

PSB Indian Creek LLC v Halpern
2022 NY Slip Op 31163(U)
April 7, 2022
Supreme Court, New York County
Docket Number: Index No. 651406/2017
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART 48

Justice

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PSB INDIAN CREEK LLC, JHPSB INDIAN CREEK VENTURES LLC, JHPSB INDIAN CREEK VENTURES INVESTORS LLC, 2901 JMH, LLC, PSB COLLINS LLC, JHPSB COLLINS VENTURES, LLC, JHPSB COLLINS VENTURES INVESTORS, LLC, JHPSB COLLINS DEVELOPMENT LLC, and JHPSB COLLINS DEVELOPMENT 2 LLC,

Plaintiffs,

- v -

JASON HALPERN, JMH INDIAN CREEK DEVELOPMENT, LLC, 295 COLLINS LLC, 295 LNP LLC, JMH DEVELOPMENT III LLC, GERARD LONGO,¹ and 29 ICD, LLC,

Defendants.

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INDEX NO. 651406/2017

**TRIAL DECISION
Findings of Fact &
Conclusions of Law**

The issue for this portion of the trial is whether defendant JMH Indian Creek Development, LLC (JMH), breached the operating agreement.² (NYSCEF 470, April 28, 2020, SJ Decision at 9-10.) Plaintiff PSB Indian Creek LLC (PSB) contends that JMH breached the agreement by: (1) failing to make its initial capital contribution in violation of §2.1; (2) failing to obtain PSB's consent prior to making a capital call for \$4.1 million

¹ Longo was dismissed from the action, but his name was never removed from the caption. (NYSCEF 278, September 7, 2018, Decision at 27.) After the summary judgment decision, the remaining defendants are JMH and 29 ICD LLC as the claims against the other defendants were dismissed. (NYSCEF 470, April 28, 2020, SJ Decision at 13.)

² Also pending is plaintiffs' claim for tortious interference with contract against defendant 29 ICD, LLC which is contingent on first finding a material breach of contract. Justice Scarpulla found issues of fact exist concerning 29 ICD's knowledge about the terms of the Agreement and the due diligence undertaken prior to the sale. (NYSCEF 470, April 28, 2020, SJ decision at 13.) However, this claim is not subject to the Agreement's jury waiver. (NYSCEF 508, Agreement §11.6.)

on July 15, 2016;³ (3) causing the Company to sell the Property on January 17, 2017 without PSB's consent; and (4) beginning on October 21, 2015, failing to timely provide financial documents to PSB in violation of Section 6.2.

JMH contends that it timely made its initial contribution and thus PSB breached first when it failed to make its \$800,000 mandatory contribution by the due date of March 14, 2016. As result of PSB's default, JMH argues that PSB lost its governance rights and was substantially diluted, and thus PSB's consent was not required for the \$4.1 million capital call on July 15, 2016, nor the sale of the Property. Finally, JMH insists that it timely provided all required and existing financial documents.

The agreement at issue is the October 21, 2015, First Amended and Restated Limited Liability Company Agreement of JHPSB Indian Creek Ventures, LLC (Agreement) which forms JHPSB Indian Creek Ventures, LLC (Company), a joint venture to acquire and develop real estate (Project), located at 2901 and 2911 Indian Creek Drive, Miami Beach, Florida (Property). (NYSCEF 508, Agreement.) Prior to January 17, 2017, the Company's subsidiary 2901 JMH LLC owned the Property. (NYSCEF 497, Halpern Aff., ¶ 9; NYSCEF 508, Agreement §§1.1, 1.14; NYSCEF 547 October 17, 2014, Mortgage; NYSCEF 533, January 13, 2017, Closing Statement). PSB and JMH originally entered the Agreement on October 17, 2014. (NYSCEF 546, Initial Agreement.)

³ Justice Scarpulla dismissed plaintiff's breach of contract claim to the extent that plaintiffs alleged that defendants breached the Agreement by issuing a capital call for the stated purpose of repayment of the mortgage and carrying costs; under §2(6)(i), such repayment is a permissible purpose for a capital call. (NYSCEF 278, September 7, 2018, Decision at 11-12; NYSCEF 463, November 25, 2019, Decision [denying motion to renew based on new evidence].) She did not dismiss this claim to the extent that plaintiff alleges JMH's failure to obtain PSB's consent to the July 15, 2016, capital call.

PSB stands for Dhruv Piplani, Aviv Siso, and Louis Buckworth. (NYSCEF 497, Halpern Aff., ¶16; NYSCEF 504, Halpern Trial tr 327:7.) Piplani, Siso, and Buckworth, created PSB to invest in Miami real estate projects. (NYSCEF 497, Halpern Aff., ¶16)⁴ PSB was primarily responsible for providing capital for the Project, either on its own or through other investors. (NYSCEF 508, Agreement §§2.1, 2.2, 8.5.)

JMH is a developer of luxury condominiums in Miami Florida. (NYSCEF 497, Halpern Aff., ¶15.) Defendant Jason Halpern is the principal of JMH. (*Id.* at ¶12.) JMH was the manager of the Project, responsible for the day-to-day management including the authority to: (a) bind the Company with respect to all Affairs; (b) execute and deliver documents, contracts, agreements on behalf of the Company and the subsidiaries; (c) develop and implement the development budget, annual capital budget, and annual operating budget; and (d) make decisions and determinations on behalf of the Company, which pertain to loans, obtained by the Company or subsidiaries. (NYSCEF 497, Halpern Aff., ¶128; NYSCEF 508, Agreement §§1.1, 5.1, 5.2.) Halpern funded all of his real estate projects from a separate limited liability company, defendant 295 LNP, LLC (295 LNP). (NYSCEF 497, Halpern Aff., ¶14.) 295 LNP is owned and controlled by Halpern and is the parent entity of JMH. (*Id.*)

⁴ Plaintiff PSB alleges it is a New York limited liability company. (NYSCEF 44, Amended Complaint ¶16.) The court takes judicial notice of the absence of any listing on the New York Secretary of State's website for "PSB Indian Creek LLC" or any other corporate form. While Halpern complains that PSB represented to him that PSB had a written agreement memorializing their partnership which he understands is not true, defendants fail to raise plaintiff's lack of standing as a defense. (NYSCEF 497, Halpern ¶17; NYSCEF 288, JMH Answer.) Nevertheless, the court is compelled to dismiss the case for the added reason that plaintiff has for five years failed to register with the NYS Secretary of State even after defendant flagged the issue. In the absence of standing, in the future, should PSB wish to file anything in this proceeding, it must first file with the Secretary of State as the defect is curable. (See §30. Unlicensed Plaintiff Corporation, Siegel, N.Y. Prac. § 30 [6th ed.]) However, this is yet another misstatement by Piplani in a sworn document.

Funding of the IC Project

Initially, JMH had no funding obligations under the initial Agreement. (NYSCEF 497, Halpern Aff ¶13; NYSCEF 546, Initial Agreement.) However, on October 17, 2014, Titan Capital ID, LLC (Titan) loaned 2901 JMH, LLC, a subsidiary of the Company, \$4,000,000 to acquire the Property, which had a maturity date of April 17, 2016 (Acquisition Loan), which could be extended for an additional six months, until October 17, 2016. (NYSCEF 497, Halpern Aff., ¶¶10-11; NYSCEF 547, Mortgage §2.08.) Halpern personally guaranteed the Acquisition Loan. (NYSCEF 497, Halpern Aff., ¶12.) Further, §2.1 of the Agreement, as amended on October 21, 2015, provides that JMH would fund \$500,000 as of the October 21, 2015. (NYSCEF 508, Agreement §2.1 and Exhibit A, p 43/47 NYSCEF pages.)

Under the initial Agreement, PSB had already funded \$3,900,000⁵ by October 17, 2014. (NYSCEF 494, Piplani Aff ¶4; NYSCEF 508, Agreement, §2.1; NYSCEF 563, November 29, 2015, JMH LLC Capital Account Report.) As a result of the amendment of the Agreement, §2.2(a)(i) obligated PSB to make additional contributions on certain dates, deemed “Mandatory Proceeds,” as follows:

“2.2 Additional Capital Contributions by PSB Member. (a) (i) The Members agree that [PSB] shall fund additional capital as follows (such payments, the “Mandatory Proceeds”):

1. October 31, 2015 - \$200,000
2. November 30, 2015 - \$700,000
3. January 1, 2016 - \$800,000.” (NYSCEF 508, Agreement, § 2.2(a)(i).)

The due date for the \$800,000 mandatory Proceeds was extended to March 14, 2016. (NYSCEF 562, March 9, 2016, email from Friedman⁶ to Piplani denying Piplani’s

⁵ Exhibit A to the initial Agreement reflects PSB’s \$4 million contribution and 100% in its capital interest. (NYSCEF 546, Initial Agreement, p 44/46 in NYSCEF pages.)

⁶ David Friedman was a consultant working on the Project. (NYSCEF 497, Halpern ¶13.)

request to delay the payment and break into smaller pieces; NYSCEF 504, Halpern Trial tr 239:11-12.) Since PSB failed to pay the \$800,000, JMH funded it on March 21, 2016. (NYSCEF 522, Capital Account Report, NYSCEF pages 2/3.)

Section 2.6(a) of the Agreement also permitted JMH to make capital calls for additional contributions from PSB for pre-construction financing by issuing funding notices, as follows:

“2.6 Additional Funds (a) Additional Contributions (i) Pre-Construction Financing. Prior to the consummation of Construction Financing, if JMH Member reasonably believes the Company is in need of additional funding for any bona fide Company reason (other than as already provided in Section 2.2 hereof), then JMH Member shall have the right to deliver (or cause the Manager to deliver) to PSB Member and JMH Member a notice (each, a “Funding Notice”) to that effect setting forth the purposes and amounts of such additional requested funding (the “Required Funds”); provided, however, the JMH Member shall not have the right to deliver a Funding Notice without the prior written consent of the PSB Member if the Required Funds, together with all other Required Funds funded pursuant to this Section 2.6(a)(i), exceed ten percent (10%) of the aggregate equity requirement set forth on the Pre-Development Budget. Within sixty (60) days following the date on which such Funding Notice was given, PSB Member shall contribute to the Company, as an additional Capital Contribution, an amount equal to the total amount of the Required Funds.” (NYSCEF 508, Agreement §2.6(a)(i).)

If PSB is served with a funding notice for additional funding, PSB has 60 days to contribute such funds to the IC Project. (*Id.*, § 2.6(a)(i).)

Dilution, Carried Interest, and Corporate Governance

Section 2.2(a)(ii) states that PSB’s interests are subject to dilution if it fails to contribute its Mandatory Proceeds:

“2.2 (a) (ii) Failure of PSB Member to make any contribution of any Mandatory Proceeds on or prior to the date of such funding as set forth in Section 2.2(a), time being of the essence with respect thereto, shall be subject to dilution pursuant to Section 2.2(b) in the event JMH Member opts to fund any such Mandatory Proceeds on behalf of PSB Member, provided, however, that JMH Member shall provide PSB Member written notice (which notice may take the form of an email) of PSB Member’s failure to fund pursuant to this Section 2.2(a) and PSB Member shall have five (5) Business Days from the date of delivery of such notice to cure such failure before JMH Member may exercise its right to contribute funds on behalf of [PSB Indian Creek] and cause the related dilution of PSB Member’s interests as provided herein. . . . (*Id.*, §2.2(a)(ii).)

Section 2.2(b) states that if PSB fails to provide the Mandatory Proceeds, and JMH opts to funds such proceeds, PSB shall be subject to dilution:

“(b) In the event JMH Member elects pursuant to Section 2.2(a) to make a contribution of capital upon a failure of PSB Member to make a capital contribution pursuant to Section 2.2(a), then (i) such additional contribution shall be deemed to be a Default Capital Contribution pursuant to Section 2.6 and (ii) the Carried Interest Distributions and Capital Account of PSB Member shall be diluted and reduced, as applicable, as set forth in Section 2.6(c) and 2.6(e) hereof.” (*Id.*, §2.2(b).)

Section 2.6(c) states that if PSB fails to provide the funds for more than 60 days after JMH contributes such funds, JMH could elect to have such funds be deemed JMH’s “Capital Contributions” to the Company and have the “Carried Interest Distributions” adjusted upward, and have PSB’s Carried Interest Distributions adjusted downward. (*Id.*, §2.6(c).)

Capital Contributions “means, with respect to any Member, the amount of money and the initial fair market value of any property other than money (net liabilities to which such property is subject) contributed to the Company with respect to the Interest in the Company held by such Member.” (*Id.*, §1.1.)

Carried Interest Distributions “means 50% for each of JMH Member and PSB Member in each case as such Carried Interest Distributions may be adjusted in accordance with the terms of this Agreement, including without limitation Section 2.2.” (*Id.*)

Section 2.6(d) provides that if PSB fails to make a capital call, JMH “shall have the right, but not the obligation, without PSB Member’s consent, to fund all capital required by the Funding Notice (on behalf of itself and PSB) . . . via a loan to the Company” (JMH Advance), which shall accrue interest and “be payable in accordance

with §4.4,” which provides that the JMH Advance shall be repaid prior to any distributions. (*Id.*, §§2.6(d); §4.4.)

Moreover, §2.6(e) provides that if PSB’s Carried Interest Distributions are adjusted downward, then it would be diluted:

“(e) Capital Dilution. Notwithstanding anything contained herein to the contrary, if the Failing Member has its Carried Interest Distributions reduced and the Funding Member has its Carried Interest Distributions increased pursuant to Section 2.2(b) or this Section 2.6, then an amount equal to (i) the Default Capital Contribution and the Default Preferred Return thereon multiplied by (ii) 150 percent (150%) (the “Shifted Capital”) shall be transferred from the Failing Member’s Capital Account to the Funding Member’s Capital Account and the amount of such Shifted Capital shall be treated as Capital Contributions made by the Funding Member (and not of the Failing Member) including for determining invested capital and Capital Interests.” (*Id.*, §2.6[e].)

In addition to dilution, upon PSB’s failure to pay Mandatory Proceeds, the Agreement also provided that PSB would forfeit its right to participate in the governance of the IC Company, and JMH would solely retain the right, as follows:

“(f) Right of Funding Member. In addition, as of the date PSB Member as Failing Member has failed to make one or more additional Contributions in accordance with the terms of Section 2.2(a), then PSB Member, as Failing Member, shall forfeit the right to participate in the governance of the Company (to the extent it had governance rights under this Agreement), and [the JMH] as Funding Member alone shall have the right to govern the Company and, in connection therewith, shall have all rights and powers Afforded a manager of a limited liability company under the Act.” (*Id.*, §2.6[f].)

Other Relevant Provisions of the Agreement

The Agreement provides for indemnification as follows:

“The Company shall indemnify and hold harmless each Indemnified Party against any loss or damage (including attorneys’ fees and other professional fees) incurred by the Indemnified Party on behalf of the Company or in furtherance of the Company’s interests, without relieving the Indemnified Party of liability for fraud, willful misconduct, gross negligence or misappropriation of funds. The satisfaction of any indemnification shall be from and limited to Company’s assets and no Member shall have any liability on account thereof. The right to indemnification shall include the right to be paid or reimbursed by the Company the reasonable expenses actually incurred by the Indemnified Party and documented with reasonably sufficient evidence, in advance of the final disposition of the any proceeding, provided, however, that the advance payment

of such expenses shall be made only upon delivery to the Company of a written Affirmation by such Indemnified Party of such Indemnified Party's good faith belief that the Indemnified Party has met the standard of conduct necessary for indemnification under this Agreement and a written undertaking, by or on behalf of such Indemnified Party, to repay all amounts so advanced if it shall ultimately be determined that such Indemnified Party is not entitled to be indemnified under this Agreement or otherwise."

(*Id.*, §10.2.)

The merger clause is found in §11.9 entitled "Entire Agreement" which provides:

"This Agreement contains the entire understanding among the parties and supersedes any prior understandings and agreements between them respecting the subject matter hereof, including, without limitation, the letter regarding Changes to Operating Agreements dated October 17, 2014 by and between the Members. There are no representations, agreement, arrangements, or understandings, oral or written, between or among the parties hereto relating to the subject matter of this Agreement which are not fully expressed herein." (*Id.*, § 11.9.)

With regard to attorneys' fees, the Agreement provides in §11.7:

"If the Company or any Member obtains a judgment against any Member by reason of the breach of this Agreement or the failure to comply with the terms hereof, it is the intent of the parties that reasonable attorneys' fees and costs will be borne by such Member. (*Id.*, § 11.7.)

The parties agreed to exculpation from any liability in §10.1 which provides as follows:

"No Member, Manager, or any officer, director, shareholder, partner, member, manager, employee or agent of a Member or Manager (an "Indemnified Party") shall be liable, responsible or accountable in damages or otherwise to the Company or the other Members for any act or omission performed or omitted by the Indemnified Party in good faith pursuant to the authority granted to the Indemnified Party under this Agreement and in a manner reasonably believed by the Indemnified Party to be in the scope of the authority granted to the Indemnified Party by this Agreement and in the best interests of the Company, provided that the act or omission is not determined by a court to be due to the Indemnified Party's fraud, willful misconduct, gross negligence, or misappropriation of funds. (*Id.*, §10.1.)

The Agreement required both JMH and PSB to consent to "Major Decisions," including selling the Property, filing for bankruptcy, establishing a development budget, making a capital call in excess of 10% of the pre-development budget. (*Id.* §5.3(a).)

Changes to the Agreement

The initial Agreement was amended on October 21, 2015. (NYSCEF 497, Halpern Aff., ¶27.) According to Halpern, the purpose of amending the initial Agreement was to: (a) require JMH to provide some funding to the Project in the form of an initial capital contribution of \$500,000 (Halpern Aff., ¶21; NYSCEF 505, Piplani Trial tr at 84:23 - 85:2) and (b) ensure that PSB met its funding obligations, which it was failing to do since the inception of the Project. Halpern explained:

Q. Do you recall why there were mandatory payments required in the amended Operating Agreement, even though they were not in the original?

A. Yes, because we had...made capital calls previously, which PSB did not fund. So we wanted to have it certain so that there would not be further issues.” (NYSCEF 504, Halpern Trial tr 219:25-221:21; 323:17-324:21.)

Piplani stated different reasons for the amendment: “As a result of obtaining such entitlements earlier than anticipated, JMH Indian Creek requested that the members agree to amend the initial operating agreement to provide for additional capital contributions to fund the Indian Creek Project. Based upon JMH Indian Creek's assurances that it would proceed with the Project, including preparing for construction and obtaining an appropriate construction loan, PSB Indian Creek agreed.” (NYSCEF 494, Piplani Aff ¶5.) However, the amended Agreement is consistent with Halpern's explanation and provides:

“The Members acknowledge that on September 10, 2015, JMH Member delivered to PSB Member a notice of default for capital required to be funded pursuant to Section 2.1 hereof in the amount of \$402,939.00 and a capital call pursuant to Section 2.2(a)(i) for \$692,250 (the ‘Capital Call/Default Notice’). The JMH Member agrees that the Capital Call/Default Notice is hereby withdrawn ab initio and PSB Member has no obligation to fund any capital contributions to the Company under the Capital Call/Default Notice.”

(NYSCEF 508, §2.2(a)(iii).)

Piplani's explanation is illogical. While not a significant discrepancy, the Agreement itself undermines Piplani's testimony, foreshadowing a credibility problem. Piplani was an uncooperative witness. (See e.g. NYSCEF 505, Piplani Trial tr 39:17-42:2; 64:13-23; 77:8-19.) He answered questions that were not asked.⁷ (See e.g. *id.*, tr 56:17-22.) Indeed, Piplani did not answer some of his own attorney's questions.

Another change in the Agreement was to designate Louis Buckworth as an authorized representative of PSB. (NYSCEF 508, Agreement §5.9.)

The Collins Project and Elkaim

Since March 2014, the parties were involved in development of a property at 300 Collins Avenue, Miami Florida. (NYSCEF 497, Halpern Aff. 14, fn. 1.) On July 20, 2015, Piplani and Halpern, through their respective LLCs, entered into an amended Limited Liability Company Agreement (Collins Agreement) creating JHPSB Collins Ventures, LLC for a separate real estate venture in Miami (Collins Project). (NYSCEF 497, Halpern Aff., ¶ 14; NYSCEF 548, JHPSB Collins Ventures LLC Agreement.) There were several other investors in the Collins Project, including Simon Elkaim. (NYSCEF 497, Halpern Aff., ¶ 16.) As of August 26, 2014, Elkaim invested approximately \$1.3 million into the Collins Project. (*Id.*; NYSCEF 522, June 21, 2016, email at p. 3, line 17 [noting that the total Elkaim investment was \$1,360,101].) In June 2015, Elkaim requested that \$400,000 of his \$1.3 million investment be returned to him because he was going through a divorce and needed the money. (NYSCEF 497, Halpern Aff., ¶ 17;

⁷ Similarly, Halpern repeatedly said he paid the \$400,000 at issue. (See e.g., NYSCEF 504, Halpern Trial tr 227:16-18 (lines 19-22 were stricken as nonresponsive), 272:10-13.) However, repeating the same words does not make it so. Halpern was at times not responsive and reluctant to answer questions, instead e.g. repeating that he followed the operating agreement. (See e.g. *id.* tr 245:245:8-246:25; 232:9-15; 272:4-9; 276:1-2; 315:17-316:2; 313:24-314:2.) The court found some of Halpern's responses incredible. (See e.g. *id.* tr 210:12-14 the court observed Halpern hesitate and not recall his own address; 299:14-300:11, 285:9-12.)

NYSCEF 551, July 1, 2015, email from Buckworth to Halpern at p. 2; NYSCEF 505, Piplani Trial tr 65:2-15; NYSCEF 504, Halpern Trial tr 326:22-327:10.) JMH agreed to pay Elkaim. (NYSCEF 504, Halpern Trial tr 326:22-327:10.) On July 30, 2015, Halpern directed Merrill Lynch to wire \$400,000 to Elkaim's account from 295 LNP's account. (NYSCEF 497, Halpern Aff., ¶ 18; NYSCEF 552, Merrill Lynch Statement.) The transaction was documented in a Collins Project capital account report, which lists capital contributed by all investors in the Collins Project. Specifically, it reflects Elkaim's \$400,000 buyout by JMH as a debit in line 16, Elkaim's account, and a credit to 295 LNP's account of \$400,000 in line 26. (NYSCEF 497, Halpern Aff. ¶ 19; NYSCEF 522, June 21, 2016, email re Cap.)

On March 9, 2016, the Collins Project made a distribution to 295 LNP in the amount of \$2,335,054.50 which included JMH's \$400,000 capital contribution to the Company. (NYSCEF 524, July 15, 2016, letter; NYSCEF 522, Collins Capital Report at 3, line 26 and line 36; NYSCEF 498, Brown Aff ¶ 14; NYSCEF 507, Brown Trial tr 426:18-23.) In other words, JMH's \$400,000 capital contribution was returned to 295 LNP (JMH's parent); JMH no longer had a capital contribution to the Company.

PSB insists that effectively, JMH withdrew its capital contribution from the Company in March 2016. While the Agreement's §7.1 bars withdrawals: "No Member shall have the right to withdraw from the Company prior to the dissolution and winding up of the Company," plaintiff's first breach of contract claim focuses on JMH's initial contribution, not whether JMH maintained its contribution as required by §7.1.

Nevertheless, relying on the general ledger and based on Brown's journal entries in June 2016 to reflect the October 2015 amended Agreement, specifically JMH's \$400,000 payment to Elkaim, which journal entries were not reversed until August 26, 2016, the court finds JMH's general ledger maintained a capital account from October

15 to August 26, 2016. The court relies on the general ledger because many of the reports created by Halpern and his employees were riddled with errors. (See e.g. NYSCEF 508, Agreement Exhibit A compared to NYSCEF 546, initial Agreement Exhibit A; NYSCEF 504, Halpern Trial tr 225:20-227:1, 230:6-232:15.) During the period of March 9, when the Collins Project distributed funds to 295 LNP, until March 21, 2016, when JMH funded PSB's unpaid mandatory proceeds \$800,000, JMH's capital account's corresponding entry to the general ledger was a receivable from Collins and the \$100,000 deposited in November 2015. Regardless of the cash taken out of Collins, Collins continued to owe the Company \$400,000 until August 26, 2016.

As a result of Florida litigation, Piplani is now the owner of the Collins Project. (NYSCEF 494, Piplani Trial Aff., p. 5, n.5.)

Breach 1: JMH's Initial Contribution

The court finds that JMH timely made its initial contribution of \$500,000. While JMH delivered \$100,000 to the Company almost 30 days late on November 12, 2015, the bulk of the payment was made on July 30, 2015, well before the October 15, 2015, deadline.⁸ (NYSCEF 514, 515, 516, IC Capital Account statements.) Exhibit A of the amended Agreement, listing the parties' initial contributions, specifically notes "400,000 previously funded." (NYSCEF 508, Agreement, §2.1, Ex. A.) Piplani acknowledges that he signed the Agreement and was represented by counsel in negotiating and executing the amended Agreement. (NYSCEF 505, Piplani Trial tr 37:6-20.] The court finds Exhibit A reliable because just as Exhibit A to the initial Agreement showed PSB's \$4 million contribution, Exhibit to the amended Agreement shows JMH's contribution. The Agreement's merger clause bars plaintiff from contesting the veracity of that statement

⁸ The court focuses on the \$400,000 because that is plaintiff's focus; the 30-day delay in 2015 and the delayed amount of \$100,000 are de minimus in the context of this case.

with parol evidence. (*WWW Assocs. v Giancontieri*, 77 NY2d 157, 163 [1990].)

Nonetheless, the parol evidence supports the conclusion that the parties agreed to credit JMH for having reimbursed Elkaim.

JMH and PSB agreed that the \$400,000 paid by 295 LNP to Elkaim, the Collins Project investor, be recognized to the IC Project as \$400,000 of JMH's \$500,000 initial capital contribution. (NYSCEF 497, Halpern Aff., ¶¶ 22, 23.) While Piplani testified during trial otherwise, he was contradicted by his own deposition testimony, in which he unequivocally and on multiple occasions, admitted that he agreed to this arrangement (NYSCEF 505, Piplani Trial tr 73:6-76-16; 139:5-142:1.) The parties all understood the parties' agreement -- that 295 LNP's \$400,000 payment to the Collins Project would be allocated to the IC Project as part of JMH's \$500,000 initial capital contribution requirement. (NYSCEF 497, Halpern Aff., ¶ 26.)

Piplani's conduct corroborates his consent. During and after the negotiations on the amendment, Piplani simply inquired about whether JMH contributed the additional \$100,000 to the Project because he apparently understood that \$400,000 was previously funded – a fact he admitted. (NYSCEF 497, Halpern Aff., ¶ 23; NYSCEF 505, Piplani Trial tr 73:6-76-16; NYSCEF 497, Halpern Aff., ¶ 37; NYSCEF 555, November 10, 2015, email from Halpern to Piplani at DF_00007482; *Id.* at DF_00007476 (a November 5, 2015, e-mail from Piplani; NYSCEF 556, November 9-16, 2015 e-mail chain between Piplani and Bernstein.)

Buckworth, the B in PSB and identified in the Agreement as PSB's Representative, also expressly noted the parties' agreement in two separate e-mails. In a March 10, 2016, e-mail from Buckworth to Piplani, Buckworth said: "Sorry to chime in late. By [sic] my recollection [sic] this figure was netted off on Indian Creek at the time when the docs were renegotiated, was it not? JMH now hold a \$500k capital account in

Indian Creek after funding an additional \$100k.” (NYSCEF 497, Halpern Aff., ¶ 24; NYSCEF 553, March 10, 2016, email from Buckworth to Piplani; see NYSCEF 554, March 11, 2016, email from Buckworth to Piplani [“I spoke to David last night and it is agreed that the \$400 was applied to Indian Creek.”].) Buckworth testified at his deposition that this was the parties’ understanding. (NYSCEF 505, Buckworth tr 179:10-180:3)

Indeed, in a July 15, 2016, letter, PSB expressly referenced this agreement, noting that JMH received credit for \$400,000 in the Project “on account of the Simon Elkaim transaction” in the Collins Project. (NYSCEF 497, Halpern Aff., ¶ 25; NYSCEF 524, July 15, 2016, letter.)

JMH told PSB that JMH will not deliver the \$400,000 cash of its initial capital contribution to the Company until PSB contributed \$4.15 million as JMH had demanded, a week prior, in the July 2016 Funding Notice. (NYSCEF 525, July 22, 2016, Letter from Halpern; NYSCEF 506, Halpern Trial tr 289:19 – 291:3.) JMH’s letter of July 22, 2016, is not an admission that JMH had breached Agreement in October 2015 and was still in breach on July 22, 2016. As explained above, the Company’s general ledger had a \$400,000 receivable from the Collins Company until August 26, 2016, until it was converted to cash.

Finally, Brian Brown, the CPA who worked on the Project, was by far the most credible witness at trial. (NYSCEF 498, Brown Aff., ¶ 2.) Brown learned of the October 21, 2015, amendments in June 2016 when he was preparing the annual tax documents. (*Id.* ¶ 7.) Brown made corresponding journal entries on the general ledgers for both the Project and the Collins Project. (*Id.* ¶¶ 9, 10, 11.) “[O]n March 9, 2016, the Collins Project made a distribution to JMH of \$2,335,054.50, which included repayment of the \$400,000.” (*Id.* ¶ 14; NYSCEF 511, JHPSB Member Loan Schedule; NYSCEF 522,

June 21, 2016, email; NYSCEF 525, July 22, 2016, Letter from Halpern; NYSCEF 439, Halpern Aff., ¶¶81 – 82; NYSCEF 506, Halpern Trial tr at 235:18 – 20, 237:13 – 239:1; 282:1 – 3.) Because of PSB’s imprecise objection to Brown’s accounting as “double counting,” and because “JMH’s \$400,000 credit in the Collins Project was not a cash infusion into the Collins Project, but rather a repayment of \$400,000 from the Collins Project to Mr. Elkaim,” Brown recommended that “JMH contribute \$400,000 to the IC Project in cash.” (*Id.* ¶18.) On August 26, 2016, JMH’s bank account reflects such a wire payment of \$400,000 from 295 LNP. (*Id.* ¶19.)

The court rejects Halpern’s attempt to blame Brown for an accounting error (NYSCEF 506, Halpern Trial tr 218:19-21, 219:4-21; 274:1-8, 293:16-18; 274:1-8);⁹ the error was Halpern’s error not Brown’s error. Halpern admitted that he and Jeff Bernstein handled the bookkeeping and thus Halpern failed to keep the books and records up to date which was Halpern’s responsibility. (NYSCEF 504, Halpern Trial tr 215:10-12, 230:6-9.) Halpern failed to timely inform Brown of the October 21, 2015, amendments and seek instruction on how to record the intercompany transaction. It appears to the court that Halpern sought no instruction when on March 9, 2016, the Collins Company returned \$2.3 million in equity to 295 LNP, without Halpern understanding that it included the \$400,000. (NYSCEF 504, Halpern Trial tr 218:2-219:21.)

Since JMH timely made the initial \$400,000 contribution prior to October 2015, JMH was not in breach beginning in October 2015, as PSB insists. Accordingly, PSB’s

⁹ Halpern blamed Penn, a land use attorney, for errors too, but again ultimately, Halpern signed the deed. (NYSCEF 497, Halpern Trial Aff., ¶106; NYSCEF 504, Halpern Trial tr 322:4-323:6.)

failure to pay its \$800,000 mandatory payment due on March 14, 2016, was not excused and was the initial breach, resulting in dilution and loss of governance rights.

Breach 2: The \$4.1 Million Capital Call on July 15, 2016

Section 2.6(a)(i) permits JMH to issue a funding notice for any bona fide reason, provided that if the funding exceeds 10% of the aggregate equity requirement of the pre-development Budget, JMH would need PSB's consent to issue the notice. (NYSCEF 508, Agreement.) JMH concedes that it did not obtain PSB's consent to issue the July 15, 2016, funding Notice for \$4.1 million because consent was not required. (NYSCEF 527, October 6, 2016, Letter.) The amount of capital demanded in the July 2016 Funding Notice exceeded the limit set forth in §2.6(a)(i) of the Amended Operating Agreement. (NYSCEF 508, Agreement §2.6(a)(i); NYSCEF 527, October 6, 2016, Letter; NYSCEF 512, September 28, 2015, email at 2; NYSCEF 504, Halpern Trial tr at 277:7 – 278:13).

PSB failed to fund this \$4.1 million. (NYSCEF 494, Piplani Trial Aff., 31-42; NYSCEF 376, Piplani Depo tr at 213:7-18.) Instead, JMH elected to put up \$2 million in October 2016 and to partially pay off the Acquisition Loan. (NYSCEF 531, Indian Creek Note.) As a result, PSB was fully diluted from 29% to 0%, having no interest left in the Project as of October 6, 2016. (NYSCEF 582, February 13, 2017, JMH Capital Account Report; NYSCEF 497, Halpern Trial Aff., ¶84.) Upon failing to make its \$800,000 Mandatory Proceeds payment on March 14, 2016, PSB immediately forfeited its governance rights pursuant to OA §2.6(f). (NYSCEF 508, Agreement.) Therefore, even if the Funding Notice's capital call of \$4.1 million exceeded 10% of the aggregate equity requirement of the pre-development budget, PSB's consent to issue any funding notices in July 2016, was not required four months after PSB lost its governance rights.

On December 24, 2015, Halpern told PSB that, on behalf of the Company, JMH was unilaterally, and over PSB's objection, putting the Project on hold because of "market" conditions. (NYSCEF 517, December 2015 Letter.) Nevertheless, the Project continued incurring pre-development costs, which were substantial. (NYSCEF 497, Halpern Trial Aff., ¶52.) These costs included servicing the Acquisition Loan, real estate taxes, architectural design costs, costs related to the entitlements on the Property, the sales center, presales, marketing, building permits. (NYSCEF 504, Halpern Trial tr 233:7-234:20; 352:2-24.) PSB's failure to comply with its funding obligations had consequences.

Breach 3: Selling the Property Without PSB's Consent

JMH concedes that it did not obtain PSB's consent to sell the Property to 29 ICD in January 2017 because consent was not required. As of March 14, 2016, PSB forfeited its governance rights in the Project and its interest in the Project was diluted from 50% to 29%, resulting from its failure to fund the \$800,000 in Mandatory Proceeds. [NYSCEF 497, Halpern Trial Aff., ¶69; NYSCEF 527, October 6, 2016, Letter.] As of October 6, 2016, PSB was fully and completely diluted, having no interest left in the Project, resulting from its failure to fund the July 15, 2016, capital call for \$4.1 million. (NYSCEF 497, Halpern Trial Aff., ¶84.) PSB's consent was not required to sell the Property in January 2017, ten months after PSB lost its governance rights and three months after it was fully diluted.

Breach 4: Failure to Timely Provide Financial Reports

Section 6.2 states that JMH should provide certain financial reports to PSB at least every six months, including balance sheets, profit and loss statements and cash flow statements, and project status reports. (NYSCEF 508, Agreement, §6.2; NYSCEF 504, Halpern Trial tr 242:5-8.) PSB argues that commencing on October 21, 2015, JMH

breached its contractual obligations by failing to provide PSB with these financial records. Specifically, PSB objects that JMH did not cause an audit of the Company to be conducted and JMH did not furnish, by February 29, 2016 (within sixty days of the end of the 2015 fiscal year), audited financial statements for the Company to PSB. (NYSCEF 494, Piplani Trial Aff., ¶ 22; NYSCEF 498, Brown Trial Aff., ¶¶20; NYSCEF 504, Halpern Trial tr 242:9-22). As of March 8, 2016, JMH had not provided PSB with certain material information concerning the Project (updated budget, costs and proforma). (NYSCEF 562, March 9, 2016, email, p. 2). By June 10, 2016, JMH had not provided PSB with the Company's balance sheets, profit and loss statements, and cash flow statements, audits for the fiscal years ending December 31, 2014, and December 31, 2015, and quarterly project status reports. (NYSCEF 519, June 10, 2016, Letter.) Also, by June 10, 2016, JMH failed to provide PSB with the Company's bank statements, the general ledger, and copies of material agreements. (*Id.*)

On June 21, 2016, JMH provided PSB with a capital analysis for the Company. (NYSCEF 522, June 21, 2016, email).

By July 5, 2016, JMH had not provided PSB with the updated budget for the Project. (NYSCEF 521, July 5, 2016, email). However, on July 14, 2016, JMH provided PSB with an updated budget for the Project. (NYSCEF 587, July 14, 2016, email.)

On October 13, 2016, and for the first time, JMH provided PSB with 2014 and 2015 financial statements (which were not audited), and a balance sheet/cash flow statement. (NYSCEF 588, 2014 and 2015 JHPSB Indian Creek Annual Financial Statements.) However, JMH never provided PSB with audited financial statements. (NYSCEF 498, Brown Trial Aff., ¶23.)

Halpern testified that JMH provided monthly reports some of which contained financial information. (NYSCEF 504, Halpern Trial tr 243:18-20, 244:8-9, 19-20.)

However, a review of the monthly reports shows otherwise. (NYSCEF 504, Halpern Trial tr 264:24-267:8.)

JMH argues that because development of the Project paused in December 2015, certain documents required by the Agreement did not exist and therefore could not be provided to PSB. Brown explained that when the Project was not being developed, it would have been a “colossal waste of the parties’ money.” (NYSCEF 498, Brown Aff ¶22.)

Further, JMH argues that Buckworth, the PSB Representative, spent a significant amount of time at JMH’s offices where he had complete access to all of the available books and records of the Project. (NYSCEF 504, Halpern Trial tr 329:6-15.)

JMH’s compliance with its obligation to provide financial statements was never excused. The Agreement required that any modification of the agreement must be in writing; no such writing was proffered to the court. JMH was required to provide audited financials and its failure to do so constitutes a breach. As to other documents that JMH did not provide, the court finds that the breach is not material because PSB had access to existing financial information since Buckworth worked in the Project’s office and had access to the records. Further, the court finds that failure to provide nonexistent documents because the project had not reached the development stage at which such documents would be produced is also not a material breach.

As to JMH’s failure to produce audited financials, to timely provide documents, or to provide nonexistent documents, the court finds that JMH is exculpated from liability by §10.1 which exculpates JMH “from liability for acts that are performed in good faith pursuant to the Agreement, reasonably believed to be within the scope of the Agreement, and in the best interest of the Project, provided that the act or omission is not determined by the court to be fraud, willful misconduct, gross negligence, or

misappropriation of funds.” (NYSCE 508, Agreement §10.1.) Accordingly, the court rejects PSB’s reliance on cases for the proposition that whether JMH’s failure to perform its contractual obligations was intentional or due to “error” is legally irrelevant. (See *AQSR India Private, Ltd. v. Bureau Veritas Holdings, Inc.*, C.A. No. 4021-VCS, 2009 WL 1707910, at *11 (Del. Chan. June 16, 2009) (“Absent a contractual provision dictating a standard of conduct, there is no legal difference between breaches of contract made in bad faith and breaches of contract not made in bad faith. Both are simply breaches of the express terms of the contract.”). Here there is such a contract provision. (See NYSCEF 508, Agreement §10.1 for standard of care.)

The court makes no findings as to JMH’s further actions regarding the Project including the January 17, 2017 sale of the Property to Gerard Longo, Halpern’s longtime business partner, or how JMH applied the proceeds of the sale (NYSCEF 533, Closing Statement; NYSCEF 504, Halpern Trial tr 313: 21-23; NYSCEF 494, Piplani Trial Aff., ¶147) or why Halpern’s entity Indian Creek Investment Lender, LLC filed suit against 29 ICD LLC in Florida state court on May 14, 2020 to foreclose on the mortgage. (NYSCEF 497, Halpern Trial Aff., ¶106.)

Attorneys’ Fees

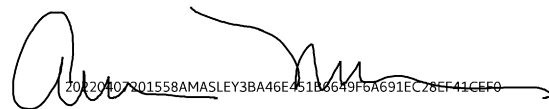
As the prevailing parties, defendants are entitled to attorneys’ fees under §11.7. (NYSCEF 508, Agreement.)

The court has considered the parties’ remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that the action is dismissed in its entirety, and judgment is entered in favor of defendants with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that within 30 days of this decision, for calculation of attorneys' fees, defendants shall submit an affirmation of services including firm bios or resumes and time sheets. Plaintiffs shall have 15 days from receipt of the affirmation of services to file opposition. Defendants shall inform the court by email when the application is fully submitted or when plaintiff's time to oppose has lapsed. The court shall determine whether a hearing on attorneys' fees is necessary.



ANDREA MASLEY, JSC

4/7/2022

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)