Lotwala v Dhabuwala
2022 NY Slip Op 32639(U)
August 3, 2022
Supreme Court, New York County
Docket Number: Index No. 651966/2014
Judge: Melissa Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA CRANE** **PART** **60M**

Justice

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RAJENDRA LOTWALA, HASMUKH PATEL,

Plaintiff,

- v -

ASHOK DHABUWALA, SAM CHANG, MCSAM WEST 28, LLC,METRO SAI HOPITALITY, LLC,PRESIDENTIAL SUITES, LLC,METRO EIGHT, LLC,RISINGSAM UNION SQUARE, LLC,RAJ SAI HOSPITALITY, LLC,METRO ELEVEN, LLC,JFK SAI HOSPITALITY, LLC,29 SAI HOTEL, LLC,MCSAM TRIBECA LLC,JAI SAI HOSPITALITY, LLC,METRO SAI HOSPITALITY, LLC,FGC37W24, LLC,

Defendant.

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INDEX NO. 651966/2014

MOTION DATE 06/25/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 333

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, it is

Plaintiffs Rajendra Lotwala and Hasmukh Patel[1] allege that defendant Ashok Dhabuwala solicited plaintiffs and others to invest in the limited liability company defendants (the LLCs). The LLCs were in the business of buying and operating hotels. Plaintiffs claim that they became members of the LLCs by virtue of their investments and that Dhabuwala and defendant Sam Chang, who managed and controlled the LLCs, did not pay plaintiffs the monies to which they were entitled as members and investors.

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[1] Patel discontinued his action against defendants (NYSCEF 177, Horn aff at 2).

Dhabuwala, Airport Sai Hospitality, LLC (Airport Sai), Presidential Suite, LLC (Presidential), Raj Sai Hospitality, LLC (Raj Sai), JFK Sai Hospitality, LLC (JFK), 29 Sai Hotel, LLC (29 Sai), McSam Tribeca, LLC (McSam Tribeca), and Jai Sai Hospitality, LLC (Jai Sai) are called the Dhabuwala defendants. The other defendants are Chang, McSam West 28, LLC (McSam West), Metro Sai Hospitality, LLC (Metro Sai), Metro Six Hotel, LLC (Metro Six), McSam Downtown, LLC (McSam Downtown), Metro Eight Hotel, LLC (Metro Eight), Risingsam Union Square, LLC (Risingsam), Metro Eleven, LLC (Metro Eleven), and FGC37W24, LLC (FGC). Dhabuwala brought a third-party action against Jai Shree Ram, Inc. (Jai Shree, Inc).

The Dhabuwala defendants move for summary judgment: 1) dismissing the complaint as against them; 2) on liability against plaintiff Lotwala and third-party defendant Jai Shree in favor of Dhabuwala for breach of fiduciary duty; 3) against defendant Chang for $535,550 owed to Dhabuwala; 4) declaring that Chang did not fulfil the condition precedent for possessing an interest in McSam Tribeca and that Dhabuwala is entitled to all funds held for said LLC; and 5) on liability against Chang for breach of fiduciary duty and breach of contract.

Originally, the complaint asserted causes of action for breach of contract, breach of fiduciary duty, fraud, money had and received, fraudulent concealment, unjust enrichment, and embezzlement. As remedies, plaintiffs sought declaratory relief, constructive trust, accounting, and damages (NYSCEF 181). The court dismissed the complaint to the extent that it purported to plead anything other than breach of contract and breach of fiduciary duty, including the claim for constructive trust (NYSCEF 182 at 19-20).

According to plaintiff, Dhabuwala solicited Lotwala to invest in defendant LLCs, in exchange for equity ownership. Lotwala and the other plaintiff were part of a group of investors

Dhabuwala solicited that Lotwala identifies as the Dhabuwala group and to which Dhabuwala belonged. The Dhabuwala group held a 100% equity interest in the LLCs. Subsequent to Lotwala's investment, Chang purchased half of the interest in some of the LLCs from Dhabuwala. Lotwala did not receive his share of the purchase proceeds. When the LLCs sold their real properties, plaintiffs should have received a share of the sale proceeds proportional to their ownership interest/investment. They did not. Nor did they receive the proper share of distributions from the LLCs. Nor were they ever informed about any LLC action, including Chang's purchases. Lotwala says that his investments entitled him to an ownership interest in each LLC from 2% to 5%, either of the entire LLC or as part of the Dhabuwala group's interest.

Defendants argue that Lotwala was never a member of the LLCs and thus has no basis for asserting defendants owe him money or a fiduciary duty, that Lotwala was paid everything to which he was entitled, that the complaint does not adequately allege causes of action for breach of contract and fiduciary duty, and that statutes of limitations bar the claims.

Dhabuwala and Lotwala agree that they are joint owners of third-party defendant Jai Shree, Inc that owns and operates Intown Motor Lodge in Elizabeth, NJ. The parties do not clearly indicate how their shares are allocated. Dhabuwala's third-party complaint alleges that Lotwala oppressed him and engaged in breach of contract, breach of fiduciary duty, and conversion by keeping him out of Jai Shree's affairs, unilaterally removing Dhabuwala as president of the company, and not paying him appropriate dividends.

Standard for summary judgment motions

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact (CPLR 3212; *Shaw v Looking Glass Assoc. LP,* 8 AD3d 100, 102 [1st Dept 2004]). Only if

the movant satisfies this standard does the burden shift to the opposing side to rebut the prima facie showing, by producing admissible evidence sufficient to require a trial of material factual issues (*Shaw, supra*). The court must deny summary judgment if the moving party fails to meet this standard, regardless of any insufficiency in the opposition (*Komonaj v Curanovic,* 90 AD3d 505, 505 [1st Dept 2011]). The courts must view the facts in the light most favorable to the nonmoving party (*see Vega v Restani Constr. Corp.,* 18 NY3d 499, 503 [2012]). The court draws all reasonable inferences in favor of the nonmoving party and does not decide issues of credibility (*Garcia v J.D. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). The same standards apply to a motion based on the statute of limitations (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 644-645 [1st Dept 2019]). A defendant may move for summary judgment on the grounds listed in CPLR 3211 (a), provided these are asserted as defenses in the answer which, in this case, they are (*Houston v Trans Union Credit Info. Co.,* 154 AD2d 312, 313 [1st Dept 1989]). Defendants argue that the claims for breach of contract and fiduciary duty are insufficiently pleaded.

Lotwala's ability to plead on behalf of another

Defendants state that it was Lotwala's wife, not Lotwala, who invested in some LLCs and that he shows no authority to make claims on her behalf. As a general rule, a party does not have standing to assert claims on behalf of another (*see Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 773 [1991]). There is evidence showing Lotwala's spouse made some investment payments, for instance, that the $100,000 invested in Airport Sai issued from an account in her name (NYSCEF 280). However, Airport Sai, in common with other LLCs, issued K-1s to Lotwala in his name and those identify him as the person entitled to distributions. The

checks by which Lotwala invested in the LLCs came from accounts in the name of both Lotwala and his spouse (*id.*). Therefore, although it is correct that Lotwala lacks authority to act for his spouse, defendants fail to show that Lotwala was not an investor in the LLCs that were somehow connected to her.

Statutes of Limitations

Previously, plaintiffs commenced a case under Index No 651906/12 (the 2012 action), with the same claims and parties as this action. The 2012 action commenced on June 1, 2012 and was dismissed without prejudice on December 12, 2013 (NYSCEF 179, order). During oral argument on defendants' CPLR 3211 motion to dismiss the 2012 complaint, the court noted that, if CPLR 205 was adhered to, any claim that was timely pleaded in the 2012 action would be timely in a subsequent action (NYSCEF 180 at 8). This action was filed on June 27, 2014. The parties do not dispute that, pursuant to CPLR 205, a claim that was timely pleaded on June 1, 2012 is timely for this action and that June 1, 2012 is the operative date for calculating statutes of limitations in this action (CPLR 205; *Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]).

The alleged wrongs are defendants' failure to pay Lotwala proceeds of sales by the LLCs and distributions, to repay him for a loan to an LLC, and to make Lotwala a member of the LLCs. Lotwala invested in the LLCs between 2001 and 2005. The K-1's from the various LLC's issued to Lotwala are dated from 2005 through 2012.

