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

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BEATRICE INVESTMENTS, LLC, CORNFLOWER INVESTMENTS, LLC, GLADTIDINGS INVESTMENTS, LLC, FAST MARCH INVESTMENTS LLC, SKYWARD INVESTMENTS LLC, and TRIUMPH INVESTMENTS, LLC, Individually as well as Derivatively on Behalf of 940 Realty LLC and 511 9th LLC,

Plaintiffs,

-against-

940 REALTY LLC, 511 9TH LLC, 940 INVESTOR LLC, 511 MANAGER CORP., and SALIM "SOLLY" ASSA,

Defendants,

-and-

940 REALTY LLC and 511 9TH LLC,

Nominal Defendants
In the Derivative
Causes of Action

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Index No.: 654052/2013

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Motion sequence numbers 009 and 010 are consolidated for disposition.

By order dated May 22, 2018, the court denied defendants' motion to dismiss the second amended complaint (SAC) and *sua sponte* granted plaintiffs leave to amend their complaint to add direct causes of action for breach of fiduciary duty (Dkt. 359 [May Decision]).[1] Plaintiffs filed a third amended complaint on June 8, 2018 (Dkt. 362 [TAC]). Defendants move, pursuant to CPLR

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). The court assumes familiarity with the May Decision; capitalized terms not defined herein have the same meaning as defined therein.

2221(d), for reargument of their motion to dismiss (Seq. 009). Plaintiffs oppose. Defendants also move, pursuant to CPLR 3211(a)(1), (7) and (10), to dismiss the TAC (Seq. 010). Plaintiffs oppose. Defendants' motion to reargue is denied and their motion to dismiss the TAC is granted in part.

I. Motion for Leave to Reargue (Seq. 009)

Leave to reargue a motion may be granted, in the court's discretion, only where the court overlooked or misapprehended the facts or the law or otherwise mistakenly arrived at its earlier decision (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). The motion is not designed to give unsuccessful parties successive opportunities to reargue previously decided issues or to present new arguments (*id.*).

Defendants argue that the May Decision's *sua sponte* grant of leave to amend the SAC to include direct causes of action for breach of fiduciary duty improperly amended the court's order dated April 4, 2017 (the Prior Order) on defendant's motion to dismiss the amended complaint (Dkt. 107 [AC]). At the hearing on that motion, the court dismissed plaintiffs' direct causes of action for breach of contract—stating that the AC failed to support any direct causes of action—and granted plaintiffs leave to file a one "last" complaint (Dkt. 317 [Apr. 4, 2017 Oral Arg. Tr.] at 17-19, 22-25). At that time, and until the filing of the TAC, there were no direct causes of action asserted for breach of fiduciary duty. The May Decision granted leave to amend based on newly detailed allegations relating to preferred equity grants (May Decision at 23 n 19, 28 n 26).[2]

The decision to grant leave to amend a complaint is "committed to the court's discretion" (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983]) and should be freely given unless amendment would prejudice defendants or the amendment is palpably improper or

[2] Allegations of "preferred returns"—while present in the AC (¶¶ 2, 38-39, 42, 48)—were asserted solely in connection with the breach of contract causes of action. Moreover, unlike the AC, the SAC (¶¶ 26-30) specifically alleges deprioritization of plaintiffs' LLC distributions.

insufficient (*see Proner v Julien & Schlesinger, P.C.*, 214 AD2d 460, 461 [1st Dept 1995]). For the reasons discussed in the May Decision and in connection with the motion to dismiss below, the newly added causes of action are not palpably improper or insufficient. This court has not dismissed any direct causes of action for breach of fiduciary duty, much less with prejudice. Therefore, the May Decision—which was issued by the same judge that presided over the hearing addressing the AC—did not actually vacate a prior order (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 39 [1st Dept 2012] ["law of the case" doctrine inapplicable where second amended complaint differed from first (dismissed) complaint]).[3] The court simply exercised discretion to grant leave to amend based on what was presented. Moreover, prior statements on the record purporting to curb future discretionary rulings are not binding "law of the case" (*see People v Evans*, 94 NY2d 499, 505 [2000] ["a successor Judge examining an earlier discretionary ruling is in a position different from one who would revisit a prior determination of law or finding of fact"]).

Defendants' objections to the remainder of the May Decision—which upheld the AC's derivative causes of action, on behalf of the Companies, for breach of fiduciary duty against Assa and the Managers—likewise lack merit. Nothing was overlooked or misapprehended; Accordingly, defendants' contentions do not warrant reargument and their motion is denied (*see Kassis*, 182 AD2d at 27).[4]

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[3] Because the court is not vacating a prior order or allowing plaintiffs to assert previously dismissed causes of action, the cases cited by defendants are inapposite (*Adams v Fellingham*, 52 AD3d 443 [2d Dept 2008] [reversing trial court decision to *sua sponte* vacate prior order granting plaintiffs leave to enter a default judgment against defendants]; *Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp.*, 51 AD2d 140 [4th Dept 1976] [applying "law of the case doctrine" to hold that causes of action "essentially the same" as those previously dismissed must also be dismissed]).

[4] The court rejects defendants' proposition that the court, on the motion to dismiss the SAC, was "required" to consider voluminous documents lacking irrefutable evidentiary value (e.g., Assa's

II. Motion to Dismiss the TAC (Seq. 010)

The detailed discussion of the SAC's factual allegations and causes of action set forth in the May Decision will not be repeated here. The TAC includes the two causes of action asserted in the SAC for breach of fiduciary duty, asserted derivatively on behalf of Eighth LLC and Ninth LLC, and does not add any facts over those alleged in the SAC (*see* Dkt. 427 [redline]). Additionally, pursuant to the leave to amend granted in the May Decision, the TAC adds a direct, third cause of action for breach of fiduciary duty against Ninth Manager and Assa (TAC ¶¶ 53-61) and a direct, fourth cause of action for breach of fiduciary duty against Eighth Manager and Assa (TAC ¶¶ 58-62). The third cause of action alleges that Assa and Ninth Manager granted Assa's companies and allies "Preferred Return Membership Interests" that "diluted, deprioritized and prejudiced" Ninth Plaintiffs' equity interests in Ninth LLC (TAC ¶ 56). The fourth cause of action alleges that Assa and Eighth Manager did the same vis-à-vis Eighth LLC, harming Eighth Plaintiffs in the same fashion (TAC ¶ 61). Detailed factual allegations concerning the direct causes of action are set forth in both the SAC and TAC (¶¶ 24-30), discussed on pages 12-13 of the May Decision.

Defendants move to dismiss the TAC because (1) newly submitted evidence warrants dismissal, (2) plaintiffs failed to join necessary parties, and (3) plaintiffs wrongfully included direct and derivative breach of fiduciary duty clams relating to defendants' grant of "Preferred Return Membership Interests".[5] More generally, defendants argue that their conduct was immunized by the Eighth Agreement and Ninth Agreement. As discussed in the May Decision, the fiduciary

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testimony in his own defense), page-level citations (e.g., the Republic Lease) and a fulsome explanation as to why the evidence ***conclusively*** established a defense to plaintiffs' allegations. A court may not address, on the motion to reargue, such "matters of fact not offered on the prior motion" (CPLR 2221[d][2]) but they are addressed below on the motion to dismiss the TAC.

[5] Defendants also argue that the May Decision improperly reversed the Prior Order in granting leave to amend. This argument was already rejected (*see supra* at 2-3).

standards imposed by NY LLC Law, Eighth Agreement and Ninth Agreement do not insulate defendants' conduct from all scrutiny, and defendants' actionably bad faith may be reasonably inferred from facts plausibly alleged by both the SAC and TAC and is not conclusively rebutted by the documentary evidence. Dismissal is not appropriate on any of the proffered grounds, with one slight exception, noted below.

a. Newly Submitted Evidence

i. Preferred Return Membership Interests

The TAC (¶¶ 24-30), like the SAC (¶¶ 24-30), alleges that defendants improperly granted "Preferred Return Membership Interests" in the Companies to Assa's affiliates and associates. Defendants now submit correspondence from 2011[6] purportedly relating to the grant of preferred return membership interests, some of which was already considered by this court (Dkt. 393 [Ex. B to Sutton Aff.]; Dkt. 397 [Ex. F to Sutton Aff.]; Dkt. 398 [Ex G to Sutton Aff.]; *see* May Decision at 13-15). Defendants argue that the evidence demonstrates that plaintiffs were notified that the grant would effectively wipe out their interest in the Companies. As the May Decision stated, however, "compliance with the advance notice requirement [] does not conclusively establish the absence of bad faith" (May Decision at 23; *see also id.* at 28).

ii. Fee Amendment

The TAC (¶¶ 32-34), like the SAC (¶¶ 32-34), alleges that defendants improperly paid Administrative and Development Fees to their affiliates in excess of the amounts permitted by the operating agreements. In their motion to dismiss the SAC, defendants argued that the Fee

[6] Defendants assert, without clear proof, that the "9th LLC Preferred Return Amendment was signed in or about mid-2011" (Dkt. 390 [Defs.' Opening Br. in Supp. of Mot. to Dismiss TAC] at 11). The Preferred Return Amendment is dated June 8, 2009 (*see* Dkt. 350 at 2-8 [Preferred Return Amendment]; *accord* Dkt. 404 [Sutton Aff. Ex. M]).

Amendment, signed by B Mex and Ninemex and dated January 1, 2008, authorized the fees. Defendants now submit emails from April and May 2009 (Dkt. 403 at 2-5) to prove that B Mex and Ninemex executed the Fee Amendment in 2009.[7] As discussed in the May Decision (page 25), however, the Fee Amendment is not a conclusive defense to an inference of bad faith because, as defendants now admit, the Fee Amendment was backdated to justify amounts already disbursed.

iii. SJP Payments

The TAC (¶ 37), like the SAC (¶ 37), alleges that between 2009 and 2012, defendants improperly paid $260,490 to SJP, an Assa affiliate and an alter ego of SI Partners that held itself out as a legal services provider (*see* May Decision at 9). Defendants argue that Eighth Agreement and Ninth Agreement permitted Assa to hire his own "in-house counsel" (Migliaccio) to perform the Companies' legal work and allowed Assa to "reimburse" himself for his in-house counsel's billable hours. Defendants submit electronic filing records dated 2010-2012 (Dkt. 409) —unrelated to compensation amounts—and a paycheck dated 2015 (Dkt. 410).[8]

These submissions are unavailing, for at least three reasons. First, Eighth Agreement and Ninth Agreement state that expenses may be paid "as reimbursement to the Manager and/or any of its Affiliates, as the case may be, ***to the extent paid or incurred*** by the Manager and/or any of its Affiliates" (Dkt. 323 [Ninth Agreement] at 16 [emphasis added]; *accord* Dkt. 324 [Eighth Agreement] at 17). Defendants offer no evidence as to the amount of expenses that they or their affiliates ***paid or incurred*** in connection with legal services to the Companies between 2009 and

[7] Defendants argue that B Mex and Ninemex signed the Fee Amendment two years ***before*** the preferred equity grants, which would refute allegations of an improper *quid pro quo*. Defendants, however, provide no proof that the preferred equity was granted in 2011 rather than 2009 (the date on the face of the Preferred Return Amendment).

[8] Migliaccio's federal taxable wages for this two-week period are recorded as $3,076.93. Defendants redacted all other dollar amounts from the exhibit without justification.

2012. Second, the operating agreements did not give defendants the right to bill the Companies hourly for work undertaken by a manager's (or its affiliate's) salaried employees. Finally, defendants fail to demonstrate that the submitted invoices provide a ***complete, dollar-for-dollar defense*** to allegations that Assa improperly transferred money to SJP (*see* May Decision at 9 n 6 [invoices failed to account for nearly $20,000 in checks to SJP]). As the court explained previously, one may reasonably infer that defendants transferred money to SJP in bad faith and at the Companies' expense (*see* May Decision at 25-26).

iv. Republic Food and Ladino Payments

The TAC (¶¶ 20, 35-36), like the SAC (¶¶ 20, 35-36), alleges that defendants improperly abated rent owed by and made $936,215 in payments to Eighth LLC's tenant, Republic—which Assa allegedly controlled—and made $845,628 in payments from Republic to its sub-tenant, Ladino—in which Assa allegedly had an ownership interest.[9] Defendants seek to establish the commercial reasonableness of the Republic Lease[10] and payments to Republic, mainly by citing Assa's testimony justifying his own actions, which the court will not credit at the motion to dismiss stage (*see Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 (1st Dept 2014) [documentary evidence must be "essentially undeniable" to support motion to dismiss on CPLR 3211(a)(1) grounds]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]). Defendants also cite a foreclosure proceeding against Eighth Property and an income-sharing agreement with Republic Food, which do not conclusively demonstrate commercial

[9] Defendants previously argued that Assa did not own Republic Food and asserted—in conclusory fashion—that the Republic Lease authorized the payments (Dkt. 333 [Defs.' Br. In Supp. Of Mot. To Dismiss SAC] at 19-20, 27). These assertions were not dispositive on the issue of bad faith (*see* May Decision at 28-29 & n 27).

[10] Defendants argue that the Republic Lease allotted $350,000 to Republic Food for tenant improvements—far short of the alleged $936,215 total.

reasonableness or good faith. As defendants have failed to establish the propriety of the alleged payments, their motion fails as to the Republic Food allegations.

v. Payments to Orchedia

The TAC (¶ 38), like the SAC (¶ 38), alleges that Eighth LLC transferred $337,771 to Orchedia, an Assa affiliate. The court previously refused to dismiss any part of this allegation—notwithstanding the fact that § 5.1(d) of Eighth Agreement permitted payments to an Assa-affiliated manager and leasing agent—insofar as some of the payments allegedly related to the Republic Lease (*see* May Decision at 29). Defendants now submit copies of lease documents to demonstrate that other leases account for $149,230.20 of the alleged fees (Dkt. 414 [lease documents] at 5-20; *see also id.* at 4 [summary spreadsheet]). As plaintiffs do not object to the executed leases as documentary evidence, defendants have provided a conclusive defense to this portion of the alleged amounts (*see Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept. 2012] ["by amending the complaint, plaintiff gave defendants a renewed opportunity to offer documentary evidence (not submitted on the first dismissal motion) conclusively disproving the amended complaint's material allegations"]). The TAC's allegations as to $149,230.20 of the claimed Orchedia payments are, therefore, dismissed without prejudice; the allegations as to the remaining $188,540.83, however, survive.

b. Necessary Parties

Defendants argue that the TAC must be dismissed for failure to join LLC members who received preferred equity grants as "necessary parties" pursuant to CPLR 1001(a).[11] Plaintiffs seek "rescission and rescissory damages sufficient to return [plaintiffs] to their economic position

[11] The court previously observed that "[p]laintiffs have neither requested rescission of the preferred equity grants nor joined the grantees as necessary parties" (May Decision at 19 n 15).

before their failed investments with Assa" (TAC at 24-25) on causes of action asserted against Assa, Eighth Manager and Ninth Manager (TAC at 20-23). Insofar as the prayer for relief requests "rescission," it does not specifically request that the preferred equity grants or any other transaction between the Companies and non-joined parties be rescinded. Defendants, moreover, assert that merely awarding the requested ***rescissory damages*** would require the other members to return their preferred equity or would otherwise render the preferred return amendments "ineffective." But a monetary judgment against ***Assa, Eighth Manager or Ninth Manager*** for breach of fiduciary duty would not do so. Defendants have, accordingly, failed to show nonjoinder of indispensable parties requiring dismissal (*see* CPLR 1003).

c. Direct Causes of Action for Breach of Fiduciary Duty

Defendants argue that plaintiff's direct (third and fourth) causes of action for breach of fiduciary duty must be dismissed as "duplicative, comingled and confused" with plaintiffs' derivative causes of action for breach of fiduciary duty (the first and second causes of action). A cause of action asserting harm to the LLC is derivative; recovery will typically accrue to the LLC (*see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del 2004]; *accord Yudell v Gilbert*, 99 AD3d 108, 110, [1st Dept 2012] [adopting *Tooley* test]). A cause of action asserting that certain LLC members incurred ***independent*** harms—not confused with or embedded in the harm to the corporation—is direct, and recovery will accrue to the members who suffered such harms (*Tooley*, 845 A2d at 1039; *Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014]).

The plaintiffs permissibly seek a direct recovery, on the third and fourth causes of action, to the extent that the preferred equity grants to Assa and his associates "diluted, deprioritized and prejudiced" plaintiffs' equity interests (TAC ¶¶ 56, 61). Defendants complain that the derivative causes of action also seek a recovery for the LLC based on the preferred equity grants (TAC ¶ 49). The causes of action are not duplicative, however, because the alleged harms are independent.

First, defendants allegedly ***harmed the Companies*** by improperly (i.e., in bad faith) ***granting*** valuable privileges to non-plaintiff members, which may entitle the Companies to repayment from defendants for the value of those privileges (*see Gentile v Rossette*, 906 A2d 91, 99 [Del 2006]). Second, defendants allegedly ***harmed plaintiffs*** by improperly (i.e., in bad faith) ***revoking privileges from plaintiffs***—such as rights to *pari passu* distributions from the Companies. This may entitle plaintiffs to monetary damages from defendants for plaintiffs' resultant losses, such as the loss of any distributions to which plaintiffs would have been otherwise entitled (*see Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014] [reduction of LLC member's capital account and discontinuance of distributions to member gave rise to direct claim]; *Gjuraj v Uplift Elevator Corp.*, 110 A.D.3d 540 [1st Dept 2013] [failure to pay minority shareholder's share of profit gave rise to direct claim]). Such a recovery does not, as defendants assert, "belong to" the Companies, nor are such harms "confused" or "embedded" with harm to the Companies (*see Serino*, 123 AD3d at 40). To the contrary, favoring one set of members with distributions or dividends over another set of members would not harm the Companies in any discernable way. Concerns that plaintiffs' potential recovery may overlap with that of the corporation does not warrant outright dismissal where plaintiffs have alleged independent harms (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 225 [1st Dept 1996] [plaintiffs "may not recover the value of their investment in the companies since … this claim is being pursued by the companies and there cannot be a duplication of damages"]). Accordingly, it is

ORDERED that defendants' motion for reargument (Seq. 009) is denied; and it is further

ORDERED that the motion to dismiss (Seq. 010) by defendants 940 Investor LLC, 511 Manager Corp., and Salim "Solly" Assa and nominal defendants 940 Realty LLC and 511 9th LLC

is granted in limited part to the extent set forth in the decision and in all other respects is denied; and it is further

ORDERED that there will be a teleconference on March 15, 2019 at 11:00am.

Dated: March 12, 2019

ENTER:

JENNIFER G. SCHECTER, J.S.C.