New York Official Reports

Unreported Disposition
37 Misc.3d 1214(A), 961 N.Y.S.2d 357 (Table), 2012 WL 5276925 (N.Y.Sup.), 2012 N.Y. Slip Op. 52036(U)

***1** Martin Daskal, individually and on behalf of 333-345 green llc, 1775 east 17th st., llc, and 1584 fulton llc,, Plaintiff,

v.

Joseph Tyrnauer a/k/a volvi tyrnauer, wnt construction corp. wtc development corp., wtc construction co., inc., wtc management inc., home @ greene ny inc., wt development corp., wt construction corp., 101-115 spring garden st llc, elie staub, 1230 57th st. llc, gregory miedrzynski a/k/a greg miedrzynski, and banco popular north america,, Defendants.

500734/11
Supreme Court, Kings County
Decided on October 22, 2012

CITE TITLE AS: Daskal v Tyrnauer

ABSTRACT

Pleading
Sufficiency of Pleading
Civil RICO Claim under 18 USC § 1962 (c)

Pleading
Sufficiency of Pleading
Fraudulent Conveyance

Daskal v Tyrnauer, 2012 NY Slip Op 52036(U). Pleading—Sufficiency of Pleading—Civil RICO Claim under 18 USC § 1962 (c). Pleading—Sufficiency of Pleading—Fraudulent Conveyance. (Sup Ct, Kings County, Oct. 22, 2012, Demarest, J.)

APPEARANCES OF COUNSEL

Attorney for Plaintiff:
Michael Korsinsky
Korsinsky & Klein, LLP
30 Broad Street - 15th Floor
New York, NY 10004
Attorney for Defendants:
(Defendants Tyrnauer & Tyrnauer Companies)
Steven Weg
Goldberg & Rimberg, PLLC
115 Broadway, 3rd Floor
New York, NY 10006
(Defendants Banco Popular & Miedrzynski)
Steven Lucks
Fishkin Lucks, LLP
277 Broadway, Suite 408
New York, NY 10007
(Defendant Staub)
Roger Adler
233 Broadway, Suite 1800
New York, NY 10279

OPINION OF THE COURT

Carolyn E. Demarest, J.

The following papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*30, 32, 34-36, 45-46*

Opposing Affidavits (Affirmations)

Reply Affidavits (Affirmations)

Affidavit (Affirmation)

Other Papers *Memoranda of Law31, 59-61, 63, 65-66*

In this action by plaintiff Martin Daskal (Daskal), individually and on behalf of 333-345 Green LLC (Green LLC), 1775

East 17th St., LLC, and 1584 Fulton LLC (collectively, plaintiff), defendants Joseph Tyrnauer a/k/a Volvi Tyrnauer (Tyrnauer), WNT Construction Corp., WTC Development Corp., WTC Construction Co., Inc. (WTC Construction), WTC Management Inc., Home @ Greene NY Inc. (Home @ Greene), WT Development Corp., WT Construction Corp., and 101-115 Spring Garden St LLC (the Tyrnauer defendants) move for an order dismissing plaintiff's first amended complaint: (1) pursuant to CPLR 3211 (a) (7), for failure to state a cause of action upon which relief may be granted, (2) pursuant to CPLR 3013 and 3014, for failure to plead plain and concise statements, and (3) pursuant to CPLR 3016 (b), for failure to allege fraud with particularity. Defendant Elie Staub (Staub) moves for an order dismissing plaintiff's first amended complaint as against him on these same grounds, and also for an order, pursuant to CPLR 603, severing the claims asserted as against him. Defendants Banco Popular North America (Banco Popular) and Gregory Miedrzynski (Miedrzynski) move for an order dismissing, with prejudice, plaintiff's first amended complaint, pursuant to CPLR 3211 (a) (5) and (7), and pursuant to CPLR 3016 (b).

The gravamen of the complaint is plaintiff Daskal's claim that he was defrauded by Tyrnauer through the various Tyrnauer defendants, with the assistance of Banco Popular's loan officer Miedrzynski, in the diversion of the assets of Green LLC. Although Daskal has alleged a derivative suit on behalf of 1775 East 17th Street and 1584 Fulton LLC, in addition to Green LLC, the complaint is devoid of allegations of actual loss to either of ***2** these entities. Moreover, the claims asserted by Daskal, sounding in breach of fiduciary duty, have been previously alleged, in substance, in other pending actions.

BACKGROUND

The facts, as alleged in plaintiff's amended complaint are as follows:[1] On or about March 7, 2000, Daskal, with a partner, purchased a foreclosed parcel of real property located at 333-345 Greene Avenue, in Brooklyn, New York (the Greene property) through an entity that he owned named 333-345 Greene Corp. The purpose of such purchase was to develop the Greene property with a residential and retail building. After Daskal's partner withdrew from the project for financial reasons, Tyrnauer, in mid-2001, approached Daskal and offered to participate in the development of the Greene property. Tyrnauer represented to Daskal that he had his own construction company, WTC Construction, and that in exchange for a 50% interest in the Greene property, he would contribute $550,000 (an amount which was allegedly well below the fair market value of a one-half interest in the Greene property) to what would be Green LLC, and he would have WTC Construction develop the Greene property at cost. Daskal accepted Tyrnauer's offer.

In order to effectuate Tyrnauer's obtaining a 50% interest in the development of the Greene property, Daskal, on June 17, 2001, formed Green LLC, with Daskal and Tyrnauer each obtaining a 50% interest in Greene LLC. On or about July 24, 2002, in furtherance of the agreement between Daskal and Tyrnauer, the Greene property was transferred from 333-345 Greene Corp. to Green LLC, and Green LLC thereby became the owner and developer of the Greene property. Also on July 24, 2002, Daskal and Tyrnauer signed a "Notice of Shareholder and Officer of 333-345 Green LLC," which identified them as the sole members of Green LLC and provided that they were both required to execute documents relating to transactions involving the Greene property. On November 15, 2005, Tyrnauer and Daskal signed an Operating Agreement, which stated that the purpose of Green LLC was to acquire, own, develop and manage the Greene property. In May 2006, the Operating Agreement was amended and restated to provide, at paragraph 11, that all documents affecting the real property owned by Green LLC must be signed by both members. On December 14, 2007, Daskal and Tyrnauer signed a document acknowledging that there was an Operating Agreement requiring both of them to sign all documents relating to transactions pertaining to Green LLC.

On June 22, 2006, Green LLC entered into a construction contract (the Greene ***3** Project Construction Contract) with WTC Construction (of which Tyrnauer was the sole owner) for the construction of an apartment building at the Greene property (the Greene Project). The total cost of completing the job, as set forth under the Greene Project Construction Contract, was to be $15,357,340.20. According to Daskal, this amount was represented to be the actual cost that Tyrnauer anticipated it would take to complete the building pursuant to the contract specifications, and there was to be no profit to WTC Construction. A Supplemental Amendment executed on June 26, 2006 set a target date for the completion of the Greene Project as 26 months from the date of the closing.

In order to finance the development of the Greene property, in or about June 2006, Greene LLC obtained a loan from Banco Popular in the amount of $22,600,000, divided into a Land Acquisition Loan in the amount of $2,750,000, a Project

Loan in the amount of $3,341,592, and a Building Loan in the amount of $16,508,408 (collectively, the Loans). The Loans were evidenced by loan documents dated June 28, 2006 and June 30, 2006, and were secured by mortgages on the Greene property, which were signed by Tyrnauer and Daskal, as members of Green LLC and personally as guarantors.

Under the terms of the Loans, Banco Popular did not provide Green LLC with the full $22,600,000 outright, but in accordance with common practice for building loans, the loan agreements provided that Banco Popular would advance Green LLC particular sums of money upon receiving evidence that specific stages of construction had been completed. In order to ensure that it did not release excessive funds or release funds before construction benchmarks had been met, Banco Popular employed Project Control Associates, Inc. (PCA). PCA reviewed WTC Construction's loan draw requests and lien waivers, along with the supporting documents, and monitored the Greene Project to determine that the construction had reached the proper benchmarks before Banco Popular would release funds to Green LLC. Plaintiff alleges that defendants submitted false documents to Banco Popular in order to prematurely draw down proceeds from the Loans.

On July 10, 2006, WTC Construction entered into a construction contract (the Nesher Contract) with Nesher Builders LLC (Nesher). In the Nesher Contract, Nesher agreed to be the general contractor for the Greene property at the completion price of $11,975,000, which was $3,382,340.20 less than was stated as the cost of completion in the Greene Project Construction Contract. Nesher allegedly terminated the Nesher Contract and ceased to work on the Greene Project due to WTC Construction's failure to make payments. Nesher was paid approximately $600,000 for the work it performed.

As a result of WTC Construction's failure to make adequate progress on the Greene Project, the Greene Project Construction Contract was amended on July 16, 2008 to extend the date by which the Greene Project was to be completed to March 30, 2009, and to add a time-of-the-essence provision. Plaintiff alleges that Tyrnauer agreed in the July 16, 2008 amendment that if the Greene Project was not completed by that date, he would pay Daskal $108,000 per month. ***4**

Green LLC maintained a bank account at Signature Bank. According to plaintiff, Tyrnauer also created a secondary bank account in January 2009 for Green LLC, but changed the name of the account name to Home @ Greene, transferring $1,803,121.07 from the primary Green LLC bank account into this secondary account. Plaintiff claims that Home @ Greene was created to avoid paying certain judgments and creditors which are not involved in this action. Specifically, plaintiff alleges that in January 2009, WTC Construction advised parties to whom it owed money or with which it had contracted to perform services that it had effectively gone out of business. Daskal claims that WTC Construction, however, had not gone out of business. On February 3, 2009, Tyrnauer sent a letter to the subcontractors working at the Greene Project, stating that he had terminated his agreement with WTC Construction, and that the terms and conditions of their agreements with WTC Construction would be honored by Home @ Greene, which he had hired to complete the work, and that all balances on the original contract would be honored. Lien waivers submitted with Requisition No. 24 on March 19, 2009, and AIA forms submitted with Requisition No. 26 on May 9, 2009 listed Home @ Greene as the general contractor. In Requisition No. 32, Home @ Greene stated that it had received all of the funding provided by Banco Popular through that time, i.e., the full $11.7 million, the bulk of which had been received by WTC Construction.

Plaintiff asserts that Tyrnauer engaged in a pattern of submitting false lien waivers from subcontractors on the Greene Project in order to obtain additional funds from Banco Popular, when the subcontractors were paid significantly less than the amounts claimed to have been paid to them in the lien waivers submitted to Banco Popular. Among these allegedly false lien waivers was: one submitted by Bayport Construction, which was the subcontractor hired to do the masonry work; a lien waiver from Nesher; a lien waiver by Empire Concrete Construction, which performed work on the concrete superstructure; a lien waiver by Daley Construction of America LLC (Daley Construction), a subcontractor which performed framing and insulation; and a lien waiver by Rotavel Elevator Inc., which performed elevator work. Plaintiff alleges that all of these lien waivers submitted for the work at the Greene Project were notarized by Staub, an employee of WTC Construction. Plaintiff also alleges that a false lien waiver was submitted by Tri State Lumber, which performed lumber work at the Greene Project.

Plaintiff states that 31 requisitions were transmitted to Banco Popular for the Greene Project. These requisitions set forth the percentage of the job that had been completed and determined the amount of draw downs that WTC Construction was

permitted to obtain under the Loans. Plaintiff claims that Tyrnauer made false statements in these documents to fraudulently obtain money under the Loans. In a report dated September 10, 2009, PCA reported that as of September 8, 2009, the Greene Project was approximately 86% complete.

Daskal alleges that on or about September 9, 2009, he contacted Miedrzynski, the Banco Popular loan officer responsible for the Loans and a vice-president of Banco ***5** Popular, and instructed him not to release additional loan funds without first talking to him or without his authorization. On September 10, 2009, members of the senior management of Banco Popular visited the Greene property with Miedrzynski. Daskal claims that Miedrzynski told him that he should not raise his concerns about possible fraud or misconduct in the presence of Banco Popular's "owners" and that he would address them later. Daskal continued to contact Miedrzynski on September 14, 15, 18, and 22, 2009, reminding him that no additional funds should be released without his authorization. Plaintiff asserts that a loan disbursement in the amount of $306,249.90 was made without Daskal's approval on September 15, 2009 for Requisition No. 31, which had been submitted on September 8, 2009. Miedrzynski claimed that this requisition had already been processed and disbursed before he learned of Daskal's direction not to fund the loan without Daskal's authorization. Plaintiff insists this was not true, that Miedrzynski had knowledge of Tyrnauer's fraud, and that many of the necessary documents to support the release of funds by Banco Popular were missing. Plaintiff maintains that Miedrzynski's alleged knowledge of the fraud should be imputed to Banco Popular.

Plaintiff alleges that, on two occasions, Tyrnauer drove into Manhattan with a WTC Construction employee to meet with Miedrzynski, and that he asked the employee to stay with the car while he went into Miedrzynski's office, "exposed a wad of currency," and stated, "this is for Greg," meaning Miedrzynski. Thus, upon information and belief, plaintiff alleges that Tyrnauer bribed Miedrzynski with cash in exchange for Miedrzynski's allowing Tyrnauer to continue to draw down payments on the Project Loan even though, under the terms of the Project Loan, Green LLC was not entitled to the draw down progress payments for work on the Greene Project that had not been completed. Plaintiff further alleges that Michael Gitchel, the president of Nesher, was offered a bribe of $100,000 to falsely state that lien waivers that had been submitted by Nesher were accurate, but that Gitchel refused to do so.

During the course of the Greene Project, Banco Popular wired a total of $12,370,440.95 into the account of Green LLC at Signature Bank based upon the 31 requisitions submitted by Tyrnauer. Of this sum, $5,363,598.12 was wired from the Green LLC account into WTC Construction's bank account, leaving a balance of $7,006,842.83. From this balance, Tyrnauer allegedly made various distributions, including $35,400 to 1775 East 17th St., LLC and $14,995 to 1584 Fulton, LLC, companies in which both Daskal and Tyrnauer each held 50% interests.

Plaintiff asserts that from the secondary Green LLC bank account, under the name Home @ Green, which Tyrnauer opened and operated without Daskal's knowledge or consent, at least $162,000 of the loan proceeds from Banco Popular, earmarked for the Greene Project, were diverted by Tyrnauer in order to obtain an interest in property located at 1230 57th Street (the 57th Street property) pursuant to an agreement to purchase ***6** that property from Simon Reichman (Reichman).[2] Plaintiff further alleges that Tyrnauer controlled this secondary Green LLC account and caused various other transfers, some by wire, from that account for services performed by WTC Construction at 1230 or 1236 57th Street, unrelated to the Greene Project, and for Tyrnauer's personal benefit.

The completion of the Greene Project continued to be delayed, requiring four extensions by Banco Popular, ultimately to September 30, 2009. In December 2009, Tyrnauer attempted to sell to an unidentified buyer the Greene property, and properties located at 1775 East 17th Street (the East 17th Street property) and 1584 Fulton Street (the Fulton Street property), in Brooklyn, that were jointly owned and being developed by Daskal and Tyrnauer.[3] Daskal, at that time, asserted that Tyrnauer was not the managing member of the LLCs that owned each of these properties and refused to agree to such transaction.On March 17, 2010, Banco Popular filed a foreclosure action against Green LLC, as well as Daskal, Tyrnauer, and WTC Construction as individual guarantors, seeking to foreclose the mortgage on the Greene property due to Green LLC's failure to pay the principal and interest due on the maturity date, September 30, 2009 (*Banco Popular N. Am. v 333-345 Green LLC* [Sup Ct, Kings County, index No 6781/10]) (the foreclosure action). In that foreclosure action, in April 2010, Banco Popular applied for the appointment of Cheever Development Corporation (Cheever) as a receiver for the Greene property. Cheever had been retained by Banco Popular and had prepared a report,

dated June 14, 2010, concluding that the cost to complete the Greene Project, plus payment of existing liens on such project for work already done, would be $7,631,924.59. Plaintiff contends that Cheever's report established that the PCA report grossly overstated ***7** the amount of work that had been completed on the Greene Project in its September 2009 report, which was the basis for Green LLC's draw down of funds from Banco Popular. By decision and order dated January 17, 2012 in the foreclosure action, this court granted Banco Popular summary judgment as against Green LLC, Daskal, Tyrnauer, WTC Construction, and Daley Construction (which had a mechanic's lien on the Greene property), and an order of reference to determine the sum due.

THE COMPLAINT IN THIS ACTION

In 2011, plaintiff filed this action against the Tyrnauer defendants, Staub, Banco Popular, and Miedrzynski. Plaintiff's first unverified amended complaint, dated December 22, 2011, alleges five causes of action.

Plaintiff's first cause of action purports to allege a claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO),18 USC § 1962 (c). Plaintiff asserts that WNT Construction Corp., WTC Development Corp., WTC Construction, WTC Management Inc., Home @ Greene, WT Development Corp., WT Construction Corp., and 101-115 Spring Garden St LLC (collectively, the Tyrnauer Companies), are entities that are or were owned and/or controlled by Tyrnauer. Plaintiff further asserts that for purposes of RICO, the Tyrnauer Companies are an association-in-fact that are an "enterprise" within the meaning of 18 USC § 1961 (4). Plaintiff alleges that the Tyrnauer Companies shared a common purpose to engage in a fraudulent course of conduct and to work together to achieve such purpose. Plaintiff further alleges that the Tyrnauer Companies are primarily engaged in the construction, investment, development, management, and/or operation of real property businesses, but that, although they primarily conduct legitimate businesses, their engagement in fraudulent activities constitute predicate acts under RICO committed in the course of operating those businesses. Plaintiff asserts that the Tyrnauer Companies have engaged in such predicate acts with respect to Daskal, Spencer Court Holdings, and the Lev group in different real estate development projects in New York and in Pennsylvania.[4] Defendants Banco ***8** Popular and Miedrzynski, as well as Tyrnauer employee Staub, have been joined as participants in the alleged RICO enterprise, although neither Banco Popular, nor Miedrzynski, had any role in the Spencer Court or Lev alleged predicate acts. The only allegations against Banco Popular, Miedrzynski and Staub relate to the RICO violations alleged in the first and second causes of action.

Plaintiff claims that defendants have conducted or participated in the conduct of the enterprise through a pattern of racketeering activity that consists of two or more predicate acts, which include: (1) using mailings as part of the underlying activities, constituting mail fraud in violation of 18 USC § 1341; (2) using various wire transactions as part of the underlying activities, constituting wire fraud in violation of 18 USC § 1343; (3) defrauding and obtaining monies from a Federal Deposit Insurance Corporation-insured financial institution, constituting bank fraud in violation of 18 USC § 1344; and (4) engaging in bribery punishable as a felony under the Penal Code by a prison sentence of over one year. Plaintiff asserts that these alleged predicate acts commenced as early as 2006 and continue to the present day and threaten to continue into the future and that the activities of the enterprise affect interstate or foreign commerce because Banco Popular's personnel involved with the Greene Project were located in states other than New York, ***9** as well as in Puerto Rico, PCA was located in New Jersey, and the real property development in which the Lev group had an interest was in Pennsylvania. Plaintiff claims that by reason of the violation of 18 USC § 1962 (c) based upon predicate acts of mail fraud, wire fraud, bank fraud, and bribery, he and the three LLC's for whose benefit he brings suit, have suffered losses that constitute injury to their business or property and that they are entitled to treble damages.

Plaintiff's second cause of action purports to allege a claim for RICO conspiracy under 18 USC § 1962 (d). Plaintiff asserts that Tyrnauer used various entities, including Staub's official duties as a notary public, to continue to commit the alleged frauds. Plaintiff further asserts that Tyrnauer, together with Miedrzynski, who was in a unique position at Banco Popular, were able to obtain the financing from Banco Popular and conceal the alleged fraud and that this alleged violation by defendants of 18 USC § 1962 (d) has caused losses that constitute injury to their business or property that warrant recovery of three times the amount of the damage to plaintiff's business or property.

Daskal's third, fourth, and fifth causes of action are asserted as against the Tyrnauer defendants under the Debtor and Creditor Law, without differentiation as to the statutes relied upon in the third and fourth causes of action. The third

cause of action alleges that, as a direct result of the alleged fraudulent transfers of money belonging to the LLC's and the use of that money by Tyrnauer and his agents to develop the 57th Street property, Green LLC has become insolvent and its main asset, the Greene property, may be lost in the foreclosure action brought by Banco Popular. Plaintiff further alleges, in this cause of action, that the primary business of Green LLC was the development and management of the Greene property, but that Green LLC does not have sufficient capital, assets, or property to engage in its primary business as a result of the Tyrnauer defendants' fraudulent transfers and conversion of money. Tracking the language of Debtor and Creditor Law § 273, plaintiff asserts that at the time of the Tyrnauer defendants' conveyances of money belonging to Green LLC, Green LLC was about to incur debts, i.e., payments due under the construction loan, that were, as a result of the alleged wrongful conveyances, beyond its ability to pay as they matured.

Plaintiff alleges that these wrongful conveyances by the Tyrnauer defendants and their agents consisted of the transfer and use of assets, money, and property belonging to Green LLC to construct a three-unit residential condominium building on the 57th Street property for the benefit of the Tyrnauer defendants, that Green LLC and Daskal did not receive any consideration for the assets, money, and property conveyed, and that such conveyances were made with the intent to defraud Green LLC and its creditors, including Daskal. Plaintiff asserts that the Tyrnauer defendants' actions, in converting the funds, assets, money, and property of Green LLC, has rendered it insolvent, which has prevented Daskal from collecting distributions due to him as a 50% owner of Green LLC and has resulted in the loss of his investment in both Green LLC and the Greene property.

Plaintiff's fourth cause of action as against the Tyrnauer defendants alleges that the ***10** aforesaid transfers were made at a time when the Tyrnauer defendants intended or believed that Tyrnauer and Green LLC's indebtedness to Daskal would increase beyond the ability to pay same as it matured. Plaintiff asserts that the transfers to the benefit of the 57th Street property by the Tyrnauer defendants were thus fraudulent under the Debtor and Creditor Law and are void, and that Daskal has suffered damages.

Plaintiff's fifth cause of action as against the Tyrnauer defendants alleges that the aforementioned transfers and conveyances were made with the actual intent to hinder, delay, or defraud either present or future creditors of Green LLC, including Daskal, and that they did, in fact, hinder and delay Daskal. Plaintiff asserts that the alleged conveyances, therefore, constitute fraudulent conveyances within Debtor and Creditor Law § 276-a, and seeks to recover reasonable attorneys' fees under that section.

The court takes judicial notice that this is one of seven non-foreclosure actions pending before this court in which Daskal has raised claims against either Tyrnauer, Banco Popular, or some of the Tyrnauer Companies, relating to the development of the properties at issue in this action.[5] With respect to the two related foreclosure actions before this court,[6] Daskal also alleged counterclaims against Banco Popular in the Greene property foreclosure action and cross-claims against Tyrnauer in an action to foreclose the East 17th Street property. On September 8, 2011, this court granted summary judgment in the East 17th Street foreclosure action, struck the answers and affirmative defenses of Daskal, Tyrnauer, and 1775 East 17th St. LLC, severed the cross-claims by Daskal and 1775 East 17th St. LLC against Tyrnauer, and dismissed those cross-claims as duplicative of the prior litigation. On October 7, 2011, this court signed an order of reference in that action. On June 19, 2012, the day before the motion for a judgment of foreclosure and ***11** sale was to be argued, 1775 East 17th St. LLC filed a chapter 11 petition in the United States Bankruptcy Court for the Eastern District of New York which resulted in a stay in the prosecution of that action. Tyrnauer argued that Daskal filed the bankruptcy petition and was unauthorized to do so. On January 17, 2012, this court also granted summary judgment in the Greene property foreclosure action, *sub nom Team Greene 333 LLC v 333-345 Green LLC*, and struck the affirmative defenses and counterclaims against Banco Popular by Daskal, Tyrnauer, Green LLC, and WTC Construction. On March 20, 2012, this court signed an order of reference in that action. In virtually every case, Daskal has raised similar allegations of fraud and breach of fiduciary duty against Tyrnauer.

A tax lien foreclosure action[7] against the Fulton Street property is also pending before Justice Dabiri of this court, and a prior federal RICO action,[8] commenced by Daskal, was dismissed by Judge Weinstein of the Eastern District of New York as "moot, but not on the merits."

DISCUSSION

"It is well settled that, as a general rule, on a motion to dismiss the complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed

in the light most favorable to the plaintiff" (*Gruen v County of Suffolk*, 187 AD2d 560, 562 [2d Dept 1992]; *see also Rosen v Watermill Dev. Corp.*,1 AD3d 424, 425 [2d Dept 2003]). The court must also accept the facts as alleged in the complaint as true and "accord [the] plaintiff[] the benefit of every possible favorable inference" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Thus, when evaluating whether a complaint is sufficient to survive a motion to dismiss pursuant to CPLR 3211 (a) (7), initially, " the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"' (*Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2d Dept 2008], quoting *Morris v Morris*, 306 AD2d 449, 451 [2d Dept 2003]).

"However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference" (*id.*). Any allegation that states purely legal opinions or conclusions, rather than facts, will not be afforded any weight (*see Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]). Therefore, dismissal of the complaint pursuant to CPLR 3211 (a) (7) "will be warranted . . . in those situations in which it is conclusively established that there is no cause of action" (*Town of N. Hempstead v Sea Crest Constr. Corp.*, 119 AD2d 744, 746 [2d Dept 1986]).

Plaintiff's first and second causes of action purport to assert, respectively, claims against defendants under section 1962 (c) and section 1962 (d) of the Federal RICO ***12** statute. Dismissal of plaintiff's RICO causes of action, pursuant to CPLR 3211 (a) (7), is warranted where the facts alleged, even if accepted as true, fail to establish that the plaintiff has a cause of action (*see Noble v Graham*, 8 AD3d 641, 642 [2d Dept 2004]). Courts impose a heightened pleading requirement for RICO claims (*see Besicorp Ltd. v Kahn*, 290 AD2d 147, 151 [3d Dept 2002], *lv denied* 98 NY2d 601 [2002]). Moreover, since "[t]he mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants . . . courts should strive to flush out frivolous RICO allegations at an early stage of the litigation" (*Figueroa Ruiz v Alegria*, 896 F2d 645, 650 [1st Cir 1990]; *see also Invacare Supply Group, Inc. v Star Promotions, Inc.*, 27 Misc 3d 1202[A], 2010 NY Slip Op 50521[U], *3 [Sup Ct, Kings County 2010]; *Peralta v Figueroa,* 17 Misc 3d 1128[A], 2007 NY Slip Op 52184[U], *13 [Sup Ct, Kings County 2007]).

"To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, 18 USC § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962"' (*DeFalco v Bernas*, 244 F3d 286, 305 [2d Cir 2001], *cert denied* 534 US 891 [2001], quoting *Pinnacle Consultants, Ltd. v Leucadia Natl. Corp.*, 101 F3d 900, 904 [2d Cir 1996]). In order to establish a violation of 18 USC § 1962 (c), a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" (*Sedima, S.P.R.L. v Imrex Co.*, 473 US 479, 496 [1985]; *see also DeFalco*, 244 F3d at 306; *Cofacredit, S.A. v Windsor Plumbing Supply Co. Inc.*, 187 F3d 229, 242 [2d Cir 1999]). The requirements of 18 USC § 1962 (c) must be established as to each defendant (*see United States v Persico*, 832 F2d 705, 714 [2d Cir 1987], *cert denied* 486 US 1022 [1988] ["The focus of section 1962 (c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962 (d)"]; *see also Wasserman v Maimonides Med. Ctr.*, 970 F Supp 183, 189 [ED NY 1997]).

The above stated elements of the RICO offense must be sufficiently pleaded. In moving for dismissal of plaintiff's first cause of action alleging a RICO claim under 18 USC § 1962 (c) for failure to state a cause of action, defendants argue that plaintiff has failed to sufficiently allege these requisite elements of a RICO claim.[9]

Defendants contend that plaintiff has failed to plead the existence of a racketeering "enterprise" sufficient to sustain his RICO claim. Plaintiff alleges that defendants have created an "association-in-fact" which constitutes a RICO enterprise. The RICO statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a ***13** legal entity" (18 USC § 1961 [4]). The Supreme Court has stated that a "group of individuals associated in fact" refers to "a group of persons associated together for a common purpose of engaging in a course of conduct" (*United States v Turkette*, 452 US 576, 583 [1981]; *First Nationwide Bank v Gelt Funding Corp.*, 820 F Supp 89, 98 [SD NY 1993], *affd* 27 F3d 763 [2d Cir 1994], *cert denied* 513 US 1079 [1995] [stating that associated entities "must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes"]).

In the first amended complaint, plaintiff conclusorily states that the Tyrnauer Companies are an association-in-fact constituting an "enterprise" because they "share[] a common purpose to engage in a fraudulent course-of-conduct and to work together to achieve such purpose." It appears from the allegations that plaintiff is claiming that Banco Popular, Miedrzynski and Staub were also part of the "enterprise" although there are no allegations linking them together in a common purpose other than with respect to the Greene Property. Plaintiff fails to allege any particularized facts as to this alleged common purpose, and the mere parroting of the statutory language will not suffice to survive a motion to dismiss (*see Zaro Licensing, Inc. v Cinmar, Inc.*, 779 F Supp 276, 284 [SD NY 1991]). The only "common purpose" of the "enterprise" that can be gleaned from plaintiff's first amended complaint was to defraud Daskal in connection with the Greene Project. In opposition to the motions, plaintiff argues that the purpose of the enterprise was to manipulate various financing for real property so as to permit Tyrnauer to obtain money for his own uses as to Daskal and others who were similarly victimized. Plaintiff contends that all of the members of the Tyrnauer Companies had ongoing relationships and that Banco Popular was related to them via the loan for the Greene Project. No explanation is offered for Banco Popular's alleged motivation in participating in the alleged enterprise or why it would share in this alleged common purpose. In fact Banco Popular, Miedrzynski and Staub are not expressly alleged to be part of the "enterprise" as defined under the first cause of action. Since there are no factual allegations against Banco Popular, and the only allegation against Miedrzynski is the speculation that he accepted bribes from Tyrnauer, the complaint is inadequate as to them. The motion to dismiss on behalf of these defendants must be granted.

In order to adequately plead the existence of a RICO enterprise, a plaintiff must also allege with particularity how the various associates of the alleged enterprise worked together as a unit to achieve the enterprise's common purpose (*see First Capital Asset Mgmt., Inc. v Satinwood, Inc.*, 385 F3d 159, 174 [2d Cir 2004]). "Courts in the Second Circuit look to the "hierarchy, organization, and activities" of an alleged association-in-fact to determine whether its members functioned as a unit" (*Nasik Breeding & Research Farm Ltd. v Merck & Co., Inc.*, 165 F Supp 2d 514, 539 [SD NY 2001]; *see also United States v Coonan*, 938 F2d 1553, 1560-1561 [2d Cir 1991], *cert denied* 503 US 941 [1992]).

Plaintiff has failed to allege that the participants in the alleged enterprise ***14** functioned as a unit (*see Turkette*, 452 US at 583; *First Capital Asset Mgmt., Inc.*, 385 F3d at 174) or that there existed any "hierarchy, organization, or activities . . . from which [the court] could fairly conclude that its members functioned as a unit" (*First Capital Asset Mgmt., Inc.*, 385 F3d at 174). The first amended complaint is silent as to the internal workings or organization of the alleged enterprise, and fails to explain how such alleged organization was run or by whom it was run (*see Greenberg v Blake*, 2010 WL 2400064, *6 [ED NY, Jun. 10, 2010]). Plaintiff does not plead the role that each person or entity played in the alleged enterprise, but merely states, in conclusory fashion, that the Tyrnauer Companies constitute an "association-in-fact." Such conclusory allegations are wholly insufficient to satisfy the pleading requirements of the statute, and their mere "conclusory naming of a string of entities does not adequately allege an enterprise" (*Moy v Terranova*, 1999 WL 118773, *5 [ED NY, Mar. 2, 1999] [internal quotation marks omitted]; *see also First Capital Asset Mgt., Inc.*, 385 F3d at 175). As noted, the complaint fails to allege any acts of Banco Popular that could constitute participation in the "enterprise," which is defined as including only the Tyrnauer Companies. The only allegations relating to Banco Popular indicate that the Bank was also a victim of Tyrnauer's fraud, further mandating dismissal as against Banco Popular.

Moreover, it is necessary, in stating a RICO claim, to plead the existence of an enterprise that is distinct from the alleged pattern of racketeering activity (*see Turkette*, 452 US at 583; *First Capital Asset Mgmt., Inc.*, 385 F3d at 174). "[T]he existence of an enterprise is an element distinct from the pattern of racketeering activity" (*Boyle v United States*, 556 US 938, 947 [2009]). That is, "[t]he enterprise' is not the pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages" (*Kottler v Deutsche Bank AG*, 607 F Supp 2d 447, 458 [SD NY 2009]). "[I]n a fraud-based RICO claim, if the sole purpose of the alleged enterprise is to perpetrate the alleged fraud, there can be no enterprise for RICO purposes" (*Atkins v Apollo Real Estate Advisors, L.P.*, 2008 WL 1926684, *14 [ED NY, Apr. 30, 2008] [internal quotation marks and citation omitted]; *see also First Capital Asset Mgmt., Inc.*, 385 F3d at 174 [no enterprise where the plaintiffs failed "to detail any course of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves"]; *Mikhlin v HSBC*, 2009 WL 485667, *3 [ED NY, Feb. 26, 2009]). The first amended complaint herein fails to allege that the enterprise, comprised of the Tyrnauer Companies, is distinct

from the alleged pattern of racketeering activity (*see Cruz v FXDirectDealer, LLC*, 2012 WL 652038, *7 [SD NY, Feb. 29, 2012]). Rather, Daskal alleges that the participants came together for the common purpose of defrauding himself and the LLC's by engaging in bribery, mail fraud, wire fraud, and bank fraud. Thus, the fraud upon Daskal is the sole purpose of the enterprise. This singular purpose fails to create a distinct racketeering enterprise (see *Mikhlin,* 2009 WL 485667, *3). The "predicate acts" alleged, relating to other entities, are totally unrelated to plaintiff or the LLC's he represents and, as described, were not perpetrated by all of the defendants ***15** alleged to constitute the enterprise. The pleading is thus deficient in pleading the requisite "predicate acts" essential to a RICO claim.

Plaintiff contends, in his opposition papers, that even if the sole purpose of the alleged enterprise was to perpetrate the alleged fraud, there can be an enterprise for RICO purposes. Such contention is devoid of merit and contrary to well established precedent (*see Turkette*, 452 US at 583; *Atkins*, 2008 WL 1926684, *15; *United States v International Longshoremen's Assn.*, 518 F Supp 2d 422, 473 [ED NY 2007]; *Goldfine v Sichenzia*, 118 F Supp 2d 392, 401 [SD NY 2000]; *Invacare*, 2010 WL 123908, *8-9). Plaintiff is simply attempting to craft a claim under RICO based upon purely personal disputes between two business partners. " [C]ourts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb'" (*National Union Fire Ins. Co. of Pittsburgh, PA v Archway Ins. Services LLC*, 2012 WL 1142285, *3 [SD NY, Mar. 23, 2012], quoting *Goldfine*,118 F Supp 2d at 397). Thus, the court finds that plaintiff has failed to adequately plead the existence of an "enterprise" as required by RICO, and has failed to state a cause of action in his first and second causes of action.

Finally, 18 USC § 1962 (c) "imposes liability only upon defendants who operate or manage RICO enterprises" (*West 79th Street Corp. v Congregation Kahl Minchas Chinuch*, 2004 WL 2187069, *13 [SD NY, Sept. 29, 2004]). As was held in *Reves v Ernst & Young* (507 US 170, 179 [1993]), "some part in directing the enterprise's affairs is required." In *Reves* (507 US at 183), the U.S. Supreme Court found that to satisfy the requirements of 18 USC § 1962, a plaintiff must plead each defendant's participation in the "operation or management" of an enterprise (*see Dietrich v Bauer*, 76 F Supp 2d 312, 347 [SD NY 1999]). "Merely rendering services to an alleged enterprise does not establish that a person or entity controls the enterprise for purposes of [18 USC §] 1962 (c)" (*West 79th Street Corp.*, 2004 WL 2187069, *14).

Here, there is no showing that Banco Popular, Miedrzynski, or Staub were ever in a position to exert the type of control necessary to constitute such participation in the alleged enterprise, and the first amended complaint is devoid of any allegations that either Banco Popular, Miedrzynski, or Staub were involved in the "operation or management" of the alleged enterprise. With respect to Staub, plaintiff alleges that Staub, as Tyrnauer's employee, notarized false lien waivers containing false signatures, which were subsequently submitted to Banco Popular to obtain loan funds that exceeded the value of the services supplied. Such service to his employer does not alone render Staub a participant in a RICO conspiracy. Moreover, contrary to plaintiff's argument, even where a bank official or employee allegedly facilitates a fraud by third parties, a defendant bank will not be held vicariously liable under RICO (*see Mikhlin*, 2009 WL 485667, *9). The sole allegation against Miedrzynski is speculation that he was bribed by Tyrnauer to ignore evidence of Tyrnauer's improprieties. There is no connection made to other Tyrnauer Companies or to other predicate acts which would render him a member of a ***16** RICO enterprise. Plaintiff's RICO complaint must be dismissed as to Banco Popular, Miedrzynski and Staub.[10]

Furthermore, under RICO, a plaintiff must plead a "pattern" of "racketeering activity", which includes any act indictable under a variety of state and federal criminal statutes (*see Mikhlin*, 2009 WL 485667, *3; 18 USC 1962 [c]). Plaintiff alleges violation of the mail fraud statute,18 USC § 1341, the wire fraud statute,18 USC § 1343, and the bank fraud statute, 18 USC § 1344, in addition to 18 USC § 201, prohibiting bribery, which is also listed in 18 USC § 1961 (1) as a predicate act. Mere common-law fraud, however, does not constitute racketeering activity for RICO purposes (*see* 18 USC § 1961 [1]).

" [A] pattern of racketeering activity' requires at least two acts of racketeering activity . . . the last of which occurred within ten years . . after the commission of a prior act of racketeering activity" (18 USC § 1961 [5]). The acts of racketeering activity must be " related, and . . . amount to or pose a threat of continued criminal activity'" (*Cofacredit, S.A.*, 187 F3d at 242, quoting *H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 239 [1989]). Although the statute requires a minimum of two predicate acts of racketeering, proof of two predicate acts does not alone establish the requisite pattern (*H.J. Inc.*, 492

US at 236-238). To establish a RICO "pattern", a relationship evidencing an organizing principle, together with evidence of continuity, is required (*see id.*).

To satisfy the requirement of "continuity" in a pattern of racketeering, a plaintiff must show that the defendants' activities were "neither isolated nor sporadic" (*GICC Capital Corp. v Technology Finance Group, Inc.*, 67 F3d 463, 467 [2d Cir 1995], *cert denied* 518 US 1017 [1996]), but the demonstrated conduct may be open-ended, posing a threat of continuing criminal conduct beyond the period during which the predicate acts were performed, or closed-ended, "a series of related predicate acts extending over a substantial period of time" in the past (*see H.J. Inc.*, 492 US at 239-243; *Cofacredit, S.A.*, 187 F3d at 242-243; *GICC Capital Corp.*, 67 F3d at 466). "The aspect of continuity critical to making out a RICO violation is the risk of repeated criminal activity extending into the future" (*Invacare Supply Group, Inc.*, 27 Misc 3d 1202 [A] ,*6; *see also H.J. Inc.*, 492 US at 242). ***17**

In support of his claim that there was open-ended continuity, plaintiff asserts that the Tyrnauer Companies' predicate acts began at least in 2006 and continued to at least 2010, and included not just Greene LLC, but also Spencer Court Holdings and the Lev group. However, open-ended continuity is not established since the only alleged enterprise participants that are common to the alleged predicate acts are Joseph Tyrnauer and WTC Construction, which plaintiff admits is no longer in business. Thus there is no demonstrated threat of continuing criminal conduct (*see Spool v World Child Intl. Adoption Agency*, 520 F3d 178, 183 [2d Cir 2008]; *Cofacredit, S.A.*, 187 F3d at 242). Moreover, the perpetuation of Tyrnauer's alleged fraud as it relates to the Loans cannot continue into the future since the loans matured and have been declared in default, and the Greene property is in foreclosure. Thus, the bare conclusory allegations that plaintiff expects the pattern of racketeering activity to continue in the future are patently insufficient to meet the requirement of open-ended continuity.

Plaintiff's argument that there was closed-ended continuity also must fail. Plaintiff contends that Tyrnauer used and enlisted the cooperation and assistance of companies that he controlled, i.e., the Tyrnauer Companies, and others, namely, Staub and Miedrzynski, to obtain for himself and his companies money that should have gone elsewhere, by means of mail fraud, wire fraud, and bank fraud, as well as bribery, that occurred over many years in at least two states against three unrelated victims. Plaintiff further claims that there was a regular and systematic submission of false documents to draw down loan proceeds, and that there was a diversion of money. However, "where the conduct at issue involves a limited number of perpetrators and victims and a limited goal, the conduct is lacking in closed-ended continuity" (*FD Property Holding, Inc. v U.S. Traffic Corp.*, 206 F Supp 2d 362, 372 [ED NY 2002]). The complaint fails to identify any participation in the alleged predicate acts by most of the defendants, thus undermining the RICO claim that the defendants constitute an "enterprise."

Although plaintiff contends that he has alleged multiple claims of RICO activity beyond that concerning the Greene property, such contention is belied by a review of plaintiff's first amended complaint. Plaintiff, in his memorandum of law, speculates that "presumably much the same happened with Chinatrust on the Spencer Court Project as it did with Banco Popular and Greene." Plaintiff claims that there were false documents submitted to Chinatrust for the draw down on the construction loan for the Spencer Court Project, and that Chinatrust was defrauded. However, paragraphs 204 through 217, which address Spencer Court Holdings, refer to an arbitration decision concerning a breach of contract. Thus, there is no establishment of the required "relationship" between predicate acts with respect to Spencer Court Holdings and the Greene Project by showing that there were the "same or similar purposes, results, participants, victims, or methods of commission," and there is no showing that these were "not isolated events" (*H.J. Inc.*, 492 US at 252; *United States v Simmons*, 923 F2d 934, 951 [2d Cir 1991], *cert denied* 500 US 919 [1991]; *Certilman v Hardcastle, Ltd.*, 754 F Supp 974, 979 [ED NY 1991]). ***18**

There are also no specific predicate acts alleged with respect to the Lev group. While plaintiff alleges that the Lev group was defrauded by Tyrnauer, he has not sufficiently alleged a relationship between such alleged fraud and the alleged acts regarding the Greene Project (*see Certilman*, 754 F Supp at 979). Such allegations regarding the Lev group and the Philadelphia Project are also unrelated to Banco Popular, Miedrzynski, and Staub. Further, the court takes judicial notice that, as discussed *supra*, the Lev Group resolved its dispute with Tyrnauer and received an interest in the partnership controlling the Philadelphia Project prior to the commencement of any of the current litigation involving Daskal.

Thus, the first amended complaint fails to allege a relationship of the "enterprise" participants to allegations regarding

Spencer Court Holdings and the Lev group so as to establish a pattern, essential to a RICO claim. Plaintiff has merely alleged various unrelated acts and attempted to connect them together so as to satisfy the language of the RICO statute. Consequently, plaintiff has failed to adequately allege that defendants' acts constituted a "pattern" of racketeering activity (*see H.J. Inc.*, 492 US at 238-239; *United States v Long*, 917 F2d 691, 696-697 [2d Cir 1990]; *Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 1218 [2d Dept 2011]).

Moreover, in order to litigate a RICO violation, a plaintiff must demonstrate that "the RICO violation was the proximate cause of his or her injury, meaning there was a direct relationship between the plaintiff's injury and the defendant's injurious conduct"' (*UFCW Local 1776 v Eli Lilly & Co.*, 620 F3d 121, 132 [2d Cir 2010], *cert denied* __ US __, 131 S Ct 3062 [2011], quoting *First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763, 769 [2d Cir 1994], *cert denied* 513 US 1079 [1995]). The plaintiff further "must show that the RICO violation was the but-for (or transactional) cause of his [or her] injury, meaning that but for the RICO violation, he [or she] would not have been injured" (*UFCW Local 1776*, 620 F3d at 132; *see also Holmes v Sec. Investor Prot. Corp.*, 503 US 258, 268 [1992]).

Here, plaintiff has failed to allege that he, or the LLC's he represents, suffered an injury caused by racketeering activity. In fact, no injury to either 1775 East 17th St. or to 1584 Fulton has been identified. Plaintiff is unable to dispute that he was not directly injured from the alleged RICO conduct. Daskal does not allege that he relied on fraudulent misrepresentations allegedly made by Tyrnauer and that such reliance was the proximate cause of his alleged injury. In fact, plaintiff concedes that he did not rely on false statements, contending that this does not matter because "it is enough that Banco Popular did." In this regard, plaintiff's first amended complaint suggests that Banco Popular relied upon the alleged fraudulent misrepresentations of the Tyrnauer defendants, however, Banco Popular does not claim to be a victim of the alleged RICO scheme, but relied on review and monitoring of the Greene Project by non-party PCA. The injuries claimed by plaintiff are thus too speculative and remote to constitute RICO injuries. As such, plaintiff fails to allege any injuries resulting from RICO conduct (*see DeSilva v* ***19** *North Shore-Long Island Jewish Health Sys., Inc.*, 770 F Supp 2d 497, 524 [ED NY 2011]; *B.V. Optische Industrie De Oude Delft v Hologic, Inc.*, 909 F Supp 162, 170 [SD NY 1995]).[11]

Inasmuch as plaintiff has failed to demonstrate that he has a viable claim under 18 USC § 1962 (c), dismissal of plaintiff's first cause of action must be granted with prejudice. Plaintiff's second cause of action alleges that defendants violated 18 USC § 1962 (d), which makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)" (18 USC § 1962 [d]). Since plaintiff has failed to state a cause of action under 18 USC § 1962 (c), the second cause of action for a RICO conspiracy cannot stand as a matter of law (*see Cofacredit, S.A.*, 187 F3d at 244; *National Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 1142285, *6; *Malester v Adamo*, 2010 WL 5065865, *4 [SD NY, Dec. 8, 2010]; *Tuscano v Tuscano*, 403 F Supp 2d 214, 229 [ED NY 2005]). Therefore, plaintiff's second cause of action for federal RICO conspiracy must also be dismissed.

The third, fourth and fifth causes of action in plaintiff's amended complaint are predicated upon the Debtor and Creditor Law (DCL), without differentiation as to the particular statutes relied upon, and relate only to the Tyrnauer Defendants. Defendants correctly take issue with the insufficiency of the pleading, arguing that these claims fail to state a cause of action pursuant to CPLR 3211 (a) (7) and fail to plead fraud with sufficient particularity as required under CPLR 3016 (b). While Daskal speculates that Tyrnauer has an ownership interest in 1230 57th Street, and has annexed to his complaint a list of 197 transfers from the account of Green LLC which he alleges are for "services performed by WTC unrelated to the Green Project, specifically at either 1230 57th Street or 1236 57th Street", such allegations would support Daskal's claims, set forth in other pending actions, against Tyrnauer for self-dealing, waste of corporate assets, and breach of fiduciary duty, but do not sufficiently allege a fraudulent conveyance, made without fair consideration, to an identified recipient so as to adequately apprise defendants of plaintiff's claim. However, defendants' argument that Daskal lacks standing to raise such claims against them on behalf of the conveyor, Greene LLC, is not dispositive. Relying on *Friedman v Wahrsager* (848 F Supp 2d 278 [EDNY 2012]) and *Federal National* ***20** *Mortgage Association v Olympia Mortgage Corp.* (2011 WL 2414685 [EDNY]), and analogizing plaintiff Daskal's role in bringing a derivative action on behalf of the LLC's to the role of the receiver in those cases, to retrieve for the corporation property that was fraudulently conveyed from the corporation by the management thereof to defendant entities without fair consideration, plaintiff has articulated a basis for standing to litigate such claims. Moreover, Daskal has asserted his right of recovery against Green LLC for any losses he may incur

as Green LLC's guarantor to Banco Popular on the foreclosed mortgage, thus identifying a potential debt owed to himself personally by his co-plaintiff.

Defendants' point is well-taken, however, with respect to Daskal's efforts, on his own behalf, to void the alleged conveyances based upon his personal losses of speculative profit from his investment (see *Lama Holding Co. v Smith Barney,* 88 NY2d 413, 421 [1996]). Daskal has demonstrated no out-of pocket losses yet sustained as a result of the defendants' alleged fraudulent actions. Rather, the gravamen of his claims under the DCL is that the derivative plaintiff Greene LLC was rendered insolvent as a result of such fraudulent conveyances and was unable to pay its mortgage to Banco Popular and profits to Daskal .This backward approach to the DCL does not state a cause of action in Daskal's favor as Daskal is essentially seeking to recover from his own co-plaintiff. "[F]raudulent conveyance laws have historically existed to protect creditors, not those making the fraudulent conveyances" (*Fed'l Nat'l Mortg Ass'n v Olympia Mortg. Corp,* 2011 WL at *7). Plaintiff's complaint, as it stands, must be dismissed as defectively pleaded.

It may be that repleading of plaintiff's complaint would cure the present defects, however, leave to replead in this action must be denied as numerous other cases, particularly the action brought by Daskal on his own behalf and derivatively on behalf of the LLC plaintiffs herein under the caption *Daskal v Tyrnauer* (index no. 31074/09), in which litigation is still pending, provides an appropriate means to address the only viable causes of action remaining (see CPLR 3211(a)(4); Siegel, 7B McKinney's Practice Commentaries, C3211:14 and C3211:15, pp26-31; *O'Brien v City of Syracuse*, 54 NY2d 353, 357-358 [1981]; *Craig-Oriol v Mount Sinai Hosp.*, 201 AD2d 449, 450 [2d Dept 1994]). This action revolves around a business dispute between two former partners. Notably, the very first action commenced by the plaintiff, *Daskal v Tyrnauer* (Index No. 31074/09), included causes of action against Tyrnauer for fraud, conversion, breach of fiduciary duty, waste of corporate assets, and self-dealing based on the same allegations in the present action. In addition to that complaint, Daskal, individually and on behalf of the LLC plaintiffs in this action, has also raised those same allegations of fraud by Tyrnauer and a number of the Tyrnauer Companies either directly or as counter or cross claims in the following actions: *Tyrnauer v Daskal* (Index No. 28384/09), *Tyrnauer v Daskal* (Index No. 9986/10), *1775 Capital Associates LLC v 1775 East 17th St.* (Index No. 12299/10), *Matter of Tyrnauer* (Index No. 26129/10), *Daskal v Tyrnauer* (Index No. 500735/11). Thus, earlier pending actions contain identical claims based upon the same ***21** events alleged in the instant action. The complaints in the earlier actions can easily be amended to add claims or defendants if necessary to obtain relief. While, mysteriously, defendants did not seek dismissal of the instant action based on CPLR 3211(a)(4), it is the court's prerogative to control its own calendars and maintaining multiple actions involving the same claims and issues will unduly burden both the court and the litigants in duplicative litigation. Accordingly, the third, fourth and fifth causes of action sounding in fraud must also be dismissed pursuant to CPLR 3211(a)(4). To the extent that the plaintiff seeks relief not already sought in the prior actions, counsel may move to amend a prior pleading.

CONCLUSION

The motions of all defendants to dismiss this action are granted. The motions of defendants Banco Popular, Miedrzynski, and Staub to dismiss the causes of action alleged against them under RICO are granted with prejudice as there is no reasonable basis to assert a RICO action under the facts alleged. Moreover, plaintiff had an adequate opportunity to interpose such claims against Banco Popular and its employee Miedrzynski in the prior foreclosure action. The motion of the Tyrnauer defendants is granted with prejudice as to the RICO causes of action alleged in the first and second causes of action and granted without prejudice to asserting the remaining claims brought under the Debtor and Creditor Law in one of the other pending actions between the parties.

In light of the multiplicity of pending actions concerning the dispute between Daskal and Tyrnauer relating to their real estate ventures which form the basis for all of the litigation, both parties are precluded from commencing *de novo* actions regarding this subject-matter. Leave to amend existing pleadings may be sought if necessary.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.

FOOTNOTES

Footnotes

1 These facts, which are taken from plaintiff's first amended complaint, shall be assumed to be true for the purpose of this motion to dismiss (*see* *Simkin v Blank*, 19 NY3d 46, 52 [2012]).

2 Tyrnauer had allegedly entered into an agreement with Reichman, whereby he was to purchase the 57th Street property to build a three-story condominium, using his company WTC Construction, and WTC Construction also was to provide services to build Reichman's house on the other half of the property lot at 1236 57th Street.

3 These properties are owned by 1775 East 17th St., LLC and 1584 Fulton LLC, respectively. There are no other allegations regarding 1775 East 17th St., LLC, on whose behalf (along with 1584 Fulton LLC and himself as an individual) Daskal purports to bring this action. Plaintiff further alleges that Daskal and Tyrnauer were each 50% owner of 1584 Fulton LLC, which was formed to develop the Fulton Street property. Plaintiff claims that in early 2009, Banco Popular advised Tyrnauer that because of project delays, it was reducing the amount of the loan for the Greene Project by $2,000,000, and that Tyrnauer told Daskal that he would borrow money against his home to make up the shortfall, but that such loan would need to be secured by a $1,000,000 mortgage on the Fulton Street property. While Daskal executed a mortgage in favor of Tyrnauer against the Fulton Street property, which has never been recorded, Tyrnauer never provided the $1,000,000 in additional money to the Greene Project. There are no allegations that 1584 Fulton LLC has suffered any actual loss as a result of such mortgage though it is possible that plaintiff seeks to void the mortgage he executed.

4 In the complaint, plaintiff claims, in addition to allegations with respect to the Greene Project, that Tyrnauer used his entities to defraud others. Plaintiff alleges that Pincus Rand (Rand) owned Spencer Court Holdings LLC (Spencer Court Holdings), which was formed to develop the Spencer Court Project and that WTC Construction was hired to perform the work for this project. Plaintiff asserts that Spencer Court Holdings took out a construction loan of $6,710,000 to fund this project from Chinatrust Bank, and that Tyrnauer engaged in a scheme with respect to the Spencer Court loan similar to that engaged in with respect to the Greene Project. Specifically, plaintiff alleges that WTC Construction submitted false documents to Chinatrust for the draw down of the construction loan for the Spencer Court Project.

The complaint also seeks to analogize allegations related to the Greene Project to a development to be built in Philadelphia, Pennsylvania at 101-115 Spring Garden Street (the Philadelphia Project), about which, in or about October 2004, Tyrnauer approached Mordechai Lev and several others (the Lev group). The Lev group allegedly agreed to invest approximately $2.4 million to acquire a 50% interest in that development and paid $1,905,202.81 into the Philadelphia Project. Before construction began, however, Tyrnauer told the Lev group that their investment was actually a loan and that they had no ownership interest in the Philadelphia Project. The Lev group filed an action in the Supreme Court, Kings County (index No. 4241/06), seeking to enjoin any sale of the property. Thereafter, the Lev group and Tyrnauer agreed to have their dispute resolved in a rabbinical court, which, on February 8, 2007, found that the Lev group was entitled to the return of its $1.9 million within 90 days, or a 50% interest in 101-115 Spring Garden Street LLC and a 38% interest in 101-115 Spring Garden Street. Plaintiff asserts that soon after the rabinical court issued its decision, Tyrnauer entered into a $1.5 million mortgage on the Philadelphia Project with Reichman as the mortgagee. Plaintiff contends that $1.5 million was the price paid to Reichman by Tyrnauer for a 50% interest in the 57th Street property. Although Reichman filed a mortgage release dated in September 2007, plaintiff asserts that the Reichman mortgage, which was transmitted by mail from New York to Philadelphia, was an attempt to defraud the Lev group.

Plaintiff's allegations regarding the Spencer Court Project and the Lev group are stated “upon information and belief” and the plaintiff acknowledges that his companies “were not parties to these other frauds and accordingly have limited information about their circumstances.” Both *Lev v Tyrnauer* (Index No. 4241/06), and the petition to confirm an arbitration award stemming from that action, *Lev v Tyrnauer* (Index No. 29200/07), were before this court. After a Beth Din proceeding, plaintiff/petitioner Lev received an interest in the partnership controlling the Philadelphia Project and, upon consent of counsel for all of the parties, the petition to confirm the arbitration was withdrawn as moot on January 23, 2008.

5 The other cases pending before this court are: *Tyrnauer v Daskal* (Index No. 28384/09), *Daskal v Tyrnauer* (Index No. 31074/09), *Tyrnauer v Daskal* (Index No. 9986/10), *Matter of Tyrnauer* (Index No. 26129/10), *Daskal v Banco Popular* (Index No. 4230/11), *Daskal v Tyrnauer* (Index No. 500735/11). However, on September 14, 2012, after this motion was fully submitted, 1775 East 17th St., purportedly at the sole direction of Daskal, filed a notice of removal of the dissolution action before this court, *Matter of Tyrnauer* (Index No. 26129/10), to the Eastern District of New York. The notice of

removal states that 1775 East 17th St. "needs to determine the assets and liabilities of [1775 East 17th St.] in connection with the Chapter 11 Plan" and the "winding down [of 1775 East 17th St.] should be done as part of the Chapter 11 Plan process, since that would determine the assets and liabilities of the Debtor."

6 *Team Greene 333 LLC v 333-345 Green LLC* (Index No. 6781/10) and *1775 Capital Associates LLC v 1775 East 17th St.* (Index No. 12299/10). The original plaintiff in the *Team Greene* action was Banco Popular. The caption was modified to list Team Greene 333 LLC as plaintiff due to an assignment after this court granted summary judgment. The original plaintiff in the *1775 Capital Associates* action was Signature Bank. The caption was modified to list 1775 Capital Associates LLC as plaintiff due to an assignment after this court granted summary judgment.

7 *NYCTL 2010-A v 1584 Fulton LLC* (Index No. 11079/11).

8 *Daskal v Tyrnauer*, Docket No. 11-CV-4296 (ED NY).

9 The Tyrnauer defendants and Staub also seek dismissal of plaintiff's first amended complaint pursuant to CPLR 3013 and 3014 contending that such 66-page complaint is redundant and fails to plead the claims in a concise and understandable manner with sufficient particularity (*see* *Barsella v City of New York*, 82 AD2d 747, 748 [1st Dept 1981]).

10 Although the court finds that plaintiff has failed to allege a viable RICO claim with respect to Banco Popular and Miedrzynski, it is also noted that Daskal previously asserted claims of fraud and breach of contract against Banco Popular and Miedrzynski in other actions presently before the court. In *Daskal v Banco Popular* (Index No. 4230/11), Daskal made allegations of fraud against Banco Popular based upon Miedrzynski's purported involvement in committing fraud against Daskal and Green LLC. In the foreclosure action, *Team Greene v 333-345* (Index No. 6781/10), Daskal and Green LLC similarly alleged counterclaims against Banco Popular regarding the bank's purported breach of agreement by releasing excessive funds. Accordingly, these claims should have been addressed in those actions (*see* CPLR 3211(a)(4)).

11 Defendants further argue that plaintiff's alleged RICO claims are, at least partially, time-barred. It is noted that the Statute of Limitations for civil RICO claims is four years (*see* *Agency Holding Corp. v Malley-Duff & Associates, Inc.*, 483 US 143, 156 [1987]; *Lichtenstein v Reassure America Life Ins. Co.*, 2009 WL 792080, *11 [ED NY, Mar. 23, 2009]). The Second Circuit has held that a RICO claim is deemed to accrue when the plaintiff knew or should have known of his or her injury (*see* *Rotella v Wood*, 528 US 549, 553 [2000]). It appears that Daskal became actually aware of his alleged claims herein in September 2009, which would render this action timely. It is, however, unnecessary to reach this issue since the court finds that plaintiff has not alleged a cognizable RICO claim.

End of Document