Town & Country Adult Living, Inc. v Hearth at Mount Kisco, LLC
2021 NY Slip Op 30519(U)
February 22, 2021
Supreme Court, New York County
Docket Number: 657551/2017
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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TOWN AND COUNTRY ADULT LIVING, INC.,THE WESTCHESTER RESIDENCE AND CLUB, LLC, ROBERT MISHKIN,

Plaintiffs,

- v -

THE HEARTH AT MOUNT KISCO, LLC,FORTUS MOUNT KISCO, LLC, FORTUS COMPANIES, LLC, HEARTH SENIOR CARE MOUNT KISCO, LLC, ADAM PROBST, CHRISTIAN SEXTON, CARL GUY, MAYNARD FAHS, DEBBIE PROBST

Defendants.

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INDEX NO. 657551/2017

MOTION DATE 07/09/2020

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 229, 232

were read on this motion for SUMMARY JUDGMENT.

This action arises out of the attempted development of an assisted living home for senior citizens in Mount Kisco, New York. Plaintiffs Robert Mishkin (Mishkin), Town and Country Adult Living, Inc. (TCAL), and the Westchester Residence and Club, LLC (WRC) (collectively, plaintiffs) filed this lawsuit against the following defendants: The Hearth at Mount Kisco, LLC (the Company), Fortus Mount Kisco, LLC (FMK), Fortus Companies, LLC (the Fortus Companies), Hearth Senior Care Mount Kisco, LLC (HSC), as well as individuals Adam Probst, Debbie Probst, Christian Sexton (Sexton), Carl Guy (Guy), and Maynard Fahs (Fahs) (collectively, defendants).

Defendants now move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the first, second, third, fifth, eighth and ninth causes of action of the

amended complaint, with prejudice. For the reasons set forth below, defendants' motion is granted with respect to the eighth and ninth causes of action for equitable estoppel and constructive trust and denied with respect to the remaining causes of action.

FACTUAL BACKGROUND

Since 2006, plaintiffs have been attempting to develop a large new assisted living facility for seniors with disabilities in the Village of Mount Kisco, New York (the Village), to replace an older, smaller facility they were operating at 53 Mountain Avenue (Mishkin aff, ¶ 2 [NYSCEF Doc No. 208]). Eventually, plaintiffs acquired the rights to purchase land located at 270 Kisco Avenue (the Property) from the Village, which would serve as the site for plaintiffs' planned project (the Project) (*id.*)

In 2007, TCAL and WRC entered into a Ground Lease with the Village in order to confirm the parties' interest in the purchase and sale of the Property, while site plan approvals for the Project were being worked out (*id.*, ¶ 3). Under the Ground Lease, the Village was the Landlord of the Property, while TCAL and WRC became co-tenants (*id.*). The Ground Lease was meant to provide a temporary stopgap until plaintiffs could purchase the Property outright.

However, the purchase was contingent on obtaining site plan approval for the Project. As the years went by, that approval never materialized. In the meantime, plaintiffs periodically amended and extended their Ground Lease with the Village.

By 2012, plaintiffs were looking for partners to help them complete the approval process, and ultimately complete the Project. Because of defendants' experience and involvement in developing many housing communities like the senior housing development project that plaintiffs have been pursuing, plaintiffs sought defendants' involvement to assist in completing the approval, development, building, and management processes (*id.*, ¶ 4).

Beginning in 2012, plaintiffs and defendants formed a limited liability company (The Hearth at Mount Kisco, LLC), which was formed by entities from the Fortus group of companies, the Hearth group of companies, and plaintiffs. The Fortus entities were to provide financing and to obtain the permits for the project, and the Hearth entities were to build and to manage the project thereafter. In August 2012, plaintiffs and defendants entered into a joint venture to move forward with the Project's development. To formalize their relationship, plaintiffs and defendants executed a series of interrelated contracts (*id*., ¶¶ 5-8).

To facilitate defendants' participation, plaintiffs, the Company, FMK, the Fortus Companies, and HSC entered into a Formation Agreement (NYSCEF Doc No. 171) governing the formation and transfer of assets to the Company (defendants' statement of undisputed material facts [SMF, NYSCEF Doc No. 168], ¶ 1). As part of the LLC formation, plaintiffs assigned several valuable assets to the Company – (1) the Ground Lease (NYSCEF Doc No. 173), (2) the $1.5 million contract deposit that plaintiffs paid to the Village for the purchase of 270 Kisco Avenue, (3) plaintiffs' ownership of 53 Mountain Avenue, and (4) the Project plans. TCAL conveyed its property interests in the Ground Lease and in its existing senior-care property to the Company, with the proviso that TCAL could repurchase those rights from the Company "if not expired or terminated" (Formation Agreement, § 2.5).

In August 2012, HSC, FMK, the Fortus Companies, and WRC also entered into an Operating Agreement for the operation and management of Company (the Operating Agreement [NYSCEF Doc No. 172]) (SMF, ¶ 5).

On August 27, 2012, plaintiffs and defendants signed a Fifth Amendment to the Ground Lease (the Fifth Amendment) with the Village (NYSCEF Doc No. 210) (SMF, ¶ 8). Under the Fifth Amendment, plaintiffs assigned the Ground Lease to the Company (to be managed by

FMK and the Company) (Mishkin aff, ¶ 12). Like the Formation Agreement, paragraph 1 of the Fifth Amendment recognized that plaintiffs could repurchase its rights in the Project, and succeed to the Ground Lease if the lease had not yet expired (*see* Fifth Amendment, ¶ 1).

Plaintiffs contend that various delays by defendants required additional amendments to extend the expiration of the Ground Lease. Specifically, plaintiffs allege that Adam Probst, Sexton, Guy and Fahs were involved with and worked to delay the Village's issuance of site approval and the closing of the purchase of 270 Kisco Avenue while they waited for project approval from the New York City Department of Environmental Protection (the DEP) (Mishkin aff, ¶ 14). Plaintiffs further allege that Adam Probst, Sexton, Guy, and Fahs (each having negotiated and drafted a number of the amendments to the Ground Lease) were aware that they could not use the lack of DEP approval to delay closing the purchase of 270 Kisco Avenue, and that they could not acquiesce in or agree to the Village's delay of site plan approval until after DEP approval (*id.*, ¶ 16).

Pursuant to section 2.5 of the Formation Agreement, the Company was required to pay Mishkin, TCAL and WRC additional consideration of $750,000.00, payable only if the land was purchased by the Company from the Village (SMF, ¶ 2). On October 7, 2013, Mishkin, WRC and TCAL entered into a Fixed Date of Payment Agreement (the FDPA [NYSCEF Doc No. 174]), pursuant to which the Company agreed to accelerate and make the $750,000.00 contingent payment, even though the payment was not due because the Company had not purchased the land, in exchange for various concessions by plaintiffs (FDPA, ¶ 2; *see* SMF, ¶ 9). Paragraph 4 of the FDPA states that:

> Each Transferor [plaintiffs] hereby agrees that, notwithstanding anything to the contrary contained in the Formation Agreement or this Agreement or any other document or agreement and notwithstanding anything said or alleged to have been said by any of the Releasees (a) the Company is not obligated to acquire the

> Property, initiate or complete the Project or the Facility or take any other action in any way related to potential acquisition, ownership and/or development of the Property; and (b) any act or omission by the Company . . . related in any way to the Property . . . and/or the potential acquisition, ownership, and/or development of the Property can be made by the Company . . . in its sole and absolute discretion and without the consent, approval, or any vote or input by or liability to any [plaintiff] including without limitation, the modification, extension, or termination of the lease . . . The Parties agree that Exhibit A to the Formation Agreement and the words "and the Parties' current intent with respect thereto is set forth on Exhibit A" contained in the first recital of the Formation Agreement are hereby deleted from the Formation Agreement and of no further force and effect"

(FDPA, ¶ 4).

Notwithstanding these agreements, the Project continued to languish. The protracted delays necessitated additional amendments to the Ground Lease, culminating in the Tenth Amendment (NYSCEF Doc No. 175), which would expire on August 31, 2015 (Mishkin aff, ¶ 17). During that time, the partnership between the Fortus Companies and the Company had started to erode, with the result that the Fortus Companies and the Company sold three of their joint projects to Prudential (Mishkin aff, ¶ 19).

Plaintiffs allege that, with the continuing erosion of their partnership, defendants did not properly handle the Project, and ultimately allowed the Ground Lease to expire at the end of August 2015, without any amendment or extension in place, and without any notice to plaintiffs (*id.*, ¶ 22). Plaintiffs allege that, "on multiple occasions, we put Defendants on notice that we intended to exercise the repurchase rights and to close on the sale of 270 Kisco Avenue as provided by Section 2.5 of the Formation Agreement" (Mishkin aff, ¶ 24).

In June 2016, defendants elected to terminate the Formation Agreement (*id.*, ¶ 37). Since that point, plaintiffs allege that defendants have acted inconsistently, telling the Village that they support plaintiffs' repurchase, while telling plaintiffs that they are interfering with defendants' efforts to negotiate with the Village (*id.*, ¶¶ 31-36).

Plaintiffs filed this action in December 2017 and filed an amended complaint on July 27, 2018. In the amended complaint, plaintiffs allege nine causes of action against various groupings of defendants: breach of contract (first through third causes of action), breach of the implied covenant of good faith and fair dealing (fourth cause of action), tortious interference with contract (fifth cause of action), breach of fiduciary duty, as well as aiding and abetting such breach (sixth and seventh causes of action), equitable estoppel (eighth cause of action), and constructive trust (ninth cause of action).

On June 28, 2019, this court issued a decision and order granting in part and denying in part defendants' motion to dismiss (NYSCEF Doc No. 127). Specifically, this court granted defendants' motion to dismiss as to plaintiffs' first, second, and third causes of action as to all defendants except the Company; and plaintiffs' fourth, sixth and seventh causes of action as to all defendants.

Defendants now move for summary judgment dismissing the following causes of action: (1) the first cause of action against the Company for breach of sections 2.5 and 4.3 of the Formation Agreement; (2) the second cause of action against the Company for breach of the Fifth Amendment; (3) the third cause of action against the Company for breach of the Formation Agreement by WRC and Mishkin as third-party beneficiaries; (4) the fifth cause of action by all plaintiffs against the Fortus Companies, Adam Probst, Sexton, Guy and Fahs for tortious interference with contract; (5) the eight cause of action for estoppel by all plaintiffs against all defendants; and (6) the ninth cause of action for constructive trust by all plaintiffs against all defendants.

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

A. Defendants are Entitled to Summary Judgment Dismissing the Claims for Equitable Estoppel (Eighth Cause of Action) and Constructive Trust (Ninth Cause of Action)

In their eighth cause of action, plaintiffs allege that "[n]otwithstanding Defendants' termination of their rights to and interest in the parties' LLC, Defendants have continued to attempt to close the purchase of 270 Kisco Avenue and to develop the Senior Housing Project - to the exclusion of Plaintiffs" (amended complaint, ¶ 208). Plaintiffs allege that, "[b]ased on the foregoing, Defendants should be estopped and permanently enjoined from any further

participation in or efforts to (i) develop the Senior Housing Project, and (ii) purchase or otherwise close the purchase of 270 Kisco Avenue from the Village" (*id.*, ¶ 209).

The necessary elements of an equitable estoppel claim are: (1) conduct amounting to false representation or concealment of material facts; (2) an intention or expectation that the relying party will act upon such conduct; and (3) actual or constructive knowledge of the true facts (*BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985]; *see also River Seafoods, Inc. v JP Morgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005]). "'Equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action'" (*Knobel v Shaw*, 90 AD3d 493, 494 [1st Dept 2011], quoting *Kaufman v Cohen*, 307 AD3d 113, 122 [1st Dept 2003]). The affirmative wrongdoing must be separate and apart from the underlying claim (*Bobash, Inc. v Festinger*, 57 AD3d 464, 467 [2d Dept 2008]; *Sheffield v Pucci*, 63 Misc 3d 1216[A], 2019 NY Slip Op 50554[U], * 13 [Sup Ct, NY County 2019]).

Here, the cornerstone of plaintiffs' equitable estoppel claim is defendants' alleged conduct with respect to plaintiffs' exercise of the repurchase right under section 2.5 of the Formation Agreement (*see* amended complaint, ¶ 208). Plaintiffs alleges this same conduct to support their first, second and fifth causes of action, which each refer to alleged conduct affecting the "exercise of the Mishkin Repurchase Right" (*see* amended complaint, ¶¶ 136-37, 156-158, and 176). Because the alleged conduct underlying the estoppel claim is the same conduct underlying plaintiffs' substantive causes of action, including breach of contract, the eighth cause of action is dismissed as duplicative (*see Guerrero v West 23rd St. Realty, LLC*, 45 AD3d 403, 404 [1st Dept 2007] [finding dismissal of equitable estoppel claim was proper because it was duplicative of breach of contract claim]).

In their ninth cause of action for constructive trust, plaintiffs allege that defendants "have impaired the value of Plaintiffs' contributed assets and have intentionally interfered with Plaintiffs' repurchase rights," and that "[a]s a direct and proximate result of Defendants' conduct as described herein, Plaintiffs respectfully seek the imposition of a constructive trust over Defendants' assets to the extent of constituting or satisfying the value of the assets Plaintiffs contributed to the parties' LLC and which Defendants impaired" (amended complaint, ¶¶ 213-214).

"Under New York Law, a constructive trust is an equitable remedy, the key purpose of which is to prevent unjust enrichment" (*In re Chowaiki & Co. Fine Art Ltd.*, 593 BR 699, 718 [Bankr SD NY 2018], citing *Simonds v Simonds*, 45 NY2d 233, 242 [1978]). "A party seeking the imposition of a constructive trust generally must establish that there is 'clear and convincing evidence of: (1) a confidential or fiduciary relationship; (2) an express or implied promise; (3) a transfer in reliance on such a promise; and (4) unjust enrichment'" (*id.* at 718-719 [citation omitted]). "A constructive trust is a remedy, not a cause of action. The proper pleading would be a claim for unjust enrichment which is the requested relief of a constructive trust" (*id.*; *see also Bankers Sec. Life Ins. Socy, v Shakeredge*, 49 NY2d 939, 440 [1980] [the "constructive trust doctrine serves as a 'fraud-rectifying' remedy rather than an 'intent enforcing' one"]).

As such, the remedy of constructive trust and the cause of action for unjust enrichment are fundamentally founded upon quasi-contract (*see In re First Central Financial Corporation v Martin Ochs*, 377 F3d 209, 214 [2d Cir 2004], quoting *Miller v Schloss*, 218 NY 400, 408 [1916] ["'Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity"']). Accordingly, the principles that apply to quasi-contractual remedies also apply to constructive trusts (*see* Scott, The Law of Trusts 4th ed. § 461 ["The general principles with

reference to unjust enrichment that are the basis of constructive trusts . . . are also at the basis of quasicontractual obligations"]).

"[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter" (*Clark-Fitzpatrick; Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). Thus, "an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y. Inc.*, 18 NY3d 777, 790 [2012]; *see also Cox v NAP Constr. Co.*, 10 NY3d 592, 607 [2008] ["a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter"]; *Pappas v Tzolis*, 20 NY3d 228, 234 [2012] [unjust enrichment is available only "'*in the absence of an actual agreement*'"] [emphasis in original; citation omitted]).

Accordingly, plaintiffs' constructive trust claim must be dismissed because there is a valid contract (the Formation Agreement) that defines the responsibilities of the parties in general and, in particular, with respect to the purported right to repurchase. Although Defendants argue that Section 2.5 does not mandate repurchase [*see infra*], there is no dispute that the contract governs the parties' rights and responsibilities with respect to that issue, even if the breach of contract claim ultimately fails (*see Corsello*, 18 NY 3d at 790 ["Unjust enrichment is not a catchall cause of action to be used when others fail"]).

B. Factual Issues Preclude Summary Judgment as to Remaining Claims

1. <u>The Motion is Premature</u>

At the outset, Defendants' motion to dismiss the remaining causes of action is premature. No depositions have been taken, and defendants have produced very few documents responsive to plaintiffs' document requests (*see* affirmation of Brian H. Brick, Esq., ¶ 5 [NYSCEF Doc No.

222]; *see also* NYSCEF Doc No. 236 [granting plaintiffs permission to move to strike defendants' answer for dilatory conduct in discovery]).

In support of their motion for summary judgment, defendants principally rely upon multiple affidavits from themselves, as well as witnesses to whom plaintiffs have not had access, including:

> "the annexed Affirmation of John J. Pribish, dated July 9, 2020, the annexed Rule 19(a) Statement, and the Affidavits of Carl F. Guy, Mark Burritt, Adam Probst, Christian Sexton, Maynard Fahs, Joann Coviello, Douglas Hertz, and Jeffrey A. Hopper and Defendants' accompanying Memorandum of Law dated July 9, 2020"

(defendants' memorandum of law, at 1 [NYSCEF Doc No. 169]).

However, because plaintiffs have not yet been able to depose Guy, Mark Burritt, Adam Probst, Sexton, Fahs, or Jeffrey Hopper (or Debbie Probst, a defendant; Rodney Baker, a FMK Manager; or Dan Suits, John Dzury or Chad Glassburn, who are also affiliated with defendants and the Project), defendants cannot rely on their self-serving affidavits for summary judgment. "On a motion for summary judgment ... self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Sacher v Long Is. Jewish–Hillside Med. Ctr.*, 142 AD2d 567, 568 [2d Dept 1988]; *accord Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]; *Nahar v Gulati*, 33 Misc 3d 1233[A], 2011 NY Slip Op 52230[U], *1 [Sup Ct, NY County 2011]; *see also* John R. Higgitt, Supplementary Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3212:19 [2015 Supp] [explaining movants cannot rely on self-serving testimony for summary judgment "[w]hen the movant holds the sole key to a material fact" because "it is too easy for her to state the fact as she wishes in the moving affidavit. She should be required to testify to it in open court, and then submit to that most probing of truth-discerning devices: the cross-examination"]). Indeed, "[i]f

everything or anything had to be believed in court simply because there is no witness to contradict it, the administration of justice would be a pitiable affair" (*Punsky v City of New York,* 129 App Div 558, 559 [2d Dept 1908]). Thus, defendants' self-serving affidavits are insufficient to establish their "prima facie entitlement to summary judgment as a matter of law" (*see e.g. Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]).

Accordingly, because a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a summary judgment motion, defendants' motion for summary judgment must be denied (*see Corvino v Schineller*, 168 AD3d 812, 812-813 [2d Dept 2019] [affirming the denial of the plaintiff's summary judgment motion where "[t]he plaintiff moved for summary judgment before the parties had an adequate opportunity to conduct discovery, as little discovery had taken place and the depositions of the parties had not yet occurred"]; *Hawthorne v City of New York*, 44 AD3d 544, 545 [1st Dept 2007] [summary judgment properly denied as premature because of minimal discovery to date]; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003] [reversing grant of summary judgment as premature because "plaintiff had not had an opportunity to depose defendant, and defendant had not yet responded to her discovery requests"]; *Esposito v Metropolitan Transp. Auth.*, 264 AD2d 370, 371 [1st Dept 1999] ["In view of defendants' failure to comply with discovery requests, dismissal of this action would be premature"]).

2. <u>Breach of Section 2.5 of the Formation Agreement (First Cause of Action)</u>

Turning to the individual causes of action, Plaintiffs allege that the Company breached section 2.5 of the Formation Agreement by "interfering with Town and Country's repurchase rights (the 'Mishkin Repurchase Right')" (amended complaint, ¶ 136). Plaintiffs further allege that the Company "prevented Town and Country from exercising the Mishkin Repurchase Right

by, among other things, (i) failing to give timely notice of Defendants' intent not to pursue the continued development of the Senior Housing Project and the acquisition of the Property, (ii) allowing the Ground Lease to expire without extension or amendment, (iii) threatening Plaintiffs with legal action and other consequences for their proper exercise of the Mishkin Repurchase Right, (iv) communicating false information to the Village as a way to thwart the exercise of the Mishkin Repurchase Right, and (v) communicating with the Village for the purchase of the Property after Defendants ended the LLC and gave up their rights to pursue purchasing the Property" (*id.*, ¶ 137).

In support of their motion for summary judgment, defendants contend that plaintiffs' claim that the Company breached section 2.5 of the Formation Agreement is legally deficient because the right to repurchase is only triggered in the event that the Formation Agreement is terminated, and once notice of termination is given, TCAL must exercise the right and close on same within 90 days of the notice of termination and agree to reimburse the Company pursuant to the formula set forth in section 2.5. Defendants further contend that, under New York law, TCAL, as a non-repudiating purchaser, must demonstrate that it was ready, willing and able to close and had the funds to do so within the 90-day period, or December 1, 2016, the date agreed upon by counsel, but that TCAL never demonstrated that it was a ready, willing and able purchaser with sufficient funds to close by that date (defendants' memorandum of law at 7).

Under New York law, a non-repudiating party to a contract must demonstrate that it was ready, willing, and able to perform:

> "'Where one party to a contract repudiates it and refuses to perform, the other party by reason of such repudiation is excused from further performance, or the ceremony of a futile tender. He must be ready, willing and able to perform, and this is all the law requires' . . .; *see also Bigler v Morgan*, 77 NY 312, 318 [1979] ["The refusal of the defendant to perform . . . did not dispense with the necessity of showing that the plaintiff was able, ready and willing to perform"]

(*Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532 [2012] [internal citation and emphasis omitted]). Where a defendant seller is the party moving for summary judgment dismissing a cause of action breach of contract for the sale of real property, "'he or she has the burden of demonstrating the absence of a triable issue of fact regarding whether the plaintiff buyer was ready, willing, and able to close'" (*Brickstone Group, Ltd. v Randall*, 172 AD3d 671, 672 [2d Dept 2019] [citation omitted]; *Jian Yun Guo v Azzab*, 162 AD3d 754, 754 [2nd Dept 2018]; *see Revital Realty Group, LLC v Ulano Corp.,* 112 AD3d 902, 904 [2d Dept 2013] [denying motion for summary judgment as "the seller failed to show that the buyer was not ready, willing, and able to close the transaction within a reasonable time after the contractual closing date"]).

Here, defendants fail to meet their initial burden of demonstrating, as a matter of law, that TCAL was not ready, willing, and able to close, as the parties sharply dispute why the repurchase transaction did not close by December 1, 2016. Although defendants claim that plaintiffs were unable to pay the purchase price and argued it was "too high," plaintiffs submit Mishkin's affidavit in which he alleges that defendants (1) improperly competed with plaintiffs by continuing to negotiate with the Village for a new deal even after terminating the Formation Agreement and after notifying the Village it was terminating its involvement with the Project (*see* Mishkin aff, ¶ 26 ["(f)rom September 2015 onward, we tried to negotiate with the Village for the right to continue with the project and to purchase 270 Kisco Avenue. But when we did so, Defendants reacted sharply to our efforts and claimed that we were interfering with Defendants' negotiations with the Village for the purchase of 270 Kisco Avenue"]; and (2) failed to provide an accurate purchase price before the end of the option period, thereby preventing plaintiffs from closing on the repurchase (*see* Mishkin aff, ¶ 42 ["(t)o facilitate Plaintiffs' repurchase of the LLC's assets, we continually asked Defendants to provide us with the

corrected amount Plaintiffs were required to pay. Defendants were unable to give us a definitive number, and the amounts they communicated to us changed constantly"]).

Mishkin also alleges that, each time defendants provided plaintiffs with the proposed purchase price, it was wrong, with plaintiffs pointing out the omissions and with defendants then still failing to provide correct numbers. According to Mishkin, defendants also refused to allow plaintiffs access to the Project professionals for basic due diligence in connection with the repurchase (*see* Mishkin aff, ¶¶ 45-48). Mishkin asserts that, nonetheless, he was always ready, willing, and able to pay the purchase price for the repurchased assets, but defendants never provided him with the correct numbers within the time frame of the option period, thereby frustrating and preventing plaintiffs' ability to close the repurchase (Mishkin aff, ¶¶ 52-56; *see Mr. Ham, Inc. v Perlbinder Holdings, LLC*, 116 AD3d 577, 578 [1st Dept 2014] [noting "it is a 'familiar' principle that a party may not rely on performance of a condition where that party has frustrated such performance"] [citations omitted]; *Ellenberg Morgan Corp. v Hard Rock Cafe Assoc.*, 116 AD2d 266, 271 [1st Dept 1986] [explaining that a party may not insist upon performance of condition precedent when its nonperformance has been caused by the party himself]).

The record thus contains issues of fact about whether plaintiffs simply failed to close the repurchase (as defendants argue), or whether defendants frustrated plaintiffs' ability to close (as plaintiffs contend). These issues of fact about why the repurchase transaction did not close cannot be resolved on this motion and ultimately may require determination by a jury. Accordingly, defendants' motion for summary judgment with respect to the alleged breach of section 2.5 of the Formation Agreement is denied (*see Ornstein Leyton Realty, LLC v Central Islip Assoc., LLC*, 165 AD3d 683, 685 [2d Dept 2018] [denying motion for summary judgment

where "defendant failed to meet its initial burden of demonstrating, prima facie, that the plaintiff was not ready, willing, and able to close" and "failed to eliminate all triable issues of fact"]; *Knopff v Johnson*, 29 AD3d 741, 742 [2d Dept 2006] ["(t)he defendant failed to demonstrate the absence of a triable issue of fact regarding whether the plaintiff was ready, willing, and able to close in accordance with the fully-executed real estate contract" because "[t]the papers submitted in support of its motion show the existence of triable issues of fact as to whether the communications and correspondence between the parties after the execution of the contract constituted a counteroffer that was expressly rejected by the defendant"]; *see also Stardial Communications Corp. v Turner Constr. Co.*, 305 AD2d 126, 126 [1st Dept 2003] [denying motion for summary judgment dismissing breach of contract claim, as deposition testimony of plaintiff's principal raised questions of fact as to whether defendant construction company interfered with plaintiff's access to work site so as to hinder plaintiff's ability to perform salvaging work under subcontract]; *Jupiter Envl. Servs., Inc. v Graystone Constr. Corp.*, 31 AD3d 388, 390 [2d Dept 2006] [plaintiff "raised a triable issue of fact, inter alia, as to whether or not (defendant) prevented it from performing its obligations under the subcontract"]).

3. Breach of Section 4.3 of the Formation Agreement (First Cause of Action) and Breach of the Fifth Amendment (Second Cause of Action)

As part of the first cause of action, plaintiffs allege that the Company "breached Section 4.3 of the Formation Agreement because having decided to acquire the Property, they failed to fulfill the obligations of the Lessee under the Ground Lease, including, but not limited to, the pursuit of site plan approval" (amended complaint, ¶ 138).

In the second cause of action, plaintiffs allege that the Company breached the Fifth Amendment to the Ground Lease because they failed to pay all real taxes that became due on 270 Kisco Ave, and did not timely and diligently pursue site plan approval for the Senior

Housing Project (amended complaint, ¶¶ 146-147). Plaintiffs further allege that defendants improperly delayed the completion of site plan approval and the closing of the purchase of 270 Kisco Avenue while waiting for DEP approval, which was in breach of the terms of the Ground Lease and its operative amendments (*id.*, ¶ 148).

Defendants argue that both of these causes of action must be dismissed because the Company's obligations with respect to the Ground Lease were initially governed by section 4.3 of the Formation Agreement, and section 4.3 of the Formation Agreement was subsequently superseded and modified by paragraph 4 of the FDPA.

Section 4.3 of the Formation Agreement provides:

> "To the extent the Company makes the decision to acquire the Property, the Company agrees to fulfill the obligations of the Lessee as defined and set forth in the Lease"

(Formation Agreement, § 4.3).

Paragraph 4 of the FDPA provides, in relevant part, that:

> Each Transferor [plaintiffs] hereby agrees that, notwithstanding anything to the contrary contained in the Formation Agreement or this Agreement or any other document or agreement and notwithstanding anything said or alleged to have been said by any of the Releasees (a) the Company is not obligated to acquire the Property, initiate or complete the Project or the Facility or take any other action in any way related to potential acquisition, ownership and/or development of the Property. . . . The Parties agree that Exhibit A to the Formation Agreement and the words "and the Parties' current intent with respect thereto is set forth on Exhibit A" contained in the first recital of the Formation Agreement are hereby deleted from the Formation Agreement and of no further force and effect"

(FDPA, ¶ 4).

"The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). A plain reading of section 4.3 demonstrates that it means what it says: if the Company decides to buy 270 Kisco Avenue, then it will fulfill the Ground Lease obligations. Recognizing that the Company had sole discretion to

decide whether to proceed with or to cease the Project, section 4.3 merely confirms under what circumstances the Company will fulfill the Ground Lease.

In its initial form, the Formation Agreement contained Exhibit A, which was defendants' statement of their "Current Intent": "Based on the information currently known by the Company: (a) the Company currently intends to develop the subject property" (Formation Agreement, exh A, ¶ 3). Paragraph 4 of the FDPA removed exhibit A and a portion of the first recital from the Formation Agreement. However, it did not change or remove (or even mention) section 4.3. Paragraph 4 of the FDPA was specific in referencing what it was deleting, and it expressly mentions both exhibit A and the first recital of the Formation Agreement. Yet, it does not mention section 4.3.

As a general matter, when "'contract language expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'" (*Ambrose v City of White Plains*, 2018 WL 1635498, * 13, 2018 US Dist LEXIS 56309, * 33 [SD NY 2018] [citation omitted]; *see also Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403-404 [1984] [explaining that contract's inclusion of certain items means that "any excluded items are intentionally outside the definition"]). The lack of any reference to section 4.3 alongside the explicit references to Exhibit A and to the first recital evinces an intent not to include section 4.3 among the provisions that paragraph 4 changed. Accordingly, defendants' claim that paragraph 4 of the FDPA superseded section 4.3 is incorrect.

In any event, these causes of action cannot be dismissed because there are material issues of fact that must be resolved with respect to these claims. Plaintiffs contend that the Company breached section 4.3 of the Formation Agreement and the Fifth Amendment by not following the

requirements of the Ground Lease and its amendments during the time that the Company was proceeding with the Project. More specifically, plaintiffs contend that the Ground Lease and its amendments did not permit the Company (or the Village) to use the lack of NYCDEP approval as a reason to delay issuing site plan approval or the closing of the sale of 270 Kisco Avenue (*see* Mishkin aff, ¶¶ 15-16).

Conversely, defendants argue that that they were not responsible for the lack of site plan approval from the Village because the Village had made it clear that it would not grant such approval until the Project was first separately approved by the NYCDEP (*see* defendants' rule 19-a statement of undisputed material facts [NYSCEF Doc No. 168], ¶¶ 4, 7).

However, in the affidavit that Village Attorney Whitney Singleton submitted in 2016 in litigation that the Company brought against the Village (NYSCEF Doc No. 223), Singleton directly challenged defendants' assertion that DEP approval was a condition to site plan approval and to closing the sale of 270 Kisco Avenue (*see* Singleton aff, ¶ 15 ["DEP approval" was "never" "a contingency to closing of title"]).

These submissions raise an issue of fact about who is responsible for the delays in obtaining site plan approval and in closing the sale (*see Creative Kids Enrichment, LLC v Yorktown Off. Warehouse, LLC*, 41 AD3d 416, 417 [2d Dept 2007] [noting "there were outstanding issues of fact as to the parties' respective responsibility for the delay" in construction of a building as required under terms of lease]).

Accordingly, defendants' motion for summary judgment dismissing plaintiffs' causes of action for breach of section 4.3 of the Formation Agreement and breach of the Fifth Amendment to the Ground Lease is denied.

4. Third-Party Beneficiary (Third Cause of Action)

In their third cause of action, plaintiffs allege that Mishkin and WRC are third-party beneficiaries of the repurchase rights provided for in Section 2.5 of the Formation Agreement (*see* amended complaint, ¶ 156). Defendants contend that Mishkin and WRC are not third-party beneficiaries because the Formation Agreement does not specifically identify them as beneficiaries, and only identifies TCAL.

"A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost'" (*State of Cal. Pub. Employees' Ret. Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000] [citation omitted]). "[T]he parties' intent to benefit the third party must be apparent from the face of the contract" (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001]; *accord Saska v Metropolitan Museum of Art*, 42 Misc 3d 548, 559 [Sup Ct, NY County 2013], *affd* 125 AD3d 438 [1st Dept 2015]).

Here, WRC and Mishkin are both signatories to the Formation Agreement, and both the Formation Agreement and the Ground Lease have, on their face, intended benefits to WRC and to Mishkin that are sufficiently immediate and tangible. Indeed, the repurchase right is specifically identified as the "Mishkin Repurchase Right" in the Formation Agreement, and paragraph 1 of the Fifth Amendment to the Ground Lease explicitly recognized that all plaintiffs could repurchase their rights in the Project, and succeed to the Ground Lease if the Ground Lease had not yet expired.

In these circumstances, the third-party beneficiary claim cannot be dismissed as a matter of law.

5. Tortious Interference with Contract (Fifth Cause of Action)

Finally, in their fifth cause of action for tortious interference of contract, plaintiffs allege that defendants Fortus, Sexton, Guy and Fahs "intentionally induced" the Company, FMK and HSC "to breach various provisions of the Formation Agreement (including the Mishkin Repurchase Right as set forth in Section 2.5 of the Formation Agreement)" by "(i) threatening Plaintiffs with legal action and other consequences for their proper exercise of the Mishkin Repurchase Right, (ii) communicating false information to the Village as a way to thwart the exercise of the Mishkin Repurchase Right, and (iii) communicating with the Village for the purchase of the Property after Defendants ended the LLC and gave up their rights to pursue purchasing the Property" (amended complaint, ¶¶ 175-177).

A claim for tortious interference with contract requires (1) the existence of a valid contract between plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of the third party's breach of that contract without justification, and (4) damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

In support of their motion for summary judgment dismissing this cause of action, defendants contend that that there was no breach of, or interference with, any contract. However, the issue of whether defendants intentionally induced the Company's alleged breaches of contract is sharply disputed by the parties, precluding summary judgment (*see R.U.M.C. Realty Corp. v JCF Assocs., LLC*, 51 AD3d 993, 994-995 [2d Dept 2008] [denying summary judgment given issues of fact about intentional inducement of breach]; *Nesenoff v Dinerstein &*

Lesser, 5 AD.3d 746, 748 [2d Dept 2004] [noting "issue of fact as to whether the defendants caused ENJC not to extend its contract with the plaintiff"]).

In his affidavit, Mishkin contends that the Fortus Companies, Adam Probst, Sexton, Guy and Fahs interfered with their ability to exercise their repurchase rights by causing the Company to continue to negotiate with the Village after June 30, 2016, even though defendants had supposedly terminated their involvement, and by not providing the necessary information and price data for the closing to occur by the deadline (*see* Mishkin aff, ¶¶ 44-50). Mishkin further avers that the individual defendants also allowed the Company to use the lack of DEP approval as a means to delay closing the Project, and they acquiesced and agreed with the Village's efforts to delay the issuance of site plan approval until after DEP approval – all in violation of the governing agreements (*id.*, ¶¶ 14, 16). Mishkin also avers that the individual defendants allowed the Ground Lease to expire, as well as several key repurchase assets to lapse or to be lost, including the foreclosure of 53 Mountain Avenue, that they then failed to contest, to pay the taxes to avoid, and to recover from the Village the surplus after the tax deficiency was satisfied (*id.*, ¶¶ 22 42, 44, 54, 57-60). Plaintiffs assert that all of these actions (and inaction) induced the Company to breach sections 2.5 and 4.3 of the Formation Agreement.

In sum, there are material issues of fact requiring denial of the summary judgment motion (*see National Fin. Partners, Corp. v USA Tax & Ins. Servs., Inc.*,145 AD3d 440, 440 [1st Dept 2016] [finding that "issues of fact preclude dismissal of the claim for tortious interference with contractual relations," including whether the contract was actually breached, and whether defendant "intentionally procured any such breach"]; *MUFG Union Bank, N.A. v Axos Bank*, 68 Misc 3d 1229[A], 2020 NY Slip Op 51101[U], * 6 [Sup Ct, NY County 2020] [motivation of

defendant in alleging procuring other party's breach of contract "turns on issues of credibility not suitable for determination as a matter of law on summary judgment"]).

Defendants also argue that the individual defendants were not strangers to the Formation Agreement, because Guy and Sexton were members of the Company, Fahs was a member of HSK, which was a member of the Company, and Adam Probst was a member of the FMK, which was a member of the Company. Although "the general rule is that a claim for tortious inference with contract will be only against a stranger who improperly interferes with the contract between the two contracting parties" (*IMG Fragrance Brands LLC v Houbigant, Inc.*, 679 F Supp 2d 395, 407 [SD NY 2009]), it is also true that agents, officers, or employees of a corporation may be held personally liable for inducing a breach of contract if their "'acts were taken outside the scope of their employment or . . . they personally profited from their acts'" (*Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]). A determination of the individual defendants' intent, willfulness, or malice obviously requires an assessment of their states of mind – a factual issue not susceptible to summary judgment.

Defendants also argue that they are not susceptible to a tortious interference claim because they "acted to protect [their] own legal or financial stake in the breaching party's business" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *see also Dell's Maraschino Cherries Co. v Shoreline Fruit Growers, Inc.*, 887 F Supp 2d 459, 484 [ED NY 2012] [noting "the defense . . . only applies when the alleged interfering parties have acted to protect their interest in the breaching party's business . . . [and] not their own"]). However, the issue of whether defendants were acting for their own personal interests and not the Company's interests is a disputed factual issue, not capable of determination on summary

judgment (*see AIU Ins. Co. v Robert Plan Corp.*, 17 Misc 3d 1104[A], 2007 NY Slip Op 51828[U], * 9 [Sup Ct, NY County 2007]).

Accordingly, the motion to dismiss plaintiffs' fifth cause of action for tortious interference with contract is denied.

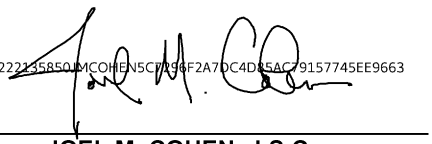
The court has considered defendants' remaining arguments and finds them to be without merit.

* * * *

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the limited extent that the eighth cause of action for equitable estoppel and the ninth cause of action for constructive trust are both dismissed, and the motion is denied in all other respects.

This constitutes the decision and order of the Court.



2/22/2021
DATE

JOEL M. COHEN, J.S.C.

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