The statute of limitations for breach of contract is six years (CPLR 213 [2]). The statute of limitations for breach of fiduciary duty depends on the substantive remedy sought (*Loengard v Santa Fe Indus.,* 70 NY2d 262, 266 [1987]). Where the relief sought is equitable in nature, a six-year limitations period applies (*id.* at 267). In contrast, where suits alleging a breach of fiduciary duty seek only money damages, a three-year statute of limitations applies (*Kaufman v Cohen*,

307 AD2d 113, 118 [1st Dept 2003]). Plaintiff seeks an accounting, which is an equitable remedy (*Rozenberg v Perlstein*, 200 AD3d 915, 920 [2d Dept 2021]). Thus, the limitations period for the fiduciary claim is six years (*see Loengrad,* 70 NY2d at 266).

Breach of contract claims accrue at the time of the breach, even if damages do not accrue until a later date and even if the complaining party is unaware of the breach (*Ely–Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *Yarbro v Wells Fargo Bank, N.A.*, 140 AD3d 668, 668 [1st Dept 2016]). A breach of fiduciary duty claim accrues when damages are sustained; that is when "the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

To escape dismissal, plaintiff's claims must have been timely on June 1, 2012. This means that the statutes of limitations for the claims must have accrued, at the latest, six years before, on June 1, 2006. Defendants argue that Lotwala's claims accrued between 2001 and 2005, when Lotwala invested and that, by June 2012, more than six years later, the time to sue on these claims had lapsed. Anticipating plaintiff's counterargument, defendants argue against applying the continuing wrong or continuing breach doctrine to the statutes of limitations.

There are two types of continuing breaches/wrongs/violations. "Though frequently confused or conflated, these two approaches are in fact quite different in both purpose and effect. The first sort of continuing violation aggregates multiple allegedly wrongful acts, failures to act, or decisions such that the limitations period begins to run on this collected malfeasance only when the defendant ceases its improper conduct. The second type of continuing violation divides what might otherwise represent a single, time-barred cause of action into several separate claims, at least one of which accrues within the limitations period prior to suit" (Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz L Rev 271, 275, 326 [2008] [assessing the

distinctions between these two different conceptions of continuing violation doctrine in the context of different causes of action and arguing that in some situations, either the first version or second version "may represent the optimal means of producing fair and efficient outcomes"])

Under the first type of continuing violation, the statute of limitations on the cause of action begins to run at the time of the last injurious act (*Henry v Bank of Am.,* 147 AD3d 599, 601 [1st Dept 2017]). Under the second type, the doctrine applies where "a contract requires continuing performance over a period of time, [such that] each successive breach may begin the statute of limitations running anew" (*Guilbert v Gardner,* 480 F3d 140, 150 [2d Cir 2007]). The second version of the doctrine is predicated on continuing wrongful actions and not on the continuing effects of earlier wrongful conduct (*Henry,* 147 AD3d at 601). Where the original wrong was committed outside of the statute of limitations period, but wrongs continued to be committed during the statute of limitations period, and those wrongs are deemed to be independent of the original wrong, the injured party can recover damages on the wrongs committed during the statute of limitations period (*id.*). The term, "independent," is relative, because the original wrong is always connected to the subsequent continuing wrongs. Otherwise, there would be no discussion of the continuing wrong doctrine. While a plaintiff may not recover for conduct that took place before the limitations period, "evidence of such conduct may be admissible to shed light on the ultimate damages recoverable within the limitations period" (*Lemle v Lemle,* 2017 NY Slip Op 30811[U], *7-8 [Sup Ct, NY County 2017]; *see also City of W. Haven v Commercial Union Ins. Co.*, 894 F2d 540, 546 [2d Cir 1990]). "[W]here a duty imposed prior to a limitations period is a continuing one, the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period" (*Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65

AD3d 1226, 1228 [2d Dept 2009] [citation and internal quotation marks omitted]). A new claim, with a new limitations period, may arise out of a new set of facts that forms part of a series with the original wrong (*CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC,* 195 AD3d 12, 18 [1st Dept 2021]). Thus, evidence of conduct before the limitations period expired is relevant.

Defendants contend that Lotwala's damages are the consequence of the wrongful act of failing to make him an LLC member upon his investments from 2001 through 2005 and that each subsequent failure to make payments to Lotwala did not constitute a distinct or independent wrong with its own statute of limitations. The court agrees that the claim based on failure to make Lotwala a member of the various LLCs accrued on the date of his investments. The statute of limitations on the failure to make him a member has expired, because the date that he invested in each LLC was six years before June 2012. However, the limitations periods on the claims for payments from the LLCs did not accrue on the dates of investments, but when the payments came due. The second type of continuing wrong applies in this case because the duty to pay Lotwala returns on his investment was sufficiently independent of the original promise to make him a member in an LLC or to invest his money in an LLC. Lotwala's statements and the testimony of Dhabuwala make it clear that Lotwala invested in the LLCs, that is, that he and Dhabuwala had the expectation that Lotwala was due returns on the money that Lotwala paid into the LLCs and these returns would be on a continuing basis and not limited to a set period of time. Lotwala sufficiently indicates that the obligation to share profits and distributions with him, according to his percentage interest, was a continuing contractual obligation. The obligation to repay any loan from Lotwala was also a continuing obligation.

The causes of action accrued when the duty to make the distributions or other payments arose (*see Lia v Saporito,* 909 F Supp 2d 149, 168 [EDNY 2012]), *affd* 541 Fed Appx 71 [2d Cir

2013], *cert denied* 572 US 1116 [2014] ["since the retention of profits and distributions is a continuing wrong, a cause of action for an accounting is timely so long as it pertains to acts or omissions occurring within the six (6)-year period preceding the commencement of the action"]; *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 435 [1st Dept 2010] ["recurring obligation" to pay plaintiff his 31% share of the profits generated by the properties at issue]; *Knobel v Shaw,* 90 AD3d 493, 494 [1st Dept 2011] [plaintiff's contract claim "accrued each time [Mr. Shaw] allegedly breached" his obligation]; *Butler v Gibbons,* 173 AD2d 352, 353 [1st Dept 1991] [defendant's "repeated and continuing failure to account and turn over proceeds" was continuing wrong, and "a new cause of action accrued each time defendant collected proceeds and kept them to himself"]).

The claims based on Lotwala's right to sales proceeds, distributions, and other monies are untimely to the extent that payments of these monies became due more than six years before June 2012. However, when the monies became due is an issue of fact. Neither the parties, nor the LLC operating agreements provide the due dates for distributions. Where the contract specifies no time for performance, the parties have a reasonable time to perform and the breach can only occur after the expiration of such reasonable time (*see Weksler v Weksler*, 140 AD3d 491, 492 [1st Dept 2016]; *Bernstein v La Rue*, 120 AD2d 476, 477 [2d Dept 1986]). The question of what is a reasonable time, then, is an issue of fact for trial (*Bernstein,* supra).

Lotwala's interest in the LLCs

Defendants claim that Lotwala is a member of JFK only, as he is listed as a member in its operating agreement and in no other, and that there is no evidence of his membership in any other LLC. The other LLC operating agreements are signed by and/or list as members Dhabuwala, Chang, or both and sometimes a third person.

Whether Lotwala is a member of the LLCs is an issue of fact. However, it is not clear whether Lotwala being a member, or just a nonmember investor, would make a difference.

Individual execution of the operating agreement is not a prerequisite to membership (*see Bobrow v Liebman,* 15 Misc 3d 1121[A], 2007 NY Slip Op 50795[U], *8 [Sup Ct, NY County 2007] [defendants moved for a declaration that plaintiff was not a member of the LLC on the ground that she had not signed the operating agreement; the court refused to grant the motion on that basis]; 5 White, New York Business Entities P L602.01 [2022] [Westlaw version]). That Lotwala is not listed in an operating agreement does not mean that he was not a member of the LLC.

The operating agreement of an LLC governs the relationships among members and the powers and authority of the members and manager (Limited Liability Company Law [LLCL] § 417; *LNYC Loft, LLC v Hudson Opportunity Fund I, LLC,* 154 AD3d 109, 114 [1st Dept 2017]). Under the operating agreements of defendant LLCs, admission of a member requires the votes of a majority of members or, in some instances, membership interests. Lotwala does not allege adherence to any of the provisions concerning membership in the LLC operating agreements or to any statute, or that he became a member upon formation of an LLC (*see* LLCL § 102).

