A&A Wholesale Inc. Pension Plan v Overlook Group LLC
2016 NY Slip Op 30520(U)
March 28, 2016
Supreme Court, New York County
Docket Number: 650167/2015
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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A&A WHOLESALE INC. PENSION PLAN,

Index No.: 650167/2015

Plaintiff,

DECISION & ORDER

-against-

OVERLOOK GROUP LLC, SMLC FUND, LLC, and SINA MAHFAR,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Overlook Group LLC (Overlook), SMLC Fund, LLC (SMLC), and Sina Mahfar move to dismiss all causes of action in the complaint based upon documentary evidence and for failure to state a cause of action [CPLR 3211(a)(1) & (7)], and further move to dismiss the first and fifth causes of action as time-barred. CPLR 3211(a)(5). In the alternative, defendants seek summary judgment on the complaint. CPLR 3212. Plaintiff A&A Wholesale Inc. Pension Plan (A&A Wholesale) opposes and cross-moves for summary judgment on its first cause of action. For the reasons set forth below, defendants' motion is granted in part and denied in part, and A&A Wholesale's cross-motion is denied.

I. Background

As this is a motion to dismiss, the following facts are based on the Verified Complaint (VC) and the parties' documentary evidence.

A. Complaint

This case arises from the sale of an investment property located in Dallas, Texas (the Property).[1] Dkt. 2, VC ¶ 4.[2] A&A Wholesale manages the pension plan for Nejatollah Ahdoot's family business, a closely-held New York company. VC ¶ 3. Ahdoot is A&A Wholesale's principal. Dkt. 2 (January 16, 2015 Verification of Nejatollah Ahdoot) ¶ 1.

The complaint alleges that in January 2007, Mahfar invited Ahdoot, a longtime family friend, to invest in Overlook, a newly-formed, limited purpose LLC. VC ¶ 4. Mahfar explained that Overlook would exist to purchase and operate the Property for profit, and that Mahfar alone would own and control SMLC, the entity that would manage Overlook. ¶¶ 6-10. Mahfar offered A&A Wholesale a 25% interest in Overlook in exchange for a $562,500 net capital contribution [¶ 11], which Overlook would apply to a down payment on the Property. ¶ 17.

In January or February of 2007, Ahdoot accepted Mahfar's offer on behalf of A&A Wholesale, and A&A Wholesale made several capital contributions to Overlook, totaling $562,500.[3] ¶ 17. As a result, A&A Wholesale acquired a 25% stake in Overlook. Dkt. 10 (Operating Agreement), Ex. A. Overlook obtained $1.875 million in additional financing from six other investors, raising approximately $2.25 million in initial capital. *Id.* It then secured a $10 million mortgage loan from UBS Real Estate Securities, Inc. for the remainder of the Property's purchase price. ¶ 18.

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[1] The Property consists of a parcel of land in an industrial park, improved by a large office building. Dkt. 10 (Operating Agreement), Ex. B (Description of the Property).

[2] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

[3] Overlook submits a capital distribution spreadsheet indicating that A&A Wholesale actually contributed $625,000 in 2007, but later received a distribution of $62,500, leaving a net capital contribution of $562,500. Dkt. 12 (Capital Distribution Spreadsheet).

The complaint alleges that before accepting Mahfar's offer, Ahdoot advised Mahfar that A&A Wholesale's $562,500 investment would constitute nearly the entire value of Ahdoot's family pension fund. ¶ 12. He sought assurances from Mahfar that Overlook would be a secure, long-term investment that could sustain Ahdoot, who was 75 years old, during his retirement. *Id.* According to A&A Wholesale, Mahfar assured Ahdoot that the Property would produce immediate profits and would be a "suitable" investment. ¶ 13.

The complaint further contends that Mahfar "led Ahdoot to believe" that Mahfar was a successful investor who owned profitable investment properties at home and abroad. ¶ 9. Mahfar purportedly promised Ahdoot that as long as Overlook was using the Property as security for a loan, SMLC would not sell the Property without obtaining the consent of all of Overlook's investors. ¶ 14. The complaint alleges that Ahdoot relied on Mahfar's representations in accepting Mahfar's offer. ¶ 15.

After entering into the Agreement, A&A Wholesale alleges that it received no distributions from Overlook from 2008 to 2012. ¶¶ 23-24. A&A Wholesale claims that Mahfar told Ahdoot that the reason A&A Wholesale received no distributions was that Overlook was still searching for the best tenants for the Property. *Id.* In October 2012, for reasons that the parties do not disclose, SMLC placed the Property on the market for sale. Dkt. 12 (Letter to Members). A&A Wholesale alleges that SMLC did so without informing A&A Wholesale [VC ¶ 25], at a time when the Property was just beginning to generate profits. ¶ 36. On June 10, 2014, Mahfar agreed in principle to sell the Property to a third-party, and scheduled a closing for June 30, 2014.[4] ¶¶ 26 & 42. A&A Wholesale did not discover that Mahfar intended to sell the

[4] Overlook states that before the June 10, 2014 agreement, Overlook had entered in three separate contracts for sale with different buyers, none of which proceeded to closing. Dkt. 12 (Closing Statement).

Property until after the close of business on June 10, 2014 [¶ 27], when Overlook's attorney sent Ahdoot's daughter an email requesting A&A Wholesale's consent to proceed with the sale. ¶ 29.

Three days later, A&A Wholesale's attorney advised counsel for Overlook that A&A Wholesale did not consent to the sale. ¶ 34. A&A Wholesale requested additional information about the sale, including the Property's appraisal value compared to its purchase price.[5] ¶ 35. Further, because the timing of the sale (purportedly) coincided with the Property allegedly becoming profitable, A&A Wholesale requested a statement from Mahfar that the sale was in the best interest of Overlook and that Mahfar was not engaged in any self-dealing. ¶ 35.

On June 16, 2014, SMLC executed a warranty deed, effective June 30, 2014, in favor of its third-party buyer. ¶ 39. Four days later, counsel for defendants sent A&A Wholesale a letter offering to allow A&A Wholesale to inspect Overlook's books and records. ¶ 43. The letter stated that the inspection could not occur until July 8, 2014 because Mahfar would be out of the country. ¶ 43. As of the start of this lawsuit, A&A Wholesale had not completed a books and records inspection. ¶ 54

On June 30, 2014, SMLC sold the Property for approximately $8.91 million, resulting in a substantial loss [¶ 46] -- presumably, around $3.34 million. That same day, SMLC used the proceeds of the sale to pay off the remaining balance on the UBS loan. Dkt. 11 (Payoff Demand Statement). Overlook retained approximately $1.05 million in net sales proceeds, which it then distributed to its members. ¶ 46; Dkt. 12 (Closing Statement). A&A Wholesale did not first learn of the sale until July 11, 2014, when it received $109,999 of the proceeds (around 10%), suffering a net loss of $452,500. ¶ 50.

[5] A&A Wholesale reiterated their request for information to Mahfar on June 16, 2014 and June 18, 2014. VC ¶¶ 37 & 40.

A&A Wholesale asserts the following causes of action against Overlook, SMLC, and Mahfar, numbered here as in the complaint: 1) breach of the Operating Agreement against Overlook and SMLC; 2) breach of fiduciary duty against SMLC; 3) an accounting; 4) money had and received against all defendants; 5) fraud against Mahfar; and 6) aiding and abetting breach of fiduciary duty against Mahfar.

B. Capital Contributions

Defendants maintain (and A&A Wholesale does not dispute) that A&A Wholesale received no cash distributions from 2008 to 2012 because A&A Wholesale made no additional capital contributions to Overlook.[6] Br. at 7. Defendants submit a "Distribution Spreadsheet" indicating that Overlook's other members all made at least two additional capital contributions, in 2008 and 2010. Dkt. 12 (July 10, 2014 Closing Statement). These additional contributions diluted A&A Wholesale's percentage interest in Overlook from 25% to approximately 19%. *Id.* The additional contributions also gave Overlook's other investors first priority to cash flow under section 9.3 of the Operating Agreement.

