

Matter of AJG Parkview Corp. v Calabrese
2016 NY Slip Op 33104(U)
September 1, 2016
Supreme Court, Nassau County
Docket Number: 605226/15
Judge: Stephen A. Bucaria
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The following papers read on this motion:

Notice of Motion.....XX
Affirmation in Opposition.....XX
Reply Affirmation.....XX
Memorandum of Law.....X

Motion (sequence # 3) by respondents James Calabrese, Calabrese Bros. Development Corp., Calabrese Bros. Construction Co., and Breeze Bros. Aluminum & Vinyl Siding Co., Inc. for an order approving payment application No 24 and directing the receiver Gerard Fishberg, Esq. to issue a check in the amount of \$330,994.79 to Breeze Bros. Aluminum & Vinyl Siding Co., Inc. is **granted** to the extent indicated below. Motion (sequence #4) by petitioner AJG Parkview Corp. for an interim distribution from the receiver in the amount of \$3,000,000 is **denied**.

This action arises from a dispute between the members of a limited liability company. Respondent James Calabrese owned a parcel of real property in Westbury on which he planned to develop a 30 unit condominium project through his limited liability company, respondent Parkview At Salisbury LLC. Because Calabrese was in need of financing, he sold a 50% membership interest in Parkview At Salisbury to defendant AJG Parkview Corp.

Pursuant to the operating agreement dated July 18, 2013, AJG Parkview was to make an initial capital contribution of \$1.5 million to Parkview at Salisbury, which was to be used to repay the existing mortgages on the property, totaling \$1,267,388, closing costs of the operating agreement, and construction costs (Dkt 108). Pursuant to Sec 4.7, AJG Parkview was to have "exclusive control" over the company's bank accounts. Calabrese was to be the managing member of Parkview At Salisbury, and Calabrese's construction company, Calabrese Bros Development Corp., was to perform the construction management work.

The project was to be completed in three phases: first building, 8 units; second building, 14 units; and third building, 8 units. Pursuant to Sec. 7.1[c] of the operating agreement, the first \$1.5 million of "Extraordinary Cash Flow" was to be held as "reserves" to pay costs of construction of phase 2. Under Sec 7.1.(b), "Extraordinary Cash Flow" was defined as cash proceeds of a "Capital Transaction", increased by interest payments on such proceeds, and decreased by expenses of the capital transaction, debt payments, indemnity payments, and reserves established pursuant to Sec. 7.1[c]. "Capital Transaction" was defined in Sec. 1.1 as refinancing or sale of any units in the project.

Schedule 3.7, “Parkview at Salisbury Business Plan,” provides that “The goal is to have AJG Parkview and Marie Holdings paid in full, including all principal, interest and fees, upon the sale of the 22 units that make up phase 1 and phase 2. The cost to build phase 3 (8 units) will be paid for by James Calabrese and AJG Parkview will have no responsibility or obligation on Phase 3.” According to AJG Parkview, the proceeds of the sale of phase 2, and any excess over the \$1.5 held in reserve from the proceeds of phase 1, were to be used for “returns” to AJG Parkview and then to fund construction of phase 3.

The operating agreement provides that AJG was to receive a “first preferred return” of 83.33% of its capital contribution (Dkt 108 at 5). The operating agreement further provides that AJG was to receive a “second preferred return” of 12% per year, compounded monthly, and “starting to accrue on the first anniversary date of the contribution” (Id at 9). Pursuant to Sec. 7.2 of the operating agreement, entitled “Distribution of operating cash flow and extraordinary cash flow,” interest and principal on loans were to be paid first, then creditors, then loans from members, and then the first and second preferred returns referred to above. Sec. 7.2 provides that, with respect to distribution of cash flow, Calabrese was to be last in order of priority. Sec. 11.13 provides that in litigation between the members, the prevailing member shall be entitled to reasonable attorney fees.

It appears that AJG Parkview made the \$1.5 million capital contribution by AJG’s principal, Anthony Galeotafiore, guaranteeing a loan from Marie Holdings to Parkview at Salisbury in that amount. In any event, on April 23, 2014, the lender, Marie Holdings, Inc., served Parkview at Salisbury with notice of default. It appears that the defaults included commencing work on phase 2 before phase 1 was completed. On April 25, 2014, AJG Parkview served Calabrese with notice of default under the operating agreement. AJG claimed that Calabrese was in default for prematurely commencing work on phase 2 and also failing to pay subcontractors. It appears that the fundamental dispute between the parties is that Calabrese began construction of phase 2 before phase 1 was complete. AGJ further alleges that around September 2014 Calabrese began entering into contracts for phase 3, although phase 2 was not yet complete. In the April 25 letter, AJG purported to terminate the construction management agreement.

On May 21, 2014, AJG Parkview Corp. entered into an agreement with James Calabrese and Calabrese Bros Construction Company (Dkt 125). The agreement provides that AJG Parkview was to contribute \$650,000 to Parkview at Salisbury to complete the construction work, pay amounts currently due Calabrese Bros Construction, and other costs. Between May 2014 and April 2015, AJG Parkview made an additional capital contribution of \$1,152,000, for a total \$2,652,000 investment. On February 3 and March 19, 2015, AJG

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Parkview received payments totaling \$748,600 towards its “first preferred return” of capital of \$2,209,911.60.

On May 11, 2015, Calabrese commenced an action against AJG Parkview (Index No 602920/15). Calabrese alleged that AJG Parkview interfered with the day-to-day operations of Parkview at Salisbury and wrongfully withdrew funds from the company. In the first cause of action, Calabrese sought an order removing AJG Parkview as a member of Parkview at Salisbury for cause. In the second cause of action, Calabrese sought to set aside the operating agreement as an adhesion contract. In the third cause of action, Calabrese sought to set aside the operating agreement as unconscionable. In the fourth cause of action, Calabrese sought damages for breach of fiduciary duty. In the fifth cause of action, Calabrese sought damages for breach of the operating agreement. Calabrese’s second and third causes of action were dismissed by order dated August 24, 2015. Calabrese’s first, fourth, and fifth causes of action were dismissed by order dated August 22, 2016.

In its answer, defendant AJG Parkview asserted four counterclaims. The first counterclaim is for breach of the July 2013 operating agreement by failing to make distributions to AJG Parkview. The second counterclaim is for a declaratory judgment as to AJG Parkview’s rights under the July 2013 and May 21, 2014 agreements. The third counterclaim is for breach of fiduciary duty by disloyalty, self-dealing, and looting. In the fourth counterclaim, AJG Parkview incorporates its claims in Index No 603044/15 (see below) and the present proceeding for the judicial dissolution of Parkview at Salisbury, LLC.

On May 25, 2015, AJG Parkview commenced Index No 603044/15 against Parkview at Salisbury, Calabrese Bros Development Corp., and James Calabrese. In the first cause of action, AJG Parkview seeks a declaratory judgment that the reserve requirement of Sec. 7.1[c] of the operating agreement applies to all costs of construction. In the second cause of action, AJG seeks a declaratory judgment terminating the construction management contract for willful misconduct. In the third cause of action, AJG seeks an accounting with respect to the affairs of Parkview at Salisbury. In the fourth cause of action, AJG seeks a declaratory judgment that it is the prevailing party entitled to attorney fees. In the fifth cause of action, AJG seeks damages for breach of fiduciary duty. In the sixth cause of action, AJG seeks damages for breach of the implied covenant of good faith and fair dealing. The seventh cause of action is for breach of the operating agreement. The eighth cause of action is for breach of the May 2014 agreement. In the ninth cause of action, AJG seeks to impose a constructive trust upon Calabrese’s interest in Parkview at Salisbury.

By order dated June 30, 2015, the court issued a preliminary injunction, restraining Parkview at Salisbury and Calabrese from proceeding with any closings of condominium

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units, unless the sales contract had been provided to AJG Parkview within 24 hours of execution and AJG Parkview was provided with 24 hour notice of the closing. Additionally, the court restrained Parkview at Salisbury and Calabrese from making any distributions or payment of funds from the closing attorney's escrow account without the signature of both members of Parkview at Salisbury, except for payments in the ordinary course of business. On August 24, 2015, Gerard Fishberg, Esq. was appointed as receiver of Parkview at Salisbury, LLC.

On August 13, 2015, AJG Parkview commenced the present proceeding for the judicial dissolution of Parkview at Salisbury, LLC.

By notice of motion dated May 6, 2016, respondents James Calabrese, Calabrese Bros. Development Corp., CALABRESE Bros. Construction Co., and Breeze Bros. Aluminum & Vinyl Siding Co., Inc. move for an order approving payment application No 24 and directing the receiver Gerard Fishberg, Esq. to issue a check in the amount of \$330,994.79 to Breeze Bros. Aluminum & Vinyl Siding Co., Inc. Payment was requested from the receiver by letter dated October 16, 2015. This amount represents the difference between \$1,682,009.72 incurred by Breeze Bros and \$1,351,014.93 total payments. The total costs include a construction management fee payable to Breeze Bros in the amount of \$168,593.75.

Petitioner AJG Parkview objects to the motion for payment on the ground of "poor record keeping" and that Calabrese was responsible for the costs of construction of phase 3. The receiver takes no position with respect to the application.

The court concludes that respondent Breeze Bros costs have been sufficiently documented. However, in view of the fact that Calabrese is a 50% member of Parkview at Salisbury, the construction management fee should await a determination of the profit on the project. Accordingly, respondent's motion for an order approving payment application No 24 is **granted** to the extent that the receiver shall pay Breeze Bros \$162,401.04.

By notice of motion dated June 3, 2016, petitioner AJG Parkview moves for an "interim distribution" from the receiver in the amount of \$3 million. In essence AJG Parkview seeks its first and second preferred returns of capital, minus \$748,600 payments already received.

As the court noted in its August 22, 2016 order, the provision for AJG Parkview to withdraw 83% of its initial capital investment before any distribution is made to Calabrese was not unconscionable as between the parties. However, it is not clear that AJG Parkview may withdraw its capital before the project was complete, particularly as AJG has not

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established that the return of capital provision was disclosed to the condominium purchasers in the offering statement (See, General Business Law § 352-e (6), outlawing fraudulent practices in real estate syndication offerings; see also **Kerusa Co. v W10Z/515 Real Estate LLP**, 12 NY3d 236 [2009]).

Accordingly, petitioner AJG Parkview's motion for an interim distribution is **denied** with leave to renew following the final accounting of the receiver upon the completion of the marketing of the project.

So ordered.

Dated SEP 01 2016

Stephen A. Scarsa

J.S.C.

ENTERED
SEP 08 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE