

**Mohinani v Charney**

2016 NY Slip Op 30414(U)

March 11, 2016

Supreme Court, New York County

Docket Number: 653229/2012

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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HARRY MOHINANI and VIJAY MOHINANI,

Index No.: 653229/2012

Plaintiffs,

**DECISION & ORDER**

-against-

TZILI DORON CHARNEY, in her capacity as  
Guardian for L.C., WARREN GLEICHER, in his  
capacity as guardian for L.C., and LHC CLUB LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Tzili Doron Charney (Tzili), Warren Gleicher, and LHC Club LLC (LHC) move, pursuant to CPLR 3211, to dismiss the Amended Complaint (the AC). Plaintiffs Harry Mohinani and Vijay Mohinani oppose the motion. For the reasons that follow, defendants' motion is granted in part and denied in part.

*I. Factual Background & Procedural History*

As this decision involves a motion to dismiss, the facts recited are taken from the AC (*see* Dkt. 101)<sup>1</sup> and the documentary evidence submitted by the parties.

Plaintiffs Harry Mohinani and Vijay Mohinani are Hong Kong residents. In March 2007, they sent \$4.5 million to Leon H. Charney (Charney)<sup>2</sup> to invest in Manhattan real estate.

<sup>1</sup> Plaintiffs filed a redacted version of the AC on November 26, 2014. *See* Dkt. 77. This apparently was done at defendants' insistence, as defendants moved by order to show cause to permit the unredacted version to be filed under seal, but not publicly. *See* Dkt. 79. By order dated December 24, 2014, the court denied defendants' motion on the ground that good cause for sealing does not exist. *See* Dkt. 95. As of the date of this decision, the NYSCEF system reflects the fact that plaintiffs filed an unredacted version of the AC on January 5, 2015 as Dkt. 97, but that document is still sealed from public view. In the ordering language below, plaintiffs are directed to inform the County Clerk that Dkt. 97 is to be immediately unsealed.

<sup>2</sup> Charney is referred to as "L.C." in his guardianship proceeding and in the caption in this action.

Charney is now incapacitated. He is represented by his court appointed guardians, Tzili and Gleicher, who are defendants in this action. Plaintiffs, however, did not meet or deal directly with Charney. Rather, they acted through an agent, non-party Gaby Bitton, who works in the garment industry in New York.

Plaintiffs allege that in 2006, Charney described to Bitton the significant amount of money he had made by facilitating real estate investments. Charney asked Bitton if he knew of anyone who might be interested in investing with him. Bitton told Charney that he knew investors in Hong Kong who might be interested.

On February 11, 2007, while Bitton was at a trade show in Las Vegas, Charney called Bitton and informed him of a prospective \$180 million real estate purchase in Manhattan, which would mostly be funded with a loan, but required a cash investment of approximately \$30 million. Charney told Bitton that he was personally investing \$25-26 million and needed to raise another \$4-5 million. Charney asked Bitton to contact his prospective Hong Kong investors to gauge their interest. Later that month, at a meeting in Charney's New York office, Charney provided Bitton with a brochure with a picture of one of two properties he was purchasing, a 23-story office building located at 119 West 40th Street in Manhattan (the Office Property). The other property, on which a hotel was intended to be constructed, is located at 120 West 41st Street (the Hotel Property) (collectively, the Properties). Bitton told Charney that "the investors who he represented were interested in putting up approximately 15% of the cash investment, as long as they were never called for any additional funds and their interests would not be diluted." AC ¶ 21. Charney allegedly responded with the following oral representations: (1) Charney "would be running the project himself, and would be signing for the project loan personally"; (2)

“the Project<sup>3</sup> was not being charged with any fees, other than legal fees of which the partners’<sup>4</sup> 15% portion would be approximately \$40,000 to \$50,000”; (3) Charney “would require a ‘25% kicker’ from [Bitton’s] investors upon the repayment of their initial cash investment plus interest”; and (4) “the next time that [Charney] would receive any money from the Project would be when he would sell the Properties at a profit and get the kicker from the partners that [Bitton] represented.” *See* AC ¶ 22.

Meantime, while Charney was soliciting plaintiffs’ investment through Bitton, on February 14, 2007, Charney signed a letter agreement on behalf of his LLC, defendant LHC,<sup>5</sup> with non-parties Fortis Property Group, LLC (Fortis) and George Comfort & Sons, Inc. (GCS) in which it was agreed that another LLC, L.H. Charney 40<sup>th</sup> Street, LLC (the Office Property LLC), would, and indeed did, purchase the Properties for approximately \$182 million. *See* Dkt. 102 (the February 2007 Letter Agreement).<sup>6</sup> The February 2007 Letter Agreement provides that LHC would receive 25% of the equity in the Office Property LLC, GCS would receive 25%, and Fortis would receive the remaining 50%. *See id.* at 3. Fortis and GCS further agreed that Charney would put up a \$10 million deposit on the sale and that Charney would receive a \$1 million “acquisition fee” at closing. *See id.* at 5.

Subsequently, on March 20, 2007, Bitton had another meeting with Charney, at which plaintiffs allege that:

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<sup>3</sup> A term plaintiffs use to refer to their investment in the subject real estate but, as noted below, plaintiffs’ investment was in an LLC that owned an interest in the real estate.

<sup>4</sup> Again, the parties became members in an LLC, not partners.

<sup>5</sup> LHC are Charney’s initials.

<sup>6</sup> *See also* Dkt. 103 (real estate sale contract).

[Charney] stated to [Bitton] that he was taking in other partners (in addition to those represented by Mr. Bitton), reducing [Charney's] portion of the initial cash investment to \$9 million, with the investors represented by [Bitton] taking on half of that amount, or \$4.5 million. [Charney] repeated representations from his earlier meetings with [Bitton] **and further specifically represented that he would be putting in the same amount of money as the Plaintiffs.** In response to questions by [Bitton] concerning [Charney's] taking in other partners, [Charney] specifically stated that he would still run the Project himself; **that [Bitton's] investors would still have the same undilutable 15% interest in the Project; and that the Project was not being charged with any fees other than the legal fees, of which [Bitton's] principals' portion would be approximately \$40,000 to \$50,000.** In response to further questions by [Bitton] concerning [Charney's] taking in other partners, [Charney] **specifically promised that, if Plaintiffs sent him \$4.5 million they would be partners in the Project, with benefits and distributions co-equal to all other partners.** In that connection, [Charney] **specifically stated and promised that no partner would receive any monies in connection with the investment without all of the others receiving a share commensurate with the monies they put in.** [Charney] specifically added that he might offer to buy out other partners as he had in other projects, and **specifically promised that if he did so "every buy-out offer that I make will go to all of the others, including your group."** Further expanding on the statement and promise that all of the investors would receive co-equal benefits and distributions, [Charney] stated at that meeting that if the Plaintiffs agreed to send him \$4.5 million, no commitment could be made by [Charney] affecting their interests in the Project without their prior knowledge and consent.

See AC ¶¶ 23-28 (emphasis added; paragraph breaks and numbering omitted).

After the meeting, Charney drafted a letter, dated March 20, 2007, that memorializes the parties' understanding regarding the investment plaintiffs' were about to make:

Pursuant to our conversations of the past-few months, this letter confirms the fact that you wish to invest and will invest **in a building project** entitled 119 W. 40th street. You understand from our conversations and that you have physically seen the buildings and that it entails two buildings with the concept of tearing one down and creating a 22-story hotel probably not to operate, but to sell immediately upon completion. The market is large in New York for boutique hotels in this area. I explained to you that the total equity for the project was plus or minus [\$30 million] and that because we took in partners who could help with the hotel situation, my personal equity was reduced to [\$9 million] and you and I agreed that I would accept your right to subscribe to [\$4.5 million] of the same.

You have told me that you wish to participate in the equity only for profits **and that you don't ever want to be called for additional funds. I have agreed to**

**this concept.** It is understood that once your [\$4.5 million] is returned to you, with an interest rate of Prime plus 2, your percentage participation will be reduced by [a] 25% kicker to me and your remaining position will stay [the same] until the building is sold, refinanced or distributions are made. Thus, if we deduct 25% from 15% of the equity, your position after return of capital plus interest will be 11.25%. Other than legal costs, which your share could amount to approximately \$40,000 - \$50,000, there will be no other costs to you for this transaction.

If the above is a reflection of our conversation and understanding, please sign below where indicated and facilitate a transfer of [\$4.5 million] per wire instructions attached hereto, no later than Monday March 26th, 2007.

This letter shall be a binding agreement between us and **more formal documentation reflecting your membership in an LLC which will represent the equity will be facilitated in the very near future.**

See Dkt. 101 at 24 (the March 2007 Letter Agreement) (emphasis added). Bitton signed the March 2007 Letter Agreement on March 21, 2007. On March 29, 2007, plaintiffs wired \$4.5 million to Charney from an account in Hong Kong owned by an entity called "Sunny Trader Limited."

The following week, in a documented titled "Interoffice Memorandum", dated April 5, 2007, Charney informed Bitton that:

- A. The purchase of 119 W. 40<sup>th</sup> and 120 W. 41<sup>th</sup> street closed on Friday March 30<sup>th</sup>, 2007. The purchase price was \$181,950,000.
- B. The deal received financing from Wachovia and Greenwich Capital in the amount of \$202,250,000.
- C. The deal was originated by the undersigned.
- D. The equity of the deal was capitalized at \$32,000,000.
- E. Charney brought in a group for 50% entitled Fortis Property Group.
- F. Thus, the original equity was Charney 50%, Fortis Property Group 50%.
- G. Charney sold 20% of his 50% to George Comfort and Sons an old line real estate company.

H. Charney retained 30% of his equity in an entity entitled LHC Club LLC, herein after referred to as "Club".

I. Thus, Charney's group equity participation was \$9,600,000.

J. Gaby Bitton's participation is as follows:

1. Bitton invested \$4,500,000 which represents 14.0625% of the capitalization.
2. Passing that participation to Club gives Bitton 46.875% of Club's interest in the deal.
3. **It was understood between Charney and Bitton that Bitton's participation would be for profits only and he would not [be] subject to any call or extra money if such money was deemed necessary. His position might have dilution if the same occurred.**
4. His investment was based upon the fact that he would receive Prime +2 upon his investment until all of his money is recouped and thereafter his participation would be diluted by a kicker of 25% to Leon Charney.
5. Pursuant to a letter dated, March 20th, 2007 between Bitton and Charney, Bitton's group would be responsible for certain legal fees which were referred to in said letter attached hereto.
6. Bitton has represented to the above that his participation may come in corporate form and could be inclusive of an investment of all of his brothers. He is to inform me in the near future who is to have title to his investment.

See Dkt. 110 at 2 (the April 2007 Memo) (emphasis added).<sup>7</sup>

As contemplated, LHC became a member of the Delaware LLCs that acquired the Properties. The Office Property LLC, which owned the Office Property, is governed by an LLC agreement dated April 2, 2007. See Dkt. 106. Another LLC, 41st Street Holdings, LLC (the Hotel Property LLC), owned the Hotel Property and is governed by a separate LLC Agreement, also dated April 2, 2007. See Dkt. 107. In a letter dated May 7, 2007, Bitton disclosed the

<sup>7</sup> The March 2007 Letter Agreement and the April 2007 Memo, to which Bitton nor plaintiffs ever objected, make clear that the parties always understood that (1) Bitton was only acting as an agent; (2) plaintiffs' investment interest would be equity in an LLC; and (3) the LLC would have an interest in the Properties. The AC, however, uses imprecise and misleading terms such as "partner" and "project".

identity of his Hong Kong investors and indicated that each plaintiff would own 50% of the interest purchased with their \$4.5 million investment. *See* Dkt. 111. The K-1s, provided beginning in 2007, reflected that plaintiffs each had a 23.4375% interest in LHC. *See* Dkt. 120 (2007 K-1s); *see also* Dkt. 121 & 122 (K-1s for 2008-2012). In 2008, each plaintiff made an additional \$291,865 capital contribution to LHC, which is reflected in their 2008 K-1s. *See* Dkt. 121 at 2. In November 2008, plaintiffs requested and were provided certain records relating to LHC, including the operating agreements for the Office Property LLC and the Hotel Property LLC.

In a letter transmitted by email on December 18, 2008, counsel for plaintiffs (not counsel of record in this action) set forth plaintiffs' position on a number of disputes (the specifics of which are beyond the scope of this motion), and also clarified plaintiffs' understanding of their investment. *See* Dkt. 113. Counsel correctly observed that plaintiffs are not parties to the LLC Agreements of the Office Property LLC and the Hotel Property LLC (LHC is), but that plaintiffs believed themselves to be bound by the March 2007 Letter Agreement and the April 2007 Memo. *See id.* at 2. She then wrote, in no uncertain terms, that plaintiffs "**are members in LHC Club LLC**" and that they are represented by Bitton. *See id.* at 3 (emphasis added). LHC is a New York LLC that was formed by former defendant Bruce Block, who managed LHC after Charney's incapacitation. *See* Dkt. 123. LHC does not appear to have a governing operating agreement (*but see* Note 16, *infra*) and, therefore, is governed by the default rules contained in New York's LLC Laws.

A number of other important events transpired prior to this lawsuit. First, in June 2008, LHC and GCS bought out Fortis' interest in the Hotel Property LLC, resulting in LHC's and

GCS's interests in the Hotel Property LLC respectively increasing to 60% and 40%.<sup>8</sup> This is reflected in the Hotel Property LLC's amended LLC Agreement dated June 19, 2008. *See* Dkt. 115. Then, after the market crash in 2008 (which drastically affected real estate prices), the Office Property LLC defaulted on its mortgage. Pursuant to a letter agreement dated October 16, 2009, Fortis' interest in the Office Property LLC was amended from a management role to a passive investor role in consideration for an option to put its equity to Charney after 5 years for 75% of the capital it invested. *See* Dkt. 116. Then, in the Office Property's mortgage foreclosure action, by order dated January 20, 2010, this court (Friedman, J.) appointed a receiver to take control of the Office Property. *See* Dkt. 117 (Index No. 117469/2009 (Sup Ct, NY County) (1/20/10 order)).

The following year, in November 2011, the Hotel Property was sold for a loss for \$20.5 million. By letter dated November 17, 2011, Block<sup>9</sup> notified plaintiffs of the sale, which purportedly resulted in proceeds, net of the Hotel Property LLC's debts, of \$8.7 million. *See* Dkt. 119. LHC's share was \$5.2 million. *See id.* at 3-6. Block took the position that the amount due to plaintiffs – the funds necessary to pay them for loans made to LHC after the initial 2007 investment – was \$583,729.80. Plaintiffs were each provided with a check in the amount of \$291,864.90. *See id.* at 7. According to Block, LHC had no further funds to repay the members, resulting in a loss of their original equity investment. Additionally, on May 9, 2012, Fortis commenced its own action against Charney and LHC for breach of the October 16, 2009 letter agreement. *See* Dkt. 118 (Index No. 501095/2012 (Sup Ct, Kings County), Dkt. 1 (complaint)). That lawsuit settled in December 2012 with Tzili and Gleicher purchasing Fortis' interest in the

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<sup>8</sup> This, of course, increased plaintiffs' interest in the Hotel Property.

<sup>9</sup> At that point, Block was running the LLCs because Charney became incapacitated in 2009.

Office Property for approximately \$9.6 million. Plaintiffs claim they first became aware of the details of this settlement in October 2014 as a result of court ordered discovery in this action.

Plaintiffs commenced this action on September 14, 2012. Their original complaint asserted six causes of action: (1) breach of contract against Charney; (2) fraud in the inducement against Charney; (3) breach of fiduciary duty against Charney; (4) aiding and abetting breach of fiduciary duty against Block; (5) a declaratory judgment against Charney; and (6) an accounting by Charney and Block. *See* Dkt. 1. By order dated May 29, 2013, the court denied dismissal except with respect to the fourth cause of action, which was dismissed without prejudice and with leave to replead. *See* Dkt. 38. Moreover, in light of plaintiffs' clear right to an accounting, which was necessary for plaintiffs to understand what happened to their investment and how their money and the money of the other LLC members was distributed, it was decided that plaintiffs would get financial disclosure first and then seek leave to amend their complaint if such discovery revealed malfeasance. A disclosure schedule was set forth in an order dated June 11, 2013. *See* Dkt. 43.

The initial financial disclose portion of this action was completed in October 2014.<sup>10</sup> Plaintiffs filed their operative amended complaint (the AC) on November 26, 2014 (which, as explained, was redacted). *See* Dkt. 77; *see also* Dkt. 101 (complete, unredacted version). The AC contains five causes of action: (1) breach of contract; (2) fraudulent inducement; (3) breach of fiduciary duty; (4) declaratory judgment and specific performance; and (5) an accounting. These causes of action are asserted against Tzili and Gleicher in their capacity as Charney's guardian. LHC is named as a nominal defendant. Essentially, plaintiffs claim their agreements with Charney (i.e., the terms of the March 2007 Letter Agreement and the April 2007 Memo,

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<sup>10</sup> There was some delay due to the guardianship proceedings.

such as the “co-equal treatment” provision) were breached and that the false representations Charney made to Bitton (e.g., the amount of money Charney was personally investing) fraudulently induced plaintiffs’ \$4.5 million investment. Plaintiffs further claim that Charney breached the fiduciary duties he owed them as minority members in LHC by wrongly diverting money directly to himself. Plaintiffs also seek a more complete accounting based on their contention that they have not been provided with the full universe of relevant financial records.

On January 7, 2015, defendants moved to dismiss the AC. The court reserved on the motion after oral argument and ordered the parties to mediation. *See* Dkt. 134 (10/15/15 Tr.). After the parties’ settlement attempts failed, a new discovery scheduled was issued. *See* Dkt. 136 (1/14/16 order).<sup>11</sup>

## II. *Legal Standard*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by

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<sup>11</sup> On February 17, 2016, the court, on its own, obtained a hard copy of the oral argument transcript. The motion was then marked as fully submitted.

documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

### III. Discussion

#### A. Breach of Contract

To state a claim for breach of contract, a plaintiff must plead “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Plaintiffs have done so. As discussed, Charney and Bitton (on behalf of plaintiffs) negotiated the terms of plaintiffs’ investment in LHC, and such terms are reflected in the March 2007 Letter Agreement and the April 2007 Memo. To the extent such terms are not entirely clear, that fact does not warrant dismissal. Both documents were drafted exclusively by Charney and, thus, any ambiguities therein must be construed against him and in favor of plaintiffs. *See Natt v White Sands Condo.*, 95 AD3d 848, 849 (2d Dept 2012) (“It has long been the rule that ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it”), quoting *151 W. Assocs. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 (1984); *see also Wormser, Kiely, Galef & Jacobs, LLP v Frumkin*, 125 AD3d 516, 517 (1st Dept 2015) (same).

Additionally, neither document is too indefinite such that the essential terms of the parties’ agreement cannot be ascertained. *See Cobble Hill Nursing Home, Inc. v Henry &*

*Warren Corp.*, 74 NY2d 475, 482 (1989) (contract enforceable only when their material terms can be determined with reasonable certainty). Here, there is no problem identifying the alleged material terms of the parties' agreement, only their precise meaning. Indeed, even where an essential term is missing from the contract, the contract may still be enforceable. See *Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 61 (1st Dept 2015) ("all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy"), citing *Cobble Hill*, 74 NY2d at 483; see also *Basu v Alphabet Mgmt. LLC*, 127 AD3d 450 (1st Dept 2015) ("The court correctly found that the claimed oral agreements are not as a matter of law unenforceable for indefiniteness, since there may exist an objective method for supplying the missing terms needed to calculate the alleged compensation owed plaintiff"), citing *166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 (1991) ("This Court, however, has not applied the definiteness doctrine rigidly. Contracting parties are often imprecise in their use of language, which is, after all, fluid and often susceptible to different and equally plausible interpretations. Imperfect expression does not necessarily indicate that the parties to an agreement did not intend to form a binding contract. A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties.").

Here, at best, defendants have questioned the meaning and enforceability of certain of the alleged contractual terms, such as the alleged *pari passu* provision. This is, at worst, an ambiguity which, as noted, would be construed in favor of plaintiffs. Nonetheless, the March 2007 Letter Agreement and the April 2007 Memo do not contain merger or integration clauses, and, consequently, the terms agreed to orally but not reflected in writing may also govern. While

there are questions as to the exact terms of the parties' agreement that need to be resolved through discovery, there is no question that Charney agreed to provide plaintiffs with equity in LHC in exchange for \$4.5 million and made specific promises regarding how their investment would be treated. As a result, an agreement exists. Questions regarding the meaning of each of the disputed terms and Charney's alleged breaches cannot be resolved on this motion.

*B. Fraudulent Inducement*

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); see *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).

Defendants contend that plaintiffs fail to state a claim for fraud because any reliance on Charney's alleged false representations, such as how much money he was personally investing and how plaintiffs' investment would be treated relative to the other investors, are not actionable because plaintiffs' reliance was unreasonable as a matter of law. Defendants are wrong.

"The question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss." *ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 (2015). That said, as defendants correctly aver, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations." *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 (1st Dept

1997).<sup>12</sup> Here, however, defendants do not explain what due diligence plaintiffs could have conducted that would have revealed Charney's alleged fraudulent intent. Contrary to defendants' contentions, this case is not analogous to *Holzer v Mondadori*, 40 Misc3d 1233(A) (Sup Ct, NY County 2013), where this court held that plaintiff could not plead reasonable reliance because she failed to inspect the property, which was really just an empty hole in the ground instead of the beautiful building portrayed in the brochure. *See id.* at \*5.<sup>13</sup> It is hard to conceive how plaintiffs were supposed to divine that Charney, allegedly, was lying. Bitton is not a sophisticated real estate businessman and plaintiffs, regardless of their alleged sophistication, resided in Hong Kong and did not have access to the other investors in New York. Plaintiffs were not in privity with the other investors. The LLC in which plaintiffs are members (LHC) was a co-member in the LLCs that owned the Properties. Only Charney (and later Block) dealt with the other investors. Indeed, plaintiffs were passive investors and relied upon Charney, the managing member of LHC. *See Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014) (managing member of LLC owes fiduciary duty to non-managing members).

That being said, there are serious questions about the overlap between plaintiffs' contract and fraud claims. For instance, to the extent the court ultimately finds some of the alleged

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<sup>12</sup> While Bitton does not appear to be a sophisticated real estate investor, the parties dispute the sophistication of plaintiffs. This dispute cannot be resolved on this motion. That said, while sophisticated commercial actors are ordinarily charged with heightened due diligence obligations [*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194 (1st Dept 2012)], reliance is unreasonable, even to a layman, when the fraud could easily have been uncovered with "the exercise of **ordinary** intelligence." *See Stuart Silver*, 245 AD2d at 98 (emphasis added); *see also Rosenblum v Glogoff*, 96 AD3d 514, 515 (1st Dept 2012) ("when told that the air conditioning unit was behind a particular cabinet door, plaintiffs failed to even open the door or inquire what was 'thru-wall' air conditioning, or how it worked. It is not speculation to conclude that plaintiffs could have discovered the truth by use of ordinary intelligence.").

<sup>13</sup> There also were specific disclaimers in the contract that precluded the fraud claim. *See id.*

fraudulent representations to actually be agreed-upon contractual terms, a fraud claim would be duplicative. *See Wilshire Westwood Plaza LLC v UBS Real Estate Secs., Inc.*, 94 AD3d 514, 516 (1st Dept 2012) (“The court properly dismissed [the] fraudulent inducement claim on the ground that it was essentially a breach of contract claim” because the claim “is essentially that [defendant] never intended to honor its obligation ... under the [contract].”). But, at this juncture, it is premature to determine which of Charney’s alleged oral promises amount to binding contractual terms.<sup>14</sup>

### C. Breach of Fiduciary Duty & Accounting

In the AC, plaintiffs allege that LHC is a Delaware LLC. *See* AC ¶ 12. Likewise, in the subject contracts Charney executed on behalf of LHC, LHC is referred to as a Delaware LLC. *See, e.g.*, Dkt. 106 at 6 (“LHC CLUB LLC, a Delaware limited liability company”). Yet, according to the website of Delaware’s Division of Corporations, no such entity exists. However, “LHCclub LLC” is an active New York LCC that was formed on June 6, 2005 by Block on behalf of Charney, prior to plaintiffs’ 2007 investment.<sup>15</sup> Defendants note this in their moving brief. *See* Dkt. 124 at 8. They also observe that LHC does not have an operating

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<sup>14</sup> Defendants make other clearly erroneous arguments regarding the fraud claim that do not merit extensive discussion. At best, the issues raised by defendants, such as loss causation, cannot be resolved on a motion to dismiss. *See generally Loreley Fin. No. 3 Ltd. v Wells Fargo Secs., LLC*, 797 F3d 160 (2d Cir 2015). Nevertheless, it should be noted that in light of the real estate market crash, which resulted in the Hotel Property being sold at a significant loss, establishing loss causation may be extremely difficult in this case. That hurdle, however, would be inapposite to plaintiffs’ other claims of malfeasance, such as the contract and fiduciary duty claims, which rest on allegations that Charney took money from LHC that he was not entitled to.

<sup>15</sup> *See* [https://appext20.dos.ny.gov/corp\\_public/CORPSEARCH.ENTITY\\_INFORMATION?p\\_nameid=3232523&p\\_corpid=3214679&p\\_entity\\_name=%6C%68%63%63%6C%75%62&p\\_name\\_type=%41&p\\_search\\_type=%42%45%47%49%4E%53&p\\_srch\\_results\\_page=0](https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=3232523&p_corpid=3214679&p_entity_name=%6C%68%63%63%6C%75%62&p_name_type=%41&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0).

agreement<sup>16</sup> and that Charney, and later Block, managed LHC, in which plaintiffs were passive investors. New York law, therefore, applies.

It is indisputable that Charney had fiduciary duties to plaintiffs. Despite the extensive argument in defendants' moving brief about why Charney supposedly did not, under well settled New York law, a manager of an LLC such as Charney owes fiduciary duties to the LLC's non-managing members (i.e., plaintiffs). *Pokoik*, 115 AD3d at 429; *Chiu v Chiu*, 71 AD3d 621, 623 (2d Dept 2010) (“[defendant], as the managing member of the LLC, owed a fiduciary duty to the plaintiff and breached this duty by failing to make full disclosure of all material facts referable to the operation and management of the LLC”); *see also Kalikow v Shalik*, 43 Misc3d 817, 824 (Sup Ct, Nassau County 2014) (“New York case law is replete with cases demonstrating that a managing member of an LLC has a fiduciary duty to other members of the LLC”) (collecting cases).<sup>17</sup> For this reason, the parties' dispute over whether the facts in *Roni LLC v Arfa*, 18 NY3d 846 (2011) are analogous to this case is not relevant. While there are certain similarities, the Court in *Roni* did not rest its holding on a fiduciary relationship which may have existed by virtue of the parties' LLC membership status, but rather on the role played by the real estate

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<sup>16</sup> It is unclear if plaintiffs' counsel's December 18, 2008 email is suggesting that there is an operating agreement for LHC dated May 1, 2007 (she appears to be referring to a section 2.2), or if she is being unclear and means to refer to the operating agreements of the Office Property LLC and the Hotel Property LLC. *See* Dkt. 113 at 2. However, those operating agreements are dated April 2, 2007 and are separately discussed in that same email. To the extent an operating agreement for LHC does exist, it has not been produced. If it exists, it must be produced immediately because its terms may significantly affect the parties' rights. Additionally, to the extent LHC is referred to incorrectly in the caption, plaintiffs are directed to immediately move to change the caption.

<sup>17</sup> It should be noted that the same is true under Delaware law. *See Kelly v Blum*, 2010 WL 629850, at \*10 (Del Ch 2010) (“[U]nless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members.”); *see generally Feeley v NHAOCG, LLC*, 62 A3d 649, 661 (Del Ch 2012).

promotor defendants. *See id.* at 848-49. Here, while the role played by Charney arguably, on its own, could give rise to fiduciary duties, there is no need to reach that issue because, as noted, New York law imposes default fiduciary duties on a managing member of an LLC, and such duties are not disclaimed in an LHC operating agreement.

Here, plaintiffs claim defendants took money from the Properties that was due to the LHC and that defendants, despite the extensive financial disclosure provided thus far, have not provided plaintiffs with all of the financial records pertaining to the Properties. Until plaintiffs are given all of the records, the court cannot resolve the parties' disputes over Charney's entitlement to the money he received. Plaintiffs' concerns, among other things, are grounded in the revelation that Charney comingled LHC's funds with funds from other real estate investments in a single account. Doing so, while not per se wrongful, makes it much harder for plaintiffs to understand what Charney did with their money. While Charney may not, in fact, have done anything wrong, the truth cannot be known without sufficient disclosure.<sup>18</sup> Plaintiffs are entitled to this information, which they seek in the form of an equitable accounting. Under New York law in the First Department, a party to whom a fiduciary duty is owed is generally entitled to an equitable accounting. *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213-14 (1st Dept 1990); *see Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 (1st Dept 1997) (same). An accounting is highly appropriate in this case.

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<sup>18</sup> Going forward, plaintiffs will be provided with discovery greater in scope to than what was provided to date, which uncovered myriad facts about the management of the Properties that defendants had refused to disclose, such as the terms of Charney's settlements with the other investors. The court may consider permitting broader than usual ESI because Charney's incapacitation may require his emails be used to determine what occurred.

*D. Remaining Claims*

Plaintiffs remaining claims for a declaratory judgment and specific performance are dismissed. It is well settled that declaratory judgment and specific performance claims are duplicative where, as here, the breach of contract claim can afford plaintiffs all of their requested relief. *See Cherry Hill Market Corp. v Cozen O'Connor P.C.*, 118 AD3d 514, 515 (1st Dept 2014), citing *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988) (“A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.”); *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 (2001) (“specific performance will not be ordered where money damages would be adequate to protect the expectation interest of the injured party”) (quotation marks omitted). Accordingly, it is

ORDERED that the motion by defendants Tzili Doron Charney, Warren Gleicher, and LHC Club LLC to dismiss the Amended Complaint is granted only with respect to the fourth cause of action (declaratory judgment and specific performance) and is otherwise denied; and it is further

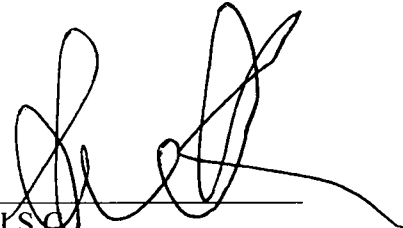
ORDERED that the Clerk is directed to unseal Dkt. 97, and within 7 days of the entry of this order on the NYSCEF system, plaintiffs shall notify the Clerk of this directive; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, plaintiffs shall submit a proposed order on notice to defendants that calls for the caption in this action to be amended to reflect the correct “LHC” LLC defendant with a specific indication that it is a New York LLC; and it is further

ORDERED that within 21 days of the entry of this order on the NYSCEF system, defendants shall search all records in their possession custody and control (including those records possessed by Block) and shall either produce an operating agreement for LHC or certify in writing to plaintiffs that no such agreement exists.

Dated: March 11, 2016

ENTER:

  
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J.S.C.

**SHIRLEY WERNER KORNREICH**  
**J.S.C**