SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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TPC ANGELS LANDING DTLA, LLC, MACFARLANE DEVELOPMENT COMPANY, LLC

Plaintiffs,

- v -

CLARIDGE DTLA ASSOCIATES, LLC,

Defendant.

INDEX NO. 652567/2021

MOTION DATE N/A

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 175, 187, 188, 189, 193

were read on this motion to DISMISS COUNTERCLAIMS.

This dispute arises from a $1.6 billion development project in downtown Los Angeles known as "Angels Landing." Plaintiffs/Counterclaim-Defendants TPC Angels Landing DTLA, LLC and Macfarlane Development Company, LLC ("TPC Angels") and Defendant/Counterclaim-Plaintiff Claridge DTLA Associates, LLC ("Claridge") allegedly formed a joint venture to bid on the Angels Landing project.

After having been sued in this action for allegedly breaching an LLC Agreement in connection with the project (NYSCEF 2), Claridge asserted counterclaims against TPC Angels for breach of contract, breach of fiduciary duty, promissory fraud, and promissory estoppel, and related affirmative defenses (NYSCEF 137). TPC Angels now brings this motion to dismiss those counterclaims and defenses. For the reasons set forth below, the motion is granted.

BACKGROUND

According to the factual allegations in the Second Verified Amended Answer with Counterclaims ("SAA") (NYSCEF 137), which are assumed to be true for purposes of this motion, in 2015 Ricardo Pagan ("Pagan"), Claridge's CEO and founder, discovered the Angels Landing development opportunity and approached R. Donahue Peebles ("Peebles") to work together to acquire and develop the property. Pagan and Peebles orally agreed that Pagan would contribute "sweat equity" to the Project, employing his connections and knowledge of the City, and Peebles would address the financial needs of the Project.

As alleged in the SAA, in April 2015 the parties agreed to establish a joint venture to acquire and invest in the Project through the City's bidding process. In April 2017, in furtherance of the joint venture, Peebles formed Angels Landing Partners, LLC ("ALPartners"), a Delaware LLC, to bid on and develop Angels Landing. According to the Complaint in this matter, ALPartners was formed without a written operating agreement (NYSCEF 2 ¶ 11).

In spring 2017, Peebles brought Victor MacFarlane ("MacFarlane") into the Project, with the parties agreeing to work collaboratively and split the equity ownership 40/40/20, with Claridge having the 20 percent interest. The parties decided to memorialize the terms of their 2015 oral agreement in a written Memorandum of Understanding ("MOU"). The MOU on its face stated that it was not a binding agreement (NYSCEF 34).

Under the MOU, the parties' respective ownership interests were not tied to funding capital for the ultimate development of the Project. Rather, according to Claridge, the MOU provided that the parties would contribute proportionate costs *for the RFP process*, and Peebles later allegedly modified that agreement so that Claridge could focus on securing the Project rather than on fundraising efforts. Relying on these promises, Claridge set up meetings with

various City representatives, connected ALPartners to team members who joined the Project, and worked on the design scope and ways to differentiate ALPartners' bid from other development bids. In December 2017, the City accepted ALPartners as the successful bidder for the project.

From there, according to Claridge, the relationship among the putative partners soured. Having received the benefit of Claridge's efforts in helping to obtain the project, TPC Angels executed a pre-existing plan to "right size the partnership" to Defendants' advantage. In what Claridge describes as a bait and switch, TPC Angels prepared an LLC Agreement for Angels Landing Partners, LLC (NYSCEF 3) naming itself as managing member of ALPartners and affording Claridge no role. The LLC Agreement reduced Claridge's equity interest to 15 percent and provided for dilution of Claridge's ownership interest if it failed to meet capital calls set by TPC Angels. Claridge objected to these proposed revisions. TPC Angels ignored those concerns and threatened to take Claridge to arbitration to determine ownership rights. Claridge asserts that because it had already performed the valuable services that it brought to the joint venture table, it did not have leverage to object to the proposed LLC Agreement.

The parties, including Claridge, executed the LLC Agreement on January 18, 2019. Section 4.2(c) of the LLC Agreement provides that: "[t]he Members shall work together to make the Project successful and shall not take any action to intentionally hinder or damage the Project, including, without limitation, disparaging the Company or the Project through the use of press, media or other public outlets" (NYSCEF 3 § 4.2[c]). Claridge alleges that TPC Angels breached that provision by excluding Claridge from communications, directing others not to include Pagan in messaging, and effectively sidelined Claridge from the Project. TPC Angels stopped including Claridge's involvement in press releases. Meanwhile, Claridge's equity interests were diluted as it failed to meet capital calls.

DISCUSSION

I. Claims under the Oral Joint Venture Agreement and MOU

For the reasons set forth below, Claridge's counterclaims for breach of contract (first counterclaim), breach of fiduciary duty (second counterclaim), promissory fraud (third counterclaim), and promissory estoppel (fourth counterclaim) based on the Oral Joint Venture Agreement and MOU are dismissed.

A. Breach of Contract and Breach of Fiduciary Duty

1. The MOU is Expressly Non-Binding

First, these claims rely on a finding that the MOU described an enforceable joint venture agreement between the parties. However, the MOU expressly states that it is non-binding: "This document is not intended to be a legally binding agreement, but simply a statement of joint intentions and guiding principles that will govern the Developers relationship for purposes of responding to the Angels Landing RFP" (NYSCEF 34). It is well settled that a purported "agreement" cannot be enforced when the parties have expressed their intention not to be bound (*see e.g., Stevens v RX Med. Dynamics, LLC*, 191 AD3d 487 [1st Dept 2021], *lv to appeal denied,* 37 NY3d 909 [2021]; *Beck v New York News, Inc.*, 92 AD2d 823, 825 [1st Dept 1983], *aff'd,* 61 NY2d 620 [1983]).

2. Claridge has Failed to Allege the Existence of an Oral Joint Venture Agreement

Second, the alleged oral agreement that preceded the MOU is similarly unenforceable. Claridge has "failed to state a cause of action based on a joint venture agreement because it failed to allege 'a mutual promise or undertaking to share the burden of the losses of the alleged enterprise'" (*Mawere v Landau*, 130 AD3d 986, 988 [2d Dept 2015]). In this case, Claridge's

undertaking principally were its "services in negotiating or arranging the deal. Courts, however, have generally held that the risk of losing the value of one's services is not sufficient to constitute sharing in the losses of a joint venture" (*Mawere v Landau*, 39 Misc 3d 1229(A) [Sup Ct, Kings County 2013], *affd as mod*, 130 AD3d 986 [2d Dept 2015]). Here, unlike *Cobblah v Katende* (275 AD2d 637 [1st Dept 2000]), where the First Department recognized that a joint venture may exist even where there is no explicit agreement to share losses if "there was no reasonable expectation that there would be any losses" (*id.*), here there plainly would have been losses if the parties expended resources but did not win the bid.

3. *The Merger Clause in the LLC Agreement Supersedes any Prior Agreement*

Third, even assuming there had been a binding oral joint venture agreement and/or a binding MOU, *both* agreements were expressly superseded by the LLC Agreement. Section 12.9 of the LLC Agreement provides that "[t]his Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof and thereof and supersedes all prior agreements with respect to the same subject matter, whether oral or written" (NYSCEF 524 [LLC Agreement § 12.9]). Despite its misgivings, Claridge chose to sign the LLC Agreement, which provided Claridge with a 15 percent ownership stake contingent on meeting an initial capital call. Under Delaware law, which governs the LLC Agreement (*see* NYSCEF 524 [LLC Agreement § 12.1]), "[w]hen people enter into a contract, that contract is the primary determinant of their rights and duties to each other. Moreover, when, as is the case here, contracting parties are sophisticated and represented by counsel, the Court should be extremely wary of holding one of the parties liable for a pre-contractual promise that is inconsistent with the terms of the contract" (*Blaustein v Lord Baltimore Capital Corp.*, CIV.A.

6685-VCN, 2012 WL 2126111, at *7 [Del Ch May 31, 2012]). There is no allegation that Claridge, which was represented by counsel, misunderstood or was otherwise unaware of the equity arrangements under the LLC Agreement. Thus, Claridge's counterclaims for breach of contract and breach of fiduciary duty are dismissed.

B. Promissory Fraud and Promissory Estoppel

1. Claridge Cannot Justifiably Rely on the Non-Binding MOU

Claridge's promissory fraud and promissory estoppel claims under California law[1] are also precluded by the LLC Agreement's merger clause. Claridge alleges it that it worked for more than two years in reliance on the promise of a 20 percent equity interest and involvement as a partner in the Project. However, according to Claridge, TPC Angels intentionally misled Claridge as they never had any intention of following through on those promises as reflected in the MOU at the time such promises were made.

Under California law, "'[p]romissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud" (*Lazar v Superior Ct.*, 12 Cal 4th 631, 638 [1996]). "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract" (*id.*). "'The intention not to perform a promise is a matter of inference from the facts proven and subsequent conduct may be sufficient to show such intention [citations] . . . .Without

[1] Claridge asserts that California has the most significant interest in the subject matter of its claim, and that California law therefore should be applied to the extent it conflicts with New York law. California law recognizes a cause of action for promissory fraud where a promise is made without the intention to perform (*Lazar v Superior Court*, 12 Cal 4th 631 [1996]; *cf. Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 67 [1st Dept 2017] [citing *Deerfield Commc'ns Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]).

the consideration of other evidence, *the subsequent failure to perform* warrants the inference that appellants *did not intend to perform* when they promised'" (*City of Larkspur v Jacobs Eng'g Group, Inc.*, A123486, 2010 WL 2164406, at *13 [Cal Ct App 2010], quoting *Longway v Newbery*, 13 Cal2d 603, 611 [1939]).

Here, even assuming California law applies to this claim, the express disclaimer in the MOU stating that it is not binding fatally undermines Claridge's claim of justifiable reliance (*see Dore v Arnold Worldwide, Inc.*, 39 Cal 4th 384, 394 [2006] [rejecting plaintiff's promissory fraud claim which alleged that a company induced plaintiff to leave his job by promising him long-term employment where plaintiff admitted that he signed the company's letter stating his employment was at will and terminable at any time]).

2. *Claridge's Promissory Fraud Claim Does Not Fall Outside of the LLC Agreement's Merger Clause*

Although courts have held that a merger or integration clause does not necessarily bar claims of fraud or fraudulent inducement (*see e.g.*, *United Guar. Mortg. Indem. Co. v Countrywide Fin. Corp.*, 660 F Supp 2d 1163, 1177 n15 [CD Cal 2009]; *Hinesley v Oakshade Town Ctr.*, 135 Cal App 4th 289, 301 [Cal Ct App 2005]), "Claridge does not allege that it was fraudulently induced to sign the LLC Agreement" (NYSCEF 187 at 20 n8 [br. in opp.]). Accordingly, Claridge's counterclaims based on the alleged Oral Agreement are superseded by the LLC Agreement and are dismissed (*see Neurvana Medical, LLC v Balt USA, LLC,* CV 2019-0034-KSJM, 2020 WL 949917, at *21 [Del Ch 2020]; *Red Sail Easter Ltd. Partners, L. P. v Radio City Music Hall Productions, Inc.*, CIV.A. 12036, 1992 WL 251380, at *8 [Del Ch 1992]).

II. Claims under the LLC Agreement

Claridge seeks to evade the LLC Agreement on the grounds that it should be rescinded based on promissory fraud (fifth counterclaim) or be declared void based on a lack of consideration (seventh counterclaim). Claridge also asserts a counterclaim for breach of the LLC Agreement (sixth counterclaim). For the following reasons, these counterclaims are dismissed as well.

A. Rescission of the LLC Agreement by Promissory Fraud

Claridge argues that although it expressed reservation to signing the LLC Agreement, it relied on Section 4.2(c) as a basis for believing Claridge would be involved in the Project and not be pushed to the side as a silent partner. "To assert a claim for promissory fraud, the plaintiff … must plead specific facts that lead to a reasonable inference that the promissor had no intention of performing at the time the promise was made" (*see e.g.*, *Winner Acceptance Corp. v Return on Capital Corp.*, No. 3088-VCP, 2008 Del. Ch. LEXIS 196 [Del. Ch. Ct. Dec. 23, 2008[]).[2] Here, Claridge alleges that TPC Angels excluded Claridge from email exchanges, withheld information and updates from Claridge, forced Claridge to defer to rest of the team in meetings, and did not include Claridge in press releases. These allegations, according to Claridge, show that TPC Angels had no intention of keeping its promise to work with Claridge on the venture.

However, Claridge fails to allege any facts that support its claim that TPC Angels breached Section 4.2(c). There are no allegations that TPC Angels did not work together *to make the project successful*, or that TPC Angels took actions that intentionally hindered or

[2] Claridge asserts that it has stated a claim for promissory fraud under both California and Delaware law. Since the parties' LLC Agreement contains a Delaware choice of law clause, and this claim arises out of the LLC Agreement, this claim is subject to Delaware law.

damaged the Project. Claridge only argues that it was excluded from certain updates and internal and external communications, but nothing in Section 4.2(c) defines the specific manner in which the parties were to work together, only that such work would make the project successful, which it was. Thus, Claridge's fifth counterclaim seeking rescission of the LLC Agreement based on promissory fraud fails.

B. Breach of the LLC Agreement

Likewise, Claridge's counterclaim for breach of the LLC Agreement fails. As noted, Claridge has not alleged sufficient facts to support a claim that TPC Angels breached section 4.2(c) of the LLC Agreement.

C. Declaratory Judgment that the LLC Agreement is Void for Lack of Consideration

There is also no basis for Claridge's counterclaim seeking to have the LLC Agreement declared void on the ground that Claridge had already largely performed its obligations under the Oral Agreement, and thus, there was not adequate consideration to support the LLC Agreement. The LLC Agreement does not exclusively rely on Claridge's past contributions. It requires that Claridge contribute a proportionate share of the company's capital in exchange for its equity interest in ALPartners (*see* NYSCEF 524 [LLC Agreement §§ 3.3, 3.4]). This is sufficient consideration (*Low v Ngan Fung Chum*, 261 AD2d 337, 337 [1st Dept 1999] ["Consideration was provided by plaintiff's equity interest in the restaurant he owned with appellant and the other two defendants"]). Accordingly, the seventh counterclaim is dismissed.

III. Affirmative Defense of Unconscionability

Finally, Claridge's Eighth Affirmative defense of unconscionability under California Law is dismissed. Section 1670.5 of the California Civil Code states that a court may refuse to enforce a contract that was unconscionable at the time it was made. Here, there is nothing

facially unconscionable about the LLC Agreement. The fact that Claridge was asked to make equity contributions in exchange for its equity stake may not have been its preference, but that does not make it unconscionable. The purpose of § 1670.5 is "the prevention of oppression and unfair surprise…and not of disturbance of allocation of risks because of superior bargaining power" (§ 1670.5, cmt.1). Evaluating this claim under New York or Delaware law would not change the result.[3] If Claridge believed the LLC Agreement contravened the parties' prior agreement(s), the time to assert that claim *instead of* signing the LLC Agreement, not afterward.

Accordingly, it is:

ORDERED that TPC Angel's motion to dismiss the second amended counterclaims is **granted**, and Claridge's first, second, third, fourth, fifth, sixth, and seventh counterclaims and affirmative defenses are dismissed.

This constitutes the Decision and Order of the Court.

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6/7/2022
DATE

JOEL M. COHEN, J.S.C.

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

[3] *See, e.g., Progressive Intern. Corp. v E.I. Du Pont de Nemours & Co.*, C.A. 19209, 2002 WL 1558382, at *11 [Del Ch July 9, 2002] ("A mere disparity in the bargaining power of parties to a contract will not support a finding of unconscionability."); *Burnell v Morning Star Homes, Inc.*, 114 AD2d 657, 658 [3d Dept 1985] ("The mere exercise of superior bargaining power…is not a sufficient basis for a finding of unconscionability.").