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| <b>Dynamic-Hakim, LLC v Maloney</b>                                                                                                                                                                                            |
| 2018 NY Slip Op 31818(U)                                                                                                                                                                                                       |
| July 30, 2018                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 651765/2017                                                                                                                                                                                                     |
| Judge: Saliann Scarpulla                                                                                                                                                                                                       |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39

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DYNAMIC-HAKIM, LLC, BRAD ZACKSON, AND  
JBLTZ HOLDINGS, LLC, INDIVIDUALLY AND AS  
THEIR INTEREST APPEAR DERIVATIVELY, FOR  
AND ON BEHALF OF PMG QPP HOLDINGS, LLC  
AND KH QPP HOLDINGS, LLC

Plaintiffs,

Index No.: 651765/2017

- v -

KEVIN MALONEY, FRANKLN R. KAIMAN,  
NED WHITE, KM QPP EQUITY, LLC, ZACHARY  
DANIELS, AND PROPERTY MARKETS GROUP, INC.,

**DECISION AND ORDER**

Defendants,

and

QPP VENTURE, LLC, QPP MEZZ, LLC, AND QUEENS  
PLAZA PARK DEVELOPMENT, LLC,

Nominal Defendants.

-----X  
**Saliann Scarpulla, J.**

In this action, *inter alia*, to recover damages for fraud, defendants Kevin Maloney, Franklin R. Kaiman, Ned White, KM QPP Equity, LLC, Zachary Daniels, Property Markets Groups, Inc. and nominal defendants QPP Venture, LLC, QPP Mezz, LLC, and Queens Plaza Park Development, LLC move to dismiss the complaint.

Plaintiff Brad Zackson (“Zackson”) and his corporation Dynamic Hakim LLC (“DH”) allegedly founded a property development project located at 29-19 41<sup>st</sup> Avenue and Queens Plaza North in Long Island City (“QPP project”). Zackson and DH allegedly

performed planning, site control, development, tax abatement and other services for the QPP project. Zackson brought in equity investor Kamran Hakim (“Hakim”) to the project. Hakim created KH QPP Holdings, LLC as the vehicle through which Hakim would participate, with a 50 percent ownership in the project. KH QPP Holdings, LLC consisted of Hakim, Joseph Tuchman, Legacy QPN LLC, and Brad Zackson’s LLC JBLTZ Holdings, LLC.

Zackson and DH allegedly asked Kevin Maloney (“Maloney”) if he wanted to participate in the project. PMG QPP Holdings, LLC was a corporation created by Maloney and/or attorney Franklin Kaiman (“Kaiman”) as the vehicle by which they would participate in the QPP Project, owning the other 50 percent of the project. PMG QPP Holdings, LLC consisted of KM QPP Entity, LLC, Kaiman, Ned White, Joseph Tuchman, JBLTZ Holdings, LLC, and Legacy QPN LLC.

KH QPP Holdings LLC and PMG QPP Holdings LLC then formed the limited liability joint venture QPP Venture LLC and then QPP Mezz LLC to fund and manage the QPP Project.

At a meeting in August 2014, after which Hakim agreed to invest one half of the 44-million-dollar equity investment in the QPP Project, Maloney allegedly represented that he would invest the other half. He further represented that he would take a short-term loan of 20 million dollars from Hakim, execute loan documents, and repay the loan with the interest rate of one million dollars per month, and the balance would be paid in full at the end of one year. Finally, according to plaintiffs, Maloney also represented that “he and PMG had the requisite experience and knowledge to construct/build, which

would be the highest skyscraper in Queens County, that he could and would procure all of the debt financing (construction financing) and bonding, that he could and would guarantee all loans, and that he would invest one half, 22 million dollars, of the project equity investment, that he and PMG would and could competently and timely perform and obtain all of the necessary development, design, architectural, licensing/permitting, and other services, and provide all other deliverables in connection with the project.” Based on these representations, plaintiffs accepted Maloney as a partner and PMG as the official developer.

According to plaintiffs, Maloney took the loan but never provided the half of the equity as he promised. In addition, Maloney did not have the loan documented or referenced in any of the relevant operating agreements. Rather, the loan was only documented in “secret side letters,” which were created so that Maloney would not have to report the loan on any financial statement. However, Maloney never repaid the loan.

Plaintiffs allege that Maloney prevented the project from proceeding because he guaranteed a 750-million-dollar loan in the “Steinway project” and therefore, would never have been able to pass credit for the large loans needed to fund the QPP project. For this reason, according to plaintiffs, Maloney and PMG did not apply for construction financing and made no effort to obtain subcontractors for the project.

In July 2016, Maloney and PMG listed the property for distressed sale. In October 2016, the loan servicer declared a default under the project loan agreement. In December 2016, Maloney and PMG sold the real estate and approvals to the Durst Organization for approximately 175 million dollars.

After the sale, plaintiffs commenced this action, asserting causes of action for (1) fraud in the inducement and common law fraud; (2) gross negligence and willful misconduct; (3) breach of fiduciary duty; (4) breach of contract; (5) aiding and abetting breach of fiduciary duty and breach of contract; and (6) accounting.

Defendants now move to dismiss the complaint. They first maintain that plaintiffs improperly mingled direct and derivative claims, that DH and Jackson are not members of any of the joint venture LLCs and have no standing to bring derivative claims, and that because JBTLZ has failed to allege the requisite pre-suit demand for derivative claims it has no standing either.

They further argue that the breach of contract claim must be dismissed because plaintiffs do not identify the agreements or provisions of agreements breached, the parties to those agreements, or damages. In addition, the relevant operating agreements state that defendants have the power to make all business decisions and manage the project. Defendants also argue that none of the plaintiffs, other than JBLTZ, are parties to any relevant contract.

Defendants also maintain that the fraud claims must be dismissed because: plaintiffs do not and cannot allege justifiable reliance, as there is a merger clause in the contract; plaintiffs allege a misrepresentation of future intent rather than a misrepresentation of present fact; plaintiffs do not plead fraud with particularity; and the fraud claims are duplicative of the breach of contract claims.

They further contend that the gross negligence claim and breach of fiduciary duty claims must be dismissed because they are duplicative of the breach of contract claim,

and in any event, the claims are factually void. Further, the aiding and abetting claim must be dismissed as there is no recognized cause of action for aiding and abetting a breach of contract, and in any event, the claims are insufficiently pled. Finally, defendants argue that the accounting claim must be dismissed because there was no confidential or fiduciary relationship upon which it could be based, and any claim for punitive damages has no basis.

In opposition, plaintiffs first argue that they did not improperly mix direct and derivative claims. They clarify that (1) the fraud claims which pre-date the operating agreement were brought on behalf of Zackson and Dynamic Hakim and the fraudulent concealment claims which arose during the period of the operating agreement were brought on behalf of JBLTZ; (2) the accounting claim was brought on behalf of all of the plaintiffs and is appropriate under the operating agreements; (3) all remaining claims were brought on behalf of JBLTZ and are expressly allowed pursuant to the operating agreement; and (4) none of their claims are duplicative.

### **Discussion**

At oral argument on this motion, counsel for plaintiffs clarified that “this is a simple cause of fraud in the inducement” and “the claims are intended to be direct claims.” Plaintiffs also admit, in their opposition papers, that the claims for breach of contract, breach of fiduciary duties, gross negligence, willful misconduct, and aiding and

abetting breach of contract and breach of fiduciary duties were intended to only be asserted by JBLTZ, not Dynamic Hakim or Zackson.<sup>1</sup>

The crux of plaintiffs' complaint is their allegation that they were fraudulently induced to bring Maloney and his partners into their deal by relying upon Maloney's representations that he was borrowing 20 million dollars from Hakim in order to invest that money into the corporation, that he would execute loan documents and repay the loan with the interest rate of one million dollars per month, with the balance paid in full by the end of the year so that his records would be free of debt and financially strong for lenders to see, and that Maloney and PMG had the requisite experience and knowledge to construct/build this project. Based on these representations, Zackson and Dynamic Hakim accepted Maloney as a partner and investor, and accepted PMG as the official developer for the project, and turned over the project to them. Plaintiffs allege that Maloney did not execute loan documents, did not invest that money into the corporation, did not repay the loan, and did not have the experience or knowledge to execute the project.

"To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury. In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim. Moreover, these misrepresentations of present fact must be collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract" *Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 438-439 (1<sup>st</sup> Dept. 2015)(internal citations omitted) *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 A.D.3d 287 (1<sup>st</sup> Dept. 2011).

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<sup>1</sup> Dynamic Hakim and Zackson were not parties to any of the relevant contracts.

Here, taking the allegations of the complaint at face value, as is required in the context of a motion to dismiss (*see generally Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168 [1<sup>st</sup> Dept. 1998]), Dynamic Hakim and Zackson have sufficiently pled a claim for fraudulent inducement against Maloney and PMG.

However, regardless of whether the breach of contract, breach of fiduciary duties, gross negligence, willful misconduct, and aiding and abetting breach of contract and breach of fiduciary duties claims may be asserted directly or derivatively by JBLTZ, plaintiffs have failed to set forth sufficient allegations to support any of these claims. Plaintiffs have not pled that any specific contractual terms or clauses were breached by any of the defendants, instead, the allegations that a contract was breached are vague and factually deficient.

Further, JBLTZ's claims for breach of fiduciary duties, gross negligence, willful misconduct, fraud, aiding and abetting breach of contract and aiding and abetting breach of fiduciary duties all arise out of the contractual relationship, are derivative, and may not be brought directly by it. As such, these claims are all dismissed.

Any fraud claims asserted against defendants Kaiman, White or Daniels are dismissed as there are no allegations involving those defendants stated with "particularity" or "stated in detail" as required by CPLR 3016(b). *See generally Cronos Group Ltd. v XComIP, LLC*, 156 A.D.3d 54 (1<sup>st</sup> Dept. 2017).

In the absence of a pled fiduciary or confidential relationship with the defendants, the claim for accounting is dismissed as well. *See Eden Roc, LLLP v Marriott Intl., Inc.*, 2014 N.Y. Slip. Op 30377(U) (N.Y. Sup. Ct., February 6, 2014).

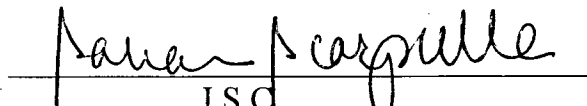
In accordance with the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted to the extent that all claims asserted by plaintiff JBLTZ Holdings, LLC are dismissed, all claims asserted against defendants Franklin R. Kaiman, Ned White and Zachary Daniels are dismissed, and all claims asserted by plaintiffs Dynamic-Hakim LLC and Brad Zackson are dismissed except for the claim for fraud, and the remaining claim for fraud is severed and shall continue.

Defendants are directed to answer the remaining claims within twenty days of the date of this decision and order.

This constitutes the decision and order of this court.

Dated: July 30, 2018  
New York, New York

  
J.S.C.  
**HON. SALIANN SCARPULLA**