

Kostyatnikov v HFZ Capital Group LLC
2022 NY Slip Op 30486(U)
February 14, 2022
Supreme Court, New York County
Docket Number: Index No. 160904/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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SERGEY KOSTYATNIKOV, VSK E 68 LLC,
Plaintiff,

- v -

HFZ CAPITAL GROUP LLC, HFZ 235 W 75TH STREET
OWNER LLC, HFZ EAST 68TH SPECIAL MEMBER LLC,
HFZ EAST 68TH MANAGER LLC, HFZ EAST 68TH LLC
A/K/A HFZ EAST 68, LLC, HFZ EAST 68TH STREET
NORTH LLC, VNO HFZ 11 EAST 68 HOLDING MEMBER,
LLC A/K/A VNO 11 EAST 68TH HOLDING MEMBER LLC,
VNO HFZ 11 EAST 68 HOLDING LLC, ZIEL FELDMAN,
NIR MEIR, JP MORGAN CHASE & CO.,

Defendant.

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INDEX NO. 160904/2020
MOTION DATE
MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 28, 43, 48, 65, 71

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 66, 67, 68, 69, 70, 74, 76, 78, 84, 85

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 73, 75, 77, 79, 80, 81, 82, 83, 86, 87

were read on this motion to/for DISMISS

Based on the foregoing documents, HFZ 235 West 75th Street Owner LLC's (the Owner Entity) motion to dismiss pursuant to CPLR 3211(a)(7) and cancelling the notice of pendency pursuant to CPLR 6514 (Mtn. Seq. No. 001) and HFZ Capital Group LLC, HFZ East 68th Special Member LLC, HFZ East 68th Manager, LLC (the Manager), HFZ East 68th LLC a/k/a HFZ East 68 East LLC (the 68th Street Company), HFZ East 68th Street North LLC, VNO HFZ 11 East 68 Holding Member, LLC a/k/a VNO East 68th Holding Member, LLC, VNO HFZ 11

East 68 Holding, LLC and Ziel Feldman's (collectively, the **HFZ Defendants**) motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) (Mtn. Seq. No. 003) is granted solely to the extent of dismissing the causes of action for a declaratory judgment because they are duplicative of the breach of contract causes of action. The cause of action for tortious interference with contract was withdrawn on consent (1.26.2022) with leave to replead. The Plaintiffs are given leave to file an amended complaint within 30 days of the date of this order to add a cause of action for fraud and to replead the breach of fiduciary duty causes of action. Nir Meir's motion to dismiss pursuant to CPLR 3211(a)(7) (Mtn. Seq. No. 004) is adjourned for 45 days from the date of this order for Mr. Meir to determine whether his motion to dismiss will be applied against the amended complaint or whether he will file a new motion.

The Relevant Facts and Circumstances

Reference is made herein to (i) a Limited Liability Company Agreement of the 68th Street Company (the **LLC Agreement**; NYSCEF Doc. No. 56), dated as of December 14, 2011, by and among the Manager, HFZ East 68th Special Member LLC, HFZ 68 II LLC, and VSK East 68th LLC (the **Investor Entity**) pursuant to which the 68th Street Company was established to purchase a building at 11 East 68th Street (the **Property**), convert it into a condominium, and sell units at the Property, (ii) a Subscription Agreement (the **Subscription Agreement**; NYSCEF Doc. No. 55), dated December 14, 2011, by and between the Investor Entity and the Manager, pursuant to which the Investor Entity invested \$3,800,000 into the Company and received a membership interest in the 68th Street Company, (iii) a Side Letter (the **Side Letter**; NYSCEF Doc. No. 67) dated December 14, 2011 between Sergey Kostyatnikov (the **Investor**)¹ and the

¹ The Side Letter was entered into with Mr. Kostyatnikov and not the Investor Entity. Although this may have been an error, it can not be said that he does not have standing at this stage of the pleadings.

Manager, pursuant to which the **Investor** was granted the option to convert its membership interest in the 68th Street Company to acquire Unit 8A in the Property, or, if Unit 8C became available, giving the **Investor** the option to increase his investment in the 68th Street Company and convert his membership interest in the 68th Street Company to purchase Unit 8A and Unit 8C, as amended by the **First Amendment to the Side Letter**, dated October 16, 2012², as further amended by the **Second Amendment to the Side Letter** (NYSCEF Doc. No. 68), dated March 9, 2016, by and between Manager and the Investor Entity³ pursuant to which the “Investor and Manager agreed that Investor...[had] the option to purchase Unit 7A rather than 8A at the Property”, as amended by the **Third Amendment to the Side Letter** (NYSCEF Doc. No. 57), dated July 23, 2018, by and among the Investor, the Investor Entity and the Manager, pursuant to which the parties agreed, among other things, that the Manager would satisfy its obligations by acquiring from its current owner and distributing to the Mr. Kostyatnikov on behalf of the Investor Entity Units 720 and 723 at 235 West 75th Street (the **Designated Condominium Units**).

Additionally, pursuant to the Third Amendment to the Side Letter, the parties agreed:

1. The Designated Condominium Units, which shall consist of a minimum of 3,788 square feet, in the aggregate, in accordance with the floor plans attached hereto as Schedule B (the “Plans”). Units 720 and 723 are adjacent to each other and on the 7th floor of the Astor and shall be delivered legally combined, pursuant to the Plans, as one tax lot to the purchaser under the purchase and sale agreement relating to Units 720 and 723.

2. *The Company hereby represents to the Investor that, as of the date hereof, (i) sufficient financing has been received to complete the redevelopment and renovation of*

² This document is not part of the record so the court can not determine if this amendment was entered into with the Investor Entity or the Investor or someone else.

³ The document which is part of the record is not executed by the Manager. Additionally, although the document is executed by the Investor Entity, the document reflects as discussed above, an agreement of the Investor and the Manager.

the Astor in accordance with the Offering Plan of the Astor dated November 20, 2014, as amended by ten amendments, which have been delivered to Investor (the “Astor Offering Plan”), (ii) other than the combination work to be performed by the Company and sign off and close out of permits relating to the combination work (together, the “Delivery Conditions”), there are no conditions required to be met for the delivery to Investor of clean and marketable title free and clear of all liens and encumbrances to the Astor Designated Units, (iii) none of the Company, the Manager, HFZ EAST 68th SPECIAL MEMBER LLC or their respective affiliates have any reason to believe that the Delivery Conditions will not be satisfied prior to January 15, 2019.

3. The Investor herewith exercises its option to liquidate its Membership Interest by receiving the Astor Designated Units pursuant to Section 12.1.1 of the LLC Agreement. The Company shall deliver or cause to be delivered the Astor Designated Units to the Investor free and clear of all liens and encumbrances upon the closing of the Designated Unit Purchase Agreements. The Company shall assign its rights under the Designated Unit Purchase Agreements to Investor, including the right to receive title to the Astor Designated Units. Notwithstanding any contrary provisions of the Designated Unit Purchase Agreements, the Company shall pay or ensure payment of all Real Estate Transfer Tax due to the State of New York and the Real Property Transfer Tax due the City of New York, and any other applicable transfer or similar tax primarily imposed on the Seller of real property or interest in real property on the difference between the \$5,550,000 and the purchase price for the Astor Designated Units under the Designated Unit Purchase Agreements, and the Investor shall have no obligations hereunder other than to fund to the Company the Outstanding Capital Commitment and Investor shall not have any other obligations to make any additional capital contributions under the LLC Agreement or this Agreement.

4. The closing of the transfer of title to the Astor Designated Units to Investor in accordance with the terms hereof (the “Closing”) shall take place on a date to be mutually agreed upon by Investor and the Company, which shall be no later than January 15, 2019. The Company shall execute and deliver the Designated Unit Purchase Agreement prior to or simultaneously with the Closing. If the Closing (i) takes place after January 15, 2019, but prior to February 15, 2019, the Company shall pay to Investor or deduct from the Investor’s Outstanding Capital Commitment, at the Closing, \$1,000 per day for each day after January 15, 2019, but prior to February 15, 2019 that the Closing takes place, and (ii) takes place after February 15, 2019, but prior to March 15, 2019, the Company shall pay to Investor or deduct from the Investor’s Outstanding Capital Commitment, at the Closing, in addition to the amounts set forth in (i), \$2,000 per day for each day after February 15, 2019, but prior to March 15, 2019, that the Closing takes place, and (iii) takes place after March 15, 2019, the Company shall pay to Investor or deduct from the Investor’s Outstanding Capital Commitment, at the Closing, in addition to the amounts set forth in (i) and (ii), \$3,000 per day for each day after March 15, 2019 that the Closing takes place.

5. The parties agree that the liquidated damages set forth herein are reasonable compensation to Investor for delivery of the Astor Designated Units after January 15,

2019, including because the actual damages that might be caused to Investor by any such late delivery are difficult to ascertain as of the date hereof, and the Company hereby agrees to waive, in any action for enforcement of such liquidated damages any objection thereto. The parties further agree that such liquidated damages are in addition to and not in lieu of any rights or claims, Investor might otherwise have under contract, law or equity. The parties further agree that Investor and any person it designates to receive title to the Astor Designated Units pursuant to this Agreement has the right to seek specific performance of Closing after March 15, 2019 as Investor or any such other person would be irreparably and immediately harmed and could not be made whole by monetary damages if the Astor Designated Units are not delivered by March 15, 2019. It is accordingly agreed that (i) the Company and its affiliates will waive, in any action for specific performance, the defense of adequacy of a remedy at law and any other objections to specific performance of this Agreement and (ii) the Investor shall be entitled, in addition to any other remedy to which it may be entitled at law or in equity, to compel specific performance to prevent or restrain breaches or threatened breaches of this Agreement in any action without the posting of a bond or undertaking, and (iii) notwithstanding the Investor's rights to specific performance hereunder and the Designated Unit Purchase Agreement, Investor may pursue any other remedy available to it at law or in equity, including monetary damages in the amount of the liquidated damages set forth herein.

6. At the Closing, the Company shall fund or cause Sponsor to credit on behalf of the Investor, an amount equal to the purchase price for the Astor Designated Units under the Designated Unit Purchase Agreements and the Investor shall transfer the Outstanding Capital Commitment to the Company or, at the direction and on behalf of the Company, the Investor shall transfer the Outstanding Capital Commitment to the seller under the Designated Unit Purchase Agreements Purchaser.

7. The Company hereby represents and warrants to the Investor that all information in the Astor Offering Plan disclosed to the Investor regarding the Astor Designated Units is true, complete, and correct in all material respects and does not contain any untrue statement of material fact or omit to state a material fact necessary to make the statement made, in light of the circumstances under which such statements were made, not misleading to the Investor.

8. The Company and Investor hereby agree that Sergey Kostyatnikov and Investor (collectively "Investor Releasers") hereby release, acquit, satisfy, and forever discharge Company, the Guarantors, the Manager, HFZ Capital Group LL, their parents, members, partners, affiliates, predecessors, direct and indirect directors, officers, shareholders, agents, attorneys, employees, and other representatives, and their successors and assigns (collective "Company Releasees") and the Company Releaseas [sic] hereby release Investor Releasers and their affiliates, direct and indirect directors, officers, shareholders, agents, attorneys, employees, and other representatives, and their successors and assigns, of and from all manner of actions, causes of action, suits, debts, covenants, contracts, controversies, agreements, promises, claims and demands whatsoever, arising under the

LLC Agreement, the Subscription Agreement or the Original Side Letter, as the same may have been amended from time to time, except as amended by this Agreement.

9. The parties hereto are entering into this Agreement in reliance on the representations, warranties and undertakings contained herein. In the event of any conflict between the terms of this Agreement and the terms of the Subscription Agreement, LLC Agreement or the Designated Unit Purchase Agreements, the terms of this Agreement shall govern. This Agreement shall be construed according to the internal laws, and not the laws pertaining to choice or conflicts of laws, of the State of New York.

10. At any time and from time to time, the parties shall, upon request of each other, execute, acknowledge, and deliver all such further and other assurances and documents, at no cost and imposing no obligation on the delivering party, and will take such action consistent with the terms of this Agreement, as may be reasonably request to carry out the transactions contemplated herein and to permit each party hereto to enjoy its rights and benefits hereunder.

(NYSCEF Doc. No. 57 [emphasis added]).

The Investor is the sole member of the Investor Entity. The Manager is the managing member of the 68th Street Company. HFZ East 68th Special Member LLC is the majority owner of the 68th Street Company, and HFZ East 68th Street North LLC is the managing member of HFZ East 68th Special Member LLC. The Manager and HFZ East 68th Street North LLC are wholly owned by HFZ Capital Group LLC, which is controlled by Mr. Feldman and Mr. Meir. The Owner Entity owned the Astor, where the Designated Condominium Units are located. The Owner Entity was ultimately owned by HFZ 235 West 75th Street Junior Mezzanine LLC (**HFZ Junior Mezzanine**) who was owned by a subsidiary of HFZ Capital Group, LLC (NY), which is owned in part by Mr. Feldman and controlled by Mr. Feldman and Mr. Meir. The Manager and the 68th Street Company are owned under separate branches of the corporate structure than the Owner Entity, with Mr. Feldman and Mr. Meir at the head of both branches. Put another way, formally, the Manager is not the managing member or otherwise in the vertical chain of ownership of the Owner Entity.

According to the Plaintiffs, after the Investor and the Investor Entity made a \$3.8 million investment in the Company, the Defendants breached the agreement and strung him along. To wit, initially, without right given the obligations set forth in the documents and their obligation to provide the Plaintiffs with a choice as to Units 8A or 8C, the Defendants combined the two units taking away the Plaintiffs' choice. The 68th Street Company and the Manager then sold Units 8A, 8C, and 7A (i.e., the unit Plaintiff had agreed to take in substitution) to others. Following this breach, the Plaintiff was prepared to accept the Designated Condominium Units in a wholly different building based on representations made by the Defendants which the Defendants knew were false.

The Plaintiffs allege, however, that the 68th Street Company and the Manager did not obtain the Designated Condominium Units from its affiliate and despite demands for over a year and half to close, the Defendants failed to permit the Plaintiffs to close on the Designated Condominium Units.

At a UCC sale on January 7, 2021, CCO Condo Portfolio (AZ) Junior Mezzanine, LLC (the **Mezz Lender**) sold 100% of the ownership interests in HFZ Junior Mezzanine and all collateral pledged under a pledge agreement between the Mezz Lender as secured party and HFZ Junior Mezzanine as debtor, including 100% of the ownership interests in the Owner Entity (*see* Notification of Disposition of Collateral, NYSCEF Doc. No. 53). The Mezz Lender ultimately acquired the ownership interests in the Owner Entity. The collateral was offered “as is, where is” and with all faults (*id.*). Therefore, the Mezz Lender purchased the ownership interests subject to the debts and obligations of the Owner Entity.

Plaintiffs filed a complaint dated December 15, 2020 (NYSCEF Doc. No. 1), alleging causes of action for a constructive trust against the Owner Entity (first and second causes of action), specific performance against the Manager, the 68th Street Company, the Owner Entity, and Chase Bank (third and fourth causes of action), declaratory relief against the Manager, the 68th Street Company, the Owner Entity, and Chase Bank (fifth and sixth causes of action), breach of contract against the Manager and the 68th Street Company (seventh and eighth causes of action), breach of fiduciary asserted by VSK against the Manager (ninth cause of action), tortious participation in breach of fiduciary duty asserted by VSK against Mr. Feldman, Mr. Meir, and all HFZ Entities other than the Manager (tenth cause of action), and tortious interference with contract against Mr. Feldman, Mr. Meir, and the HFZ Entities other than the 68th Street Company (eleventh cause of action).

On the record (1.26.2022), the court gave the Plaintiffs leave to file an amended complaint within 30 days of the date of this order.

Discussion

On a motion to dismiss, the pleading is afforded a liberal construction, the facts as alleged are accepted as true, and the court must determine whether the facts as alleged fit any cognizable legal theory, according the plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Mr. Kostyatnikov Has Standing to Bring Claims as an Individual

As discussed above, the Side Letter is between the Investor and the Manager. As such, the Defendants can not merely whisk this lawsuit away from the Investor and say that the Investor Entity is the only party who has standing. (*cf. MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]).

The Investor and Investor Entity Sufficiently Allege Facts to Pierce the Corporate Veil

In order to pierce the corporate veil, a plaintiff must show that (i) the owners exercised complete domination of the corporation in respect to the transaction at issue, and (ii) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]). The doctrine of veil piercing is narrowly construed and the party seeking to pierce the corporate veil carries a heavy burden (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016]). A breach of contract, without something more, does not constitute a fraud or wrong that justifies piercing of the corporate veil (*id.*; *see Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013]).

The Investor and the Investor Entity sufficiently plead that the Defendants disregarded the corporate structure in their dealings with the Plaintiffs. The gravamen of the complaint is that the Defendants through their various corporate entities and less than perfect paperwork strung the Plaintiffs along and committed a fraud. To wit, the Plaintiffs claim essentially that when Mr. Feldman and Mr. Mir breached their agreements with the Plaintiffs and could not deliver the units that they had originally agreed that the Plaintiffs could purchase by virtue of their \$3.8

million investment, they merely allocated other units – *i.e.*, the Designated Condominium Units, in other entities that they owned and controlled. This sleight of hand is highlighted by not having the Owner Entity execute the Third Amendment to the Side Letter and by their failure to obtain Mezz Lender’s approval. It is beyond cavil that the combination of the units into a single tax lot unit as required by the Third Amendment required the Owner Entity, and potentially an amendment to the Offering Plan which amendment would have had to have been filed with the New York State Attorney General’s office. The well pled complaint further alleges that Mr. Meir and Mr. Feldman owned the HFZ Entities, that HFZ Capital controlled the Owner Entity, that the HFZ Entities all operated from the same location with the same phone number and key employees, and that the undercapitalized entities were by Messrs. Feldman and Meir to string the Plaintiffs along and ultimately abscond with the Plaintiffs’ money. Given the documentary evidence, this is more than sufficient at this stage of the pleadings.

The Investor and Investor Entity’s Declaratory Judgment Causes of Action Must be Dismissed

The declaratory judgment (fifth and sixth) causes of action assert that the Plaintiffs are entitled to a declaratory judgment that (i) the Plaintiffs has fully performed under the LLC Agreement, the Subscription Agreement, and the Third Amendment to the Side Letter, (ii) the Manager and the 68th Street Company have breached the terms of those agreements by failing to deliver the Designated Condominium Units or refusing to assign the 68th Street Company’s rights to receive title to the Designated Condominium Units, (iii) the Plaintiffs are entitled to the Designated Condominium Units, (iv) the Owner Entity, the Manager, and the 68th Street Company must execute the documents necessary to deliver the Designated Condominium Units, and (v) the Plaintiffs are entitled to attorneys’ fees. This is the same relief sought by the causes of action for

breach of contract and specific performance. Thus, they are duplicative and must be dismissed because the Plaintiffs have an adequate alternative remedy (*Nationstar Mortgage, LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490, 493 [1st Dept 2021]).

For completeness, the Plaintiffs on the record (1.26.2022) withdrew the cause of action for tortious interference with contract. This is dismissed without prejudice and may be replead in the forthcoming amended complaint.

The Release in the Third Amendment Does Not Bar This Suit

The release contained in paragraph 8 of the Third Amended Side Letter does not bar this suit and to the extent of any underlying fraud or fraud in the inducement claims in obtaining such release would in any event be outside of the agreement. The sum and substance of the allegations in this suit are that the Defendants' breached their representations and otherwise committed fraud because they did not intend or otherwise could not convey the units that they offered to the Plaintiffs such that the release was void *ab initio* or voidable and/or there was no consideration for the release because the Designated Condominium Units were never delivered.

The Constructive Trust, Specific Performance, and Breach of Contract are Not Dismissed

The Plaintiffs asserts causes of action for a constructive trust (first and second causes of action) against the Owner Entity. A cause of action for a constructive trust requires a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment (*Abacus Federal Savings Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). Based on the investment in the Company, the HFZ Defendants in this case owed fiduciary duties to their members –

including the Investor Entity. Inasmuch as these Defendants controlled by Messrs. Feldman and Meir abused the corporate form such that veil piercing is appropriate, the Owner Entity is liable for the delivery of the Designated Condominium Units. The investment in the Company and the release establish a transfer in reliance on a promise, initially for Units 8A or 8C at the Property, and eventually for the Designated Condominium Units. It does not matter that the Mezz Lender now owns the beneficial interests in the Owner Entity or that there has been a UCC Sale. The Mezz Lender took subject to the rights and obligations and liabilities of those entities.⁴ This was not a mortgage loan in real property where there the interests of junior interest holders were wiped out by virtue of the foreclosure. What matters is that the HFZ Defendants as an indistinguishable group were enriched by the Plaintiffs when the Plaintiffs made their investment and when they entered into the Third Amendment of the Side Letter and when they had the Plaintiffs agree to accept the Designated Condominium Units in satisfaction of the HFZ Defendants' obligations to deliver the units in the Property.

Specific performance may be awarded where parties are capable of performing their remaining obligations and the court may place the parties, to the extent possible, in the position they would have been had the contract been performed, granting no party superior rights (*Lamberti v Angiolillo*, 73 AD3d 463, 464 [1st Dept 2010], *lv denied* 15 NY3d 711). For the reasons set forth above, the Plaintiffs also sufficiently plead causes of action for specific performance requiring the Owner Entity to sell them the Designated Condominium Units based on their undisputed performance under the agreements and their demonstration that that they were ready,

⁴ For the avoidance of doubt, to the extent that the other Defendants may have failed to obtain their consent to the substitution of the Designated Units as may have been required under their loan documents, they may well have a cross-claim against those Defendants.

willing and able to close. Inasmuch as the Manager and the 68th Street Company no longer have the ability to convey the Designated Condominium Units by virtue of the UCC Sale, these causes of action must however be dismissed against them.

As discussed above, the Plaintiffs' claims survive the UCC sale and, because the Owner Entity remains the owner of the Designated Condominium Units, it is still capable of performing the Defendants' obligations under the Third Amendment to the Side Letter – i.e., to convey the Designated Condominium Units.

It is accordingly hereby ORDERED that the fifth and sixth causes of action are dismissed; and it is further

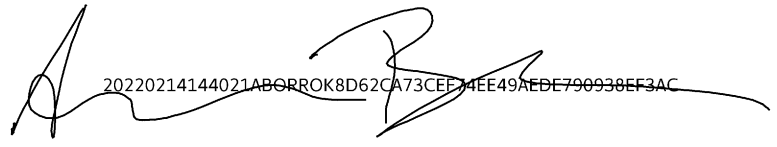
ORDERED that the third and fourth causes of action are dismissed as against the Manager and the 68th Street Company

ORDERED that the cause of action for tortious interference with contract is withdrawn on consent with leave to replead; and it is further

ORDERED that the Plaintiffs shall file an amended complaint within 30 days of the date of this order; and it is further

ORDERED that Mr. Meir's motion to dismiss (Mot. Seq. No. 004) is adjourned for 45 days from the date of this order, provided that Mr. Meir shall email Part 53 (sfc-part53@nycourts.gov)

within 45 days to inform the court whether his motion to dismiss shall be applied as against the amended complaint or whether he intends to file a new motion to dismiss.


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2/14/2022

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE