

DOF V Promenade, LLC v ER Group LRS LLC

2020 NY Slip Op 32251(U)

July 9, 2020

Supreme Court, New York County

Docket Number: 656666/2019

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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DOF V PROMENADE, LLC, DOF V REIT HOLDINGS,
LLC, TORCHLIGHT INVESTORS, LLC

INDEX NO. 656666/2019

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

ER GROUP LRS LLC, JOHN DOE,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 33, 36

were read on this motion to/for DISMISSAL.

In this action, *inter alia*, to recover damages for tortious interference with contract, defendant ER Group LRS, LLC (“ER”) moves to dismiss the complaint.

Plaintiffs DOF V Promenade, LLC (“Preferred Member”), DOF V REIT Holdings, LLC (“REIT Holdings”) and Torchlight Investors, LLC (“Torchlight”) commenced this action in November 2019. According to the allegations of the complaint, Preferred Member and HH Promenade Partners Common, LLC (“Common Member”) entered into a joint venture in June 2015. The purpose of the joint venture was to renovate the Promenade at Howard Hughes, a retail and entertainment center in Los Angeles, California. The terms of the joint venture were set forth in a limited liability company agreement (“LLC Agreement”) executed on June 5, 2015, pursuant to which

HH Promenade Partners JV, LLC (“JV”) was formed. JV owned HH Promenade Partners, LLC (“Subsidiary”), which owned the Promenade. Laurus, controlled by the Szitas brothers, was Common Member’s parent company. Preferred Member was the preferred member of JV and Common Member was the managing member. Torchlight allegedly provided funding.

Pursuant to the LLC Agreement, Section 6.4,

The Sponsor Member and the Sponsor Principals jointly and severally represent and agree for the benefit of the Preferred Member that:

(a) Each of them recognizes that (1) the Preferred Member and its Affiliates have expressed to them the importance of the identity and capabilities of the Sponsor Principals to the operational and financial success of the Company and the Subsidiary and of the identity of all direct and indirect owners of the Sponsor Member to the investment by the Preferred Member in the Company, the Subsidiary and the Property, (2) the direct and indirect restrictions on Transfer of the Membership Interest of the Sponsor Member and the ownership and other interests in the Sponsor Member have been a material inducement for the Preferred Member's entry into this Agreement and (3) each of them will comply strictly with the restrictions on Transfer set forth in Article 8.

(b) Except to the extent permitted by Article 8, the Sponsor Member and the Sponsor Principals will not (1) Transfer any of their direct or indirect equity interests in the Company or the Sponsor Member, (2) grant any option or other contractual right to acquire any of their direct or indirect interests in the Company, the Subsidiary or the Sponsor Member or any of their interest in the equity or profits of the Company, the Subsidiary or the Sponsor Member, (3) give or agree to give any other Person the right to vote or take other action with respect to their equity interests in the Company, the Subsidiary or the Sponsor Member or (4) give or agree to give any other Person the right to control the management and affairs of the Company, the Subsidiary or the Sponsor Member.

Section 8.1 of the LLC Agreement provides

No Transfer of all or part of a Membership Interest in the Company or of any direct or indirect ownership or other economic, profits, voting or other equity interest of any kind in a Member or any constituent shareholder, member or partner thereof shall be made or become effective unless the Transfer is permitted under this Article and until all requirements and conditions stated in this Article, which shall be read and construed as a whole, have been satisfied in full or have

been waived by the non-transferring Member(s). Any Transfer in violation of this Article shall be invalid, ineffective and not enforceable for any purpose. No authorization, consent or waiver applicable to one Transfer shall apply or be deemed to apply to any other Transfer or requested Transfer.

