

<b>100 &amp; 130 Biscayne LLC v EE NWT OM, LLC</b>
2021 NY Slip Op 32775(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 650188/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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100 AND 130 BISCAYNE LLC,	INDEX NO.	<u>650188/2021</u>
Plaintiff,	MOTION DATE	<u>03/09/2021</u>
- v -	MOTION SEQ. NO.	<u>001</u>
EE NWT OM, LLC, EAST END CAPITAL PARTNERS, LLC, JONATHAN YORMAK, DAVID PERETZ	<b>DECISION + ORDER ON MOTION</b>	
Defendants.		

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 27

were read on this motion to DISMISS.

This case arises from a joint venture to acquire and redevelop a 30-story office tower complex in Miami (Complaint [“Compl.”] ¶1 [NYSCEF 1]). Plaintiff 100 & 130 Biscayne LLC (“Plaintiff”) holds an 80% membership interest in the joint venture – referred to here as the “Company” (*id.* ¶2). Defendant EE NWT OM, LLC (“EE Operating Member”) holds the other 20%, and under the joint venture LLC Agreement (NYSCEF 14) is charged with managing the day-to-day business operations of the Company (*id.* ¶¶3, 25). EE Operating Member is controlled, either directly or indirectly, by EE Parent, Yormak, and Peretz, the other Defendants in the action (*id.* ¶¶4, 21).

Plaintiff alleges, in a nutshell, that its investment in the joint venture lost over \$50 million in value as a result of Defendants’ “gross mismanagement” of the project (*id.* ¶1). The Complaint asserts six causes of action: (1) breach of contract, (2) fraudulent inducement, (3) negligent misrepresentation, (4) breach of fiduciary duty, (5) gross negligence, and (6)

declaratory relief. Defendants now move to dismiss the Complaint in its entirety for failure to state a cause of action.

For the reasons set forth below, Defendants' motion is granted.

## DISCUSSION

### A. Fraudulent Inducement and Negligent Misrepresentation

First, Plaintiff's claims for fraudulent inducement and negligent misrepresentation (Counts II-III) fail because they are premised on subjective, non-actionable statements about predictions, expectations, or future performance (*Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010] [dismissing fraudulent inducement and negligent misrepresentation claims based on "only "statements of prediction or expectation"]]). The allegation, for instance, that Defendants presented "projections" which turned out to be "out of line" with "norms in the relevant market" (Compl. ¶18) are "indefinite and conclusory, and therefore not actionable" (*Pacnet*, 78 AD3d at 479 [citing CPLR 3016 [b]]). Similarly, allegations that Defendants had an "undisclosed intention to not comply with" the LLC Agreement (Compl. ¶109), and that they misrepresented, in general terms, their own ability to perform the contract (*id.* ¶98), fail to support a viable cause of action (*King Penguin Opportunity Fund III, LLC v Spectrum Grp. Mgmt. LLC*, 187 AD3d 688, 690 [1st Dept 2020] [holding that "[g]eneral allegations of lack of intent to perform are insufficient"]; *CC Pay Operations Ltd. v Alokush*, 2019 NY Slip Op 30048(U), \*3 [Sup Ct, New York County Jan. 2, 2019] [dismissing "generalized allegation[] regarding Defendants' representations as to their skill and ability to perform under the Agreement"]]).

The closest the Complaint comes to pleading misrepresentation of a material *existing fact* is the assertion that Talpiot falsely represented its qualifications to do business in Florida (*see*

Compl. ¶¶31-32). But the Complaint does not allege any facts to support the claim that Talpiot’s representations were false when made, relying solely “upon information and belief” (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st Dept 2007] [granting motion to dismiss where “[t]he complaint’s allegation upon information and belief that O’Neill acted with BTM’s knowledge is insufficient”]; *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015] [“Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud”]). The Complaint also fails to specify how Talpiot’s purported lack of qualifications inhibited its performance under the contract, alleging only that “upon information and belief, certain services undertaken by Talpiot under the Talpiot Management Agreement would have required Talpiot to be licensed as a real estate broker” (Compl. ¶32). Similarly, the allegations fail to trace “some reasonable connection” between the lack of qualifications, on the one hand, and Plaintiff’s economic injury on the other (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002] [holding “there [must] be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered”]).

Plaintiff’s claim for negligent misrepresentation also fails for an additional reason – the Complaint does not sufficiently allege “the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff” (*J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 506 [1st Dept 2015]). The Complaint suggests nothing more than “an arm’s length business relationship between sophisticated parties,” which does not, as a general rule, “give rise to a confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation” (*id.* at 507). After all, Plaintiff holds the 80% majority stake in the joint venture, represented in the LLC Agreement that it had “the capacity to protect

its own interests and ha[d] reviewed the risks and merits of its participation in the Company with its counsel and advisors” (NYSCEF 14 §12.01 [a] [vi]), and importantly, bargained for muscular decision-making authority, including the right to “override and control certain ‘Major Decisions’ related to the Project” (Compl. ¶39; NYSCEF 14 §§7.01 [g], [h]). This was, in short, an arm’s-length deal with sophisticated parties on both sides.

That Defendants allegedly possessed “special expertise” in real estate investment, and “superior knowledge of the Project,” are “not sufficient to establish a special relationship” (*J.P. Morgan Sec. Inc.*, 127 AD3d at 506 [holding that allegations of “plaintiff’s superior knowledge of the hedge fund business” were not sufficient to support negligent misrepresentation claim]). Notwithstanding Plaintiff’s “subjective claims of reliance on defendants’ expertise,” plainly “Defendants had no advisory capacity as to plaintiff” (*Waterscape Resort LLC v McGovern*, 107 AD3d 571 [1st Dept 2013] [dismissing negligent misrepresentation claim]; *Greentech Research LLC v Wissman*, 104 AD3d 540 [1st Dept 2013] [alleged expertise “in raising capital from investors” insufficient to support claim where plaintiff was “an experienced financial analyst and money manager”]).

## **B. Breach of Fiduciary Duty**

Next, the claim for breach of fiduciary duty (Count IV) against the Sponsor Defendants – EE Parent, Yormak, and Peretz – is dismissed because the Complaint fails to sufficiently allege the existence of a fiduciary duty under Delaware law (*see Estate of Eller v Bartron*, 31 A3d 895, 897 [Del. 2011]).<sup>1</sup> While “New York precedent states that determining whether a fiduciary

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<sup>1</sup> Delaware law applies because the alleged fiduciary duty arises from the relationship formed by the LLC Agreement, which itself is governed by Delaware law (*see Kagan v HMC-New York, Inc.*, 94 AD3d 67, 72 [1st Dept 2012]; *Fremuth v Stetson*, 2017 NY Slip Op 30073(U), \*10-11 [Sup Ct, New York County 2017]).

relationship exists requires a fact-specific inquiry[,] ... Delaware does not hesitate to dismiss a fiduciary duty claim” (*Morgan v Worldview Entm’t Holdings, Inc.*, 170 AD3d 500, 504 [1st Dept 2019]). In an arm’s-length transaction between sophisticated parties, like this one, “Delaware law dictates that a condition of superiority is not present and, therefore, a fiduciary relationship does not exist amongst the parties” (*Dynamis Therapeutics, Inc. v Alberto-Culver Intern. Inc.*, CIV.A. 09-773-GMS, 2010 WL 3834405, at \*3 [D Del Sept. 24, 2010]; *Prestancia Mgt. Group, Inc. v Virginia Heritage Found., II LLC*, CIV.A. 1032-S, 2005 WL 1364616, at \*6 [Del Ch May 27, 2005] [“bargained-for commercial relationship between sophisticated parties [is] a relationship that does not give rise to fiduciary duties”]).

Plaintiff’s arguments in opposition are unavailing. *First*, the contention that the “Sponsor Defendants were direct fiduciaries of Plaintiff in their role as creators, organizers and promoters of the Company and the Project” finds no authority in Delaware law (*see Prestancia Mgmt. Grp., Inc. v Virginia Heritage Found., II LLC*, No. CIV.A. 1032-S, 2005 WL 1364616, at \*5 [Del. Ch. May 27, 2005] [refusing to find fiduciary relationship despite assertion that defendant “promoted an investment opportunity”]). Indeed, the “sponsor” role described in the Complaint appears to be nothing more than a commonplace commercial relationship. The Sponsor Defendants marketed the joint venture to drum up investment capital and Plaintiff, following arm’s-length negotiations, invested millions of dollars and became an 80% equity investor in the project (Compl. ¶¶16-18). Nothing about this transaction suggests “a special trust in another or a special duty . . . rising to the level that the relationship connotes a dependence” (*Dynamis Therapeutics, Inc. v Alberto-Culver Int’l Inc.*, No. CIV. A. 09-773-GMS, 2010 WL 3834405, at \*3 [D. Del. Sept. 24, 2010] [internal quotations omitted]; *Addy v Piedmonte*, No. CIV.A. 3571-VCP, 2009

WL 707641, at \*17 [Del Ch Mar. 18, 2009] [noting Delaware courts are “chary of expanding the scope of fiduciary duty to a broad set of commercial relationships”]).

*Second*, Plaintiff fails to show an indirect fiduciary relationship running through Plaintiff’s co-venturer in the Company, EE Operating Member. The Complaint does not adequately allege that the Sponsor Defendants controlled the Company’s assets (*Bay Ctr. Apartments Owner, LLC v Emery Bay PKI, LLC*, CIV. A. 3658-VCS, 2009 WL 1124451, at \*9 [Del Ch Apr. 20, 2009] [noting that “affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners”]). Even if it did, the broad waiver of fiduciary duties in the LLC Agreement, which disclaims any fiduciary duties “that may exist as a result of the relationship of the parties” thereto (NYSCEF 14 §13.18), bars the claim against the Sponsor Defendants as “controllers” of EE Operating Member (*Wenske v Blue Bell Creameries, Inc.*, CV 2017-0699-JRS, 2018 WL 3337531, at \*17 [Del Ch July 6, 2018] [“[W]here, as here, the limited partnership agreement entirely eliminates the general partner's common law fiduciary duties to the limited partnership and its limited partners. . . the corporate general partner owes no fiduciary duties that may be ‘extended’ to its controllers”]; *compare with Bay Ctr. Apartments Owner, LLC v Emery Bay PKI, LLC*, CIV. A. 3658-VCS, 2009 WL 1124451, at \*9 [Del Ch Apr. 20, 2009] [finding that plaintiff adequately pleaded extension of fiduciary duty to member’s affiliate “assum[ing], for the purposes of th[e] motion to dismiss, that the LLC Agreement requires [the LLC’s] members to act in accordance with traditional fiduciary duties”]).

*Third*, to the extent Plaintiff’s claim relies on general statements made by Defendants that they are “fiduciaries,” “[s]imply labeling a[] [party] a fiduciary . . . is insufficient because

nomenclature does not establish duties” (*Dickerson v Murray*, No. CV S14C-07-026 (RFS), 2015 WL 447607, at \*5 [Del. Super. Ct. Feb. 3, 2015]; *see* Compl. ¶¶11, 35).

### **C. Gross Negligence**

Plaintiff’s claim for gross negligence (Count V) is also dismissed. Gross negligence “differs in kind, not only degree, from claims of ordinary negligence” (*Colnaghi, U.S.A., Ltd. v Jewelers Prot. Servs., Ltd.*, 81 NY2d 821, 823-24 [1993]), and “when invoked to pierce an agreed-upon limitation of liability in a commercial contract, ‘must smack[ ] of intentional wrongdoing’” or “evinced [ ] a reckless indifference to the rights of others” (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 352 [2020] [internal citations omitted]). And “[e]ven on a motion to dismiss, a court need not accept as true conclusory allegations that a defendant was grossly negligent or acted willfully, in bad faith or with reckless disregard of its duties” (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]). Those are labels, not factual allegations. Here, the Complaint offers only conclusory allegations regarding Defendants’ purportedly “reckless, willful, and wanton disregard for the business of the Company” (Compl. ¶127). Therefore, the gross negligence claim fails as a matter of law.

### **D. Breach of Contract**

As a result of the foregoing, the claim for breach of contract (Count I) is barred by the language of the LLC Agreement. Section 10.01 [c] of the LLC Agreement provides, among other things, that “[e]xcept in the case of fraud, willful misconduct, gross negligence, violation of law or willful breach of the express terms of [the LLC Agreement],” neither Plaintiff nor EE Operating Member may be liable to the other for “an act or omission performed or omitted in good faith” or a “failure or refusal in good faith to perform any act” (NYSCEF 14 §10.01 [c]). This provision is enforceable under Delaware law (*see Capone v Castelton Commodities Int’l*

*LLC*, 148 AD3d 506, 506-07 [1st Dept 2017] [applying Delaware law]). As noted above, Plaintiff fails to sufficiently allege its claims for fraud, negligent misrepresentation, or gross negligence. And the Complaint does not adequately allege that the conduct underlying the breach of contract constituted “willful misconduct” or bad faith (*see* Compl. ¶¶90-95; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004] [“Even on a motion to dismiss, a court need not accept as true conclusory allegations that a defendant was grossly negligent or acted willfully, in bad faith or with reckless disregard of its duties”]). Therefore, the breach of contract claim fails as a matter of law.

#### **E. Declaratory Relief**

Finally, the holdings above foreclose Plaintiff’s claim for declaratory relief (Count VI). Plaintiff seeks a declaration “under the applicable provisions of the” LLC Agreement that EE Parent should be removed as Asset Manager, that EE Parent is not entitled to any fees after January 31, 2019, and that Defendants should disgorge all fees paid to date (Compl. ¶132). But to remove EE Parent as Asset Manager, Plaintiff must demonstrate the occurrence of a “For Cause” event pursuant to Section 7.04 of the LLC Agreement, which is “fraud,” “intentional misappropriation of the funds of the Company or any Subsidiary,” or “willful misconduct or gross negligence” (NYSCEF 14 at 6; Compl. ¶131). Because Plaintiff has not stated a claim for fraud or gross negligence, as set forth above, nor alleged “misappropriation of the funds of the Company,” Plaintiff is not, as a matter of law, entitled to the declaratory judgment it seeks.

\* \* \* \*

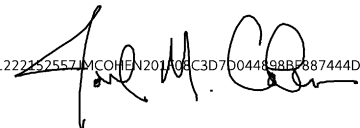
Accordingly, it is

**ORDERED** that Defendants’ motion to dismiss is **GRANTED**, and the Complaint is dismissed; and it is further

**ADJUDGED and DECLARED** that Plaintiff has not established its entitlement to remove Defendant EE Parent as Asset Manager “For Cause,” to cease paying fees to EE Parent going forward, or to disgorge fees paid to EE Parent previously.

The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

12/22/2021  
DATE

CHECK ONE:

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APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE