The Liss Action court dismissed the preliminary injunction and breach of contract counterclaims without discussion

(*id.*, decision and order at 6). It also left the contractual indemnification counterclaim, that sought damages for "the delay in failing to close the transfer of the Robert Liss partnership interest to Sage Systems, Inc." (NYSCEF Doc No. 10, ¶ 48), for litigation. Accordingly, the court finds collateral estoppel inapplicable here, as well (*see Singleton Mgt.*, 243 AD2d at 217 [internal quotation marks and citations omitted] ["(p)reclusive effect will not be given if the particular issue. . .was not actually litigated, squarely addressed and specifically decided"]). In addition, while the contractual indemnification claim in the Liss Action arises out of the same transaction as Sage's present indemnification claim, because the claim has not yet "brought to a final conclusion" in the Liss Action, res judicata is also inapplicable (*Angel*, 39 AD3d at371 [internal quotation marks and citation omitted]).

Lastly, judicial estoppel does not require dismissal of the complaint. Sage is not adopting a position different from its position in the Liss Action. On the contrary, its claims are a natural extension of its success in obtaining specific performance. Having vindicated its right to purchase Robert Liss's interest, it is now suing Michael Liss for damages caused by his refusal to sell the Liss Partnership Interest and to vacate the Liss Use Area for eight years. As these are not inconsistent positions, the doctrine of judicial estoppel is inapplicable (*see All Terrain Props. v Hoy*, 265 AD2d at 93).

b. Statute of Limitations

Defendant argues that the statute of limitations bar Sage's claims for contractual indemnification, unjust enrichment and conversion to the extent that the claims seek to recover rents the Estate collected more than: (1) six years prior to the commencement of this action for the first two claims, and; (2) three years prior to commencement for the third. Sage responds that its claims benefit from the continuing wrong doctrine, and that the relevant statutes of

limitations began to run from the day the Estate vacated the Premises, which marked the commission of the last wrong. Sage also argues that the court should deny the motion, because defendant fails to meet his burden. Finally, Sage argues that defendant is equitably estopped from raising the defense, because Sage reasonably relied on defendant's assurance, in 2011, that the Estate would not enter into new subleases.

On a motion to dismiss pursuant to CPLR 3211 (a) (5) "the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired" (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 644 [1st Dept 2019] [internal citations omitted]). Upon this showing, "[t]he burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period" (*id.* at 645).

In its first cause of action for contractual indemnification, Sage alleges that it "properly elected to purchase Robert Liss' partnership interest pursuant to the Partnership Agreement" and "[t]hat, as early as July 22, 2011, Robert Liss' partnership interest, and possession of the Liss Use Area, should have been transferred to Sage" (complaint, ¶¶ 44,45), but that defendant instead "interfered with the closing of said purchase, and wind up of S-L Properties, by subleasing the Liss Use Area and litigating the meritless claims in the [Liss] Action" (*id.*, ¶ 48). A contractual indemnification claim is subject to the six-year statute of limitations (CPLR 213 [2]). Generally, a claim accrues for statute of limitations purposes when "all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (*CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC*, 195 AD3d 12, 18 [1st Dept 2021] [internal quotations marks and citation omitted]). To the extent Sage premises the claim on defendant's refusal to transfer the Liss Partnership Interest and the Liss Use Area, the

claim accrued in 2011 and is untimely, as more than six years elapsed before Sage commenced this action in 2020. Sage is not entitled to the benefit of the continuing wrong doctrine, that "serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" *Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks and citation omitted]). The wrongful act occurred in 2011, when defendant refused to sell the Liss Partnership Interest to Sage and refused to vacate the Liss Use Area. That Sage's damages increased during defendant's continued occupation of Liss Use Area is extraneous. The doctrine is inapplicable to "a single wrong that has continuing effects" and is concerned only with "a series of independent, distinct wrongs" (*id*). Therefore, if Sage premises the indemnification claim on defendant's refusal to sell the Liss Partnership Interest, the claim is time-barred.

"However, the mere fact that a claim has accrued . . . does not mean that a new claim, with a new limitations period, may not arise out of a new set of facts that forms part of a series with the original wrong" (*CWCapital Cobalt VR Ltd.*, 195 AD3d at18). This is the cases here. To the extent that Sage premises its' indemnification claim on defendant's subleasing of the Liss Use Area, each time defendant entered into a sublease—assuming defendant then acted contrary to the best interest of the partnership and outside of his authority under the Partnership Agreement (*see* Partnership Agreement, § 13.02 [b])—it "constitute[d] a separate, actionable wrong," giving rise to a separate indemnification claim (*see CWCapital Cobalt VR Ltd.*, 195 AD3d at 19; *see also Matter of Yin Shin Leung Charitable Found. v. Seng,* 177 AD3d 463 [1st Dept 2019]). Therefore, as to the subleases that defendant entered into within six years of the commencement of this action, the court finds the indemnification claim timely (*see CWCapital Cobalt VR Ltd.*, 195 AD3d at 20 [noting "that application of the continuing wrong doctrine only

avails (a plaintiff) of claims that arose within (the limitations period) of the commencement of the action"]; *Henry*, 147 AD3d at 601 ["the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitation"]).

Sage's second cause of action for unjust enrichment and third cause of action for conversion both seek to recover the rent the Estate collected from its subtenants. Sage alleges "[t]hat Sage, as the last remaining partner of S-L Properties, was the only entity entitled to occupy the Liss Use Area after Robert Liss' death" (complaint, ¶ 59; *see also id.*, ¶ 66) and, thus, the only entity entitled to collect rental income generated by the Liss Use Area (*see id.*, ¶¶ 60, 66). A six-year statute of limitations applies to an unjust enrichment claim (CPLR 213 [1]; *see also Whittemore v Yeo*, 112 AD3d 475, 476 [1st Dept 2013]), which "generally accrues upon the occurrence of the alleged wrongful act giving rise to restitution" (*Swain v Brown*, 135 AD3d 629, 632 [1st Dept 2016] [internal quotation marks and citation omitted]). A three-year statute of limitations applies to a conversion claim (CPLR 214 [3]), which "normally accrues on the date the conversion takes place and not the date of discovery or the exercise of diligence to discover" (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013] [internal citation omitted]). Based on the foregoing, the court time-bards the claims from the second and third causes of action that seek to recover rent collected more than six and three years, respectively, before the commencement of this action.

Contrary to Sage's contention, defendant is not equitably estopped from asserting the statute of limitations defense. Equitable estoppel applies, "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. . . . [T]he plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006] [internal quotation marks and citation omitted]) and its "due diligence in

ascertaining the facts and in commencing the action . . ." (*MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept 2017] [internal citation omitted]). In April 2011, the Estate's soon-to-be attorney assured Sage that, in light of Sage's election to purchase the Liss Partnership Interest, the Estate would not enter any new subleases for the Liss Use Area (*see* NYSCEF Doc No. 39). Sage argues that it did not bring its claims earlier, because it believed "that the Estate would simply terminate the existing Third Party Subleases and promptly deliver Robert Liss' use area vacant" (NYSCEF Doc No. 41, Sage's brief in opposition at 8). However, Sage knew, "as early as July 22, 2011" (complaint, ¶ 45), that defendant would not sell the Liss Partnership Interest or vacate the Liss Use Area. Therefore, Sage fails to demonstrate that its reliance was reasonable or that it acted with due diligence to ascertain defendant's true intentions for the Liss Use Are. Accordingly, the doctrine of equitable estoppel is inapplicable (*see Zumpano*, 6 NY3d at 674 [finding no basis for collateral estoppel, where "(s)ubsequent conduct by the (defendants) did not appear in any way to alter plaintiffs' early awareness of the essential facts and circumstances underlying their causes of action or their ability to timely bring their claims"]; *MBI Intl. Holdings Inc.*, 151 AD3d at 117 [rejecting equitable estoppel claim where the plaintiffs "were on inquiry notice . . . and failed to make a reasonable investigation"]).

For the foregoing reasons, the first cause of action is time barred where it seeks indemnification for: (1) defendant's refusal to sell the Liss Partnership Interest and to vacate the Liss Use Area; and (2) defendant's subleasing of the Liss Use Area more than six years prior to commencement of this action. Simiarly, the second and third causes of action are time-barred to the extent they seek recovery of rent the Estate collected more than six and three years, respectively, prior to commencement of this action.

iii. Dismissal Pursuant to 3211(a) (7)

Defendant seeks dismissal of the complaint, in its entirety, for failure to state a claim. First, he argues that, pending liquidation, the partnership remained in existence and, absent a court order, the Estate retained Robert Liss's rights, including the right to sublease the Liss Use Area. Second, he argues that, because the complaint seeks relief pursuant to the Partnership Agreement and the Sublease Agreement, Sage may not seek the same relief under its unjust enrichment claim. Finally, defendant argues that Sage may not seek relief against defendant pursuant the Partnership Agreement and the Sublease, while simultaneously arguing that defendant was never a partner of S-L, as this would mean that defendant was not a party to those contracts.

Sage responds that the complaint's allegations are not inconsistent, because, while the Partnership Agreement and the Sublease were binding on Robert Liss' executor, the Estate's authority to act was limited to assisting Sage in the winding up of the partnership. Sage contends that defendant far exceeded his authority by subleasing the Liss Use Area. As concerns the unjust enrichment claim, Sage argues that inconsistent cause of actions may be pleaded in the alternative and that, in any event, the Partnership Agreement "does not include an explicit protocol that the partners must follow when one partner . . . improperly retains monies meant for the other partner" (NYSCEF Doc No. 41, Sage's brief in opposition at 10).

"[O]n a motion to dismiss the complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by

documentary evidence are not entitled to such consideration" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [internal citation omitted]).

First, the court finds meritless defendant's contention that the partnership continued in existence and that the Estate and Sage retained equal rights with respect to the Premises pending liquidation or a court order. S-L dissolved upon the death of Robert Liss (Partnership Agreement § 12.01 [b]; Partnership Law § 62 [4]). At that point, the partnership "was at an end. All that remained to be done was to wind up the partnership affairs and to terminate the same" (*Bayer*, 215 App Div at 471; *see also* Partnership Law § 61). The Partnership Agreement expressly provides that, upon dissolution due to the death of a partner, the "Surviving Partner" becomes the "Liquidating Partner" (Partnership Agreement, § 12.03 [a] [ii]) and is

> [i]rrevocably appointed as the true and lawful attorney in the name, place and stead of each of the Partners, such appointment being coupled with an interest to make, execute, sign, acknowledge and file with respect to the Partnership all papers which shall be necessary or desirable to effect the dissolution and termination of the Partnership in accordance with the provisions of this Article" (*id.*, § 12.03 [b]).

The Partnership Agreement also provides that, while the executor of the deceased partner's estate remains bound by the agreement (*see id.*, § 13.07), his role in the partnership is a limited one, namely to "promptly execute, acknowledge and deliver all such documents, certificates and other instruments as the Liquidating Partner shall reasonably request to effectuate the proper dissolution and termination of the Partnership, including the winding up of the business of the Partnership" (*id.*, § 12.03 [b]). Notably, these provisions are consistent with the well-established rule that "[o]n the death of a partner, the surviving partners have the exclusive right to wind up the affairs of the partnership" and "the representative of the deceased partner does not have any right to participate or interfere with the management of the partnership" (*Gross v Neiman*, 147

AD3d 505, 506 [1st Dept 2017], citing Partnership Law § 51 [2] [d] and *Silberfeld v Swiss Bank Corp.*, 273 App Div 686, 688 [1st Dept 1948], *affd* 298 NY 776 [1948]).

Merriman v Town of Colonie, N.Y. (934 F Supp 501 [ND NY 1996], *affd sub nom. Merriman v Ye Ole Locksmith Shoppe, Inc.*, 112 F3d 504 [2d Cir 1997]), upon which defendant relies, is inapposite. Unlike this case, *Merriman* involved a dispute between two living partners (*see id.*).

Accordingly, that the complaint premises many of its claims on defendant's allegedly unauthorized subleasing of the Liss Use Area, does not require dismissal of such claims.

Based on the foregoing, there is also nothing contradictory in the complaint's allegations that defendant was not a partner of S-L and exceeded the scope of his authority, while simultaneously liable for contractual indemnification under the Partnership Agreement. However, as to the fourth and fifth causes of action for breach of the Sublease and related attorneys' fees, the court dismisses those claims the independent reason that the complaint fails to allege the existence of a contract between S-L and defendant.

The complaint alleges "[t]hat pursuant to Section 6 of the . . . Sublease, upon Robert Liss' vacatur of the Liss Use Area, Robert Liss was required to surrender possession of the Liss Use Area 'in good [order] and condition with all appliances, fixtures and equipment, if any, in good repair and order'" (complaint, ¶ 72, quoting Sublease, ¶ 6). It then alleges that the Estate breached this provision (*id.*, ¶¶ 73-80), without ever alleging that the Estate, rather than Robert Liss, was bound by the Sublease. While the Partnership Agreement and the Prime Lease expressly provide that they are binding on the parties and their executors (*see* Partnership Agreement, § 13.07; Rider, ¶ 40), the Sublease contains no such provision.

Sage argues that paragraph 4 (a) of the Sublease incorporates paragraph 40 of the Rider into the Sublease and, thereby, binds defendant to perform under the Sublease. However,

paragraph 4 (a) merely requires the sublessee (i.e. Robert Liss) to perform under the Prime Lease. Even assuming this means that paragraph 40 of the Rider applies in this instance, at most, it binds defendant to perform under the Prime Lease. Sage's claim is for breach of the Sublease. Paragraph 4 (b) of the Sublease is equally unhelpful to Sage's claim. The paragraph expressly incorporates provisions of the Rider into the Sublease, such that nearly identical provisions become part of the agreement between S-L and Robert Liss. However, it does not include paragraph 40 among the incorporated provisions. Because Sage fails to demonstrate that the Sublease is binding on Robert Liss's executor, the fourth and fifth causes of action, which are premised on breach of the Sublease, fail to state a claim (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181 (2011) (stating that "the failure to allege a relationship between the parties . . . (is) fatal to (a breach of contract) claim").

The complaint also fails to state a claim for unjust enrichment. Unjust enrichment "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal citation omitted]). Here, the Partnership Agreement governs the parties' rights and obligations during the winding up and liquidation of the partnership (*see* Partnership Agreement, article 12). It also provides Sage with a right of recovery against defendant for conduct that exceeded his authority (*see id.*, §§ 13.02 [b], 13.07). Therefore, the court dismisses

the unjust enrichment claim as duplicative of the indemnification claim (*see Corsello*, 18 NY3d at 731; *IDT Corp.*, 12 NY3d at 142).

For the foregoing reasons, the court grants defendant's motion to dismiss the complaint for failure to state a claim with respect to the second, fourth and fifth causes of action.

B. Sage's Cross Motion to Amend the Complaint

Sage seeks leave to amend the complaint to assert claims for breach of fiduciary duty and fraudulent conveyance, pursuant DCL §§ 273, 274 and 276, based on Michael Liss' alleged diversion of assets away from the Estate during the pendency of the various actions.

i. Removal to Surrogate's Court Pursuant to CPLR 325 (e)

The parties dispute whether the proposed claims should go to surrogate's court, pursuant to CPLR 325 (e). Defendant argues that removal is appropriate, because Sage has filed a claim in surrogate's court to recover the Sage Judgment (*see* NYSCEF Doc No. 43) and, therefore, removal would avoid fragmentation of issues involving the Estate and would be in the interests of judicial economy. Sage counters that relief should be denied because defendant failed to make the required motion and because the dispute is between living persons.

While CPLR 325 (e) provides for removal to surrogate's court "upon motion," defendant's failure to make such a motion does not necessitate denial of relief. The issue is within the court's discretion. (*Cf Fried v Jacob Holding, Inc.*, 110 AD3d 56, 65 [2d Dept 2013].) As Sage had adequate opportunity to address the argument and, in fact, did so, the court considers defendant's request.

The court denies the request. CPLR 325 (e) states that removal is appropriate "[w]here an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court . . . ." Here, the proposed claims allege

misconduct that, if true, renders defendant liable in his personal capacity (*see* EPTL § 11-4.7 [b] [providing that "(a) personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate . . ."]; *Schwartz v Boom Batta, Inc.*, 137 AD3d 512, 513 [1st Dept 2016] [stating that a DCL claim may be brought against "both a transferee of a debtor's assets and beneficiary of the conveyance who participated in the fraudulent transfer . . . ."]). Accordingly, these claims "cannot be said to relate to either the affairs of the decedent or the administration of his estate" (*Matter of Matter of Piccione*, 57 NY2d 278, 291 [1982]). Therefore, the court denies removal.

ii. Leave to Amend Pursuant CPLR 3025 (b)

Defendant argues that the court must deny the motion to amend because the proposed causes of actions are plead on "information and belief," without any factual basis, and, are, therefore, conclusory and insufficient to state a claim for breach of fiduciary duty or fraudulent conveyance. In addition, defendant argues that the proposed DCL claim fails to plead when the alleged fraudulent transfers occurred, making it impossible to ascertain which version of the statute is applicable and whether various elements, such as Sage's status as a creditor at the time of the conveyances, are satisfied. Sage counters that the allegations sufficiently allege the proposed claims and that the claims can be amplified following discovery.

"Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). The movant "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74

AD3d 499, 500 [1st Dept 2010] [internal citations omitted]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019] [internal quotation marks and citation omitted]).

To establish a breach of fiduciary duty claim, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). The claim must be pled with particularity (*see* CPLR 3016 [b]; *Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]).

The pleading requirements for a fraudulent conveyance claim under the DCL vary, depending on the section invoked. The requirements also vary depending on when the claim accrued. The DCL was recently amended, effective April 4, 2020; the amendment does "not apply to a transfer made or obligation incurred before [the] effective date, nor . . . to a right of action that . . . accrued before [the] effective date" (L 2019, ch 580, § 7). However, no matter the provision relied upon, a plaintiff must allege the elements of the claim with particularity (*see* CPLR 3016 [b]; *see also Avilon Auto. Group v Leontiev*, 194 AD3d 537, 539 [1st Dept 2021]; *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]).

Here, Sage's proposed breach of fiduciary duty claim does not suffice as a matter of law. The claim contains two aspects. One is based on defendant's duty to the Estate's creditors. The other Sage premises on his role as the representative of a deceased partner in the winding up of the partnership. Each fails to state a claim for breach of fiduciary duty.

First, Sage alleges that defendant breached the fiduciary duty he owed to Sage, as a creditor of the Estate, by diverting the Estate's assets and making distribution prior to satisfying

the Sage Judgment (*see* NYSCEF Doc No. 40, proposed amended complaint ["PAC"], ¶¶ 79-86). The PAC sufficiently pleads the existence of a fiduciary duty, as the executor "manages all assets of the decedent and stands in a fiduciary relation to all parties interested in the estate, *specifically including creditors*" (*Matter of Runals*, 68 Misc 2d 967, 973 [Sur Ct, Cattaraugus County 1972] [emphasis added]; *see also Blood v Kane*, 130 NY 514, 517 [1892] [stating that an executor holds the property of the estate, "not in his own right, but as a trustee for the benefit . . . of the creditors of the testator . . ."]; *Matter of George*, 194 AD3d 1290, 1294 n 7 [3d Dept 2021] [stating that the executor "was a fiduciary for the creditors as well as the beneficiaries"]). However, it fails to plead the misconduct with requisite particularity, instead making such allegations "upon information and belief," without identifying the information forming those beliefs (*see* PAC, ¶¶ 82,83). As the PAC fails to "state in detail the circumstances constituting the wrong," this branch of the breach of fiduciary duty claim is insufficient as a matter of law (*see Wall St. Transcript Corp. v Ziff Communications Co.*, 225 AD2d 322, 322 [1st Dept 1996]).

In addition, Sage alleges that defendant breached his fiduciary duty "not to interfere with the wind up of S-L Properties" (PAC, ¶ 88) by "repeatedly entering into new Third Party Subleases of the Liss Use Area" (*id.*, ¶ 89). The court finds this portion of the claim deficient because it fails to allege the existence of a fiduciary relationship. It alleges that "the Estate had no rights as a partner of S-L Properties" and that defendant's "sole duty was not to interfere with the wind up of S-L Properties" (*id.*, ¶¶ 87, 88). However, Sage does not identify the source of that duty. Its reliance on cases stating that "the representative of the deceased partner does not have any right to participate or interfere with the management of the partnership" (*Gross*, 147 AD3d at 506 [internal citations omitted]) is misplaced. The absence of a right and the existence of a duty are separate matters.