Transfer is defined in the agreement as:

any sale, transfer, assignment, pledge, hypothecation or other disposal of all or any part of a Membership Interest (including economic interests) or any direct or indirect ownership interest in a Member in any manner, whether directly or indirectly by Transfer of all or a portion of any type of equity, profits, distribution or other ownership interest, and shall include the ability to approve or have any right to vote on, consent to or veto any decision or matter set forth in this Agreement and a right to receive any share or portion of payments of dividends, distributions or profits. The term "Transfer" shall not include for any purpose (a) the transfer of shares of capital stock or equity of any Affiliate of the Preferred Member thereof in public or private sales or (b) any transfer of ownership interests in DOF V REIT Holdings LLC, so long as Torchlight Investors LLC Controls, directly or indirectly, DOF V REIT Holdings LLC.

According to the allegations of the complaint, Preferred Member and Common Member entered into a first amendment to the LLC Agreement after Common Member committed several breaches of the LLC agreement. The amendment was created to give Common Member an opportunity to correct some of its breaches. However, Common Member was not able to comply with the terms of the first amendment, and as such, in April 2018, it was removed as Managing Member. Preferred Member then became Managing Member.

Common Member allegedly tried to prevent Preferred Member from acting as Managing Member and from correcting the damage that was caused by Common Member's breaches. For example, according to the complaint, it "insisted that it had not been removed as Managing Member, and sent letters to the contractors working on the

Property, threatening them with potential legal action if they did not communicate with Common Member as Managing Member or if they did not follow Common Member's instructions."

As a result, Preferred Member commenced an action against Common Member, Index No. 651819/2018 ("2018 action") seeking, *inter alia*, injunctive relief. Common Member filed an answer with counterclaims alleging mismanagement of JV and breaches of fiduciary duty. Common Member maintained that it would be receiving funding from ER, a real estate investor and alleged partner of Laurus, in order to "redeem Preferred Member's membership interest" in the company. After a hearing in April 2018, I granted a preliminary injunction and "enjoin[ed] the Common Member from interfering with Plaintiff Preferred Member's everyday running of the property." Preferred Member was told to not enter into any long term commitments or major transactions during that time period. Common Member was given twenty one days to redeem Preferred Member's interest, and if Common Member failed to do so, Preferred Member would be able to exercise full rights as manager of the property. Common Member was unable to get funding to redeem Preferred Member's interest during that time period, and Preferred Member was permitted to continue to exercise all of the rights as Managing Member. The 2018 action remains pending.

In October 2018, ER commenced an action in California, Case No. 18SMCV0020, alleging that ER was the victim of fraud in certain investments it had made with Laurus, Common Member's parent company. According to the allegations of the complaint, in

October 2017, ER “directed approximately \$11 million to an account controlled by Laurus for the purchase of an indirect equity interest in [Common Member].” It claimed that it indirectly invested in the Promenade project, and sought, *inter alia*, rescission and that the property be held in constructive trust for ER. Laurus was named as defendant, as well as JV, the Subsidiary, Preferred Member, REIT Holdings and Torchlight.

According to the complaint in this action, if ER had invested in the Promenade project through the purchase of an equity interest in Common Member as alleged in that California action, that investment would have constituted a “transfer” in violation of the LLC Agreement and would have been void and unenforceable.

Allegedly, ER, Common Member and others entered into a global settlement of the California action in January 2019 without the knowledge of the plaintiffs herein. Thomas C. Hebrank (“Hebrank”) signed the settlement agreement on behalf of JV and the Subsidiary, however, he was not authorized to sign on their behalf. The Term Sheet annexed to the settlement agreement provided that ER was a creditor of Common Member, JV and the Subsidiary, pursuant to an \$11 million “ERG Loan” and note.

A member rights agreement was also executed by ER, Common Member and others. It allegedly provided ER with the authority to make all decisions on behalf of Common Member, including those related to the pending 2018 litigation. The member rights agreement also provided the terms and conditions of a New Loan to Common Member, JV and the Subsidiary, payable upon the occurrence of a sale or liquidity event at Common Member, JV and the Subsidiary, which was allegedly to be used to fund the

2018 Action. ER allegedly hoped to gain control of Common Member's assets and the Promenade project through successful resolution of that action.

According to the plaintiffs, the ER loan/New Loan were falsely labeled as debt, and really were a disguised equity investment in Common Member, in violation of the transfer provisions of the LLC agreement. Further, the terms in the settlement agreement and member rights agreement relating to changes in control and transfers were in violation of the preliminary injunction and the LLC Agreement and therefore, void. In addition, Common Member had no authority to acknowledge any debt owed to or equity investment by ER, and had no authority to agree to any terms in the settlement agreement or member rights agreement because it was removed as managing member pursuant to the preliminary injunction in the 2018 action.

In May 2019, ER filed a new action in California ("Second California Action") against Preferred Member, REIT Holdings and Torchlight, alleging that ER reached a settlement of the first California action, which acknowledged that ER was a creditor of Common Member, Subsidiary, and JV and was entitled to return of its \$11 million. ER also maintained that it was an involuntary creditor of Common Member and JV, independent of the settlement agreement and as such, because "the purpose for which the funds were transferred-[ER]'s purchase of an interest in Common- was not carried out, [ER] is entitled to the immediate return of these funds from Common and JV, with interest."

Plaintiffs allege that “the Second California Action was in violation of the Decision and Order and the Injunction because, among other things, it sought to impose liability on such defendants, including Plaintiff Preferred Member in the [2018] Action, for the improper alleged settlement entered into in violation of the Decision and Order and the preliminary injunction, and it sought to relitigate the issue of Plaintiff Preferred Member’s status as Managing Member of the Company despite the entry of the preliminary injunction in the [2018] Action.”

Because the Second California Action and the Settlement Agreement and Note violated the preliminary injunction in the 2018 action, in June 2019, Preferred Member moved for contempt in the 2018 action. In response thereto, ER and Common Member had the Second California Action dismissed without prejudice, conceding that the Settlement Agreement and Note were not enforceable against JV or the Subsidiary, and that Hebrank was not authorized to sign on their behalf.

However, after it agreed to void the note, ER then had Common Member execute a new amended note (“Amended Note”), with many of the same terms as the original note, but without binding JV or Subsidiary. ER allegedly signed the Amended Note on behalf of Common Member, as its “manager.” According to plaintiffs in this action, control of Common Member by ER violates the LLC Agreement and therefore, the amended note is unenforceable.

On the above allegations plaintiffs allege two causes of action for tortious interference of contract. First, they contend that ER and Common Member’s agreement

whereby ER invested in Common Member caused Common Member to breach the transfer restrictions in the LLC agreement. As such, ER tortiously interfered with the LLC Agreement. Second, they maintain that the settlement agreement, note and member rights agreement violated the transfer and change in control provisions of the LLC Agreement and by causing Common Member to execute those, ER tortiously interfered with the LLC Agreement.

Plaintiffs also allege causes of action seeking declaratory judgments. Specifically, plaintiffs seek judgments declaring (1) that any transfer of control by Common Member to ER is void and unenforceable, and as such, any action purportedly taken by ER on or behalf of Common Member is void; (2) that the amended note and the new loan are disguised equity investments rather than debt obligations of Common Member and as such, are impermissible transfers in violation of the LLC Agreement and void; (3) that if the amended note and new loan are treated as debt of rather than equity investment in Common Member, then any payment or transfer would be in violation of the LLC Agreement and void and as such, ER is not entitled to any payment under the amended note and new loan; (4) that if the amended note and new loan are treated as debt of rather than an equity investment in Common Member, they are constructively fraudulent in violation of Debtor and Creditor Law Section 273, or fraudulent in violation of Debtor and Creditor Law Section 276; and (5) that plaintiffs have no liability to ER on theories alleged in the Second California action because those claims were released by the settlement agreement and, in any event, are barred by the LLC Agreement and

preliminary injunction's protection of plaintiffs' rights to act and make decisions as Managing Member.

Finally, plaintiffs seek entry of a permanent injunction enjoining ER, and all those in privity with ER, from taking or continuing to take any of the following actions: (a) controlling or acting on behalf of Common Member, whether as "Managing Member," "Manager" or otherwise, in connection with the 2018 action, the counterclaims, any matter arising under or relating to the LLC Agreement, or otherwise; (b) taking any action to enforce the amended note; and (c) taking any action to enforce the new loan.

ER now moves to dismiss the complaint. According to ER, in 2017, it invested \$44 million with Laurus, \$11 million of which was intended for the Promenade project. ER contends that Laurus committed various acts of fraud and mismanagement, and it was disbanded. ER learned that its investment had never been approved by Torchlight and other entities, however, Subsidiary took ER's money anyway and used it for certain renovations in the Promenade project. It explains that as part of the settlement of the California action, ER took over for Laurus and was responsible for operating and funding Common Member, including managing its lawsuit with Preferred Member.

In the motion to dismiss ER first argues that plaintiffs have not stated a claim for tortious interference with the LLC Agreement because they fail to state any actual breach of contract, do not allege that ER intended to induce a breach of contract, and do not state any damages. ER's complaint in the first California action states that ER's investment was never actually consummated and completed and ER did not ever end up acquiring

Common's equity, so there could not have been any actual breach of transfer restrictions. Further, there are only conclusory allegations of intent, without any factual bases, and no allegations of damages.

With regard to the second cause of action alleging tortious interference, ER argues that plaintiffs failed to sufficiently plead that it intentionally induced Common Member to breach the change in control and transfer provisions of the LLC Agreement through the execution of the settlement agreement, note and member rights agreement. Further, plaintiffs do not plead any factual basis for damages. The settlement agreement, member rights agreement and note were entered into after January 2019, which was after Common Member's removal as managing member of JV. As such, the transfer restrictions in JV's operating agreement had no application, the change of control provisions were no longer applicable, and no damages could have been sustained.

ER next argues that the third cause of action for a declaratory must be dismissed because, while Section 6.4 of the LLC agreement does provide that the parties will not give any other person the right to control the management and affairs of JV, Subsidiary or Common, that section does not void a violation. Only damages could potentially be sought for a violation; declaratory and injunctive relief would not be available. Further, while Article 8 of the operating agreement provides that "any transfer in violation of this article shall be invalid, ineffective, and not enforceable for any purpose," this provision only prevents transferring equity interests, and not the right to control management and affairs. Further, Article 8 only voids transfers that violated Article 8, not transfers that

violated Article 6. In any event, Common Member is not in control of the Promenade anymore so the transfer restrictions have no application. In fact, the only actual application in enforcing the subject provisions would be that ER would be prevented from controlling Common Member in the pending litigations, and Common Member would have no source of funding to represent itself.

ER argues that the fourth cause of action seeking a judgment declaring that the amended note and new loan are just “disguised equity investments” in Common, violate the LLC agreement and are void must be dismissed because (1) plaintiffs are not a party to the amended note and new loan or any financial obligations between ER and Common Member and therefore, have no standing to seek this relief; (2) the amended note is not an equity interest pursuant to Delaware Code Section 18-101(10); and (3) invalidating the amended note and new loan based on those restrictions would deprive Common Member of its litigation funding and would deprive ER of the consideration it received for the settlement of its action with Laurus.

With regard to the fifth cause of action for a judgment declaring that ER is not entitled to any payment under the Amended Note or New Loan if they are in fact debt, ER maintains that plaintiffs have no standing to request this relief because it relates to financial obligations between Common Member and ER and plaintiffs are not parties thereto. In any event, the transfer restrictions in the LLC agreement do not apply to debt.

ER further argues that the sixth cause of action seeking a judgment declaring that the amended note and new loan are either constructively fraudulent or actually fraudulent transfers pursuant to the Debtor and Creditor law must fail because plaintiffs have an

adequate alternate remedy under the Debtor and Creditor law, the allegations are conclusory, and the elements of Debtor and Creditor law violations were not adequately pled. As to Section 273, the complaint fails to plead that the amended note or new loan rendered Common insolvent or that the amended note and new loan were incurred without fair consideration. Further, with regard to Section 276, there is no factual support for a contention that ER intended to deny other creditors a recovery because the new loan and amended note only became due upon a liquidity event, which would mean Common is highly solvent and able to pay creditors. that the claims and requests for relief asserted by ER against Preferred Member, REIT Holdings and Torchlight in the Second California action have been released by the settlement agreement and, in any event, are barred by the LLC Agreement and preliminary injunction's protection of plaintiffs' rights to act and make decisions as Managing Member.

ER next maintains that the cause of action seeking a judgment declaring that that plaintiffs have no liability to ER on theories alleged in the Second California action must be dismissed because the second California action was dismissed. In any event, ER was not a party to the LLC agreement and therefore was not bound to it. In addition, none of the claims in that action related to the agreement, rather, they related to ER's rights as a creditor. With regard to plaintiffs' argument that the settlement agreement prohibited ER's claims in the second California action, the claims asserted in that action were against entities that were not even parties to the settlement agreement. Further, that settlement agreement was repudiated as to JV and Subsidiary and so any releases could not apply to them or any of their affiliates and the releases only applied to claims

pertaining to issues in the first California action. In addition, plaintiffs' argument that the injunction in the New York action prohibited ER's claims in the second California action is without merit because the injunction merely allowed Preferred Member to manage JV and Promenade and did not operate to bar ER, which was not a party to the New York action, from asserting any claims.

Finally, ER argues that the cause of action for a permanent injunction must fail because it is derivative of the other claims.

In opposition, plaintiffs first argue that the first cause of action for tortious interference with contract is sufficiently pled. They explain that the deal between ER and Common breached the LLC Agreement even if the deal was never consummated, because it gave ER the right to acquire an interest in Common. Further, the complaint in the first California action clearly supports the theory that a "transfer" in breach of the LLC Agreement occurred in that it states that Laurus "sold" LLC membership interests to ER.¹ In addition, as to intent, ER is a sophisticated business entity which must have known that it was breaching the LLC Agreement when it invested in Common Member. ER's acts were taken with deliberate disregard to plaintiffs' rights. It knew that consents were required in order for the investments to go through. In any event, ER has not submitted any evidence or affidavit that its actions were not done with intent. With regard to damages, ER's part in this project now creates uncertainty over the project, over

¹ In reply, ER notes that the equity mentioned in those allegations was not equity in Common, but actually referred to equity in a different entity that ER was "told would hold equity in Common on ER Group's behalf which turned out to be false."

plaintiffs' role in the project and ultimately, plaintiffs' attempts to sell the property. ER is now essentially plaintiffs' partner, which it did not bargain for.

With regard to the second cause of action, plaintiffs argue that the execution of the settlement agreement, member rights agreement and note violated the LLC Agreement's transfer and change in control provisions. ER's inducement of Common Member to breach those provisions was clearly intentional in that it took place after the entry of the preliminary injunction.

Plaintiffs next argue that with regard to the third cause of action, ER's argument that the transfer provision in section 6.4(b) does not void the prohibited transfer of control, rather it just creates a right to recover damages is incorrect when it is read in conjunction with Section 8.1, which provides that any transfer in violation of Article 8 is invalid and unenforceable. Further, contrary to ER's position, Section 8.1 does not only invalidate transfers of equity interests, and not control, rather, it invalidates transfers of any attribute or ownership, whether or not economic. In any event, the transfer here consisted of a transfer of control combined with substantial economic interests.

Next, plaintiffs maintain that ER's arguments in support of dismissal of the fourth cause of action are without merit. Contrary to ER's contention, plaintiffs have standing to assert this cause of action because the amended note and new loan are in fact equity investments, and not debt, and violate the LLC Agreement's transfer prohibitions. Specifically, they are clearly equity and not debt because neither require current payment of principal or interest; both are due, if at all, at maturity; the maturity date is not even a

fixed date, rather the amounts only become due upon a “liquidity event;” the right to repayment on both is not absolute, but rather depends on Common Member’s economic performance; neither have covenants normally found in a loan transaction, rather the only covenant is a restriction on dividends to Laurus; and Common Member has no liquidity or capital and as such, would not be able to borrow from a disinterested third party lender. According to plaintiffs, it is clear that “the purpose of these ‘loans’ is also consistent with equity: the Amended Note reflects ERG’s alleged past equity investment, not a new infusion of funds, and the New Loan is to fund a litigation that ERG will control and from which ERG will reap any benefit, including an equity participation by ERG, based on when the putative ‘Liquidity Event’ occurs.”

With regard to the fifth cause of action, plaintiffs contend that section 8.1 prohibits transfers of any economic interest, including cash. Plaintiffs explain, “both the Amended Note and the New Loan are payable only upon a liquidity event. Since Common has no operations other than its direct and indirect interest in the JV and Subsidiary, the only likely source of cash, upon occurrence of a liquidity event or otherwise, would be payment of dividends, distributions or profits.” As such, any transfer or payment of funds from Common Member to ER upon a liquidity event would violate the LLC agreement.

Plaintiffs argue that in their sixth cause of action, they are not only seeking to set aside the amended note and new loan under the Debtor and Creditor law, but also seek a judgment declaring, that ER has no right to obtain any amounts from Common Member

before Common Member's debt to plaintiffs is paid in full. Whether a fraudulent transfer occurred cannot be determined on a motion to dismiss. The allegations that Common Member was both insolvent and inadequately capitalized when the "loan" obligations occurred is enough to state a claim under Debtor and Creditor Law Section 273. Further, the complaint adequately states a claim under Debtor and Creditor Law Section 276 because the allegations sufficiently demonstrate that ER "forced Common to incur the debt with actual intent to hinder or delay plaintiffs' recovery against Common."

Plaintiffs further maintain that their cause of action seeking injunctive relief should not be dismissed even if only one of plaintiffs' claims survive this motion.

Finally, plaintiffs argue, *inter alia*, that their eighth cause of action seeking a judgment declaring that they have no liability to ER on theories alleged in the second California action must not be dismissed because even though the second California action was dismissed without prejudice, it could recommence at any time. Further, ER's claims that it was not a party to the LLC agreement, that the LLC agreement was not a basis for any claims in the second California action, and that its claims in the second California action were based on its rights as a creditor of JV, are without merit because any monies that may have been provided to the project would have had to go through Common Member and therefore, the LLC Agreement. If anything, it would only have been a creditor of Laurus, not Common Member, based on allegations in the first California complaint that ER transferred funds "to an account controlled by Laurus."

Discussion

To establish a claim of tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). A defendant must induce or intentionally acquire a third-party's breach of its contract with the plaintiff and not merely have knowledge of its existence. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996); *Beecher v. Feldstein*, 8 A.D.3d 597 (2nd Dept. 2004).

Here, plaintiffs fail sufficiently to state their first cause of action for tortious interference with the LLC agreement. Plaintiffs set forth conclusory allegations, without any factual support, that ER induced or intentionally procured Common Member's breach of the LLC Agreement. In fact, the complaint in the first California action (which plaintiffs incorporated by reference in their complaint in this action) belies plaintiffs' claim that ER "must have known" that a breach of the LLC Agreement would occur and that ER acted deliberately in procuring a breach. According to the complaint in the first California action, (1) Laurus hid information from ER; (2) ER was not aware that approvals and consents for the investment had not been obtained; and (3) ER's "investment" was illusory and not used as ER believed it would be. Plaintiffs have not adequately pled facts to support a claim that ER induced or intentionally procured Common Member's breach of the LLC Agreement.

Similarly, the second cause of action alleging tortious interference with contract is insufficiently pled because plaintiffs' allegations that ER induced or intentionally procured Common Member's breach of the LLC Agreement through the execution of the settlement agreement, member rights agreement and note are bare, conclusory allegations without factual support.

A motion to dismiss a claim for declaratory judgment, presents the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration. *Staver Co. v. Skrobisch*, 144 A.D.2d 449 (2nd Dept. 1988). A declaratory judgment is only appropriate where a justiciable controversy exists, and one only exists where there is an actual controversy affecting the parties' rights. *Bolt Assocs. v. Diamonds-In-The-Roth*, 119 A.D.2d 524 (1st Dept. 1986). "A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff." *Waterways Dev. Corp. v. Lavalley*, 28 A.D.3d 539, 540 (2nd Dept. 2006)(internal citations omitted).

Plaintiffs' third cause of action seeks a judgment declaring that the transfer of control by Common Member to ER is violative of the LLC Agreement and void, and the fourth and fifth causes of action seek judgments declaring that that the amended note and new loan, as either equity investments or debt, are violative of the LLC Agreement and void. These causes of action involve a controversy affecting plaintiffs, ER and Common Member's rights. The parties offer differing interpretations of the LLC Agreement and the relationship between plaintiffs, ER and Common Member. I find that, taken the

allegations stated as true, these causes of action are sufficiently stated to survive a motion to dismiss.

Plaintiffs' sixth cause of action seeks a judgment declaring that if the amended note and new loan are treated as debt of rather than an equity investment in Common Member, they are constructively fraudulent in violation of Debtor Creditor Law Section 273, or fraudulent in violation of Debtor and Creditor Law Section 276.

Under Debtor and Creditor Law Section 273, a plaintiff must plead that the debtors made a conveyance, they were insolvent before the conveyance or rendered insolvent, and the conveyance was made without fair consideration. *Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526 (1st Dept. 1999). Debtor and Creditor Law Section 276 provides that "every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." "Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e. circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent'" *Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dept. 1999). Causes of action under Debtor and Creditor Law Section 276 must be pled with sufficient particularity to satisfy CPLR 3016(b). *See generally RTN Networks, LLC v Telco Group, Inc.*, 126 A.D.3d 477 (1st Dept. 2015).

Here, plaintiffs sufficiently state a cause of action seeking a judgment declaring that the amended loan and new note violate Debtor and Creditor Law Section 273. They allege that Common Member was insolvent and inadequately capitalized when the amended note and new loan were rendered, and that Common Member did not receive fair consideration given in good faith for the incurrence of such obligation. However, plaintiffs fail to allege badges of fraud pled with particularity sufficient to support a Debtor and Creditor Law Section 276 cause of action. therefore, the cause of action seeking a judgment declaring that the amended note and new loan violate Debtor and Creditor Law Section 276 is dismissed.

Plaintiffs' eighth cause of action for a judgment declaring that that they have no liability to ER on theories alleged in the Second California action is dismissed because the second California action was dismissed and as such, no justiciable controversy exists. If, as plaintiffs predict, the causes of action asserted against them are reinstated or realleged at some future time, plaintiffs are free to seek declaratory relief at that time.

Finally, to sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a "violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor." *Caruso v. Bumgarner*, 120 A.D.3d 1174, 1175 (2nd Dept. 2014)(internal quotations and citations omitted). Given that certain causes of action still remain, for

which monetary damages would allegedly be inadequate, the permanent injunction cause of action will not be dismissed.

For the foregoing reasons it is

ORDERED that the defendant ER Group LRS, LLC's motion to dismiss the complaint is granted only to the extent that the first and second causes of action for tortious interference with contract are dismissed, the sixth cause of action to the extent it seeks recovery based on a violation of Debtor and Creditor Law Section 276 is dismissed, and the eighth cause of action for a declaratory judgment is dismissed, and the remaining causes of action are severed and shall continue. Defendant is directed to serve an answer within thirty (30) days of this decision and order.

This constitutes the decision and order of the court.

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

7/9/2020
DATE

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