C. The Operating Agreement

1. General Provisions

On March 12, 2007, A&A Wholesale, SMLC, and Overlook's other investors entered into an operating agreement for Overlook (the Agreement).[7] *See* Dkt. 10. Article 2 of the

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[6] Defendants claim that Mahfar sent Ahdoot a letter dated April 25, 2011 stating that A&A Wholesale had not made any additional capital contributions. Br. at 7. Defendants reference the letter as "Exhibit E" to their attorney's affirmation (Dkt. 8), but do not attach an Exhibit E.

[7] The court notes that although the Agreement contains a Texas choice of law clause (Dkt. 10 § 20.4), the parties rely exclusively on New York law in their briefs. Because the parties' briefs disclose no conflict between New York and Texas law, the court applies New York law here [*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014) (applying New York law where "the parties' briefs disclose no conflict of laws that would have a

Agreement states that Overlook was formed for the limited purpose of "owning, operating, and leasing the Property" [§ 2], which the Agreement defines as all of the land and improvements at 251 O'Connor Ridge Boulevard, Irving, Dallas County, Texas. § 6.1.28. The Manager is defined as SMLC [§ 6.1.18] and Overlook and SMLC are identified as Texas limited liability companies with principal offices in Great Neck, New York. §§ 3-4.

Section 7 of the Agreement permits SMLC to require additional cash contributions, as needed, in proportion to each member's percentage interest in Overlook. § 7.2. To request an additional contribution, SMLC must deliver a capital call notice to each member, as set forth in the Agreement. *Id.* In the event that a member fails to timely make a required additional capital contribution, section 7.2 gives SMLC the right to: (1) fund a loan to the defaulting member bearing interest at the lesser of 15% or the maximum rate permitted by law; (2) offer non-defaulting members the opportunity to fund a portion of the default loan; and (3) if the defaulting member fails to repay the default loan within 90 days, to convert the loan into a capital contribution on the part of the funding members, reducing the defaulting member's percentage interest in Overlook. *Id.*

Section 7.3 provides that the members agree to look solely to Overlook's assets for return of their capital contributions. It states: "if the assets remaining, after provision for payment or discharge of [Overlook]'s debts and liabilities, are insufficient to return the capital of the Members, no Member has recourse against the personal assets of any other Member for that purpose except to the extent otherwise provided in Section 7.2 above." § 7.3.

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significant possible effect on the outcome of the trial") (internal quotations omitted)], except with respect to the breach of fiduciary duty claim, which concerns the internal affairs of Overlook, a Texas LLC, and thus must be governed by Texas law. *See Davis v Scottis Re Group., Ltd.*, 2016 WL 902260, at *1 (1st Dept Mar. 10, 2016), citing *Hart v General Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987).

The Agreement provides for a 7% annual "preference" return to all members based on the member's capital account balance at the end of each fiscal year. §§ 6.1.1 & 6.1.27. The preference return is calculated annually and, if not distributed, becomes "Accrued Preference Return". *Id.*

The Agreement states that it "contains the entire operating agreement between the parties" and that it can be modified only by a writing executed by the party to be bound. § 20.1. Under the Agreement, Overlook owns the Property, and the members' interests "shall be personal property for all purposes." §20.7.

2. SMLC's Managerial Authority

Section 11.1 of the Operating Agreement vests management and control of the business and affairs of Overlook in the Manager, SMLC, and states that all of its decisions regarding Overlook's management and control "made or approved" by it are binding on Overlook and its members. § 11.1. Sections 11.1.1-11.1.5 give SMLC sole discretion, subject to Article 19 of the Agreement, to: "transfer and otherwise dispose of any asset of [Overlook] for such price and on such terms as [SMLC] deems appropriate;" borrow money for such purposes, on such terms and in such amounts as it deems appropriate, and encumber Overlook's property to do so; and enter into contracts SMLC deems necessary for the operation, management and sale of the Property, which contracts may provide for services supplied by SMLC or its affiliates. §§ 11.1.1 – 11.1.5. In addition, Section 13.3 states:

> [N]o Member who is not also a Manager shall take part in the conduct or control of the Company business and *shall have no right or authority to act for or on account of the Company or have any voice in any decision by [SMLC] with regard to any aspect of the Company's business*, except as specifically provided herein.

§ 13.3 (emphasis added). And, Section 13.1 insulates SMLC from any damages to Overlook's members for any act or failure to act, except for acts committed in bad faith or gross negligence. § 13.1.

Section 10.3 of the Agreement permits SMLC and all of Overlook's members to possess interests in competing real estate businesses, and not disclose business opportunities arising from the member's participation in Overlook. § 10.3. The Agreement, however, requires SMLC to:

- Keep all books of account and other records of the Company in a manner necessary to provide financial information to the Members in accordance with the terms of this Agreement . . . § 11.2.2.

- Have the Company's bookkeepers prepare an annual financial statement (audited if requested by more than fifty percent (50%) in interest of the Members) of the Company and furnish each Member with a copy of such statement, which shall include a balance sheet, a statement of the Capital Accounts of each Member and a statement of income and expenses, as soon as reasonably practicable after the end of the each calendar year, but in no even more than ninety (90) days after the end of the such year. § 11.2.3.

Section 19.1(b) of the Agreement prohibits Overlook from winding up Overlook's business while the UBS loan or any other UBS debt is outstanding. Dkt. 10 (Operating Agreement). It states, in relevant part:

> Notwithstanding any other provision herein to the contrary, the provision of this Article 19 apply as long as the Loan, or any part thereof, or any Indebtedness to Lender is outstanding...
>
> ... (b) [Overlook] shall not engage in any dissolution, liquidation, consolidation, merger or asset sale or amendment of its certification of organization or operating agreement as long as the Loan or any indebtedness is outstanding.

Section 19(d) requires the unanimous consent of the Members to file for bankruptcy. § 19(d).

3. Dissolution Provisions

Article 16.1 of the Agreement sets forth the events that trigger Overlook's dissolution, one of which is Overlook's sale of the Property. It states:

> Subject to the foregoing, [Overlook] shall be dissolved upon the occurrence of any of the following events . . . [2] Sale of substantially all of the assets of [Overlook], including, without limitation, *a sale or other disposition of the Property*. . .

§ 16.1.2 (emphasis added).

Section 16.2 then provides that on dissolution of Overlook, "[GMLC] shall proceed with dispatch to liquidate Overlook's assets as follows:

> [1] *A full accounting shall be made* and the Net Profit or Net Loss of [Overlook] shall be determined to the date of the termination and allocated to the respective Capital Accounts of the Members in accordance with Section 9.1.1 [Net Profit] and 9.1.2 [Net Loss].[8] (emphasis added).

Overlook itself terminates when "all property owned by the [it] has been disposed of, and any proceeds from the sale or other disposition of all of the [its] property . . . have been distributed to the Members." § 16.4.

4. Net Loss Distribution

The Agreement sets forth the procedure for allocating net loss to Overlook's members. Section 9.1.2 reads:

> Net Loss, if any, of [Overlook]...shall be allocated among the Members in such proportions as will cause the respective Capital Account balances of the Members as of the end of the Fiscal Year or other period... to equal, as closely as possible, the amount of distributions such Members would receive if (i) all of the assets of [Overlook], including cash, were sold for an amount of cash equal to their respective Book Value... and (ii) the proceeds of such sale were applied to pay all debts of [Overlook]*and then distributed to the Members in accordance with the provisions of Section 9.3* [Cashflow].

Section 9.3 defines Cash Flow, "with respect to any period, [as] the sum of (i) all cash receipts (other than capital contributions pursuant to Sections 7.1 and 7.2) derived by Overlook from the

[8] With some exceptions, the Agreement defines "Net Profit and Net Loss" as the Company's taxable income or loss during a fiscal year. § 6.1.20.

ownership and operation of the Property and other sources, plus (ii) all funds released from any reserve established by the Manager, minus [costs and expenses]." In other words, the Agreement requires the parties to allocate net loss as if liquidating Overlook's post-loss assets, and then distribute those assets as Cash Flow under section 9.3.[9]

> Section 9.3 calls for distribution as follows:
>
> [1] To the Members in proportion to and to the extent of their respective Unreturned *Additional* Capital Contributions;
>
> [2] To the Members in proportion to and to the extent of their respective Accrued Preference Return;
>
> [3] To the Members in proportion to and to the extent of their respective Unreturned *Initial* Capital Contributions;
>
> [4] After the repayment in full of the Members' Unreturned Initial Capital Contributions:
>
> (a) 25% to [SMLC]; and
> (b) 75% to the Members, including [SMLC] on a pro rata basis in accordance with their Percentage Interests.

§ 9.3 (emphasis added).

II. Discussion

On a motion to dismiss under CPLR 3211, the court's task is to determine whether, within the four corners of the complaint, the plaintiff alleges facts that manifest a legally cognizable claim. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-52 (2002). The court must accept the facts in the complaint as true, as well as all reasonable inferences that the court may glean from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491,

[9] The court notes that the procedure for allocating net loss on dissolution under section 9.1.2 is the same as the procedure for allocating net profit under section 9.1.1. Both sections trigger distribution as cash flow under section 9.3.

492 (1st Dept 2009). "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 documentary evidence are not entitled to favorable consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003).

Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only 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 NY*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994). Documentary evidence includes unambiguous, legally operative documents like contracts, deeds, wills, and mortgages. *See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 (1st Dept 2004).

A. Breach of Contract (count 1) and Request for an Accounting (count 3)

A&A Wholesale contends that SMLC breached the Operating Agreement by selling the Property without its consent and while the UBS mortgage loan was still outstanding. A&A Wholesale seeks rescission of the Operating Agreement, return of its $562,000 investment, consequential damages and interest. Alternatively, it asks for damages which would include consequential damages.

Defendants counter that SMLC did not, in fact, sell the Property while the UBS loan was outstanding, but rather paid off the UBS loan using the proceeds from the sale. They contend that it is unreasonable to interpret the Agreement as prohibiting SMLC from selling the Property to satisfy the UBS debt. Moreover, defendants argue that rescission is an inappropriate remedy for breach of contract.

The elements of breach of contract are the existence of a valid contract, plaintiff's performance of its obligations under the contract, defendant's breach, and resulting damages. *See Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007). To determine whether a breach has occurred, the court must interpret the Agreement "in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). "The best evidence of what parties to a written agreement intend is what they say in their writing. Therefore, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.*, *quoting Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978). Additionally, it is well settled that "a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012), *citing In re Lipper Holdings, LLC*, 1 AD3d 170, 171 (1st Dept 2003) (citations omitted); *see generally Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 (1st Dept 2015).

Here, the Agreement grants SMLC near complete authority (subject to Article 19) to sell the Property without A&A Wholesale's consent. *See* Agreement § 11.1.1 (SMLC has the authority to "transfer and otherwise dispose of any asset of the Company"); § 11.1.4 (SMLC can "[e]nter into all contracts [SMLC] deems necessary or appropriate for the operation, management and *sale* of the Property.") (emphasis added). Conversely, Overlook's members have "no right or authority to act for or on account of the Company or have any voice in any decision by [SMLC]." § 13.3.

Other provisions reinforce the conclusion that SMLC need not obtain A&A Wholesale's consent before selling the Property. For example, the Agreement states that third parties are entitled to rely on SMLC's authority to "execute any document or perform any act on behalf of [Overlook] *without* any independent investigation or receipt of any written documentation from the Members that [SMLC] has the authority to execute any such document or take any such action." § 11.1 (emphasis added). In addition, although the Agreement explicitly requires the members' consent for Overlook to file for bankruptcy (§ 19(d)), it does not include the same requirement for selling the Property. The January 10, 2014 email from Defendants' counsel to Ahdoot's daughter (Dkt. 17, Opp. Br. at 7) did not constitute a valid amendment to the Agreement, or somehow contradict the Agreement's clear terms. That email simply requests that Ahdoot provide written consent to the Property sale. It does not create an affirmative obligation on the part of SMLC to obtain that consent. Defendants, therefore, did not breach the Agreement by selling the Property without first obtaining A&A Wholesale's consent.

Nor did defendants breach section 19.1(b) of the Agreement, which prohibits SMLC from winding up Overlook's business without first paying off the UBS mortgage loan on the Property. This section does not specifically bar SMLC from selling the Property, but prohibits SMLC from, *inter alia*, "engaging in" an "asset sale" while the UBS loan is outstanding. § 19(b). A&A Wholesale argues that because the Property was Overlook's principal asset, section 19(b) precludes Overlook from selling the Property. Opp. Br. at 15. SMLC, however, submits proof (and A&A Wholesale does not dispute) that SMLC paid off the UBS loan at the same time that it sold the Property, with the proceeds from the Property sale. *See* Dkt. 11. The court finds that SMLC did not engage in an "asset sale" while the UBS loan was outstanding, but rather paid off the loan at the same time as the Property was sold.

Nonetheless, A&A Wholesale argues that Section 19.1(b) prohibits SMLC from even placing the Property on the market for sale before the UBS loan is paid off. Opp. Br. at 15. According to A&A Wholesale, the language in the Agreement that SMLC must not "engage in an asset sale" before paying off the UBS loan extends to pre-sale conduct. *Id.* This reading of 19.1(b), however, is not commercially reasonable. *See Cole*, 99 AD3d at 596 (court should interpret contracts in commercially reasonable manner). The parties formed Overlook for the express purpose of operating the Property for profit. *See* Agreement § 2. Were A&A Wholesale's reading of section 19.1(b) valid, SMLC could never sell the Property, even for a profit, while the UBS loan remained outstanding, even if SMLC determined that selling the Property would be in Overlook's best interest (if for instance, the Property increased in value) and would pay off the loan. The court declines to adopt A&A Wholesale's reading of section 19(b), which undermines the Agreement's purpose.

Moreover, as Defendants point out, it is customary in commercial transactions for parties to use real property as security for a loan. Reply Br. at 4-5. This practice protects both the lender and the borrower. In a down housing market, it allows the borrower to sell the property before the property loses significant value and pay off the loan. A&A Wholesale's reading of section 19(b), if accepted, would undermine one of main reasons for borrowing: lack of liquidity. Overlook could only sell the Property if it already had sufficient funds to pay off the UBS loan. Even where a borrower had other assets, it would dramatically increase the risk of borrowing. It would force the borrower to draw on its own assets to satisfy any outstanding mortgage debt in the event that the Property became unprofitable. This is not a reasonable interpretation of section 19.1(b). Accordingly, the court finds that Defendants' did not breach the Agreement by selling the Property to pay off the UBS loan.

Moreover, Mahfar's alleged oral promises to Ahdoot not to sell the Property while the mortgage loan was outstanding are insufficient to demonstrate a breach of the Agreement. The Agreement itself makes no such representations and, in fact, contains an entire agreement clause precluding Mahfar's reliance on pre-contract promises. Further, any modification of the Agreement is required to be in writing signed by the party to be bound – SMLC or Overlook. No such writing exists.

The court notes that while Overlook and SMLC did not breach the Agreement by selling the Property, they may have breached the Agreement by failing to provide A&A Wholesale with a complete accounting of Overlook's assets after the Property sale. *See* Agreement § 16.2.1. The Agreement states that A&A Wholesale is entitled to a "full accounting" on dissolution.[10] *Id.* Presumably, the accounting would include a financial statement signed by an individual with personal knowledge of Overlook's finances. It would also include a breakdown of the Property sale terms. Without a formal accounting, A&A Wholesale cannot reasonably determine whether it has legitimate grounds to bring an action for breach of contract based on an improper distribution of Overlook's assets.

The unsigned, unauthenticated "Distribution Spreadsheet" that Defendants attach to their motion papers (Dkt. 12) likely does not constitute a "full accounting" within the meaning of the Agreement. The distribution spreadsheet does not include any information about the amount of each members' accrued preference return, which must be distributed as cash flow before unreturned initial capital contributions under section 9.3. It does not include any information

[10] The Agreement also requires SMLC to keep Overlook's books and records in order (§ 11.2.2), and provide annual financial statements to Overlook's members that include "a balance sheet, a statement of the Capital Accounts of each Member and a statement of income and expenses." § 11.2.3.

about how SMLC used each member's capital contribution, or any information about Overlook's non-cash assets. Similarly, Defendants provide no evidence that they complied with the notice requirements in section 7.2(a) of the Agreement for requesting additional capital contributions [§ 7.2(a)] or exercised their remedial rights under section 7.2(b).

The distribution spreadsheet [Dkt. 12] does indicate that SMLC properly distributed Overlook's cash and proceeds from the Property sale in accordance with sections 16.2.1 (Dissolution of Company), 9.1.2 (Net Loss), and 9.3 (Distribution of Cash Flow) of the Agreement. Nevertheless, without a full accounting, A&A Wholesale has no way of verifying that the information in Overlook's distribution spreadsheet is accurate.

Accordingly, A&A Wholesale's breach of contract claim (on the grounds stated) is dismissed without prejudice, pending Defendants' completion of a full accounting. Defendants' motion to dismiss the third cause of action for an accounting is denied.[11]

B. Money Had and Received (count 4)

Defendants' motion to dismiss the fourth cause of action for money had and received is granted. Money had and received is a quasi-contractual claim that is barred when the parties have an express contract covering the same subject matter. *AQ Asset Mgt. LLC v Levine*, 128 AD3d 620, 621-22 (1st Dept 2015). Here, the Agreement governs A&A Wholesale's investment in Overlook, including the distribution of profits and losses from Overlook. To the extent that A&A Wholesale seeks a return of its initial investment from Overlook, the Agreement controls. The existence of the Agreement precludes A&A Wholesale's money had and received claim.

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[11] Because the court finds that the Agreement and other documentary evidence bars A&A Wholesale's breach of contract claim as a matter of law, the court need not consider the issues raised in the parties' briefs of whether A&A Wholesale's cross-motion for summary judgement on its breach of contract claim is premature or whether rescission would be an appropriate remedy in this case.

C. Breach of Fiduciary Duty (count 2) and Aiding and Abetting Breach of Fiduciary Duty (count 6)

A&A Wholesale's second and sixth causes of action are for breach of fiduciary duty against SMLC, and aiding and abetting breach of fiduciary duty against Mahfar. These claims are also dismissed, pending SMLC providing a complete accounting.

Section 13.1 of the Agreement insulates SMLC (but not Overlook) from liability to Overlook's members for "any acts performed or any failure to act[,] except for acts committed in bad faith and/or constituting gross negligence." § 13.1. Overlook and SMLC are both Texas LLCs. A majority owner and sole manager of a Texas LLC owes a fiduciary duty to a minority, non-managing member. *Allen v Devon Energy Holdings, L.L.C.*, 367 SW3d 355, 393 (Tex App Houston 1st Dist 2012). However, the Texas Business Organizations Code (BOC) (formerly the Texas Limited Liability Company Act) § 101.401 provides: "The company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company."

Here, A&A Wholesale alleges that SMLC, the managing member, breached its fiduciary duty "by secretly engaging in the sale of the Property, marketing the Property for sale, and entering into a contract for the sale of the Property without disclosing [to plaintiff] these plans and actions to sell the Property." VC ¶ 66. A&A Wholesale does not allege that the Property sale was not in Overlook's best interest or constituted acts of bad faith or gross negligence. Indeed, the Agreement specifically vests the SMLC with the "overall management and control of the business and affairs of [Overlook]," states that it "shall make and implement all decisions of or affecting [Overlook]," that all of its "decisions with respect to the management and control of [Overlook] made or approved by [SMLC] shall be binding upon [Overlook] and all of its

Members," that SMLC "shall have the power, in its sole discretion, to ... transfer or otherwise dispose of any asset of [Overlook] for such price and on such terms as [SMLC] deems appropriate," that SMLC may enter into all contracts it deems necessary for the "sale of the Property," and that "no Member who is not also a Manager shall take part in the conduct or control of [Overlook's] business and shall have no right or authority to act for or on account of [Overlook] or have any voice in any decision by [SMLC] with regard to any aspect of [Overlook's] business, except as specifically provided [in the Agreement]." Agreement §§ 11 & 13. The Agreement, thus, bars the basis for plaintiff's fiduciary breach claim.

Nonetheless, the Court recognizes that without a full accounting, it is difficult to determine whether the sale was in Overlook's best interest, whether self-dealing may have occurred and whether there may have been bad faith or gross negligence. Accordingly, like the breach of contract claim, the second cause of action for breach of fiduciary duty is dismissed without prejudice, subject to SMLC providing a complete accounting.

The sixth cause of action for aiding and abetting breach of fiduciary duty against Mahfar also is dismissed without prejudice. Because the breach of fiduciary duty claim is dismissed, there is no basis for the aiding and abetting breach of fiduciary duty and that claim too must be dismissed. *See Sahagen v Kelley Drye & Warren*, 292 AD2d 298, 300 (1st Dept 2002) (Because claim for aiding and abetting breach of fiduciary duty was dependent on existence of a fiduciary relationship and a breach thereof, which were lacking, those claims were properly dismissed).

D. Fraud (count 5)

A&A Wholesale's fraud claim against Mahfar must also be dismissed. The elements of a fraud claim are: a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable

reliance of the other party on the misrepresentation and injury. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); *see also Eurycleia v Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) (elements of fraud are material misrepresentation of fact, knowledge of its falsity, intent to induce reliance, justifiable reliance by plaintiff and damages). Here, there are two, separate allegations of fraud against Mahfar.

The first alleges fraudulent inducement. Specifically, the complaint alleges that Mahfar, a sophisticated real estate investor, induced Ahdoot, an elderly man and "a trusted friend" of many years, to invest his family's pension fund, which he controlled, in the Property Mahfar presented as "an income generating property, that would produce immediate profits and would be suitable for the type of investment necessary for Mr. Ahdoot's pension plan." VC §§ 8-13. Ahdoot allegedly had explained to Mahfar that he could only invest these funds in a "long-term, secure, income-generating asset, as he could not afford to lose that money because he was an elderly man and needed the pension money to live on once he was no longer able to work." § 12.

The second alleged fraud occurred when plaintiff would not consent to the sale of the Property unless given an opportunity to review and inspect Overlook's books and records. § 81. According to the complaint, Mahfar misrepresented that he was out of the country and would permit such review and inspection after July 9, 2014 when he returned, but closed on the property in the interim. §§ 82-83. As a result, plaintiff "did not seek to enjoin or otherwise stop the sale." *Id.* "But for this misrepresentation, Plaintiff would have done so." § 84.

Turning to the second allegation, even assuming these allegations were true, A&A Wholesale has not adequately pled causation or damages. A&A Wholesale had no right to enjoin the Property sale under the Agreement. The Agreement does not obligate SMLC to obtain

A&A Wholesale's consent to sell the Property, or to provide a books and records inspection before selling. Even if Mahfar had disclosed the sale, A&A Wholesale could not have done anything about it. Because A&A Wholesale has failed to show how Mahfar's failure to disclose the Property sale damaged A&A Wholesale, A&A Wholesale's second fraud claim based on that non-disclosure must be dismissed.

To the extent that A&A Wholesale bases its fraud claim on Mahfar's alleged pre-contract representations in 2007, the first alleged fraud, the claim is time-barred. *See* CPLR 213(8) (six-year statute of limitations for fraud). Plaintiff cannot allege that the alleged fraud was newly discovered since it is clear from the complaint that no distributions were forthcoming from the start. Moreover, the Agreement itself, Overlook's financial statements and its books and records would have informed plaintiff of the true nature of the investment. Counsel for A&A Wholesale also admitted at oral argument that A&A Wholesale's fraud claim was not related to Mahfar's pre-contract representations (the first allegation for fraud in the inducement), and was limited to the second allegation, above. *See* Dkt. 19 (9/10/15 Tr. at 16-17). Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in part to the extent of dismissing the first (breach of the Agreement), second (breach of fiduciary duty), fourth (money had and received), fifth (fraud), and sixth (aiding and abetting breach of fiduciary duty) causes of action. Except as to the fourth cause of action, the dismissals are without prejudice, subject to an accounting. Defendants' motion to dismiss the third cause of action seeking an accounting is denied and the cause of action is severed and shall continue; and it is further

ORDERED that Sina Mahfar's motion for summary judgment is denied as moot, Overlook Group LLC's and SMLC Fund, LLC's motion for summary judgment is denied, and

A&A Wholesale's cross-motion for summary judgment on the first cause of action is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on April 7, 2016, at 10:00 in the forenoon.

Dated: March 28, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.