

<b>HH Trinity Apex Invs. LLC v Hendrickson Props. LLC</b>
2020 NY Slip Op 30947(U)
April 17, 2020
Supreme Court, New York County
Docket Number: 152409/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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HH TRINITY APEX INVESTMENTS LLC, VERIDEA HOLDINGS LLC, VERIDEA APEX PARCEL 10 LLC,

Plaintiff,

INDEX NO. 152409/2018

MOTION DATE N/A

MOTION SEQ. NO. 005

- v -

HENDRICKSON PROPERTIES LLC, C. HENDRICKSON, LOOKOUT VENTURES, INC., JILL HENDRICKSON, HENDRICKSON PROPERTIES APEX LLC, HENDRICKSON PROPERTIES IV LLC, HENDRICKSON PROPERTIES V LLC, CAPITAL CLUB PROPERTIES, LLC

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the defendants' motion to dismiss pursuant to CPLR § 3211(a)(4), (a)(5), (a)(7) and (a)(10) is denied.

RELEVANT FACTUAL BACKGROUND

The facts of this matter are laid out in this court's decision and order on the prior motion to dismiss (mtn. seq. 001), which was brought pursuant to CPLR §§ 327 and 2201, which the court denied in a decision dated September 6, 2019 (NYSCEF Doc. No. 126). As discussed in the court's prior decision, this action arises out of a North Carolina real estate development project known as Veridea. Starting in 2007, HH Trinity Apex Investments LLC, Veridea Holdings LLC, Veridea Apex Parcel 10 LLC (collectively, the Plaintiffs), together with their various affiliates, began acquiring land to develop the project in and around the town of Apex, North Carolina (the Town) (Compl., ¶¶ 2, 26, 28, 31). Each of the plaintiff entities was formed to acquire certain

parcels of real property within the Town in furtherance of this project, and, in total, the Plaintiffs “invested over \$85 million into the acquisition and development of Veridea” and “now own approximately 860 acres within the bounds of the planned project” with options on hundreds more acres (*id.*, ¶¶ 2, 30). The success of the Veridea project depended on obtaining certain entitlements from the Town such as appropriate zoning and land use rights in furtherance of development (*id.*, ¶ 33). To that end, the Plaintiffs approached C. Thomas Hendrickson to assist them with their efforts due to his reputation and certain contacts with the Town (*id.*, ¶¶ 34-37). Pursuant to a pair of identical Asset Management Agreements (the **AMAs**), dated November 9, 2007, HH Trinity Apex Investments, LLC (**HH Trinity**) and Veridea Holdings LLC (**Veridea Holdings**), each as owner, contracted with Hendrickson Properties LLC (**Hendrickson Properties**), an entity controlled by Mr. Hendrickson, as agent to manage and develop the Veridea project (*id.*, ¶¶ 38, 40; *id.*, Exs. 1 & 2; NYSCEF Doc. Nos. 2-3).

The Veridea project required certain legislative and quasi-judicial decisions by the Town, which Mr. Hendrickson and Hendrickson Properties helped facilitate (Compl., ¶ 56). First, the project required an amendment to the Town’s Unified Development Ordinance (**UDO**) to allow for the type of “next generation sustainable mixed-use community” envisioned by the Plaintiffs for Veridea. To that end, the Town created a new form-based zoning district called a Sustainable Development Conditional Zoning District (**SD-CZ**). Second, the Town rezoned the property as SD-CZ (*id.*). Finally, on May 10, 2011, the Town approved a specific Sustainable Development Plan for Veridea (the **Veridea SD Plan**) (Compl., ¶¶ 44-48, 56, 67, 72).

As part of the rezoning process, the Town's UDO required that an applicant designate a "Responsible Person" with the "authority to make all the developer land use planning decisions for all land that is part of a Sustainable Conditional Zoning District SD -CZ" (Compl., ¶¶ 49-50, Ex. 5). Under the Veridea SD Plan, the designated Responsible Person for the Veridea project was Lookout Ventures, Inc. (**Lookout Ventures**), an entity wholly owned and controlled by Mr. Hendrickson (*id.*, ¶¶ 59, 72). As the Responsible Person, Lookout Ventures has:

all the responsibility and authority to make all the developer land use planning decisions for all land that is part of [the] Sustainable Conditional Zoning District SD-CZ. . . . This one person . . . will be the sole person from whom the Town will accept decisions regarding the Sustainable Development (SD) Plan and Sustainable Development Conditional Zoning District SD-CZ, including amendments, modifications or supplements thereof or the addition of lands thereto.

(Compl., Ex. 5, § 2.3.16[D]).

In February of 2016, the Plaintiffs terminated Hendrickson Properties' duties as asset manager for the Property (Compl., ¶ 100). Since that time, the Plaintiffs have attempted to "work[]" with the Town staff and members of [the] Town Council in an attempt to develop and adopt proposed amendments to the Town's UDO which would permit . . . Plaintiffs[] to appoint a new Responsible Person" (*id.*, ¶ 91). However, the Plaintiffs have been unsuccessful in their efforts to do so and, as further discussed below, they have since brought a legal claim (the **NC Action**) against the Town that, among other things, challenges the constitutionality of the Town's zoning ordinance, as further discussed below (*id.*).

The Plaintiffs have also repeatedly requested that Lookout Ventures step down as the Responsible Person, which request has been refused. The Plaintiffs allege that by naming

Lookout Ventures as the Responsible Person for the project, Mr. Hendrickson essentially inserted a “poison pill” into the Veridea SD Plan as (i) Lookout Ventures does not have an ownership interest in Veridea, (ii) the Plaintiffs have no agreement with Lookout Ventures granting it any authority or responsibility to act on their behalf, and (iii) the Veridea SD Plan allows Lookout Ventures to control the selection of the Responsible Person for the project “in perpetuity, with no ability for Plaintiffs (or any other landowner) to remove Lookout Ventures from its position without Hendrickson’s consent” (Compl., ¶¶ 61, 59). Specifically, the Veridea SD Plan:

provides for three succession/replacement scenarios, all of which – as a practical matter – are controlled by Lookout Ventures:

- Lookout Ventures can be replaced at any time by any successor corporation to Lookout Ventures by way of merger or other reorganization;
- Lookout Ventures can be replaced by another person appointed by Lookout Ventures (or its successor corporation); and,
- Lookout Ventures can be replaced if it is dissolved without the appointment of a new Responsible Person, by the owners of fifty-one percent (51%) of the land comprising Veridea at the time of the appointment.

(Compl., ¶ 62).

The Plaintiffs contend that the “practical effect of these provisions is to make it impossible for Lookout Ventures to be replaced as the Responsible Person for Veridea unless Lookout Ventures consents” (*id.*, ¶ 65). The complaint alleges that these provisions were added to the SD Plan “at the last minute,” without their review, and that had the Plaintiffs been aware of said provisions, the Plaintiffs never would have agreed to this language (*id.*, ¶¶ 66-68). In sum, the Plaintiffs allege that Mr. Hendrickson sought to “create a situation whereby [he] could leverage his position of control to extract undeserved and improper benefits from Plaintiffs (such as selling

the Property to Hendrickson below market value or causing Plaintiffs to pay Hendrickson a substantial amount of money to relinquish control over the development of the Property)” (*id.*, ¶ 71). The Plaintiffs also allege that Mr. Hendrickson used his position to “extort” a \$500,000 loan from the Plaintiffs by saying that if they did not help him, he would have to declare bankruptcy and that the Veridea project would be “destroy[ed]” (*id.*, ¶¶ 108-110). The Plaintiffs claim that, as a result, they loaned Mr. Hendrickson \$500,000, which he has yet to repay in full (*id.*, ¶ 112). To evidence the loan, Hendrickson Properties Apex (**HPA**) entered into a Secured Promissory Note (the **Note**) with HH Trinity and Veridea Holdings, dated October 28, 2009, pursuant to which HH Trinity and Veridea Holdings agreed to loan HPA up to \$500,000 (the **Debt**) and HPA agreed to repay the Debt pursuant to the terms set forth in the Note (*id.*, ¶ 122; Compl., Ex. 10, NYSCEF Doc. No. 11). Simultaneously with the Note, Mr. Hendrickson, HPA, Jill D. Hendrickson, Hendrickson Properties IV LLC, Hendrickson Properties V LLC, and Lookout Ventures (together, the **Pledgors**) entered into a Pledge and Security Agreement (the **Security Agreement**), of even date, with HH Trinity and Veridea Holdings, pursuant to which the Pledgors agreed to pledge and create a security interest in certain collateral that they either owned or controlled as security for repayment of the Note (*id.*, Ex. 11, NYSCEF Doc. No. 12). The collateral included the beneficial interest of the Pledgors in defendant Capital Club Properties, LLC (**CCP**) (Compl., ¶ 126). Additionally, HPA, Lookout Ventures, Hendrickson IV and Hendrickson V executed a UCC Financing Statement in favor of Trinity Apex and Veridea Holdings giving them a security interest in certain collateral that they either owned or controlled, which UCC Financing Statement was duly recorded with the office of the North Carolina Secretary of State (*id.*, ¶ 124, *id.*, Ex. 12, NYSCEF Doc. No. 13). The Note and the Security

Agreement both contain New York choice of law provisions (NYSCEF Doc. No. 11, ¶ 13; NYSCEF Doc. No. 12, ¶ 16[b]).

As contemplated by the Note, Veridea Holdings and Trinity Apex loaned HPA a total of \$500,000 (Compl., ¶ 129). The interest rate on this debt, prior to the maturity date of November 1, 2011, was 10% per annum (*id.*, ¶ 130). The Plaintiffs allege that HPA failed to repay the principal and interest due on November 1, 2011 (*id.*, ¶ 131). This constituted a default under the terms of the loan, at which time the default rate of 15% per annum went into effect. As of the date of the Complaint, HPA allegedly owes \$1,309,832.81 pursuant to the Note to Veridea Holdings and Trinity Apex, which amount continues to increase.

The complaint asserts the following nine causes of action:

1. Breach of fiduciary duty (against Lookout Ventures and Hendrickson)
2. Breach of fiduciary duty (against Hendrickson Properties and Hendrickson)
3. Constructive Fraud (against Hendrickson)
4. Constructive Fraud (against Lookout Ventures)
5. Unfair and Deceptive Trade Practices (against Hendrickson and Lookout Ventures)
6. Declaratory Judgment that Hendrickson Properties is not entitled to a Developer Fee under the AMA upon the sale of Veridea (against Hendrickson Properties)
7. Breach of contract (against HPA)
8. Breach of contract (against the Pledgors)
9. Declaratory Judgment that the Pledgors are required to produce certain financial records and that Trinity Apex and Veridea are entitled to the proceeds from the sale of any pledged collateral on a going forward basis.

Shortly after filing this action, the Plaintiffs also filed an the NC Action in which they challenge the constitutionality of the Town's zoning ordinance and allege, *inter alia*, that the Town wrongfully required the "Responsible Person" component of the UDO amendment (NC Compl., ¶ 29). All the landowners have been joined as necessary parties to the NC Action.

## DISCUSSION

### I. Relevant Standards

Dismissal pursuant to CPLR § 3211(a)(4) *may* be appropriate where there is another action pending between the same parties for the same cause of action in a court of any state or the United States. This provision is permissive, not mandatory.

Dismissal pursuant to CPLR § 3211(a)(5) is warranted where the cause of action is barred by the statute of limitations.

Dismissal under CPLR § 3211(a)(7) is appropriate where the claim fails to state a cause of action.

Finally, dismissal under CPLR 3211(a)(10) should be made if the court should not proceed in the absence of a person who should be a party.

