

Soifer v SD Second Ave. Member LLC
2022 NY Slip Op 31875(U)
June 10, 2022
Supreme Court, New York County
Docket Number: Index No. 654475/2021
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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CLAUDIO SOIFER, SD SECOND AVENUE VENTURE, LLC, SD SECOND AVENUE CS MEMBER, LLC, SD SECOND AVENUE HOLDING, LLC, SD SECOND AVENUE PROPERTY, LLC,

Plaintiffs,

- v -

SD SECOND AVENUE MEMBER LLC, JOSHUA SCHUSTER, 359 SECOND AVENUE GRAMERCY LLC, JVEM SILVERBACK GRAMERCY LLC, SD SECOND AVENUE MANAGER LLC, SCHUSTER ENTERPRISES LLC, SILVERBACK ACQUISITIONS AND DEVELOPMENT LLC, 67 LIVINGSTON LLC, SB GERARD AVENUE, LLLC, J.S.I.K. INTERNATIONAL LLC, SILBER ACQUISITIONS LLC, HARRY KARTEN

Defendants.

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INDEX NO. 654475/2021
MOTION DATE N/A
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 39, 41, 42, 54, 61, 77, 78, 79, 80, 81

were read on this motion to DISMISS.

Defendants J.S.I.K. International LLC (“J.S.I.K.”) and Harry Karten move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the claims against them in this action arising from an alleged fraudulent real estate development scheme. J.S.I.K. and Karten also seek to dismiss the claim against defendant SD Second Avenue Member LLC (“JS Member”) for the equitable dissociation of JS Member from plaintiff SD Second Avenue Venture LLC (“SD Venture”).

BACKGROUND

Plaintiffs Claudio Soifer, SD Venture, SD Second Avenue CS Member, LLC (“CS Member”), SD Second Avenue Holding, LLC (“SD Holding”), and SD Second Avenue Property,

LLC (“SD Property”) commenced this action seeking to recover damages from defendants JS Member, Joshua Schuster, 359 Second Avenue Gramercy LLC (“359 Gramercy”), JVEM Silverback Gramercy LLC (“Silverback Gramercy”), SD Second Avenue Manager LLC (“SD Manager”), Schuster Enterprises LLC (“Schuster Enterprises”), Silverback Acquisitions and Development LLC (“Silverback Acquisitions”), 67 Livingston LLC (“67 Livingston”), SB Gerard Avenue, LLC (“Gerard Avenue”), J.S.I.K., Silber Acquisitions LLC (“Silber Acquisitions”), and Harry Karten for their participation in allegedly fleecing SD Venture, the joint venture formed to develop the real property located at 351, 353, and 359 Second Avenue, New York, New York (the “Property”) into a luxury condominium (the “Project”). Plaintiffs essentially claim that Joshua Schuster and the other defendants engaged in a fraudulent investment scheme by luring them into investing millions in SD Venture, and then syphoning off the funds to boost their other failing real estate development projects.

The Complaint (NYSCEF Doc. No. 2) includes the following factual allegations.

Claudio Soifer controls CS Member, the sole member of SD Property, which purchased the Property.

Joshua Schuster is the sole member of Schuster Enterprises, which is the sole member of SD Manager, the sole member of 359 Gramercy. 359 Gramercy, in turn, is the sole member of JS Member, the real estate developer for the Project. Joshua Schuster also owns, controls, or has interests in Silverback Acquisitions, 67 Livingston, Gerard Avenue, and Silber Acquisitions. SD Manager has interests in Silverback Gramercy.

By Amended and Restated Operating Agreement, dated July 31, 2018, CS Member and JS Member formed SD Venture, a Delaware limited liability company, to jointly develop the Property. Under the agreement, SD Venture obtained a 100% interest in SD Holding, which has

a 100% interest in SD Property. In addition, JS Manager became the managing member, CS Member acquired a 50.5% interest in SD Venture, and JS Member acquired a 49.5% interest.

JS Member reportedly defaulted under the agreement and the parties entered into a Second Amended and Restated Limited Liability Company Operating Agreement, dated May 23, 2019 (the “Joint Venture Agreement”), to complete the Project (*see* Joint Venture Agreement, NYSCEF Doc. No. 77). The Joint Venture Agreement, among other things, designated JS Member as the managing member and required JS Member to pay CS Member \$5,000,000.00, which CS Member was obligated to finance in the form of a loan to JS Member (the “Loan Installment”). The Loan Installment required, among other things, that JS Member pay CS Member quarterly interest installments beginning on June 30, 2019. In addition, CS Member was to receive 100% of the distribution of cash flow from SD Venture until the Loan Installment was fully satisfied.

On June 24, 2019, SD Venture, as owner, retained SD Manager, as developer, to perform development management services for the Project in exchange for specified fees (*see* Development Agreement, NYSCEF Doc. No. 78). On December 16, 2019, J.S.I.K., which is wholly owned by Harry Karten, paid Schuster Enterprises \$5,000,000.00 to acquire a 48% interest in SD Manager (*see* Membership Interest Purchase Agreement, NYSCEF Doc. No. 79). Schuster Enterprises agreed to cause SD Manager to pay J.S.I.K. certain transaction fees totaling \$250,000.00 from SD Manager (*id.*). In addition, SD Manager also reportedly agreed to pay J.S.I.K. \$1,200,000.00 from the development fees that it received from SD Venture.

Plaintiffs assert that Joshua Schuster had no intention of successfully developing the Property. Rather, plaintiffs claim that Joshua Schuster engaged in a fraudulent scheme by, among other things, misrepresenting the financial condition of his companies in order to defraud

plaintiffs and other entities that invested in his real estate projects. Plaintiffs assert that Joshua Schuster or his affiliated companies concealed adverse judgments and accurate financial reports, defaulted on loans, failed to pay investors, contractors, and vendors, and improperly transferred corporate shares and funds to affiliated entities in order to boost his other failing real estate development projects. As to the moving defendants, plaintiffs claim that Joshua Schuster, through JS Member, improperly paid them \$616,184.00 from funds belonging to SD Venture.

The Complaint alleges causes of action for breach of contract (first cause of action) and breach of fiduciary duty (second cause of action) against JS Member (second cause of action); fraudulent transfer against JS Member, SD Manager, Schuster Enterprises, Schuster Acquisitions, Joshua Schuster, J.S.I.K., Harry Karten, 67 Livingston, and SB Gerard (third cause of action); unjust enrichment (fourth cause of action) and conversion (fifth cause of action) against SD Manager, Schuster Enterprises, Schuster Acquisitions, Joshua Schuster, J.S.I.K., Harry Karten, 67 Livingston, and SB Gerard; declaratory judgment against JS Member, SD Manager, Schuster Enterprises, 359 Gramercy, Silverback Gramercy, Joshua Schuster, and Silber Acquisitions (sixth cause of action); fraudulent inducement against JS Member, SD Manager, Schuster Enterprises, 359 Gramercy, Silverback Gramercy, and Joshua Schuster (seventh cause of action); equitable dissociation of JS Member from SD Venture against JS Member (eighth cause of action); and breach of contract against Joshua Schuster (ninth cause of action).

By order entered April 21, 2022, this Court dismissed without prejudice, for the reasons stated on the record, the claims asserted against SB Gerard in the Complaint (*see* Order [Mot. Seq. No. 003], NYSCEF Doc. No. 83).

J.S.I.K. and Harry Karten now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the claims asserted against them in the Complaint, and the claim for dissociation of JS Member from SD Venture against JS Member.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, *supra*).

Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*). In addressing a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268, 275 [1977]).

As stated, plaintiffs allege claims for fraudulent transfer, unjust enrichment, and conversion against the moving defendants. Plaintiffs essentially claim that Joshua Schuster, through JS Member, misappropriated \$516,184.00 from SD Venture, as development fees, and fraudulently transferred those funds to J.S.I.K. Plaintiffs further claim that Joshua Schuster improperly transferred an additional \$100,000.00 from SD Venture to J.S.I.K. Even construed in the light most favorable to plaintiffs, the claims against J.S.I.K. and Harry Karten must be dismissed.

First, the claims against Karten must be dismissed because the Complaint does not sufficiently allege facts to warrant imposing personal liability for transactions in which J.S.I.K. allegedly participated (*see Art Capital Bermuda Ltd. v Bank of N.T. Butterfield & Son Ltd.*, 169 AD3d 426, 427 [1st Dept 2019]; *501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494 [1st Dept 2013] [dismissing claims against individual defendants based on piercing the corporate veil where allegations were “wholly conclusory and consist of no more than a recitation of the elements of the claim, ‘upon information and belief’”]). Plaintiffs allege J.S.I.K., not Karten himself, purchased a minority interest in SD Manager from Schuster Enterprises and received certain payments. They make only generalized assertions against Karten himself, upon information and belief (*see Complaint, supra*). Those allegation are insufficient to state a viable claim for personal liability, even if Plaintiffs had otherwise pleaded a viable claim against J.S.I.K. Thus, the claims for fraudulent transfer, unjust enrichment, and conversion against Karten are dismissed.

Second, the claims against J.S.I.K. must be dismissed since the pleadings allege only wrongdoing by Joshua Schuster and his affiliated entities, not by J.S.I.K. (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 518 [2012]). In the third cause of action, Plaintiffs allege that JS Member fraudulently transferred millions of dollars to its affiliated entities and partners, including J.S.I.K. The pleadings do not allege that J.S.I.K. knew of and participated in the alleged fraudulent transfer or that the transfer was made without fair consideration (*see Debtor and Creditor Law §§273, 274; Cantor Fitzgerald & Co. v San Capital Partners Master Fund, L.P.*, 132 AD3d 402 [1st Dept 2015]). Plaintiffs allege only that J.S.I.K. purchased a 48% interest in SD Manager from Schuster Enterprises, and that the purchase agreement required Schuster Enterprises to make certain payments to J.S.I.K. (*see Complaint, supra*). Simply

alleging that J.S.I.K. received payments pursuant to that arrangement, without some facts tying those payments to alleged impropriety, is insufficient. Further, the allegations lack the specificity required for fraud claims (*see* CPLR 3016[b]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Thus, the claim for fraudulent transfer is dismissed as to J.S.I.K.

The fourth and fifth causes of action, alleging unjust enrichment and conversion, respectively, must also be dismissed as to J.S.I.K. Plaintiffs allege that JS Member improperly transferred funds belonging to CS Member and SD Venture to J.S.I.K. and others. Here too, however, plaintiffs simply fail to allege any facts to show wrongdoing by J.S.I.K. The pleadings state that J.S.I.K. purchased an interest in SD Manager from Schuster Enterprises, and that the purchase agreement contemplated payments to J.S.I.K. Plaintiffs do not allege any facts indicating that J.S.I.K. was enriched, at the plaintiffs' expense, or that it is against equity and good conscience to permit defendant to retain what is sought to be recovered (*see Mandarin Trading Ltd. v Wildenstein, supra*, at 182).

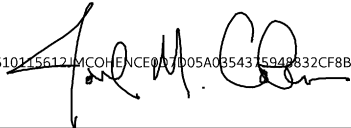
Moreover, plaintiffs fail to allege any facts to establish legal ownership or an immediate superior right of possession to the alleged funds, which J.S.I.K. received pursuant to its purchase agreement with Schuster Enterprises (*see Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). In addition, plaintiffs fail to adequately allege that the funds are "specifically identifiable and ... subject to an obligation to be returned or ... otherwise treated in a particular manner" (*id.*). As such, the Court grants the branch of the motion that seeks to dismiss the third, fourth, and fifth causes of action against J.S.I.K. and Karten.

The Court denies the branch of the motion that seeks to dismiss the eighth cause of action in the Complaint. The movants are not named as defendants in that cause of action, and thus do not have standing to seek dismissal of that claim.

Accordingly, it is

ORDERED that the motion to dismiss is **granted** to the extent that the third, fourth, and fifth causes of action in the Complaint are dismissed as to defendants J.S.I.K. International LLC and Harry Karten, and is denied with respect to the eighth cause of action in the Complaint on the ground that those defendants do not have standing to seek dismissal of that claim (in which they are not named); and it is further

ORDERED that the claims against J.S.I.K. International LLC and Harry Karten are severed and the Clerk is directed to enter judgment in their favor accordingly.

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JOEL M. COHEN, J.S.C.

6/10/2022

DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: