SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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GUY J. JACOBSON, individually, and on behalf of 99-105 THIRD AVENUE REALTY, LLC,

Plaintiff,

-against-

Index No.: 600886/2007
Motion Seq. Nos.: 005, 006
Motion Date: 2/24/2014

STEVEN CROMAN, CROMAN FAMILY PARTNERSHIP, LLC and CROMAN FAMILY ASSOCIATES, LLC,

Defendants,

-and-

99-105 THIRD AVENUE REALTY, LLC,

Nominal Defendant.

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BRANSTEN, J.

Motion sequence numbers 005 and 006 are consolidated herein for disposition.

The instant action is a dispute, centering in principal part on the alleged breach of a Buy-Out Provision contained in an Operating Agreement executed by the parties. In motion sequence number 005, defendants Steven Croman ("Croman"), Croman Family Partnership, LLC ("CFP"), and Croman Family Associates, LLC ("CFA") seek summary judgment dismissing the complaint in its entirety, as well as judgment in their favor on their first, second, and third counterclaims. In motion sequence 006, plaintiff Guy J. Jacobson, individually, and on behalf of 99-105 Third Avenue Realty, LLC ("Jacobson"),

moves for partial summary judgment on his tenth cause of action for breach of contract for failure to distribute the proceeds of a mortgage on real property located at 99-105 Third Avenue, New York, New York, and 204 East 13th Street, New York, New York. Both motions are opposed. For the reasons that follow, defendants' motion is granted in part and denied in part, while plaintiff Jacobson's motion is denied.

I. Background

As the factual background of this matter has been discussed in detail in this Court's prior decisions, dated October 6, 2008 and April 26, 2010, there is no need for an extensive discussion of the facts, except where relevant for the purposes of these motions.

In July 2000, defendant CFP and plaintiff Guy Jacobson formed nominal defendant 99-105 Third Avenue Realty, LLC (the "Company") for the purpose of acquiring real property located at 99-105 Third Avenue, New York, New York (the "Property"). The Company acquired the Property from nonparty 99-105 Third Avenue Management Corp, of which Jacobson was the sole shareholder. At the time of this acquisition, the Property consisted of two contiguous parcels of land and structures thereon, including a four-story building containing apartments and retail space, and a five-story former single room occupancy (SRO) hotel with retail space on the ground floor. One of the commercial tenants operating at the Property was 99 Third Ave.

Restaurant Corp. (the "Restaurant Tenant"), of which Jacobson was also the sole shareholder and principal.

A. *Operating Agreement*

On August 3, 2000, an operating agreement for the Company was executed by defendant Croman, on behalf of CFP, and Jacobson (the "Operating Agreement"). Under the Operating Agreement, CFP received an 85% membership interest,[1] while Jacobson received the remaining 15% interest. The Operating Agreement provided that the purpose of the Company was to "engage in the business of acquiring, developing, maintaining, improving, and operating" the Property. *See* Affidavit of Guy J. Jacobson ("Jacobson Aff.") Ex. A § 2.01 ("Operating Agreement"). In accordance with Section 5.02(a) of the Operating Agreement, Croman was elected sole manager of the Company.

Further, Section 9.02 of the Operating Agreement provided for a "buy-out" option, which gave CFP/CFA the option to buy Jacobson's 15% membership interest in the Company "on any date which may not be less than six (6) years nor more than twenty (20) years" after the Company's acquisition of the Property (the "Buy-Out Provision"). The option price was the greater of $339,000 or the fair market value of Jacobson's 15% interest as of the date of the exercise of the option, as computed by a formula set forth in

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[1] In April 2003, CFP was replaced by defendant CFA as the 85% majority member of the Company. Accordingly, this Court will refer to defendants CFP and CFA collectively, as CFP/CFA.

the Operating Agreement. In the event of a dispute, the Operating Agreement provided for an appraisal procedure.

B. *Construction Efforts on the Property*

In August 2000, the Company and Restaurant Tenant entered into a lease allowing the Restaurant Tenant to continue operating its restaurant on the Property. In 2000, Croman secured a $500,000 construction loan to renovate the Property from Dominion Financial Corporation, and in 2003, Dime Savings Bank provided another loan of $247,210.06 to the Company.

The parties dispute the efforts made to develop and renovate the Property from 2000 to the present. Jacobson alleges that the parties planned to operate a hotel on the Property. Defendants claim a hotel would have been too risky and that they tried to renovate the existing apartments, in order to lease them for a higher rent. Defendants also allege that an elevator was needed for a hotel, but that the optimal place for it was in the space then occupied by the Restaurant Tenant and Jacobson tried to leverage that need into concessions to himself.

C. *CFP/CPA's Attempted Buy-Out of Jacobson*

On September 12, 2006, CFP/CPA sent Jacobson a letter exercising the option to acquire his membership interest for $339,000. By letter dated October 16, 2006, Jacobson rejected CFP/CFA's offer of $339,000 and elected to institute the valuation mechanism provided for in the Buy-Out Provision. As part of such election, Jacobson designated The Weitzman Group, Inc. as his appraiser for determining the market value of his 15% membership interest. CFP/CFA designated J.A. Cowan & Associates as its appraiser. On March 20, 2007, Jacobson sent a letter disputing CFP/CFA's efforts regarding the appraisal process. This letter also addressed defendants' lack of willingness to address their breach of fiduciary duties alleged by Jacobson. On that same date, Jacobson filed his summons and complaint commencing this action.

D. *The Instant Action*

On June 11, 2009, defendants filed a motion for partial summary judgment on their first counterclaim for a declaratory judgment and on their second counterclaim for specific performance. Defendants also sought an order directing Jacobson to comply with the Buy-Out Provision. At that time, this action was assigned to the Honorable Richard B. Lowe. On April 26, 2010, Justice Lowe denied defendants' motion for partial

summary judgment on ground that issues of fact existed as to whether defendants breached their fiduciary duty and/or violated the covenant of good faith.

On November 23, 2010, as part of a Court-ordered mediation, Empire Valuation Consultants, LLC ("Empire") was retained to appraise Jacobson's membership interest as of 2006. As there was no resolution in mediation, the parties continued to litigate.

On July 8, 2013, Jacobson filed a third amended complaint. On July 29, 2013, defendants filed an answer to the third amended complaint with counterclaims. Defendants now move for summary judgment dismissing the complaint and for judgment in their favor on their counterclaims. Jacobson moves for partial summary judgment on his tenth cause of action for breach of contract.

II. **Analysis**

A. *Defendants' 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." *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial. *Id.*

1. Successive Summary Judgment Motions

Jacobson argues that defendants' motion for summary judgment should be denied, as it is their second motion for summary judgment seeking the same relief. "Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification" Jones v. 636 Holding Corp., 73 A.D.3d 409, 409 (1st Dep't 2010).

As defendants have never moved for summary judgment on any prior versions of the complaint, including the current third amended complaint, they are permitted to move for summary judgment dismissing the complaint. Moreover, defendants may seek summary judgment on their breach of contract counterclaim, since they have not previously sought summary judgment on this claim.

Defendants are not, however, allowed to move for summary judgment for a second time on their counterclaims for a declaratory judgment and specific performance. As discussed above, on June 11, 2009, defendants filed a motion for partial summary judgment on their first and second counterclaims in their answer to the second amended complaint. These counterclaims seek the same relief as those brought in defendants' answer to the third amended complaint, on which they are now seeking judgment. The first counterclaim in both answers seeks a declaratory judgment that Jacobson is not a

member of the Company,[2] that Jacobson must follow and participate in the buy-out valuation process prescribed by the Operating Agreement, and that CFP/CFA is entitled to a credit against the purchase price of Jacobson's interest. The second counterclaim brought in both answers also seeks the same relief in that defendants request an order directing Jacobson to accept a buy out at a price determined pursuant to the Buy-Out Provision.[3] Therefore, it is not appropriate for defendants to once again seek judgment on these two counterclaims.

Although defendants argue that there is new evidence in that the parties obtained a new appraisal of the Property, as well as a new appraisal of Jacobson's membership interest in the Company, neither resolves the issues of fact determined by Justice Lowe. In his April 26, 2010 decision, Justice Lowe found that there were issues of fact as to whether Croman's devotion to other projects injured Jacobson and whether defendants'

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[2] Although worded slightly differently, the first counterclaim in defendants' answer to the second amended complaint for declaratory judgment is the same as the declaratory judgment counterclaim in the answer to the third amended complaint. In the first iteration of the counterclaim, defendant sought a declaratory judgment forcing Jacobson to sell his interest. In the instant version of the counterclaim, defendants seek a declaratory judgment that he is no longer a member of the Company. Under either version of the claim, the ultimate result is the same. Defendants wanted, and still want, Jacobson out of the Company. Further, the issues of fact found by Justice Lowe also would be the same, so even if the motion were heard, it would be denied.

[3]Although these counterclaims are not worded exactly the same, again, the defendants are seeking the same relief in that they want an order directing Jacobson to accept the sale of membership at the determined price.

actions or inactions to develop and improve the Property constituted a breach of fiduciary duty and/or a violation of the good-faith covenant. *See* April 26, 2010 Decision at 6. These issues of fact are not resolved by a new valuation of the Property or Jacobson's membership interest.

However, as discussed above, Defendants can proceed to move on their counterclaim for breach of contract, as they have not previously sought relief on that counterclaim. That counterclaim is addressed below.

2. Summary Judgment on Defendants' Counterclaim for Breach of Contract

Defendants seek to hold Jacobson liable for breach of the Operating Agreement based on his failure to comply with the Buy-Out Provision. Defendants seek an unspecified amount of monetary damages on this counterclaim.

Issues of fact exist as to whether any alleged prior breach by defendants in their failure to develop and improve the Property justifies Jacobson's failure to comply with the Buy-Out Provision. As previously held by Justice Lowe in this case, within every contract is an implied covenant of good faith and fair dealing, and issues of fact exist as to whether Croman's devotion to other projects, as well as defendants' actions or inactions to develop and improve the Property, caused Jacobson injury. *See* April 26,

2010 Decision at 6. Therefore, summary judgment on defendants' breach of contract counterclaim is denied.

3. Summary Judgment Dismissing the Third Amended Complaint

Defendants also move for summary judgment, seeking dismissal of the third amended complaint. This complaint alleges causes of action for breach of fiduciary duty, breach of the duty of good faith and fair dealing, breach of contract, nullification, fraud, violation of Limited Liability Company Law § 409, an accounting, and attorneys' fees. Jacobson seeks monetary damages, as well as an injunction enjoining defendants from purchasing Jacobson's membership interest and barring them from proceeding with construction of an apartment building on the Property.

a. **Breach of Fiduciary Duty (First and Ninth Causes of Action)**

Jacobson alleges that defendants breached their fiduciary duty by refusing to take action to develop and improve the Property, as contemplated by the Operating Agreement, and by proceeding with the wasteful construction project of a renovated apartment complex on the Property. Again, this Court previously has held that issues of fact exist as to whether Croman's devotion to other projects injured Jacobson, and whether defendants' actions or inactions to develop and improve the Property constituted

a breach of fiduciary duty. *See* April 26, 2010 Decision at 6. Accordingly, defendants' summary judgment motion seeking to dismiss this cause of action is denied. These issues of fact relate directly to Jacobson's claim for breach of fiduciary duty and they have not be resolved since this Court's April 26, 2010 decision.

Defendants further argue that the statute of limitations bars this claim, because in his October 3, 2006 letter, Jacobson wrote that, since signing the Operating Agreement in 2000, he has begged Croman to do something to develop the Property. Thus, defendants conclude that this is an admission that Jacobson was aware back in 2000 that defendants were breaching their fiduciary duty. Defendants argue that the three-year statute of limitations applies to this cause of action, because Jacobson is seeking only monetary damages.

> New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period . Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies.

IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139 (2009) (internal citations omitted). The third amended complaint seeks equitable relief on the breach of fiduciary duty claims in the form of an injunction enjoining defendants from purchasing Jacobson's membership interest and barring defendants from proceeding with the

construction of the apartment building on the Property. Therefore, Jacobson's remedy is not purely monetary in nature and defendants have not made a prima facie case showing otherwise. The six-year limitations period applies.

Defendants have failed to make a prima facie showing that the breach of fiduciary duty claim accrued prior to March 2001. "A tort claim accrues as soon as 'the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint.'" *Id.* at 140 (quoting *Kronos, Inc. v AVX Corp.*, 81 N.Y.2d 90, 94 (1993)). "As with other torts in which damage is an essential element, the claim is not enforceable until damages are sustained." *Id.* Jacobson's statement in the October 3, 2006 letter that he had been begging Croman to do something to develop the Property since signing the Operating Agreement does not demonstrate that Jacobson sustained damages and that he was able to truthfully allege a claim, prior to March 2001.

Accordingly, defendants' motion for summary judgment as to plaintiff's breach of fiduciary duty claims is denied.

b. **Violation of Limited Liability Company Law § 409 (Third Cause of Action)**

New York Limited Liability Company Law § 409 imposes a statutory fiduciary duty on managers of limited liability companies. *See* Limited Liability Company Law § 409(a) ("A manager shall perform his or her duties as a manager, including his or her

duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances."). As issues of fact exist as to whether Croman breached his fiduciary duty, *see infra,* defendants' summary judgment motion seeking to dismiss this cause of action is denied.

c. **Duty of Good Faith and Fair Dealing (Second Cause of Action)**

As with Jacobson's claim for breach of fiduciary duty, this Court also previously held that issues of fact exist as to whether defendants breached the covenant of good faith and fair dealing. Again, the issues of fact found by the Court relate directly to Jacobson's current claim for breach of the duty of good faith and fair dealing, and they have not been resolved since Justice Lowe's April 26th decision. *See* April 26, 2010 Decision at 6. Therefore, defendants' summary judgment motion seeking to dismiss this cause of action is denied.

d. **Breach of Contract (Fourth and Tenth Causes of Action)**

Jacobson alleges that defendants breached the Operating Agreement by (1) failing to cause $750,000 to be advanced to the Company within 18 months of its acquisition of

the Property; and, (2) failing to distribute proceeds of an $11 million mortgage lien on the Property.

Section 12.02 of the Operating Agreement states:

> [Croman] will cause to be advanced to the Company from time to time within eighteen (18) months years[4] after the initial acquisition of the Property not less than $750,000.00 for the renovation and repair of the Property.

Defendants argue that they satisfied this provision by obtaining a $500,000 construction loan in 2000 and another loan of $247,210.06 in 2003 and submit evidence of the two loans. However, this does not show an entitlement to judgment as a matter of law, as the Operating Agreement clearly states "not less than $750,000" and the loans presented fall short of the required $750,000. Therefore, the court cannot grant summary judgment to defendants on this claim.

Defendants also argue that, even if Croman failed to cause $750,000 to be advanced, Jacobson has not offered evidence of damages, and, thus, the claim should be dismissed. Jacobson does not have to offer evidence of damages, as defendants are the movants here, and are the ones with the burden of making "a prima facie showing of entitlement to judgment as a matter of law." *People v Grasso*, 50 A.D.3d at 545.

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[4] The Operating Agreement states "months years," but it is undisputed that it the time period is eighteen months.

The second portion of Jacobson's breach of contract claim involves a mortgage on the Property, executed by Croman in April 2009, in the amount of $7,376,657.01, which consolidated existing mortgages to create a total mortgage lien on the Property in the amount of $11 million. Jacobson alleges that, pursuant to Section 12.01(b)(viii) of the Operating Agreement, he was entitled to receive $879,500 from the proceeds of the April 2009 mortgage, and, since he did not receive it, defendants are in breach of the Operating Agreement.

Section 12.01(b)(viii) of the Operating Agreement states, in relevant part, that:

> In the event the mortgages are refinanced and the amount exceeds $4,800,000, the difference will not be put into the Property as capital but will be distributed to the Members in accordance with their Membership Interest subject to the offset of $165,000 from Jacobson's Interest.

Defendants argue that since Jacobson was no longer a member in 2009, he was not entitled to any proceeds of the April 2009 mortgage. As discussed above, issues of fact exist as to whether Jacobson was justified or not in not complying with the Buy-Out Provision, and, thus, whether he is still a member of the Company. Therefore, defendants' motion for summary judgment is denied.

Defendants also assert that Section 12.01(b)(viii) is subject to the provisions of Article VII of the Operating Agreement, and that Section 7.04 states that no distribution shall be paid unless the assets of the Company are in excess of the Company's liabilities, which defendants allege they were not. Defendants submit a December 31, 2009 balance

sheet showing the Company's assets and liabilities to support their claim. *See* Affirmation of Mark A. Weissman in Opposition to Defendants' Motion for Summary Judgment Ex. H at 3. However, this balance sheet does not establish as matter of law that the company's liabilities exceeded its assets. The balance sheet actually raises more issues than it resolves. The deposition testimony of the Company's accountant, Alan Krasnoff, revealed that the true market value of the building on the Property is not actually represented on the balance sheet. *Id.* Ex. D at 64-65, 70-72 (Krasnoff Deposition Tr.). The balance sheet reflects the "historical cost value" of the building, i.e. the value of the building at the time of purchase plus improvements, not its "fair market value." *Id.* at 64, 72. As a result, the building may be worth a different amount than the value listed on the balance sheet. Further, there are over $5 million of intercompany loans listed as liabilities, which are not explained. *Id.* Ex. H. As a result, defendants' motion for summary judgment on this basis is denied.

e. **Nullification (Fifth Cause of Action)**

Jacobson's fifth cause of action alleges that CFA is not a party to the Operating Agreement, and, therefore, it cannot exercise the buy-out option. Jacobson has acknowledged that he signed an amendment to the Operating Agreement replacing CFP with CFA as successor in interest. Jacobson also does not oppose dismissing this cause of

action, and defendants have presented this amendment as documentary evidence. *See* Affidavit of Steven Croman in Support of Defendants' Motion Ex. F (First Amendment to Operating Agreement). Therefore, defendants' motion for summary judgment on this claim is granted, and the cause of action is dismissed.

f. **Fraudulent Inducement (Sixth Cause of Action)**

In the third amended complaint, Jacobson alleges that defendants made representations that it was their intention to maximize the profitability of the Property, and agreed that construction of a hotel on the Property would be desirable. At his deposition on October 15, 2008, Jacobson testified that Croman made promises to develop a hotel and took some steps to do so by hiring two architects who created 17 different plans. However, nothing happened after those plans were created.

Several issues of fact have been raised in regard to this fraud claim. The first issue is whether Croman did, in fact, promise to construct a hotel on the Property or whether a hotel was just one of several ideas presented for potential development of the Property. It is a classic case of "he said, she said," which cannot be resolved as a matter of law. If Jacobson is successful at trial in proving that Croman did, in fact, promise to construct a hotel, another issue of fact arises. Then, it must be determined whether Croman did not intend to honor or act on his promise to build a hotel on the Property, as it is well-settled

that a claim of fraudulent inducement "based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement." *Laura Corio, M.D., PLLC v. R. Lewin Interior Design, Inc.*, 49 A.D.3d 411, 412 (1st Dep't 2008). Further, an issue of fact also exists as to whether Croman's alleged promises were capable of inducing justifiable reliance by Jacobson.

Defendants argue that the merger clause contained in the Operating Agreement bars this fraud claim. The clause states:

> This Operating Agreement set forth all of the promises, agreements, conditions and understandings between the parties respecting the subject matter hereof and supersedes all prior negotiations, conversations, discussions, correspondence, memoranda and agreements between the parties concerning such subject matter.

See Operating Agreement § 12.15. However, "[a] general, vague merger clause is ineffective to bar parol evidence from being introduced to prove fraud in inducing a contract." *Mahn Real Estate Corp. v. Shapolsky*, 178 A.D.2d 383, 385 (1st Dep't 1991). Indeed, this merger clause contains no specific disclaimer of reliance on Croman's purportedly false representations. Therefore, the merger clause of the Operating Agreement is not specific enough to bar Jacobson's fraudulent inducement claim.

Defendants also argue that Jacobson has not offered evidence of damages, and, thus, the fraud claim should be dismissed. Again, Jacobson does not have to offer

evidence of damages, as defendants are the movants here, and are the ones with the burden of making a prima facie showing of entitlement to judgment as a matter of law. *People v. Grasso*, 50 A.D.3d at 545.

g. **Accounting (Seventh Cause of Action)**

There is a question as to whether Jacobson is still a member of the Company, and if it is determined that he is a member, he is entitled to an up-to-date accounting. *Gottlieb v. Northriver Trading Co. LLC*, 58 A.D.3d 550, 551 (1st Dep't 2009). Thus, defendants' motion for summary judgment dismissing this cause of action is denied.

h. **Attorneys' Fees (Eighth Cause of Action)**

Defendants' moving papers do not address this cause of action, aside from the inclusion of a conclusory statement that the Court should dismiss Jacobson's eighth cause of action. Thus, this claim will go forth. Further, defendants, in arguing their own right to attorneys' fees, admit that Section 12.03 of the Operating Agreement provides for attorneys' fees and court costs to the prevailing party.

B. *Jacobson's Motion for Partial Summary Judgment on Tenth Cause of Action*

As discussed in detail above, issues of fact exist as to whether Jacobson was justified in not complying with the Buy-Out Provision, and thus, whether he is still a member of the Company. Therefore, Jacobson's motion for partial summary judgment is denied.

III. **Conclusion**

Accordingly, it is

ORDERED that defendants Steven Croman, Croman Family Partnership, LLC, and Croman Family Associates, LLC's motion for summary judgment dismissing the complaint in its entirety and for judgment in their favor on their first, second, and third counterclaims (motion seq. no. 005) is granted to the extent that the fifth cause of action in the third amended complaint is dismissed and is otherwise denied; and it is further

ORDERED that plaintiff Guy J. Jacobson's, individually, and on behalf of 99-105 Third Avenue Realty, LLC, motion for partial summary judgment on his tenth cause of action (motion seq. no. 006) is denied; and it is further

ORDERED that this action shall continue as to the first, second, third, fourth, sixth, seventh, eighth, ninth, and tenth causes of action in the third amended complaint, as

well as the first, second, and third counterclaims in the answer to the third amended complaint; and it is further

ORDERED that counsel are directed to appear for a pretrial conference in Room 442, 60 Centre Street, on October 7, 2014, at 10 AM.

Dated: New York, New York
August 26 2014

ENTER

Hon. Eileen Bransten, J.S.C.