### II. Another Action Pending

As an initial matter, and as discussed, a dismissal pursuant to CPLR § 3211 (a)(4) is not required. Moreover, the court already rejected this argument on its prior decision dismissal (NYSCEF

Doc. No. 126). The Defendants may not avoid the court's decision by now asking the court to only dismiss certain claims (i.e., those seeking injunctive relief) in favor of the NC Action. The court will not dismiss this action in favor of the NC Action for all the reasons stated in the prior decision.

### III. Statute of Limitations CPLR 3211(a)(5)

The Defendants argue that the first through fifth and the seventh causes of action should all be dismissed as untimely. The Plaintiffs maintain that any arguments based on the statute of limitations were waived when the Defendants failed to preserve such objections before making their prior motion to dismiss based on *forum non conveniens* and/or for a stay and did not move at that time to dismiss based on the statute of limitations. The Defendants counter that even if this were true, the Preliminary Conference Order (the **PC Order**) dated September 4, 2019, entered into by the parties after oral argument on the first motion to dismiss, provided for defendants to move “to dismiss and/or answer w/in 30 days,” and therefore any failure to reserve their rights with respect to the statute of limitation is a “nullity” (Reply Memo., p. 2).

CPLR 3211(e) provides that an objection or defense based on the statute of limitations is waived unless raised in a responsive pleading or in a pre-answer motion to dismiss (*Horst v Brown*, 72 AD3d 434, 434 [1<sup>st</sup> Dept 2010]). However, such waiver may be “said to be retracted” under certain circumstances (*id.* at 436 [Roman, J., *dissent. in part*] [collecting cases]; *see also, Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 80 [1<sup>st</sup> Dept 2015]). The threshold inquiry is one of prejudice (*id.*). A party suffers prejudice where it has been hindered in the preparation of its case or otherwise prevented from taking some measure in support of its

position (*Scholastic*, 129 AD3d at 80; *BMX Worldwide, Ltd. v Coppola NYC, Inc.*, 287 AD2d 383 [2001]). In *Scholastic*, the First Department held that the “motion court properly considered defendant’s statute of limitations defense proffered for the first time in opposition to plaintiff’s motion for summary judgment” because “the defendants vigorously asserted such a defense in his post-answer submissions” (129 AD3d at 80). Under those circumstances, the Court found there was no prejudice to the plaintiff despite the fact that the affirmative defense was not timely asserted. Here, inasmuch as the Defendants timely filed the instant motion to dismiss and gave notice of their intention to file a second motion to dismiss at the PC conference, the Plaintiffs have suffered no prejudice. This is particularly so as discovery has just commenced in this action. Accordingly, it cannot be said that the Defendants’ statute of limitations arguments were waived.

#### **A. The Breach of Fiduciary Duty Claims (1<sup>st</sup> and 2<sup>nd</sup> Causes of Action)**

Under New York law, there is no one single statute of limitations period for breach of fiduciary duty claims, rather, the relevant period depends on the substantive remedy sought by the plaintiff seeks (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Where the remedy is purely monetary in nature, a three-year statute of limitation applies as the injury is construed as one to “property” under CPLR 214 (*id.*). Where the remedy is deemed equitable in nature, the six-year period of CPLR 213(1) applies (*id.*, citing *Loengrad v Santa Fe Indus.*, 70 NY 2d 262, 266 [1987]). And, where an allegation of fraud is essential to a breach of fiduciary duty claim, a six-year statute of limitations under 213(8) will apply (*id.*).

Here, the Plaintiffs seek meaningful equitable remedies, in addition money damages, and therefore the longer six-year statute of limitations applies to their claims (*Loengrad v Santa Fe*

*Indus.*, 70 NY2d at 266). However the claims are timely under either time frame, as the applicable time period “does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has otherwise terminated” (*Westchester Religious v Kamerman*, 262 AD2d 131, 131 [1<sup>st</sup> Dept 1999]; *Robinson v Day*, 103 AD3d 584, 586 [1<sup>st</sup> Dept 2013]). Here, based on the allegations in the Complaint, the fiduciary relationship with Hendrickson Properties and Mr. Hendrickson terminated in February of 2016, when the Plaintiffs terminated the AMAs, removing Hendrickson Properties from its position as agent asset manager (Compl., ¶ 100). This action was thus timely filed on March 19, 2018, under either statute of limitations period. To the extent that some of the misconduct alleged in the complaint may date as far back as 2007 when the parties’ relationship began, this is not a bar to the Plaintiffs’ claims under the continuing wrong doctrine (*see Henry v Bank of Am.*, 147 AD3d 599, 601 [1<sup>st</sup> Dept 2017]). And, with respect to Lookout Ventures, which is still the “Responsible Person” for Veridea, the claim for breach of fiduciary duty is certainly timely as Lookout Ventures continues to owe the Plaintiffs a fiduciary duty on that basis.

### **B. The Constructive Fraud Claims (3<sup>rd</sup> and 4<sup>th</sup> Causes of Action)**

The applicable statute of limitations period for constructive fraud claims is six years. The Complaint alleges that Mr. Hendrickson and Lookout Ventures, among other things, misused their positions by blocking the development of the Property to Mr. Hendrickson’s person financial benefit, including sabotaging certain deals with prospective developers to their own advantage (Compl., ¶¶ 79-88, 160-161, 167-168). This conduct allegedly began in 2012 but continued thereafter. The Complaint also alleges that Mr. Hendrickson engaged in public efforts

to sully the Plaintiffs' reputation with Town officials as recently as May of 2016 (Compl., ¶ 103-107, Exs. 8, 9). This is sufficient at the pleading stage to fall within the statute of limitations.

**C. The Unfair & Deceptive Trade Practices Act (UDPTA) Claim (the 5<sup>th</sup> Cause of Action)**

The applicable statute of limitations for this claim is four years under NC Gen. Stat. § 75-16.2 (*Christenbury Eye Ctr., P.A. v Medflow, Inc.*, 802 SE2d 888, 892 n 4 [NC 2017]). Continuous violations of the act, as alleged here, may constitute separate offenses and trigger a new cause of action and a new limitations period (*Cherry Cmty. Org. v Stonehunt, LLC*, 2016 WL 7984232, \*8 [NC Ct App December 30, 2016]). The Complaint alleges, among other things, that throughout 2016, 2017 and to date, the Defendants actively interfered with the Plaintiffs' efforts to amend the Town's UDO and permit the Plaintiffs to appoint a new Responsible Person (Compl., ¶ 91, ¶¶ 81-83). The Complaint also alleges that Mr. Hendrickson engaged in a public campaign to discredit the Plaintiffs with Town officials and depress the value of the Property (*id.*, ¶¶ 103-107, Exs. 8, 9). This is sufficient at the pleading stage to timely allege this claim.

**D. Breach of Contract Against HPA (the 7<sup>th</sup> Cause of Action)**

The applicable statute of limitations claim for a breach of contract claim is six years. Here, payment under the Note was initially due in 2011. However, the Plaintiffs allege that in multiple communications through 2015, HPA acknowledged the Note and its debt and then HPA also made a voluntary partial payment of \$175,000 against the Note in September of 2015 (Compl., ¶¶ 134-135). Accordingly, this cause of action is timely as alleged since a partial payment on a

debt will restart the statute of limitations period with respect to the remaining balance owed under the Note (*Saljanin v Vuksanaj*, 284 AD2d 525, 526 [2d Dept 2001]).

#### **IV. Failure to State A Claim**

The Defendants also argue that the Complaint fails to state a claim with respect to the fiduciary duty, constructive fraud, and UDTPA claims.

##### **A. Failure to State A Claim for Breach of Fiduciary Duty**

As a threshold matter, the Defendants argue that the substantive law of North Carolina should apply to the breach of fiduciary duty claims notwithstanding the New York choice of law provisions in the APAs. Even if the New York choice of law provisions contained in the parties' agreements were not broad enough to encompass the torts incident to those agreements, the first step in any choice of law analysis is to determine if there is an actual conflict between the laws of North Carolina and New York (*In re Allstate Ins. Co.*, 81 NY2d 219, 223 [1993]). If there is no conflict, a choice of law analysis is not warranted and the law of the forum state, i.e., New York's, should apply (*id.*). Here, the Defendants simply fail to identify any conflict with respect to breach of fiduciary duty, and, in fact, there does not appear to be one (*compare Pokoik v Pokoik*, 115 AD3d 428, 429 [1<sup>st</sup> Dept 2014] with *Farndale Co, LLC v Gibellini*, 638 SE2d 15, 20 [NC Ct App 2006]). Accordingly, New York law applies to the fiduciary duty claims.

A claim for breach of fiduciary duty requires (1) the existence of a duty, (2) misconduct, and (3) resulting damages (*Pokoik*, 115 AD3d at 429). A fiduciary relationship exists between two persons where one of them is under a duty to act for or give advice for the benefit of the other upon matter within the scope of that representation (*People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108, 115 [2009]). Mr. Hendrickson argues that he did not owe any fiduciary obligations to the Plaintiffs. In their opposition papers, the Plaintiffs argue that because Lookout Ventures and Hendrickson Properties are wholly owned by and solely controlled by Mr. Hendrickson, it was necessarily Mr. Hendrickson who carried out all of Lookout and Hendrickson Properties' actions. In this regard, the Plaintiffs point to the fact that, as the Complaint, alleges they hired Mr. Hendrickson precisely because he represented himself as someone who could successfully develop the Property based on his substantial political contacts with the Town and North Carolina (Compl., ¶¶ 35-37, 75). The Plaintiffs argue that the fact that Mr. Hendrickson operated through his corporate entities should not allow him to escape liability (citing *Restatement (Second) of Agency*, § 5, Comment C, *Marra v Katz*, 74 Misc 2d 1010, 1013 [Sup Ct Westchester Cnty 1973]).

Most significantly, with respect to Mr. Hendrickson, personally, the Complaint alleges a special relationship of “trust and confidence” between Mr. Hendrickson and the Plaintiffs (Compl., ¶¶ 34-39), and alleges that, based on this special relationship, the Plaintiffs vested Mr. Hendrickson with “broad discretion in connection with the Property (*id.*, ¶¶ 40-43). As a result, Mr. Hendrickson was permitted “in his capacity as Plaintiff’s agent and fiduciary” to “hire[] several local attorneys, including Lacy Reaves [] and Charlotte Mitchell [], to assist Plaintiffs with (i) the UDO amendment process, and (ii) obtain [] the necessary zoning and land use entitlements for Veridea from the Town” (*id.*, 45). The Plaintiffs allege that they relied on Mr. Hendrickson and

Ms. Reaves and Ms. Mitchell to “protect and promote” their “interests in the Property” (*id.*, ¶ 47). And, that Mr. Hendrickson abused this relationship of trust and confidence to insert a “poison pill” into the Town-approved plan for Veridea by appointing Lookout Ventures, an entity of which he was sole shareholder and office and which could not be removed without his approval, as the “Responsible Person” (*id.*, ¶¶ 55-65), and that he covertly did this at the last minute to avoid the Plaintiffs’ objections to such a plan (*id.*, ¶¶ 66-71). These allegations are sufficient to state a claim for breach of fiduciary duty against Mr. Hendrickson at the pleading stage.

The Complaint also states a claim for breach of fiduciary duty against Lookout Ventures and Hendrickson Properties as the Complaint has sufficiently alleged that both of these entities owed fiduciary duties to the Plaintiffs (*EBC I, Inc. v Goldman, Sachs, & Co.*, 5 NY3d 11, 19 [2005]). The Complaint sufficiently alleges that these entities owed duties to act for and give advice to the Plaintiffs and that they breached these obligations by acting in their own self interest to the detriment of the Plaintiffs (*see Apple Records, Inc. v Capital Records, Inc.*, 137 AD2d 50, 57 [1<sup>st</sup> Dept 1988]).

## **B. Failure to State A Claim for Constructive Fraud**

Both sides agree that North Carolina law applies to the constructive fraud claims (Def. Mov. Memo., p. 17; Ptf. Opp. Memo., p. 20). To plead a claim for constructive fraud under North Carolina law, a plaintiff must allege (1) a relationship of trust and confidence between the plaintiff and the defendant, (2) that the defendant took advantage of its position to personally benefit, and (3) injury to the plaintiff as a result (*Clay v Monroe*, 189 NC App 482, 488-89 [NC 2008]). The Defendants argue that the constructive fraud claims fail because the Complaint fails

to allege any personal benefit to either Hendrickson or Lookout Ventures. The court disagrees. The Complaint alleges that Mr. Hendrickson and Lookout Ventures acted as the fiduciary, agent and advisor to the Plaintiffs while working on the development of the Property and as the Responsible Person (Compl., ¶¶ 38-40, 46-49, 57-61, 72-78). The Complaint further alleges that they sought to benefit themselves financially by extorting additional fees unrelated to work actually performed, blocking development of the Property unless they were granted fees and attempting to “tank” the value of the Property (*id.*, ¶¶ 80-85, 88, 108-20). This is sufficient to sustain the claims at the pleading stage.

### **C. Failure to State A Claim for Violation of the UDTPA**

A UDTPA claim requires: “(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business” (*Trantham v Michael L. Martin, Inc.*, 745 SE2d 327, 333 [NC Ct App 2013]). Conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTPA claim (*id.*). Certainly, the act of buying and developing real estates is an act “affecting commerce.” The Plaintiffs assert that Lookout and Mr. Hendrickson have inequitably asserted their position of power to sabotage the Plaintiffs’ development of Veridea. This is sufficient at this juncture. The motion to dismiss this claim is denied.

### **V. Failure to Join Necessary Parties**

CPLR 3211(a)(10) requires dismissal where “the court should not proceed in the absence of a person who should be a party.” The Defendants argue that this claim should not proceed as not

all North Carolina landowners within Veridea are parties. The court should grant a motion pursuant to CPLR 3211(a)(10) only when the so-called necessary party is not subject to the jurisdiction of the court, will not appear voluntarily, no remedy is available under CPLR 1001(b), and, most significantly, *the party which is not named is so essential to the litigation that the action cannot proceed in their absence* (*United Air Cond. Corp. v Wu/Lighthouse 100 William Street LLC*, 12 Misc 3d 1168[A], \*4 [Sup Ct Nassau Cnty] [Austin, J.] [citing Seigel, Practice Commentaries C3211:34, 1 *New York Civil Practice: CPLR* ¶ 1003.04 and 1 *New York Civil Practice: CPLR* ¶ 3211.39] ). The Defendants do not even attempt to make a showing here that this action cannot proceed without the other Veridea landowners, and, in fact, they appear to abandon the 3211(a)(10) dismissal argument entirely on their reply.

Moreover, the court already rejected the Defendants' argument that this action should be dismissed for "failure to join necessary parties" on its prior motion (NYSCEF Doc. No. 126). Specifically, as the court explained, "to the extent that the defendants argue that there are other stakeholders in North Carolina to whom the defendants owed fiduciary duties as well, this argument is without merit. The fiduciary duties that are at issue in this case are the fiduciary duties owed to the Plaintiffs pursuant to the specific agreements between the Plaintiffs and the defendants" (*id.*, p. 13).

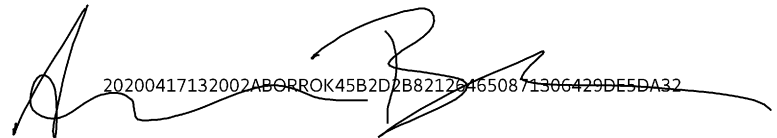
Accordingly, it is

ORDERED that the defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that the defendants serve an answer to the complaint within 30 days of this decision and order.

4/17/2020

DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: