

Stang LLC v Hudson Sq. Hotel, LLC

2017 NY Slip Op 31243(U)

June 7, 2017

Supreme Court, New York County

Docket Number: 653600/2015

Judge: Anil C. Singh

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
STANG LLC, suing in its own capacity and in the
name of and right of HUDSON SQUARE HOTEL,
LLC, *et al.*,

Plaintiffs,

-against-

HUDSON SQUARE HOTEL, LLC, *et al.*,

Defendants.
-----X

**DECISION AND
ORDER**

Index No.

653600/2015

Mot. Seq. 012-013

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, fraud, judgment declaring that the sale of the property to Hudson Canal LLC is void, constructive trust, and an accounting, defendants Hudson Canal LLC (“Hudson Canal”) and its managing member, Joel Braver (“Braver” and together with Hudson Canal “Defendants”), move pursuant to CPLR 3212 for summary judgment dismissing all of Stang LLC’s (“Stang”), 489 Southwest Canal St., Inc.’s (“Southwest Canal”) and Avihu Gerafi’s (“Gerafi” and together with Southwest Canal Inc. and Stang, “plaintiffs”) claims, pursuant to CPLR 5501 and 6514, canceling the Notice of Pendency filed by plaintiff and sanctions. Plaintiffs’ oppose.

Motion sequences 012 and 013 are consolidated for disposition.

Facts

This action relates to the alleged unauthorized and fraudulent transfer by BB Max LLC, Room 45, LLC, Five Boys One Girl, LLC, Four Girls One Boy, LLC and Z Dream, LLC (collectively, the “LLC Defendants”) to Hudson Canal of the parcel of real property located at 219-233 Hudson Street a/k/a 489/493 Canal Street (the “Property”). Complaint (“Compl.”), ¶1. In February 2013, Hudson Square Hotel LLC (“Hudson Square Hotel”) was formed for the purpose of developing a boutique hotel at the property. Initially, the property was owned by Southwest Canal Inc., which was wholly owned by Gerafi.

In order to generate revenue to build the hotel, Gerafi agreed to convey the property to Hudson Square Hotel, and in return, Gerafi received \$2.5 million, and Stang, which was also wholly owned by Gerafi would receive a 30% membership interest in Hudson Square Hotel. Each of the LLC Defendants were recruited to and agreed to make a cash contribution of \$3 million each in exchange for a 10% membership interest in Hudson Square Hotel. See Operating Agreement, Exh. A. The remaining 20% of the membership interest was held and to be sold to future investors. Compl. ¶54. On October 9, 2013, believing that all contributions had been made, Southwest Canal conveyed the property to Hudson Square Hotel and the First Amendment to Agreement of Members of Hudson Square Hotel LLC Operating Agreement (the “Operating Agreement”) was entered into by and among the parties. Id. ¶57.

Pursuant to the Operating Agreement, HSH Construction, Inc. (“HSH”) was to act as Managing Member of Hudson Square Hotel with Gibly and Gerafi as the sole managing members of HSH. Id. ¶59. After it had become clear that Hudson Square Hotel was unable to raise the capital needed to develop the property, Gerafi offered to purchase the remaining 70% of Hudson Square Hotel’s membership interest for \$5.5 million, which was rejected. On September 18, 2015, a written consent (the “Written Consent”) was signed by the LLC Defendants and purports to authorize defendant Maldini as the authorized signatory. See Gerafi Affidavit, Exh. G. On September 21, 2015, the LLC Defendants sold the property to Hudson Canal for \$13,250,000, without the knowledge of Stang. Compl. ¶2.

On October 7, 2015, Stang and Gerafi were notified for the first time of the sale of the property to Hudson Canal. The sale was allegedly consummated without proper notice to the members or a vote, as allegedly required by the Operating Agreement. Id. ¶80. Defendants’ contend that the Operating Agreement and Written Consent permitted the sale because the Operating Agreement only required a majority vote of the members. See Operating Agreement ¶8(b) (a simple majority is needed to exercise “all decision making authority and power, major and/or minor, with respect to the Company...”). It is also alleged that Maldini did not have any authority to convey the property as Managing Member. Compl. ¶86.

On October 29, 2015, plaintiffs filed a notice of pendency against the property. In this motion, defendants seek a motion for summary judgment dismissing all of plaintiffs' claims asserted against Hudson Canal and Braver, the cancelling of the Notice of Pendency and sanctions.

Analysis

Legal Standard

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass

on issues of credibility.” Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The courts role is “issue-finding, rather than issue-determination.” Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

Defendant’s Motion for Summary Judgment on Plaintiff’s Sixth, Seventh and Ninth Causes of Action

Defendant’s motion for summary judgment on plaintiffs’ cause of action for judgment declaring that the sale of the property to Hudson Canal is void (sixth cause of action), the imposition of a constructive trust against the property (seventh cause of action), and a preliminary and permanent injunction enjoining Hudson Canal from encumbering and/or alienating the property (ninth cause of action) is granted.

Whether the Sale of the Property was Duly Authorized by a Majority of Hudson Square Hotel’s Membership Interests

Defendants’ seek summary judgment on the basis that the sale of the property was duly authorized by a majority of Hudson Square Hotel’s membership interests, and is therefore valid. Plaintiffs argue that the sale of the property to Hudson Canal is voidable because the Written Consent required unanimous consent, not majority consent.

To determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing. Ashwood Capital, Inc. v OTG Mgt., Inc., 99 A.D.3d 1 (1st Dept 2012); Bank of Tokyo-

Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s, 243 A.D.2d 1, 6 (1st Dept 1998). A clear, complete document will be enforced according to its terms. Ashwood Capital, 99 A.D.3d at 7. When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide. Id. Whether there is ambiguity “is determined by looking within the four corners of the document, not to outside sources.” Kass v Kass, 91 N.Y.2d 554, 566 (1998). A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning. White v Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v Philles Records, 98 N.Y.2d 562, 569 (2002). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v Paul, 66 N.Y.2d 570, 573 (1986).

As a preliminary matter, although Hudson Square Hotel could engage in any lawful business, its purpose was to “create, construct and own a boutique hotel.” Operating Agreement, p. 2; see also Written Consent, p. 1 (“WHEREAS the Premises was acquired for the intended purpose of developing same into a boutique hotel...”). Plaintiffs’ argue that when read in context of Section 8(b) of the Operating Agreement, the whereas clause makes clear that decisions requiring majority consent refers only to the day-to-day decisions regarding operating the hotel and cannot refer to the selling of the property. However, “recitals in a contract, such as whereas clauses, are merely explanations of the circumstances surrounding the execution of

the contract, and are not binding obligations unless referred to in the operative provisions of the contract.” 17A C.J.S. Contracts §403 (2017); see also Lexington Ins. Co. v. Combustion Engineering, Inc., 264 A.D.2d 319, 322 (1st Dept 1999) (finding that a whereas clause will not expand the meaning of the contract to include insurance policies that were not specifically identified in the contract).

Although not binding, this court finds the reasoning in Manitaras v. Beusman, index no. 17227/07 (Sup. Ct. Westchester Cnty., Nov. 26, 2007) *aff'd* 56 A.D.3d 735 (2d Dept 2008) persuasive. In Manitaras, plaintiff sought a declaration from the court finding that under the LLC operating agreement, the members could not sell the LLC’s sole asset, the property. Id. at *2. The operating agreement itself, and not the whereas clause stated that the purpose of the LLC was to “own and operate the property.” Id. The court found that since the operating agreement is silent on whether members can sell the property, the court must look to Limited Liability Company Law (“LLCL”) §402(d)(2), which provides that the “vote of at least a majority in interest of the members” may approve the sale of the property. Id. at *3.

The Second Department affirmed this decision finding that where the majority of interested members approve the sale of all the assets of a limited liability company, the sale is valid regardless of the fact that the purpose of the company has been violated. See Manitaras, 56 A.D.3d 735. Here, the purpose of Hudson Square

Hotel is only contained within the whereas clause. See Operating Agreement, p. 2 (the purpose of Hudson Square Hotel is to “create, construct and own a boutique hotel.”). As the purpose is not contained in the body of the operating agreement itself, it is not binding. However, even if this language were to be contained within the body of the agreement, if a majority of the members validly sold the property, either through the express terms of the Operating Agreement or under the LLC law, the purpose clause would not be a barrier to the effectuation of a proper sale.

The unambiguous language of the Operating Agreement clearly provides that the sale of the property requires majority consent, and not unanimous consent.

Section 8 of the Operating Agreement states,

(a) All decisions involving loan, mortgages, or any form of credit to be obtained from third parties (outside party/non-LLC sources) cannot be undertaken except by a one hundred (100%) unanimous vote of the Members in writing.

(b) That unless otherwise stated in this Agreement a majority of Members is required for all decisions making authority and power, major and/or minor, with respect to the Company and its employees, agents and independent contractors, including but not limited to hiring, firing, expenses, business allowances, promotions, advertising, marketing, contracts, policies and tasks.

Under the express terms of the Operating Agreement, any decisions that involved financing from third parties require a unanimous vote. Any decisions not contained in any other part of the Operating Agreement only requires a unanimous vote of the members. Plaintiffs’ do not dispute that the sale of the property is not

provided for, but rather argues that the flip of the property should be deemed a capital event akin to financing. See Memorandum of Law in Opposition (“Opp. Memo”), p. 18.

A logical reading of the entire section is that the parties agreed that any financing decisions, which does not include the sale of the property, would require unanimous consent. Any decisions not otherwise expressly provided for in the Operating Agreement would require majority consent. As the Operating Agreement is “clear, complete and unambiguous, it should be enforced according to its terms.” Cole v. Macklowe, 99 A.D.3d 595, 595 (1st Dept 2012); see also Cara Assoc., L.L.C. v. Milstein, 140 A.D.3d 657, 657 (1st Dept 2016); W.W.W. Associates, Inc. v. Grancontieri, 77 N.Y.2d 157, 162 (1990). As the Operating Agreement does not expressly provide for what kind of consent is necessary for a sale of the property, majority consent is all that is required.¹

Plaintiffs’ allege that a majority of the members did not consent to the sale of the property because Stang had a 30% interest in Hudson Square Hotel and the remaining 20% of the membership interest was held and to be sold to future investors. However, Hudson Square Hotel does not have a voting interest because

¹ Even if this Court were to find that the Operating Agreement was silent as to whether a majority was required approve the sale of the property, the result would be the same. Under LLCL §402(d)(2), where an operating agreement is silent, the sale of substantially all of an LLC’s assets requires only the approval of a majority in interest of the members having voting rights.

an LLC cannot be a member of itself, which plaintiffs concede. See Oral Argument Transcript, p. 25; see also Affidavit of Avihu Gerafi, dated January 5, 2016, ¶16 (NYSCEF #63) (“since the 20% unsold interest cannot be voted, voting interests equal 80% with a majority constituting 41% or more.”). The voting interests of the members consisted of Stang’s 30% interest and the 10% interests of each of the LLC Defendants. See Operating Agreement, §2. Thus, the LLC Defendants constituted a majority of the voting members of Hudson Square Hotel.²

As all the LLC Defendants signed the Written Consent authorizing the sale of the property, and the LLC Defendants consisted of a majority of the voting interests in Hudson Square Hotel, the sale of the property is authorized under the terms of the Operating Agreement. Plaintiffs’ argument that Gibly gave back 5% of his voting interest back to Hudson Square Hotel is without merit. Even ignoring the fact that Gibly may not have been authorized under the Operating Agreement to give back these shares without proper written authorization, the LLC Defendants would still have constituted a majority vote.³

² Collectively, the LLC Defendants and Stang were members of 80% of the voting interests in Hudson Square Hotel, with Hudson Square Hotel holding an additional 20% to be sold to future investors. As the LLC Members owned 50% of the voting interests, they constituted a majority of 62.5%. In order to obtain a majority, the LLC Defendants would only need 40.1% of the vote.

³ Taking Gibly’s 5% and giving plaintiffs’ the benefit of all of the facts, LLC Defendants would still constitute a majority of 56.25%.

Plaintiffs' argument that Maldini lacked authority to transfer the Property on Hudson Square Hotel's behalf is misguided. To establish apparent authority, a party must allege "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." Hallock v. State, 64 N.Y.2d 224, 231 (1984). "Apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal-not the agent." Id. "A third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." Id. Therefore, an agent may not cloak himself with apparent authority, when "a party fails to conduct a reasonable inquiry in the scope of the purported agent's authority." 1230 Park Associates, LLC v. Northern Source, LLC, 48 A.D.3d 355, 356 (1st Dept 2008).

The Written Consent states that a majority of the members resolved to "authorize, empower and direct Paolo Maldini, individually and singly" to consummate the sale of the Property to Hudson Canal. See Written Consent. As discussed, *supra*, only a majority of the members of Hudson Square Hotel were required to effectuate its sale. Therefore, it was reasonable for Hudson Canal to rely upon the authority of the principals cloaking Maldini with authority to enter into the transaction contained in the Written Consent.

Plaintiffs' reliance on 1230 Park Associates and 56 E. 87th Units Corp. v. Kingsland Group, Inc., 30 A.D.3d 1134 (1st Dept 2006) is unavailing. In 1230 Park Associates, the First Department found that an individual does not have the authority to enter into a transaction where an operating agreement clearly states that business affairs may only be conducted by a majority vote of the operating managers, a majority vote was not held, and the other managers did not have knowledge of the underlying transaction. 48 A.D.3d at 355. In 56 E. 87th Units Corp., the First Department found that a president of a corporation lacks authority to enter into a transaction where the bylaws make it clear that board authorization is required. 30 A.D.3d at 1134-35. Unlike in both of these cases, the Operating Agreement states that a majority of the members can effectuate the sale of the property and the Written Consent authorized this sale. Accordingly, Maldini was cloaked with authority to effectuate the sale.

Nor does LLC Defendants alleged failure to comply with LLCL §407 make the deed voidable. Under section 407(a),

Whenever under this chapter members of a limited liability company are required or permitted to take any action by vote, except as provided in the operating agreement, such action may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken shall be signed by the members who hold the voting interests having [sic] not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all of the members entitled to vote

therein were present and voted and shall be delivered to the office of the limited liability company.

Therefore, the LLCL permits “members of a limited liability corporation to provide written consent in order to take action in lieu of an actual vote, unless the operating agreement provides otherwise.” Madison Hudson Associates, LLC v. Neumann, 2005 WL 1941229, *4 (Sup. Ct. N.Y. Cnty. 2005). Here, the LLC Defendants, as holders of a majority interest in Hudson Square Hotel were entitled to sign the Written Consent without a meeting, without prior notice and without a vote.

Plaintiffs’ contention that LLCL §407(c) renders the deed voidable is similarly misguided. Under this section,

Prompt notice of the taking of the action without a meeting by less than unanimous written consent must be given to those members who have not consented in writing but who would have been entitled to vote thereon had the action been taken at a meeting. In the event that the action that is consented to is such as would have required the filing of articles or a certificate under the Limited Liability Company Law, if the action had been voted on by members at a meeting, the articles or certificate, as filed, must state, in lieu of any statement required by the Limited Liability Company Law concerning any vote of members, that written consent has been given.

Plaintiffs do not point this court to any controlling case law that failure to comply with this section results in the ability to void the deed. Additionally, it is the LLC Defendants who allegedly failed to comply with §407(c). There is nothing in this section of the LLCL to suggest that failure to comply with §407(c) affects the

validity of the Written Consent itself and Hudson Canal's ability to rely upon the language contained in the Written Consent to consummate the transaction.

Plaintiffs' attempt to re-raise the issue of whether the members had a vested interest in Hudson Square Hotel. See Opp. Memo, p. 18 ("Since the purposes of the company did not include flipping the Subject Property *without the Individual Defendants making their full capital contributions...*"). However, in the decision dated December 12, 2016, this court expressly held that the failure of any of the parties to the Operating Agreement to make required capital contributions did not deprive them of their membership status. See Stang LLC v. Hudson Square Hotel, LLC, 2016 WL 7188563, at *36-38 (Sup. Ct. N.Y. Cnty. Dec. 12, 2016). Any arguments invoked by plaintiffs' that any member's failure to make capital contributions denies them the ability to consent to a sale of the property is without merit.

Next, plaintiffs' contention that discrepancies in the Written Consent should have raised concern and triggered further inquiry is without merit. Plaintiffs' argue that BB Max LLC identified Vieri as its member and was signed by Vieri instead of its actual member, Maldini; Room 45 LLC, identified Maldini as its member and was signed by Maldini instead of its actual member, Vieri; Z Dream LLC identified Maldini as its member and was signed by Maldini instead of its actual member,

Zidane; and Shevchenko signed on behalf of Five Girls One Boy, LLC, instead of the entities actual name, Five Boys One Girl LLC. See Opp. Memo, pp. 16-17. Defendants' contend that these mistakes were mere scrivener's errors that did not affect the validity of the sale to Hudson Canal nor raise an issue of material fact.

A scrivener's error "constitutes a mistake solely in the reduction of an agreement to writing." Rosalie Estates, Inc. v. Colonia Ins. Co., 227 A.D.2d 335, 337 (1st Dept 1996). "Where there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected." Nash v. Kornblum, 12 N.Y.2d 42, 47 (1962); see also Resort Sports Network Inc. v. PH Ventures III, LLC, 67 A.D.3d 132 (1st Dept 2009); Spivak v. Bertrand, 147 A.D.3d 650 (1st Dept 2017).

Here, neither the parties who signed the Written Consent nor defendants allege that the Written Consent did not represent their intent to transfer the property. Rather, plaintiffs' who are not a party to the Written Consent or the alleged transfer argue that the discrepancies contained in the Written Consent raise issues of material fact that should prevent the validity of the sale to Hudson Canal.

The alleged scrivener's errors do not raise any issues as it relates to the agreement itself. Through affirmations, defendants have established that the

irregularities did not affect the underlying transaction. As to Z Dream LLC, Zidane expressly authorized Maldini to sign the Written Consent on Z Dream's behalf. See Reply Affirmation of Tal E. Dickstein, Esq. ("Reply Aff."), Ex. D at ¶¶4-5. Additionally, Vieri signed for BB Max LLC and Maldini signed for Room 45 LLC, because, as reflected on the Operating Agreement's signature page, these are the true owners of the respective LLC's. *Id.*, Ex. B at ¶6. Finally, as to Shevchenko's company, a scrivener's error inadvertently reversed the words "Boy" and "Girl". *Id.*, Ex. A at ¶5. As these scrivener's errors do not raise material issues of fact as to the validity of the sale to Hudson Canal, they cannot act as a means to trigger further inquiry, as plaintiffs argue.

Whether Hudson Canal is a Bona-Fide Purchaser under RPL §266

Assuming, *arguendo*, that Hudson Canal could not show that the LLC Defendants were authorized to enter into the transaction, Hudson Canal would still be entitled to summary judgment under Real Property Law ("RPL") §266. A bona-fide purchaser for value is entitled to the protection of RPL §266. Fan-Dorf Properties, Inc. v. Classic Brownstones Unlimited, LLC, 103 A.D.3d 589 (1st Dept 2013). RPL §266 "does not in any manner affect or impair the title of a purchaser or incumbrancer for valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Plaintiffs' claim that Hudson Canal is not a bona fide purchaser fails because there is no underlying fraud. In earlier motions, this court dismissed all allegations in the complaint related to an underlying fraud. See Stang LLC v. Hudson Square Hotel, LLC, 2016 WL 7188563 (Sup. Ct. N.Y. Cnty. Dec. 12, 2016) ("the only fraud suggested by the allegations of the complaint that precedes the fifth cause of action are the allegations of fraud in the first cause of action for fraud against Gibly and Four Boys, arising out of the First Transaction. However, this fraud claim is barred by documentary evidence, and fails to states a claim...[therefore] plaintiffs cannot demonstrate the existence of an underlying fraud...") As plaintiffs' complaint no longer contains an allegation of an underlying fraud, their allegation that Hudson Canal is not a bona fide purchaser fails.

Additionally, even if plaintiffs could establish that there is an underlying claim for fraud, plaintiffs cannot show that Maldini did not have apparent authority to enter into the transaction. In order to establish apparent authority, a party must allege "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." Hallock, 64 N.Y.2d at 231. "A third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." Id.

Hudson Canal’s reliance on Maldini’s appearance of authority was reasonable. As discussed, *supra*, the Written Consent purports to authorize Maldini to enter into the transaction based upon the representations of the principals of Hudson Square Hotel, the LLC Defendants. Even if Hudson Canal were to conduct a reasonable inquiry into the scope of Maldini’s authority, the Operating Agreement would still permit the transaction because all that was required under the express terms of the agreement was majority consent. See 1230 Park Associates, 48 A.D.3d at 356. The Written Consent purported to authorize Maldini to enter the transaction and was executed by a majority of the voting members of Hudson Square Hotel. It was reasonable for Hudson Canal to rely upon this authorization.

Plaintiffs final argument that there is a material question of fact regarding the value of the consideration paid for the property is without merit. When determining what constitutes valuable consideration under RPL §266, the court will only determine whether the consideration was so low as to “shock the conscience of the court as to be deemed inadequate.” Am. Holdings Inv. Corp. v. Josey, 71 A.D.3d 927, 930 (2d Dept 2010); see also HSBC Mortg. Services, Inc. v. Alphonso, 58 A.D.3d 598 (2d Dept 2009) (finding that a purchaser was not a bona-fide purchaser for value where he purchased property valued at \$600,000 for \$20,000). Here, the property was valued by an independent appraiser at \$14.1 million. Hudson Canal

purchased the property for \$13.25 million. This discrepancy between the actual value and the purchase price does not unreasonable.

Accordingly, under RPL §266, Hudson Canal's motion for summary judgment is granted.

Plaintiffs' Standing to Sue Derivatively

Plaintiffs' do not have standing to sue derivatively. In determining whether an action against an LLC is direct or derivative in nature, New York has adopted the test the Supreme Court of Delaware developed in Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004). Yudell v. Gilbert, 99 A.D.3d 108, 110 (1st Dept 2012); Scott v. Pro Mgt. Servs. Group, 124 A.D.3d 454 (1st Dept 2015) (applying the Tooley test to Limited Liability Companies). In making this determination, the court should consider "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley, 845 A.2d at 1033.

Although plaintiffs adequately allege that the corporation suffered the harm and would receive the benefit of any recovery, plaintiffs cannot adequately plead any damages to the corporation. Plaintiffs' allege that the damages arise under the provisions of the Operating Agreement. See Memo. in Opp., p. 21. As discussed,

supra, Hudson Canal was properly deeded the property under the terms of the Operating Agreement. Therefore, there are no damages against Hudson Canal and plaintiffs' cannot state a derivative claim.

Plaintiffs Fifth Cause of Action for Aiding and Abetting Fraud

Defendants' motion for summary judgment on plaintiffs' fifth cause of action for aiding and abetting fraud against the individuals named in the complaint is granted. To successfully state a claim for aiding and abetting fraud, the moving party must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. See Oster v. Kirschner, 77 A.D.3d 51, 55 (1st Dept 2010). As this court has already dismissed the only cause of action for fraud in its prior decision, plaintiffs cannot adequately allege a cause of action for aiding and abetting fraud.

The Notice of Pendency

Defendants' motion to cancel plaintiffs Notice of Pendency is granted. Under CPLR 6501 a notice of pendency may only be filed when "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property."

"When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501, it neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself: the court's analysis is to be limited to the pleading's face."

Delidimitropoulos v. Karantinidis, 142 A.D.3d 1038, 1039 (2d Dept 2016). Here, the complaint cannot seek relief that would affect the title to, or the possession, use or enjoyment of, real property. See, supra.

Plaintiffs' argue that any claim to the property has already been decided by Justice Oing's January 2016 decision and therefore constitutes law of the case.

Where a previous motion was decided on a different standard of review, the law of the case doctrine will not bar a party from bringing the new application. See RXR WWP Owner LLC v. WWP Sponsor, LLC, 145 A.D.3d 494 (1st Dept 2016) ("our earlier holding, on a motion to dismiss, brought pursuant to CPLR 3211... does not constitute 'law of the case' barring [a party] from moving for summary judgment, which is subject to a different standard of review"); Tenzer, Greenblatt, Fallon & Kapln v. Capri Jewelry, Inc., 128 A.D.2d 467, 469 (1st Dept 1987); Moses v. Savedoff, 96 A.D.3d 466, 468 (1st Dept 2012) ("As a threshold matter, we note that the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion.").

Hudson Canal's prior motion was brought pursuant CPLR 6501 and 6514 to cancel the notice of pendency on a truncated record. See Proposed Order to Show Cause (NYSCEF #37). In fact, Justice Oing expressly ruled that his decision was limited to the motion before him and was based on the limited documentation in

front of him including the lack of any affidavit from any of the LLC Defendants. See Gerafi Aff., Ex. A at 53:17-23. Justice Oing stated that “I’m not precluding you from making any arguments in any motion you make.” Id. In this motion, Hudson Canal has supplemented the record with the affidavits of the LLC Defendants. Accordingly, Justice Oing’s decision does not constitute law of the case regarding whether Hudson Canal may bring a subsequent motion to cancel the Notice of Pendency.

Here, the notice of pendency is cancelled based upon this court granting defendants summary judgment on a full record. Accordingly, defendants’ motion to cancel the Notice of Pendency is granted.

Sanctions

Hudson Canal’s motion for sanctions for frivolous conduct is denied. Under 22 NYCRR § 130–1.1, the court has discretion to award sanctions for frivolous conduct. This is defined as conduct which is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or which is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or which involves the assertion of materially false factual statements.

The authority to impose sanctions and costs is within the court's sound discretion. De Ruzzio v. De Ruzzio, 287 A.D.2d 896 (3d Dept 2001). The court's power to impose sanctions serves the dual purpose of vindicating judicial authority and making the prevailing party whole for expenses caused by his opponent's obstinacy. Gordon v. Marrone, 155 Misc.2d 726, 590 N.Y.S.2d 649 (Sup.Ct. Westchester Cnty 1992), *aff'd* 202 A.D.2d 104, 616 (2d Dept.1994). In assessing whether to award sanctions, the court must consider whether the attorney adhered to the standards of a reasonable attorney. Principe v. Assay Partners, 154 Misc.2d 702, 586 N.Y.S.2d 182 (Sup.Ct., N.Y. Cnty. 1992).

At this stage of the litigation, the Court denies Hudson Canal's request for sanctions.

Accordingly, it is hereby

ORDERED that Hudson Canal's motion for summary judgment on plaintiffs' fifth cause of action is granted; and it is further

ORDERED that Hudson Canal's motion for summary judgment on plaintiffs' sixth cause of action is granted; and it is further

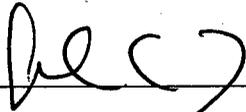
ORDERED that Hudson Canal's motion for summary judgment on plaintiffs' seventh cause of action is granted; and it is further

ORDERED that Hudson Canal's motion for summary judgment on plaintiffs' ninth cause of action is granted; and it is further

ORDERED that the Notice of Pendency filed by plaintiffs against the real property owned by Hudson Canal located at 219/233 Hudson Street a/k/a 489/493 Canal Street, New York, NY (Block 594, Lot 108) is cancelled forthwith; and it is further

ORDERED that Hudson Canal's motion for sanctions is denied.

Date: June 7, 2017
New York, New York



Anil C. Singh