SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA ANNE CRANE **PART** IAS MOTION 15EFM

Justice

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PARADELO, JOSE

Plaintiff,

- v -

AYTUG, PETER

Defendant.

----------X

INDEX NO. 650108/2017

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

Upon the foregoing documents, it is

MELISSA A. CRANE, J.S.C.:

This is a dispute concerning ownership interests in a Florida limited liability company. Defendants Peter Aytug (Aytug), Kate Fulya Aytug (K. Aytug), York Funding, LLC (York) and 1900 7th Place LLC (1900 LCC) (together, Aytug defendants), move for partial summary judgment and dismissal of the first five out of six causes of action.

For the reasons stated below, the court grants defendants' motion.

The Background Allegations

Plaintiff Jose Paradelo (Paradelo), is a real estate investor and manager of co-plaintiff Ansonia 1692, LLC (Ansonia), a domestic limited liability company (together, plaintiffs) (*see* New York Supreme Court Electronic File [NYSCEF] Doc No. 1, complaint, ¶¶ 1-3; Doc No. 37, affidavit by Paradelo in opposition, ¶ 4). On October 20, 2015, Ansonia signed an agreement to purchase a premises known as 1900 SW 7th Place, Ocala, Florida (the premises), for $375,000

from non-party 9400 Granfield, LLC (Granfield), a Florida company (*see* NYSCEF Doc No. 38, residential contract for sale and purchase of 1900 SW 7th Place, dated October 11, 2015, ¶ 2 [b]).

Paradelo approached Aytug, whom he had long known as a real estate investor and, through his Queens-based company York, a maker of "hard money" loans (*see* NYSCEF Doc No. 37, ¶ 4). Paradelo sought mortgage funding in the amount of $750,000 to acquire and improve the Florida premises (*see* NYSCEF Doc No. 1, complaint, ¶¶ 6, 10, 17). York and Aytug contacted defendant Rabs November 12 Ocala Associates, also known as Rabs PA Ocala Associates (Rabs), a Florida business entity, through Rabine Realty Corp. (Rabine Realty), a Bronx-based corporation (*see* NYSCEF Doc No. 1, complaint, ¶¶ 8, 9).

According to the complaint, Aytug informed Paradelo that Rabine Realty would not fund the loan if Paradelo owned an interest in the premises. Therefore, Paradelo and Aytug then formed a Florida limited liability company "with the intent that [it] take title to the premises and serve as the borrower" (*see* NYSCEF Doc No. 1, ¶¶ 20-21). Paradelo asserts that he and Aytug agreed that he would own 70 percent of the company shares and Aytug would own 30 percent (*see* NYSCEF Doc No. 1, ¶ 22; Doc No. 37, affidavit of Paradelo in opposition, ¶ 10). Aytug disputes this and asserts that he "advised Paradelo" that he would only arrange for funding for the premises if he were "the sole owner of the entity acquiring the [p]roperty" (NYSCEF Doc No. 29, affidavit of Vincent Falcone III [affidavit of Falcone], exhibit C, affidavit of Peter Aytug in *Rabs November 12 Ocala Assocs. v 1900 7th Place, LLC*, Circuit Court, Fifth Judicial District, Marion County, Florida, Cas No. 17-CA-000246-AX [*Rabs foreclosure proceeding*], ¶ 6). However, Aytug agreed that Paradelo would have a "contingent option" that would allow him to acquire a 70 percent membership interest, "and thereby obtain a majority of the upside profit, but

only if the transaction succeeded and the [loan] was repaid in full" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug, ¶ 8).

According to the original articles of organization, the entity was formed under the name 537 SW 6th Ave., LLC, with a Coral Gables, Florida address (*see* NYSCEF Doc No. 40, articles of organization of 537 SW 6th Ave LLC, filed on September 15, 2015 at the office of the Secretary of State, Tallahassee, Florida). The articles of organization identify Aytug as the manager and managing member, with a "care of" address with Lee Schmachtenberg, Esq., the company's registered agent located in Coral Gables, Florida (*see* NYSCEF Doc No. 40, articles of organization of 537 SW 6th Ave LLC at 2-3). There is no mention of Paradelo or Ansonia.

The company's articles of organization were amended and filed on October 19, 2015 and the company's name was changed to 1900 7th Place, LLC (1900 LLC) (*see* NYSCEF Doc No. 42, articles of amendment to articles of organization of 537 SW 6th Ave LLC at 1, filed on October 19, 2015). The amended articles of organization listed both Paradelo and Aytug as members authorized to manage the property, and the mailing address for the company was listed as that of Paradelo's New York City office (*see* NYSCEF Doc No. 42 at 1). The articles of organization were amended again the next day to remove Paradelo from the list of individuals authorized as members to manage the premises and to change the company's mailing address to that of York's Queens County address (*see* NYSCEF Doc No. 41, articles of amendment to articles of organization of 1900 7th Place, dated October 20, 2015, filed October 25, 2015, at 1, 2). Notably, Paradelo believes that the second amended articles of organization identify him as the "sole manager" of 1900 LLC (*see* NYSCEF Doc No. 37, affidavit of Paradelo in opposition, ¶ 11).

In early November 2015, Rabine Realty informed York that its client, Rabs, had approved the loan to 1900 LLC (*see* NYSCEF Doc No. 39, loan approval letter from Rabine Realty to York, dated November 3, 2015). The loan was to be secured by collateral consisting of the first mortgage on the premises, as well as "an assignment of leases and rents on the property, and guarantees by individuals and a pledge of all the membership interests in" the borrower (NYSCEF Doc No. 39, ¶ 3). Aytug, his wife, K. Aytug, and Paradelo personally guaranteed the loan, jointly and severally (*see* NYSCEF Doc No. 39, ¶¶ 3, 13; *see also* Doc No. 1, complaint, ¶ 5).

The loan had a one-year term and was to be repaid in monthly payments, with the principal and any accrued or unpaid interest repaid at maturity (*see* NYSCEF Doc No. 39, loan approval letter from Rabine Realty to York, ¶¶ 4, 6). By its terms, Aytug, or an entity the guarantors controlled, was required to be a member of the borrower, "and must have the right to receive 30 % of the net income from the property and 30 % of the distributions of funds of the [b]orrower" (NYSCEF Doc No. 39, ¶ 23 [c]). Aytug or an affiliated entity was to manage the premises as "managing agent," while the borrower and managing agent were to enter into a "management contract" (NYSCEF Doc No. 39, ¶ 23 [f]).

On November 6, 2015, Aytug signed acknowledgement of the operating agreement for 1900 LLC (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug in *Rabs foreclosure proceeding,* exhibit 1, Florida limited liability company operating agreement for 1900 7th Place, LLC). Although the complaint refers to a management agreement in which Ansonia was appointed as manager of the company and the property manager of the premises (*see* NYSCEF Doc No. 1, complaint, ¶¶ 22, 27), the only management agreement included in the motion papers is the one Aytug signed, as owner and property manager of 1900 LLC, dated

November 12, 2015 (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug in *Rabs foreclosure proceeding,* exhibit 4, management agreement dated November 12, 2015). The agreement set forth the terms of the property manager's duties but made no mention of Ansonia or Paradelo.

According to the complaint, based on the terms of the management agreement as well as the ownership agreement—although making no mention of the second amended articles of organization deleting Paradelo as a managing member—Ansonia assigned its contract to purchase the premises to 1900 LLC (*see* NYSCEF Doc No. 1, complaint, ¶ 23; *see also* NYSCEF Doc No. 43, warranty deed, dated November 12, 2015).

Also on November 12, 2015, Paradelo signed a "continuing warranty," indicating that, for "valuable consideration," Paradelo, the guarantor, unconditionally guaranteed to Rabs, the lender, that he was responsible for payment of the entire loan, including "[i]ndebtedness arising under subsequent or successive transactions between [b]orrower and [l]ender" (NYSCEF Doc No. 1, complaint, ¶ 23; *see also* NYSCEF Doc No. 44, continuing warranty dated November 12, 2015 at 1). On the same date, Aytug, as seller, and Paradelo, as buyer, signed an "Option to Purchase Agreement," wherein Aytug granted an exclusive option to Paradelo to purchase 70 percent of the membership interest in 1900 LLC, for $10.00, commencing November 12, 2015 and expiring on November 1, 2026. This option would come into effect only after the loan from Rabs to 1900 LLC was paid in full (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug in *Rabs foreclosure proceeding* exhibit 3**,** option to purchase agreement at 1).

In July 2016, without Paradelo's knowledge or approval, 1900 LLC took on an additional $100,000 in debt from Rabs, through a consolidated promissory note, a mortgage modification agreement, and a future advance promissory note. Together this formed the consolidated

balloon promissory note that Aytug signed as managing member and manager of 1900 LLC (*see* NYSCEF Doc No. 46, consolidated balloon promissory note between 1900 LLC and Rabs, dated July 11, 2016; *see also* NYSCEF Doc No. 1, complaint, ¶¶ 55-56). The consolidated balloon promissory note encompassed the "entire unpaid principal balance plus all accrued and unpaid interest thereon," in the amount of $850,000 (NYSCEF Doc No. 46, consolidated balloon promissory note at 1). In it, 1900 LLC promised to pay the additional $100,000 to Rabs in the same manner as the mortgage, with the same security agreement (*see* NYSCEF Doc No. 46, ¶ 7; *see also* consolidated balloon promissory note, future advance promissory note).

Aytug "initially delegated management to the Property and supervision of the renovations to Paradelo" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug in *Rabs foreclosure proceeding* ¶¶ 10-11).[1] However, he allegedly discovered that renovations were left incomplete and the premises "remained in poor condition." Aytug then learned that Paradelo allegedly leased apartments to new tenants without notifying him or accounting about the rent payments and security deposits of those tenants (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug in *Rabs foreclosure proceeding,* ¶ 11).

The complaint claims that Aytug informed Paradelo in December 2016 that Ansonia's agreement to act as property manager was terminated, that Paradelo had no interest in 1900 LLC or the premises, and was barred from the premises (*see* NYSCEF Doc No. 1, complaint, ¶ 29). Tenants were notified that Ansonia and Paradelo no longer managed the premises (*see* NYSCEF Doc No. 1, ¶ 29). Aytug alleges that Paradelo continued to demand that tenants pay rent to him, threatened evictions, and "repeatedly attempted to interfere" with the premises' management (*see*

[1] In a notarized letter to the Section and City of Ocala, Florida, dated January 13, 2016, Aytug described Paradelo as a general partner of the company, with "all the right[s] to execute and complete any and or all paper work" that the department might need or require (NYSCEF Doc No. 45, letter from 1900 LLC to Section and City of Ocala, Florida, dated January 13, 2016).

NYSCEF Doc No. 29, affidavit of Falcone, exhibit C, affidavit of Aytug in *Rabs foreclosure proceeding*, ¶ 13). Even after this change, Paradelo continued to remain liable for the financial health of the premises because of his guaranty (*see* NYSCEF Doc No. 1, complaint, ¶ 30).

The complaint

Paradelo and Ansonia commenced their action by filing and serving their complaint, dated January 5, 2017, containing six causes of action. They first seek a declaratory judgment that Paradelo owns a 70 percent member interest in 1900 LLC, and that Ansonia is the property manager of the premises pursuant to the management agreement (*see* NYSCEF Doc No. 1, ¶¶ 32-33). Second, they demand the imposition of a constructive trust for Paradelo based on the judgment that Paradelo holds 70 percent of the member interest of 1900 LLC (*see* NYSCEF Doc No. 1, ¶¶ 39-42). The third cause of action alleges that Aytug fraudulently represented to Paradelo that he owned 70 percent of 1900 LLC and had a 70 percent equity interest in the premises, in order to induce him and Ansonia to assign its contract of sale of the premises to 1900 LLC, that Paradelo believed and reasonably relied on those representations when he assigned Ansonia's contract of sale to 1900 LCC and signed his guaranty of the entire loan and has suffered damages "believed to be not less than $1,000,000 (*see* NYSCEF Doc No. 1, ¶¶ 44-48; and at 11, ¶ 3).

The fourth cause of action alleges that Aytug and York breached their fiduciary duty by converting not less than $40,000 of the loan proceeds, and causing 1900 LLC to take out an additional $100,000 on the loan for their personal use without plaintiffs' knowledge; they seek an accounting of the rents and profits derived from the mortgage loan proceeds as of December 1, 2016 (*see* NYSCEF Doc No. 1, ¶¶ 51-58, and at 11, ¶ 4). The fifth cause of action seeks return of the $100,000 commission fee plaintiffs paid to York in reliance on York's false

misrepresentation that it was a licensed mortgage broker (*see* NYSCEF Doc No. 1, ¶¶ 61-63). The sixth cause of action seeks rescission of the loan guaranty if it is found that Paradelo has no interest in the premises or in 1900 LLC, based either on the mutual mistake of Paradelo, Rabine Realty and Rabs concerning Paradiso's status as a member of 1900 LLC, or on the unilateral mistake by Paradelo who executed the guaranty based on Aytug and Rabine Realty's false representations that he held a 70 percent interest in 1900 LLC (*see* NYSCEF Doc No. 1, ¶¶ 69-71).

The Foreclosure Proceeding, Florida Circuit Court

In February 2017, Rabs commenced a foreclosure proceeding against 1900 LLC in Florida (the *Rabs foreclosure proceeding*). Rabs claimed that 1900 LLC had defaulted in repaying the $850,000 consolidated mortgage on the premises, due on December 31, 2016, plus daily interest (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit A, verified complaint in *Rabs foreclosure proceeding,* ¶¶ 13, 15, 16). Rabs also filed an "unopposed verified motion" for the appointment of a receiver to take immediate possession of the premises and its assets in order to operate the business and protect the value of the property (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit B, verified motion by Rabs in *Rabs foreclosure proceeding,* ¶ 19). Rabs alleged that a "dispute between the owner of [the premises owned by 1900 LLC] and the purported manager of the subject property has caused tenants to stop paying rent," and "[n]either party will recognize the other's property manager" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit B, verified motion in *Rabs foreclosure proceeding,* ¶¶ 1, 16). Further, 1900 LLC, "or its allegedly former property manager" had been receiving rents and not turning them over to Rabs (NYSCEF Doc No. 29, affidavit of Falcone, exhibit B, verified motion in *Rabs foreclosure proceeding,* ¶ 18).

The Florida court held a hearing on February 14, 2017 to address the unopposed application (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript of hearing dated February 14, 2017 [transcript], in the *Rabs foreclosure proceeding*). Counsel for both Rabs and 1900 LLC appeared in person, and Daniel Milian, Esq., a Florida attorney, appeared by telephone on behalf of Paradelo.

Milian explained to the court that Paradelo "had an interest in" 1900 LLC, and was appearing as a "matter of interest" although he had not been formally served (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in the *Rabs foreclosure proceeding* at 3, lines 14-19). Milian noted several disputes between 1900 LLC and Paradelo, in particular as to the ownership of 1900 LLC, as well as the condition of the premises and the payment of the balloon mortgage interest through December 2016 (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 6, lines 17-24; 7, lines 7-12). Milian claimed that Paradelo had never agreed to allow an additional $100,000 loan to 1900 LLC (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 7, lines 14-19). He further argued that it made no sense to have no interest in the premises or 1900 LLC, but still be the guarantor (NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 7, lines 20-23). He concluded that, based on the current relationship between Paradelo and 1900 LLC, appointment of a receiver was inappropriate until some of the "background" was addressed (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 14, lines 20-25).

Counsel for 1900 LLC, Mr. Falcone, disputed Milian's claim that Paradelo had any ownership interest in the premises. He explained that Ansonia "got the deed" for the premises from Granfield, and that Paradelo had signed it, but that Paradelo had "held the deed for a day,

and then it was transferred to the 1900 entity" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 15, lines 14-17). He acknowledged that Paradelo "was responsible for a time period for managing the property; collecting rents; supervising the renovations," but that he was terminated in December 2016, at which point Aytug demanded that the tenants' rents be paid to the premises's corporate address (NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 12, lines 12-19).

The Florida court concluded "that the proper parties are before the Court, and it's obvious from the argument that I've heard this morning that there is a real dispute," namely that one attorney claimed his client owned the property and another attorney saying that his client "has some interest here" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 15, lines 23-25; 16, lines 1-2, 5-9). The court signed the receivership order while the parties were before him, stating he was "just trying to make sure that the status quo is maintained and the property is not wasted" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit D, transcript in *Rabs foreclosure proceeding* at 17, lines 11-13).

Rabs filed its motion for summary judgment on March 30, 2017 (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit F, motion for summary judgment in *Rabs foreclosure proceeding*). Rabs argued that 1900 LLC was in default, and that Rabs had made a written demand to 1900 LLC, but that 1900 LLC had "failed to honor its respective obligation under the [l]oan [d]ocuments" (*see* NYSCEF Doc No. 29, affidavit of Falcone, exhibit F, motion for summary judgment in *Rabs foreclosure proceeding*, ¶¶ 8-11).

1900 LLC's response did not dispute that the loan was in default. Nor did it oppose the entry of a final summary judgment of foreclosure (*see* Doc No. 29, affidavit of Falcone, exhibit

G, defendant's response to plaintiff's motion for summary judgment, in *Rabs foreclosure proceeding,* ¶ 1). Instead, it challenged Paradelo's claim of any interest in the premises, and asserted that "Paradelo's counsel has ignored repeated inquiries from undersigned counsel [Falcone] and taken no action whatsoever in this litigation to advance the argument raised at the receivership hearing" (NYSCEF Doc No. 29 affidavit of Falcone, exhibit G, defendant's response to plaintiff's motion for summary judgment in *Rabs foreclosure proceeding*, ¶ 4).

The court scheduled a hearing on the motion for summary judgment for April 19, 2017 (*see* NYSCEF Doc No. 29, affidavit of Falcone, ¶ 17). According to Falcone, he emailed Milian on March 6, 2017 and again on March 10, 2017, "to ascertain whether he continued to represent Mr. Paradelo in the Florida action," and left a voicemail at Milian's office with a similar question on March 9, 2017. However, Milian did not respond to any of these messages (NYSCEF Doc No. 29, affidavit of Falcone, ¶¶ 10-12). Falcone emailed Milian a copy of Rabs's motion for summary judgment and 1900 LLC's response on April 11, 2017, and emailed Milian again on April 17, 2017, attaching the notice of hearing on the summary judgment motion; Milian did not respond or submit papers (*see* NYSCEF Doc No. 29, affidavit of Falcone, ¶¶ 9-12, 15-16).[2]

Following a "brief hearing," the Florida court issued its written decision dated April 21, 2017, granting a final summary judgment of foreclosure in Rabs's favor (*see* NYSCEF Doc No. 29, affidavit of Falcone, ¶ 18; exhibit I, decision in *Rabs foreclosure proceeding*, dated April 21, 2017). The court found "no genuine issue as to any material fact" (NYSCEF Doc No. 29, affidavit of Falcone, exhibit I, decision in *Rabs foreclosure proceeding*, ¶ 2). The decision noted

[2] Falcone provided copies only of his April 11 and April 17, 2017, emails, together with the attached motion papers and notice of hearing (*see* NYSCEF Doc No. 50, affidavit of Falcone [in reply], exhibits A, B). Paradelo denies receiving notice of the April 19, 2017 summary judgment hearing (*see* NYSCEF Doc No. 49, brief by plaintiff in opposition at 7, citing Doc No. 37, affidavit of Paradelo in opposition, ¶ 33).

Paradelo's claim of an ownership interest in 1900 LLC, but because Paradelo "took no further action to substantiate or pursue his claim of ownership," and based on Aytug's affidavit and attachments pertaining to the premises, it held that Aytug was the "100% member and sole managing member of the 1900 entity," who had the authority to engage and direct counsel for 1900 LLC and to consent to entry of the court's summary judgment of foreclosure on behalf of 1900 LLC (NYSCEF Doc No. 29, affidavit of Falcone, exhibit I, decision in *Rabs foreclosure proceeding*, ¶ 3).

The court scheduled a public foreclosure sale for July 3, 2017. On that date, Rabs purchased the premises (*see* NYSCEF Doc No. 29, affidavit of Falcone, ¶¶ 18-19).

Motion for partial summary judgment

The Aytug defendants now move for partial summary judgment pursuant to CPLR 3212 (e), seeking severance and dismissal of the first through fifth causes of action (*see* NYSCEF Doc No. 28, notice of motion, dated February 15, 2018). They rely on the doctrine of collateral estoppel, and contend that the issue of whether Paradelo owns 70 percent of the premises, underlying the first five claims of the complaint, has been litigated and decided against Paradelo in the Florida foreclosure action (*see* NYSCEF Doc No. 31, brief for Aytug defendants at 1). They point out that Paradelo's counsel appeared in the Florida proceeding, where Paradelo had a full and fair opportunity to litigate this question (*see* NYSCEF Doc No. 31 at 1).

Plaintiffs argue that collateral estoppel is not appropriate because they were not parties to the Florida action, and did not have a full and fair opportunity to litigate the issues in this action in the Florida action (*see* NYSCEF Doc No. 49, brief by plaintiffs at 1). Further, the ownership of 1900 LLC was not a necessary issue in the foreclosure action, because that court needed to find only that there was a valid mortgage and that 1900 LLC had defaulted (*see* NYSCEF Doc

No. 49 at 11). They also contend that the Florida court's determination did not address the issues present in this action (*see* NYSCEF Doc No. 49 at 1).

Discussion

To claim collateral estoppel, or issue preclusion, the movant must establish "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and . . . the party against whom [enforcement] is sought was accorded a full and fair opportunity to contest the issue" (*Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271, 276 [1988]). "The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate" (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]). The movant must show that "the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Alamo v McDaniel*, 44 AD3d 149, 153 [1st Dept 2007]; *see also Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015], quoting *Alamo*).

Here, the documentary evidence supports the Aytug defendants that Paradelo and Ansonia were not owners of 1900 LLC or the premises, but rather had a future option to purchase up to 70 percent of the company's shares upon repayment of the mortgage. This is consistent with the Florida court's finding that, based on the documents, Aytug was the "100 % owner" of 1900 LLC. Plaintiffs' allegations are completely unsupported. Further plaintiffs' claims of ignorance about the continuing foreclosure proceeding contradict the record. Simply put, plaintiffs' counsel made no request to intervene or for an opportunity to supplement his claims with written papers or otherwise present his arguments. There is also sufficient proof that Milian was apprised of the papers in the summary judgment motion and the hearing date on the motion.

Contrary to plaintiffs' argument, the issue of 1900 LLC's ownership was necessary to the Florida determination. The Florida court could not have granted foreclosure if there was any question as to the ownership and representation of 1900 LLC. Even though the court initially made no ruling as to ownership when it granted the receivership, by the time it issued its decision in the foreclosure summary judgment motion, it was satisfied that 1900 LLC was the rightful owner.

Plaintiffs' claim that Aytug and Paradelo agreed that only Aytug's name would appear on the organization documents, and that Aytug would have 30 percent of the ownership while Paradelo would have 70 percent, is nowhere in writing.[3] Moreover, the organizational and financial documents on this record contradict that position. Nor is there any signed agreement or other evidence to suggest that Aytug acted on behalf of Paradelo in a fiduciary context. In sum, plaintiffs have no right to a declaratory judgment that Paradelo is an owner of 1900 LLC, or to the imposition of a constructive trust based on ownership, or to an accounting of rents collected and profits made based on his position as manager, in particular as related to the period December 1, 2016 and after.

Next, plaintiffs claim that they are entitled to the return of the $100,000 commission they paid to York, because York was not a licensed mortgage broker and therefore not entitled to a commission. However, plaintiffs assert this claim without a scintilla of evidence either of payment to York or of York's legal status. Similarly, plaintiffs proffer no evidence to support their bald claim that Aytug and York converted at least $40,000 of the loan proceeds to their own use. Conclusory assertions, "even if believable," are not enough to defeat a motion for summary judgment (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974]). Finally, the

[3] The court will not address the question of whether this agreement would be subject to Florida's statute of frauds (§ 725.01. Fla. Stat.).

terms of the November 12, 2015, "continuing warranty," contravene Paradelo's claim that the additional $100,000 loan made to 1900 LLC in July 2016 was unauthorized. This document contains Paradelo's unconditional guarantee to Rabs that he would be responsible for payment of the entire loan, including "[i]ndebtedness arising under subsequent or successive transactions *between [b]orrower and [l]ender*." Thus, 1900 LLC and Rabs did not need to apprise or seek approval from Paradelo to undertake an additional loan that would be added to the mortgage balance.

However, the Florida action did not address plaintiffs' claims of fraud. To claim fraud, plaintiffs must allege that the Aytug defendants made "'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant[s], made for the purpose of inducing [plaintiffs] to rely upon it, justifiable reliance of [plaintiffs] on the misrepresentation or material omission, and injury'" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-579 [2018], quoting *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]).

Paradelo claims that, because he believed Aytug's false representations that he would have a 70 percent ownership in the newly organized 1900 LLC, he willingly assigned his contract of sale with Granfield to Aytug, and guaranteed the repayment of the entire mortgage balance to Rabs. Paradelo does not address the "option purchase agreement," that he signed, setting forth the agreement that Paradelo could purchase 70 percent of the membership interest in 1900 LLC, upon the mortgage's full payment. The "option purchase agreement" includes a section indicating that it is the "final, entire agreement between [Paradelo] and [Aytug]," and that they had not made any further promises of any kind to each another, nor "reached any other understandings, either written or oral." A party to a contract is "under an obligation to read a

document before he or she signs it, and a party cannot generally avoid the effect of a document on the ground that he or she did not read it or know its contents" (*Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 788 [2d Dept 2009]).

There is the odd fact that the first amended articles of organization of 1900 LLC list both Aytug and Paradelo as members of the company. This is puzzling given Aytug's insistence that he was to be sole owner, and that the very next day, the articles of organization was amended for a second time, to remove Paradelo from the list of members. This raises the question about whether Paradelo's inclusion in the articles of organization was a mistake or whether there was intent to deceive Paradelo in order to persuade him to transfer his contractual agreement with Grenfield to Aytug and 1900 LLC. Aytug's January 13, 2016 notarized letter to the Section and City of Ocala, Florida, verifying that Paradelo was "*a general partner of the company*," having the power to execute "all paper work" does not clarify this question.

As explained in *Ambac*, justifiable reliance is a "fundamental precept" of a fraud cause of action, as is "resulting injury" (*Ambac Asssur. Corp.*, at 579). The complaint conceivably alleges with sufficient detail that Aytug knowingly made misrepresentations for the purposes of inducing Paradelo to agree to transfer the Granfield contract of sale to 1900 LLC and to be the sole guarantor of the mortgage loan, although he in fact had no ownership interest (*see Ambac Assur. Corp.*, 31 NY3d at 578-579). Moreover, if Paradelo established his claim that he was fraudulently misled, his claim for an accounting of rents and profits would have viability.

The problem is plaintiffs have not established injury. Plaintiffs commenced their action to enforce what they believed to be their ownership interest in 1900 LLC, and to contest the circumstances that caused Paradelo to be closed out of ownership but remain responsible for the entire loan. After this action was filed, Rabs, the lender, successfully brought a foreclosure

action. Apparently, none of the balance of the mortgage loan had been repaid at the time the loan became due or thereafter, but there is no evidence that Rabs sought payment from Paradelo based on his unconditional guaranty. After the premises was foreclosed upon and then sold, Paradelo simply no longer had responsibility for any of the loan repayment.

Paradelo has also made no claim as to what injury he sustained by assigning his contract of sale for the premises to Aytug. He has not claimed, for instance, that he turned down other opportunities for funding the purchase. He also has not established what damages he suffered by not being a member-owner of 1900 LLC, other than that there were profits made and not shared. The only actual injury alleged is the purported $100,000 commission wrongly paid to York, a claim which has been dismissed for lack of evidence.

Because plaintiffs have not sufficiently established all the elements of a claim of fraud, the third cause of action is dismissed, along with the first, second, fourth and fifth, and the Aytug defendants' motion is granted in its entirety. Remaining is plaintiffs' sixth cause of action, seeking rescission of the unconditional guaranty Paradelo signed for payment of the mortgage.

Accordingly, it is

ORDERED that the Aytug defendants' motion for partial summary judgment is granted, and it is further

ORDERED that plaintiffs are to file their note of issue within TEN days of the efiled date of this decision and order; and it is further

ORDERED that the parties are to attend a status conference on November 2, 2020 at 2:30 PM by phone. Plaintiff is directed to circulate a call in number by email to all parties and the court.

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10/15/2020
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE