

<b>Baltic Fourth LLC v Stern</b>
2019 NY Slip Op 33109(U)
October 17, 2019
Supreme Court, New York County
Docket Number: 654881/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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INDEX NO. 654881/2018

BALTIC FOURTH LLC, directly and derivatively on behalf of
FOURTH AVENUE JV LLC, FOURTH AVENUE MEZZ LLC,
FOURTH AVENUE PROPERTY OWNER LLC, TONA
CONSTRUCTION & MANAGEMENT LLC,

MOTION DATE

MOTION SEQ. NO. 002

Plaintiffs,

- v -

MICHAEL STERN, JDS FOURTH AVENUE LLC, and JDS
CONSTRUCTION GROUP LLC,

DECISION + ORDER ON
MOTION

Defendants,

FOURTH AVENUE JV LLC, FOURTH AVENUE MEZZ LLC,
FOURTH AVENUE PROPERTY OWNER LLC,

Nominal Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75,
76, 77, 78, 79, 80, 81, 82, 89, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to/for DISMISS

Before the Court is a motion to dismiss the Amended Complaint pursuant to C.P.L.R. §
3211(a)(7) by defendants Michael Stern, JDS Fourth Avenue LLC, and JDS Construction Group
LLC (collectively, "Defendants"). The Court heard oral arguments by all parties on October 17,
2019. On the record, the Court granted Defendant's motion to dismiss counts six, eleven and
thirteen of the Amended Complaint; the Court denied Defendant's motion to dismiss counts two,
three, four, seven, eight, ten, and twelve of the Amended Complaint; and the Court reserved
decision as to counts one, five, nine and fourteen which are addressed below.

This dispute arises out a joint venture between Baltic Fourth LLC and JDS Fourth
Avenue LLC for the development of property in Brooklyn, NY ("the Property"). In December

2013, Baltic Fourth LLC and JDS Fourth Avenue LLC formed a joint venture company called Fourth Avenue JV LLC (“the Company”), a Delaware LLC. The Company then formed Fourth Avenue Property Owner LLC (“Owner”), a Delaware LLC, to hold title to the Property. In April 2014, Domenick Tonacchio, principal of Baltic Fourth LLC, and Michael Stern, principal of JDS Fourth Avenue LLC, executed an Amended and Restated Limited Liability Agreement of Fourth Avenue JV LLC (“the Agreement”) on behalf of their respective companies. The Agreement governs the parties’ relationship with respect to developing the Property. In April 2016, Owner and JDS Construction Group LLC entered a Construction Management Agreement. This action relates primarily to alleged breaches of the Agreement and the Construction Management Agreement.

On a motion to dismiss pursuant to C.P.L.R. § 3211(a)(7), the pleadings must be afforded a liberal construction. The Court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994).

In Count One of the Amended Complaint, plaintiffs seek a declaratory judgment that Baltic Fourth LLC is presently entitled to the next \$10.7 million in distributions. The parties agree that the Agreement contained a waterfall provision whereby Baltic Fourth LLC would receive the first \$14 million of distributions from developing the property, JDS Fourth Avenue LLC would receive the next \$5 million of distributions, and the parties would then split any remaining distributions thereafter.

The Amended Complaint alleges that in October 2017 Stern advised Baltic Fourth that the first \$14 million was to be set off by approximately \$6 million representing satisfaction of the mortgage on the development property at closing. Baltic Fourth does not agree to this

determination and further alleges that it has only been paid \$3.3 million in distributions to date. Thus, plaintiffs seek a prospective declaration that Baltic Fourth is entitled to the next \$10.7 million. Defendant argues Baltic Fourth's claim for a declaratory judgment must be dismissed because no actual controversy exists between the parties, and it is duplicative of its claims for breach of the Agreement.

The Court finds an actual controversy exists between the parties and that count one is not duplicative of plaintiffs' breach of contract claims. Plaintiffs' breach of contract claims address harm that has allegedly already occurred, whereas plaintiffs' request for a declaratory judgment seeks prospective relief. Plaintiffs allege that defendants seek to offset the amount of distributions owed to plaintiffs under the express terms of the contract. The parties evidently disagree on the amount to be paid and what constitutes distributable funds. As such, a controversy exists and count one is factually distinct from the breach of contract claims.

Count five of the Amended Complaint is for breach of the Agreement, or alternatively for breach of the covenant of good faith and fair dealing by plaintiffs Baltic Fourth LLC and Tona Construction & Management LLC against JDS Fourth Avenue LLC and Michael Stern. At oral argument, all parties agreed to the validity and enforceability of the Agreement. As such, the alternative claim for breach of the covenant of good faith and fair dealing is dismissed as duplicative.

With respect to the breach of contract claim, Defendants argue that plaintiff Tona Construction & Management does not have standing to bring this cause of action because Tona Construction & Management is not a signatory to the Agreement. Plaintiffs argue that Tona Construction & Management is a third-party beneficiary to the Agreement and thus plaintiff Tona Construction & Management has standing to seek relief. It is undisputed that Section 8.9 of

the Agreement provides that “subject to the approval of the lender under the Construction Loan, Tona Construction & Management LLC, an affiliate of Tonacchio (“Tona”) shall be the initial construction manager with respect to the Properties...” Plaintiffs allege that Tona Construction & Management is not the construction manager for the project. Accepting the allegations as true, plaintiffs have stated a claim for breach of contract.

Count nine of the Amended Complaint by plaintiffs Baltic Fourth LLC, derivatively on behalf of Fourth Avenue Property Owner LLC against Stern, JDS Fourth Avenue LLC, and JDS Construction, is for fraud. Plaintiffs allege that Stern, either individually or through his company, knowingly submitted invoices containing misstatements in the amount of payroll expenses actually incurred by JDS Construction in connection with developing the Property. Defendants argue that count nine is duplicative of count ten for breach of the Construction Management Agreement. While the Agreement imposes broad obligations to implement the project in an economical manner, plaintiffs allege specific instances of misrepresentations that go beyond the express terms of the contract. Accordingly, plaintiffs have stated a cause of action for fraud.

Count fourteen of the Amended Complaint by plaintiff Baltic Fourth LLC directly against Stern and JDS Fourth Avenue LLC is for fraud. Plaintiffs allege that Stern falsely represented that the construction lender had not approved Tona Construction & Management as construction manager for the project and that in reliance on this statement, Baltic Fourth did not exercise its buy-sell rights under the Agreement. Defendants argue that plaintiffs failed to allege detrimental reliance or damages. Specifically, Defendants argue that Baltic Fourth could not have exercised its buy-sell options under the Agreement regardless of any representations that were made. Plaintiffs assert that whether plaintiffs had the ability to exercise this option is a fact intensive inquiry that need not be determined on a motion to dismiss. The Court agrees. Moreover, count

fourteen contains additional allegations that Stern forged Tonacchio's signature on loan documents without Tonacchio's consent. Accepting these allegations as true, the Court declines to dismiss count fourteen.

Accordingly, it is hereby ORDERED:

that the motion is granted in part and denied in part. The motion is granted as to counts six, eleven, and thirteen. The motion is denied as to counts one, two, three, four, five, seven, eight, nine, ten and twelve.

10/17/2019  
DATE

*Barry R. Ostrager*  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	

BARRY R. OSTRAGER  
JSC