SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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HIEBER READE STREET, LLC, CHRISTINA HIEBER, JENNIFER HIEBER,

Plaintiff,

- v -

FRED TAVERNA, NY INTERIOR CONSTRUCTION OF NY, INC., DOWNTOWN DEVELOPMENT OF NY LLC, JEANETTE TAVERNA

Defendant.

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INDEX NO. 655454/2021

MOTION DATE 10/29/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 28, 29, 30, 32, 35, 36, 37, 44, 54

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (8.2.22), the motion to dismiss must be granted to the extent that the claims predicated on the lawful buyout of the defendants must be dismissed. Any claims predicated on conduct that the plaintiffs had knowledge of predating the six years prior to the commencement of this action must also be dismissed as time barred.

Reference is made to an Amended and Restated Operating Agreement of Hieber Reade Street, LLC (the **Operating Agreement**; NYSCEF Doc. No. 2), dated October 1, 2005, by and between Jean Hieber and Fred Taverna. Pursuant to the terms of the Operating Agreement, Ms. Hieber and Mr. Taverna formed a partnership. The deal was that Ms. Hieber contributed 66-68 Reade Street (the **Property**) to Hieber Reade Street, LLC (the **Partnership**) and Mr. Taverna was to

manage and develop the Property into a condominium complex with two additional floors (the **Project**).

Pursuant to the terms of their Partnership, Ms. Hieber and Mr. Taverna agreed that the costs associated with the Project would be funded by capital contributions. To wit, pursuant to Section 4.02, the parties agreed:

> Section 4.02 Additional Capital Contribution.
>
> (a) The Members shall make capital contributions to the Company as may be required from time to time, over and above amounts borrowed by the Company, with respect to the ownership, improvement and operation of the Property or otherwise required to carry on the business of the Company. All capital contributions shall be made by the Members in proportion to their Member Percentages and in cash. Hieber as of the date of this Agreement is deemed to have an outstanding loan to the Company of forty thousand dollars ($40,000.00). Contemporaneously herewith, the Members are each making their Member Percentage of a call for additional capital contribution of two hundred thousand dollars ($200,000.00) which is to be used to repay such loan and provide a reserve for anticipated expenditures with respect to the Project for the next three (3) months.
>
> (b) A Majority in Interest may make calls for additional capital contributions at such times and in such amounts as they may determine. All calls shall be in writing and shall set forth the time and manner in which the Members are to make the additional capital contributions and shall be forwarded to each of the Members by registered or certified mail, return receipt requested…
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> . . .
>
> (d) If a Member fails to make a capital contribution required of such Member when due on account of a capital call or to provide Required Funds, then the amount the other Members contributed with respect thereto plus any funds contributed by them, if any, to make up a default by another Member, shall not be a capital contribution but shall be a loan to the Company bearing interest at the Stated Rate, and such loans with interest shall be repaid in full before nay [sic] distributions to the Members under Article 7. As used herein, the term "Stated Rate" shall mean the lesser of (i) 8% above the "prime rate" reported in the Wall Street Journal as the same may vary from time to time or, if the Wall Street Journal no longer publishes the "prime rate," the so-

> called "prime rate" of the largest bank, by assets, located in the City of New York, to publish its prime rate or (ii) the maximum interest rate permitted by law.

(*id.*, § 4.02).

Notwithstanding the foregoing, as pled, the course of conduct of the parties included Mr. Taverna making capital calls (*i.e.,* and not just the Majority in Interest; NYSCEF Doc. No. 1, ¶ 38) and that shortfalls in capital contributions were not treated by the Majority in Interest as loans but were instead treated as capital contributions (NYSCEF Doc. No. 3). It does not appear that Mr. Taverna ever objected to this treatment.

The parties additionally agreed that if Mr. Taverna failed to make capital contributions required under Section 4.02, and subject to the conditions of Section 8.01, the Members constituting a Majority in Interest could buy him out for a price equal to the total of his balance his capital account and any accrued preferred return:

> ARTICLE 8
> BUY OUT OPTION
>
> Section 8.01 If Taverna (a) defaults in making any additional contribution required of him under Section 4.02 and such default shall continue for twenty (20) days after notice thereof, (b) or if Taverna dies, becomes bankrupt or is incapacitated for more than four (4) months prior to substantial completion of the Project, (c) if construction of the additional floors to the Building does not commence by the earlier of January 1, 2009 or two years after the expiration or earlier termination of the Family Center Lease, or (d) if the Project is not substantially completed within four years of the expiration of earlier termination of the Family Center Lease, then upon happening of any such conditions Members constituting a Majority in Interest shall have the right, exercisable within one hundred twenty days of the occurrence of the condition giving rise to this right of election, may by notice to Taverna or his legal representative purchase Tavern's [sic] membership interest in the Company ***for a price equal to the total of (i) the balance of his Memorandum Account*** and (ii) any Accrued Preferred Return thereon. If Members constituting a Majority in Interest make such election, then (a) the option under Section 7.05 shall terminate and any prior exercise by Taverna of his option under Section 7.05 shall be deemed nullified and of no further force and effect and (b) the notice of election shall set forth a closing date which shall be no earlier than twenty days nor later than

> thirty days from the date of such notice. The closing shall be held at the office of the Company at which time Taverna and his legal representative shall execute and deliver such documents as are reasonably satisfactory to counsel for the Company to assign and transfer Taverna's membership interest in the Company, free and clear of all liens and encumbrances, to the Member(s) making such election and Taverna or his legal representative shall receive certified check for the purchase price. If Taverna shall fail or refuse to assign and transfer his membership interest in the Company at the scheduled closing upon the tender to him of a certified check for the purchase price as provided for above, then thereafter, upon the date of mailing to him by certified mail of such certified check, his entire membership interest in the Company shall be deemed assigned to the Member(s) making the election without any further act and he shall have no further interest in the Company. For purposes of this Agreement, substantial completion of the Project shall be deemed to have occurred on the later of the recording of the Declaration in the City Register's office and a temporary or permanent certificate of occupancy being issued for all of the Units, other than the Unit Taverna is to receive if he has made the election under Section 7.04(a), permitting the Units above the ground floor to be used for residential purposes and for the Units on the ground floor or below grade level to be used for stores or offices.
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> (NYSCEF Doc. No. 2, § 8.01 [emphasis added]).

The parties also agreed that subject to Article 8 discussed above, if two floors were added to the building, Mr. Taverna could purchase an unfinished unit on the 6th or 7th floor of approximately 1850 square feet exclusive of any terrace for $633,333.00 by making an election to purchase such unit within four months after commencement of the Project:

> Section 7.05 Option to Purchase Unit. Subject to Article 8 hereof, provided at least two floors have been added to the existing building, Taverna, shall have the option to purchase an Unfinished Unit on the sixth and/or seventh floors of approximately 1850 square feet exclusive of any terrace, for the sum of six hundred thirty-three thousand three hundred and thirty-three dollars. If prior to conveying such Unit to Taverna, Company shall have expended any money towards "finishing" such Unit, then Taverna shall reimburse Company therefore at the time such Unit where all of the perimeter walls and windows as well as the slab ceiling are in place and all utilities have been brought to the Unit and stubbed up.
>
> Such option by Taverna shall be made no later than four months after commencement of construction of the Project. Any such election is subject to the provisions of Article 8 hereof.

(*id.*, § 7.05).

The declaratory judgment causes of action predicated on the proper buyout of Mr. Taverna's interests (first and second causes of action) must be dismissed because the complaint (NYSCEF Doc. No. 1) and its attachments firmly establish that the procedure set forth in Section 8.01 of the Operating Agreement for buying out Mr. Taverna's interests were not followed (NYSCEF Doc. No. 2, § 8.01). The letter (the **August Letter;** NYSCEF Doc. No. 3), dated August 28, 2020 from the Partnership to Mr. Taverna and the two trustees of the Fred Taverna 2009 Insurance Trust, put the defendants on notice as to the deficiency of their capital account.

To wit, as relevant, in the August Letter, the plaintiffs indicate that the defendants had a capital account of $2 million and were approximately $900,000 deficient – i.e., they were supposed to have a capital account $2,942,856.60. When the plaintiffs exercised their option to buy the defendants out based on the $25,000 capital call in August 2020, which they did not make, the plaintiffs only paid the defendants $40 (NYSCEF Doc. No. 15). This simply does not comply with the mechanism set forth in Section 8.01 of the Operating Agreement for buying Mr. Taverna out.

For the avoidance of doubt, it does not matter that the defendants may well have breached the Operating Agreement or that they have engaged in other conduct which gives rise to certain claims, including, breach of fiduciary duty, breach of contract, fraudulent inducement, an accounting and constructive trust or that by failing to make the contributions required under Section 4.02, Mr. Taverna may have forfeited his right to exercise his purchase option. Put

another way, although the plaintiffs may have exercised their option to buy him out, they have not complied with the provisions of the Operating Agreement to accomplish this and Mr. Taverna remains a member until he is paid in accordance with the terms of the Operating Agreement.[1] The plaintiffs simply can not oust him without paying his memorandum account balance (*i.e.*, $2 million) and then claim that he merely has a breach of contract claim. This is not the deal the parties struck. Thus, the first and second declaratory judgment claims must be dismissed.

The defendants are not however entitled to dismissal of the entire action. The declaratory judgment (third cause of action) seeking a declaration that Mr. Taverna's option pursuant to Section 7.05 of the Operating Agreement never vested can not be dismissed. As pled, neither of the conditions precedent were met (i.e., only one new floor was added and Mr. Taverna allegedly did not exercise his option within the first four months of construction; *Urban Archaeology v Decorp Invs., Inc.*, 783 NYS2d 330 [1st Dept 2004]).

The fraudulent inducement claim (ninth causes of action) is also not ripe for dismissal. The well-pled complaint alleges, among other things, that Mr. Taverna induced the plaintiffs to take out a $4.4 million loan in 2019 based on the false assurances that taking out the loan was necessary for

[1] It is undisputed that the plaintiffs were aware of the defendants' shortfall in funding contributions dating back to 2005. To the extent that they actually tried to assert a shortfall not merely based on the new capital call of $25,000 but all deficiencies during the entire 15 year period to which he was given notice and an opportunity to cure, there is an issue as to whether this was pretextual and whether the right to demand a true-up (*i.e.*, cure) was waived as to prior capital calls. The plaintiffs may well have been dissatisfied with Mr. Taverna for all the reasons that they allege, but they never demanded Mr. Taverna "pay up" or be bought out before.

a swift completion of the Project and so that the units could be sold (*id.*, ¶¶ 53-55) which was already a decade behind schedule. However, as pled, Mr. Taverna knew that the Project could not be promptly completed swiftly, the units were not ready for sale and that $4.4 million was not adequate for completion. Given the defendants' failure to maintain required records and actively hiding the records they did have to ensure the plaintiffs were unaware of his conduct, dismissal of the fraudulent concealment claim (tenth cause of action) is not appropriate with respect to the mismanagement of the construction (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 586 [1st Dept, 2009]).

In addition, the defendants are also not entitled to dismissal of the breach of contract claims (fourth and fifth causes of action). The well-pled complaint grounds these claims based on the defendants' mismanagement of the construction, failure to keep the requisite records and alleged self-dealing in violation of Sections 5.02, 5.04(b), 5.05, 6.01, 10.01, and 10.02 of the Operating Agreement (NYSCEF Doc. No. 1, ¶ 125). Mr. Taverna's company, NY Interior Construction of NY (**NYIC**), the general contractor, allegedly diverted construction funds in violation of the NY Lien Law, failed to pay subcontractors and vendors, concealed records, and failed to procure proper insurance (NYSCEF Doc. No. 1, ¶¶ 45 & 48). This is sufficient at this stage of the pleadings to state a claim sounding in breach of contract.

Moreover, given the manner in which Mr. Taverna is alleged to have breached the Operating Agreement, the defendants are also not entitled to dismissal of covenant of good faith and fair dealing claim (sixth cause of action) (*Dalton v Education Testing Serv.*, 87 NY2d 384, 389

[1995]; *Truetox Labs., LLC v Healthfirst PHSP, Inc.*, 2020 WL 4556907, at *2 [Sup Ct NY County 2020] [Borrok, J.]).

The claim of conversion (seventh cause of action) and the breach of fiduciary duty claims (eighth cause of action) also are not subject to dismissal because as alleged the defendants misappropriated money from the construction funds to pay themselves and intentionally performed the construction badly (NYSCEF Doc. No. 1, ¶¶ 125 & 161) (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]; *People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]).

Furthermore, the constructive trust (eleventh cause of action) and accounting claims (twelfth cause of action) are also not subject to dismissal because the defendants were entrusted with the construction funds which they allegedly misappropriated to themselves and ignored their obligations to keep proper records (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Metropolitan Bank & Trust Co. v Lopez*, 189 AD3d 443, 446 [1st Dept, 2020]).

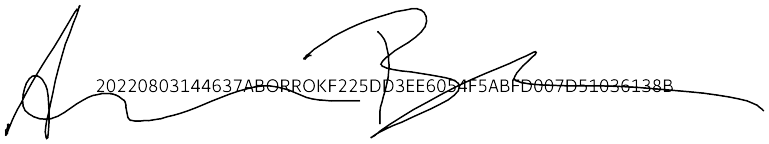
Lastly, with respect to the defendants' contentions that certain claims may be time barred, it is unclear at this stage of the proceeding as to what information the plaintiffs actually had and at what points in time. Thus, dismissal based on the statute of limitations is otherwise not appropriate. However, claims based on conduct with which the plaintiffs had knowledge of or was on inquiry notice of outside of the statutory six year period would be time barred. Inasmuch as the record is not properly developed at to what conduct the plaintiffs were aware, or had inquiry notice, of other than the deficient contributions, the defendants may bring a motion for partial summary judgment when the record is developed.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is granted to the extent set forth herein; and it is further

ORDERED that the defendants shall serve an answer within 30 days of this decision and order; and it is further

ORDERED that the defendant shall order a copy of the transcript (8.2.22) and upload a copy to NYSCEF.



8/3/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**