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| <b>Capital TCP, LLC v A-G Holdings, LLC</b>                                                                                                                                                                                      |
| 2012 NY Slip Op 31611(U)                                                                                                                                                                                                         |
| June 8, 2012                                                                                                                                                                                                                     |
| Sup Ct, New York County                                                                                                                                                                                                          |
| Docket Number: 603288/09                                                                                                                                                                                                         |
| Judge: Shlomo S. Hagler                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: [REDACTED] **Shlomo Hagler** **J.S.C.** PART 17  
*Justice*

Index Number : 603288/2009  
**CAPITAL TCP, LLC**  
 VS.  
**A-G HOLDINGS, LLC**  
 SEQUENCE NUMBER : 002  
 AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion

**THIS MOTION/OSC IS**  
**[REDACTED] DENIED [REDACTED]**  
**AS SET FORTH IN THE**  
**ATTACHED SEPARATE**  
**WRITTEN DECISION & ORDER**

**FILED**

JUN 18 2012

Dated: 6/8/12

NEW YORK  
 COUNTY CLERK'S OFFICE

**Shlomo Hagler**  
**J.S.C.**

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION  
 Check if appropriate: ☐ DO NOT POST ☐ REFERENCE  
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
 FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
CAPITAL TCP, LLC and TENNESSEE INVESTMENT  
GROUP REALTY LLC,

Plaintiffs,

Index No. 603288/09

-against-

A-G HOLDINGS, LLC, VIVID MANAGEMENT, LLC,  
ISHERRO, LLC, TODAH REALTY LLC, SAID  
SOLEIMANI, WATCHHILL CONSULTANTS, LLC,  
and MARK WOLFE,

Decision/Order

Defendants.

**FILED**

JUN 18 2012

-----X  
Hon. Shlomo S. Hagler, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs Capital TCP, LLC and Tennessee Investment Group Realty LLC ("plaintiffs," "Capital TCP" or "Tennessee Investment Group") move, pursuant to CPLR § 3025(b), for leave to file and serve an amended complaint as annexed thereto as Exhibit "4" (Motion Sequence #002). In a separate motion (Motion Sequence #003),<sup>1</sup> defendant Watchhill Consultants, LLC ("defendant" or

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1. Plaintiffs submitted papers in support of their motion to amend under Motion Sequence #002. Defendant Watchhill submitted what, at the time, appeared to be a cross-motion for summary judgment dismissing the complaint and/or amended complaint, but the cross-motion was not appearing as such in the court's case management system. Watchhill's counsel subsequently informed the court that he paid a separate motion fee for the summary judgment motion, which was apparently assigned Motion Sequence number 003. To date, case management indicates two open motions in this action, Motion Sequence #002, plaintiffs' motion to amend, and Motion Sequence #003, Watchhill's motion for summary judgment dismissing the complaint/amended complaint.

"Watchhill") moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and/or the amended complaint. Both motions are consolidated herein for disposition.

### **Background**

Plaintiffs are two limited liability companies ("LLCs"), established under the laws of Tennessee, whose sole business was the ownership and management of two apartment buildings located in Tennessee ("Buildings"). Defendants are all members of one or both of the plaintiffs LLCs. Pursuant to the Operating Agreements dated April, 2004, ("Operating Agreements") between the parties herein, defendants A-G Holdings, LLC ("A-G Holdings") and Vivid Management, LLC ("Vivid") are the managing members of both plaintiffs.

In 2006, plaintiffs agreed to sell the Buildings to two companies controlled by nonparty Eli Weinstein ("Purchaser" or "Weinstein") for a total purchase price of \$43.2 million, payable in full at closing. George Fakiris ("Fakiris"), owner of A-G Holdings, acted on behalf of plaintiffs in this transaction.

On December 7, 2006, the day of the closing, plaintiffs learned that the Purchaser did not have sufficient funds to pay the entire balance of the purchase price, falling \$5,621,792.00 short. In order to close at the agreed purchase price, plaintiffs accepted a promissory note ("Note") for the shortfall payable by Weinstein. However, Weinstein failed to make all payments on the Note as required.

As a result of Weinstein's failure to pay, Fakiris commenced a lawsuit on behalf of plaintiffs against the Purchaser in Tennessee ("Tennessee Action"). Fakiris alleges that he did so with the knowledge and consent of the defendants. The Purchaser subsequently filed counterclaims against the plaintiffs, Fakiris, and defendant Said Solemiani ("Solemiani") for fraud.

On July 9, 2010, the Tennessee court granted plaintiffs' motion for summary judgment against the Purchaser for the balance of the purchase price and the Note, and dismissed the Purchaser's counterclaims. This decision is currently on appeal. In connection with the Tennessee Action, plaintiffs incurred more than \$525,000 in fees and expenses, of which more than \$400,000 was allegedly paid on behalf of plaintiffs, by Fakiris, personally, and A-G Holdings. Fakiris anticipates that more fees and expenses in connection with this Tennessee Action will be incurred.

In addition to the Tennessee Action, in 2009, an action was commenced against the plaintiffs by Royal York Realty, LLC ("Royal York") in the New York Supreme Court, Kings County, Index No. 8603/09 ("Kings County Action").<sup>2</sup> In the Kings County Action, Royal York sought more than \$1.2 million in brokerage commissions in connection with the sale of the Buildings. A-G Holdings,

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2. On May 15, 2012, a decision was rendered by the Hon. Martin Solomon, J.S.C., in the Kings County Action which dismissed both Royal York's action and the counter-claims asserted by Capital TCP and Tennessee Investment Group.

through Fakiris, retained a law firm to defend plaintiffs. Plaintiffs have allegedly incurred more than \$10,000 in fees and expenses in connection with the Kings County Action, none of which has allegedly been paid. According to Fakiris, plaintiffs have no money to pay for these legal fees and expenses.

Plaintiffs now bring this suit seeking to compel the defendants to pay their proportionate share of past legal fees and expenses, as well as anticipated future legal fees and expenses, arising from the Tennessee Action and Kings County Action.

#### ANALYSIS

##### Plaintiffs' Motion for Leave to Amend

Plaintiffs seek leave to amend the complaint to add causes of action for breach of contract, based on specific provisions of the Operating Agreements, and for declaratory judgment, declaring that each defendant member must pay its proportionate share of the fees and expenses incurred in the Tennessee Action and Kings County Action. The proposed amended complaint also elaborates on the original unjust enrichment claim, as well as the factual background of the case.

There is no dispute that the Operating Agreements are governed by Tennessee law, and "it is the well-settled 'policy of the courts of this State to enforce contractual provisions for choice of law'" (*Boss v American Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005], *affd* 6 NY3d 242 [2006], quoting *Koob v IDS Fin. Servs.*,

*Inc.*, 213 AD2d 26, 33 [1st Dept 1995]). However, "under common-law rules matters of procedure are governed by the law of the forum" (*Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 285 [2d Dept 2010] [internal quotes and citations omitted]). Thus, the issue of whether plaintiffs should be granted leave to amend is one of procedure and governed by New York law.

It is well settled law that "leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise" (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009]). Nevertheless, an examination of the underlying merit of the proposed amendment is required, and "leave will be denied where the proposed pleading fails to state a claim or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

Here, there is neither a showing by the defendants of prejudice nor surprise resulting from plaintiffs' delay in asserting their new causes of action for breach of contract and for a declaratory judgment. However, granting plaintiffs' motion to amend would be futile since the allegations set forth in the proposed amended complaint are not sufficient to state a claim for breach of contract and for a declaratory judgment, declaring that defendants must pay their share of plaintiffs' legal fees, as provided in the Operating Agreements, as will be discussed below in Watchhill's motion for summary judgment.

**Watchhill's Motion for Summary Judgment**

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law. Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient enough to raise an issue of fact warranting a trial (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). Defendant Watchhill has met this burden, showing that it is entitled to judgment as a matter of law.

Paragraph 7 of the Operating Agreements provides, in relevant part, as follows:

The liability of any Member for the losses, debts, liabilities, and obligations of the [plaintiffs] shall be limited to paying: the capital contribution of such Member when due under this Agreement; such Member's share of any undistributed assets of the [plaintiffs]; and (only if and to the extent at any time required by applicable law) any amounts previously distributed to such Member by the [plaintiffs].

Defendant Watchhill argues that this provision of the Operating Agreements unambiguously provides that defendants are not required to provide any additional capital contributions to pay for plaintiffs' debts and liabilities.

Under Tennessee law, a court's task in resolving a contract dispute is "to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language" (*Planters Gin Co. v Federal Compress & Warehouse Co.*, 78 SW3d 885, 889-90 [Tenn 2002] [internal citation omitted]). "This



determination of the intention of the parties is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide" (*Id.* at 890). The court must first determine whether the contract language is ambiguous. If the language is clear and unambiguous, the plain language of the agreement controls (*Ruth v Home Health Care of Middle Tenn., LLC*, 2010 WL 744936, \*5, 2010 Tenn App LEXIS 159 [Tenn App Ct 2010]). A contract is only ambiguous if its meaning is uncertain and can be fairly understood in more than one way (*Id.*).

The language of the Operating Agreements is clear and unambiguous. As per Paragraph 7, defendants' liability for losses, debts, liabilities, and obligations of the plaintiffs is limited to: (1) the original contribution by each defendant; (2) the defendants' share of any undistributed assets of the plaintiffs; or (3) any amounts previously distributed to defendants by plaintiffs, **"only if and to the extent at any time required by applicable law"**.

Therefore, Watchhill, as per the Operating Agreements, can only be required to make capital contributions limited to: (1) what capital contribution it already made; (2) any undistributed assets, which here there are none, as it is undisputed that all proceeds from the sale of Buildings were distributed to the defendants; or (3) any amounts previously distributed to the defendants by

plaintiffs, if and to the extent required by law, which Watchhill asserts is inapplicable because there is no law requiring it to return the monies distributed from the sale to pay plaintiffs' legal fees.

In opposition to Watchhill's motion, plaintiffs assert that the phrase "required by applicable law" is ambiguous and precludes summary judgment. However, plaintiffs provide no support for this argument and make no attempt to show how this phrase can be subject to more than one reasonable interpretation, making it ambiguous. Furthermore, plaintiffs do not cite to any applicable law which would trigger this particular provision of the Operating Agreements.

Plaintiffs also argue that pursuant to Paragraph 11 of the Operating Agreements, the managing member shall be reimbursed for all direct out-of-pocket expenses incurred. While this is true, plaintiffs fail to mention that Paragraph 11 specifically states that the managing member shall be reimbursed by the Limited Liability Companies, i.e. the plaintiffs. Thus, under this provision, Fakiris must seek any reimbursement from the plaintiff LLCs and not the defendants. Regarding the indemnity clause contained in Paragraph 11, which plaintiffs also rely on, that also states that it is the plaintiff LLCs and not defendant members that shall indemnify and hold harmless the managing member for liability, loss, damage, or expense, including attorneys' fees.

In addition to plaintiffs' proposed amended claims for breach of contract and a declaratory judgment, defendant Watchhill also moves for summary judgment on plaintiffs' original claim for unjust enrichment. Under Tennessee law, "a contractual obligation under an unjust enrichment theory will be imposed when: (1) no contract exists between the parties or, if one exists it has become unenforceable or invalid; and (2) defendant will be unjustly enriched absent a quasi-contractual obligation" (*Duke v Browning-Ferris Indus. Of Tenn., Inc.*, 2006 WL 1491547, \*9, 2006 Tenn App LEXIS 355 [Tenn Ct App 2006]). Here, there exists a valid contract, which is the subject of this action. The issue in this case is whether, defendants, as members of the plaintiff LLCs, have to contribute additional capital to cover plaintiffs' legal fees, and whether that subject matter is governed by the Operating Agreements. Thus, as a matter of law, the equitable remedy of unjust enrichment cannot be imposed where a valid contract exists on the subject matter (*Id.* at 10).

#### CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' motion for leave to amend the complaint is denied; and it is further

ORDERED that defendant Watchhill Consultants, LLC's motion for summary judgment is granted; and it is

ORDERED that this action shall continue as to the remaining  
defendants.

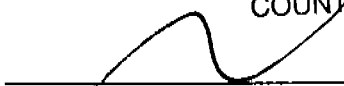
**FILED**

JUN 18 2012

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Dated: June 8, 2012

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Shlomo Hagler  
J.S.C.

  
Hon. Shlomo S. Hagler, J.S.C.