As to the relationship between a surviving partner and the representative of a deceased partner, the law is clear. First, "dissolution of a partnership terminates the fiduciary relationship between partners" (*Allied Bingo Supplies of Fla., Inc. v Hynes*, 27 AD3d 597, 598 [2d Dept 2006]; *see also Bayer*, 215 App Div at 479). Second, where dissolution is caused by the death of one partner, the surviving partner owes a fiduciary duty to the representative of the deceased partner, that "prohibits the surviving partner acquiring any benefit from the deceased partner's interest at the expense of his representative" *Bauchle v Smylie*, 104 App Div 513, 515 [1st Dept 1905] [internal citations omitted]; *see also Le Bel*, 96 AD3d at 417). The court could not locate, and Sage does not identify, any authority for a reciprocal fiduciary duty owed by the representative of the deceased partner to the surviving partner.

That defendant had a duty to permit Sage to wind up the partnership, without interference, is found in the Partnership Agreement, that names the surviving partner the "Liquidating Partner" and charges it with the responsibility of winding up and terminating the partnership (*see* Partnership Agreement, §§ 12.02, 12.03). A breach of fiduciary duty claim cannot stand where it "fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties . . ." (*Kaminsky v FSP Inc.*, 5 AD3d 251, 252 [1st Dept 2004] [internal citation omitted]). For the foregoing reasons, Sage's proposed breach of fiduciary duty claim is insufficient as a matter of law.

The proposed DCL claim is also insufficient as a matter of law. First, the fraudulent conveyance allegations are conclusory and made "upon information and belief" (PAC, ¶¶ 94-97). Neither a claim for actual nor constructive fraudulent conveyance can stand where, in this case, the "key allegations [are] made '[u]pon information and belief,' without identifying the source of the information" (*Carlyle, LLC*, 160 AD3d at 477; *see also Avilon Auto. Group*, 194 AD3d at

539). In addition, the PAC fails to specify when the alleged fraudulent conveyances took place, stating only "[t]hat, upon information and belief, over the last five (5) years, Michael Liss has divested the Estate of all assets" (PAC, ¶ 94). As the amendment of the DCL became effective on April 4, 2020 (L 2019, ch 580, § 7), the PAC's allegations make it impossible to discern which version of the statute applies.

Notably, Sage attempts to correct these deficiencies on reply. It explains that both of the proposed causes of action are premised on defendant's November 16, 2020 response to an information subpoena, disclosing that he closed the Estate's bank account in August 2020—three months after Sage had obtained summary judgment in the Sage Action and the same month that the Sage Judgment was entered (*see* NYSCEF Doc No. 45, Seeman reply affirmation, ¶¶ 5-8; NYSCEF Doc No. 46, Michael Liss' response to information subpoena at 2). While a plaintiff may correct the deficiencies of a poorly pleaded complaint with an affidavit (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]), a court will not consider new facts presented on reply (*see Mohsin v Port Auth. of N.Y. & N.J.*, 83 AD3d 536, 536 [1st Dept 2011]). Therefore, the court denies Sage's cross motion for leave to amend the complaint.

Accordingly,

ORDERED that the motion to dismiss is granted to the extent of dismissing:

(1) the first cause of action, except to the extent it is premised on defendant entering subleases for the Liss Use Area within six years prior to commencement of this action;

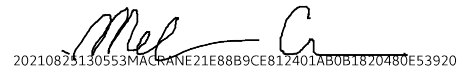
(2) the third cause of action, to the extent it seeks recovery of rents collected more than three years before commencement of this action; and

(3) the second, fourth and fifth causes of action; and it is further

ORDERED the court denies plaintiffs' cross motion for leave to amend the complaint; and it is further

ORDERED that the court directs defendant to serve an answer to the complaint within 20 days after this decision is filed on NYSCEF; and it is further

ORDERED that counsel are directed to appear for a compliance conference on **September 14, 2021** at **3:00PM**. The court will schedule the conference via Microsoft Teams.



8/25/2021					
DATE			MELISSA CRANE, J.S.C.		
CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	