The owners of an LLC are its members (*Bobrow,* 15 Misc 3d 1112[A], 2007 NY Slip Op 50795[U], *9; *Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 13 Misc 3d 1230[A], 2006 NY Slip Op 52067[U], *3 [Sup Ct, Nassau County 2006], *affd* 46 AD3d 801 [2d Dept 2007]). Nonetheless, the Second Department has held that an investor can have the position of a "nonmember purchaser" (*Kaminski v Sirera*, 169 AD3d 785, 787 [2d Dept 2019]). In a bankruptcy case, the plaintiffs provided funds to the debtor in exchange for an interest in the LLC (*In re Abbale,* 475 BR 334, 339-340 [Bankr EDNY 2012]). The court determined that

debtor had assigned to plaintiff the debtor's economic interest in the LLC shares held by the debtor, rather than a full membership interest in the LLC. The debtor had no intention of giving up his right to participate in the management of the LLC or any of his rights as a member, and plaintiffs never participated in the management or held any rights or powers as members (*id.,* pursuant to LLCL § 603). Similarly, Lotwala can occupy the status of an investor and be entitled to the rights of an investor without being a member. The LLC's operating agreements that address the transfer of interest by members provide that a transferee who is not approved as a member is entitled to receive the distributions that the transferor was entitled to receive (*see* LLCL § 603).

Lotwala argues that the K-1s that he received from the LLCs are proof of membership. Form K-1, that reports an individual's income from an LLC, is evidence of, but not dispositive of, whether a party is or was a member of the subject LLC (*Pappas v The 38-40 LLC*, 2018 NY Slip op 30329[U], at *10 [NY Sup Ct Feb 22, 2018], *affd* 172 AD3d 409 [1st Dept 2019]). Tax filings are not always binding judicial admissions (*see Imprimis Invs., LLC v Insight Venture Mgt. Inc.,* 300 AD2d 109, 110 [1st Dept 2002]; *Royal Communications Consultants, Inc. v Iviz, LLC,* 40 Misc 3d 1217[A], 2013 NY Slip Op 51213[U], *4 [Sup Ct, Kings County 2013]).

Dhabuwala's moving affidavit states that he did not authorize the issuance of K-1s to Lotwala, that Chang issued them, and that Dhabuwala was not involved in the procedure with respect to issuing K-1s (NYSCEF 270, ¶ 5). Therefore, Dhabuwala implies, the K-1s are not trustworthy and/or he is not accountable for their contents.

Lotwala states that Chang could not issue any K-1s without Dhabuwala's knowledge or consent and that Chang would have no knowledge of LLC financial details were it not for Dhabuwala. In his opposing affidavit (NYSCEF 279, ¶ 6), Lotwala cites Dhabuwala's

deposition testimony that Lotwala invested in Airport Sai and that Dhabuwala issued K-1s from that LLC to Lotwala (NYSCEF 282 at 26, 52, 53, 55). Dhabuwala testified that he issued K-ls in JFK and Presidential to Lotwala, and that Lotwala received K-ls relating to other LLCs (*id.* at 56, 64, 66-67). Dhabuwala testified that if Lotwala received a K-1, then he was a member in said entity (*id.* at 68).

Dhabuwala's allegation that the K-1s are not credible is further challenged by Anne Chang, who submits an opposition affidavit on behalf of defendant Chang (NYSCEF 314). She states that she oversees accounting and bookkeeping for nonparty McSam Hotel Group LLC (McSam Hotel), of which Sam Chang is the principal. The in-house counsel to McSam Hotel, Brian G. Wrynn, alleges that the LLC conducts Chang's organizational and business affairs (NYSCEF 305).

Anne Chang alleges that, from 2000 through 2005, Dhabuwala filed all tax returns and issued K-1s for the LLCs (NYSCEF 314). In 2006, Dhabuwala forwarded to McSam Hotel the 2005 K-1s and tax returns for Metro Six. Until then, Anne Chang did not know that there were nine other investors in Metro Six, in addition to Dhabuwala and Chang. Because of errors on this K-1, McSam Hotel was required to prepare an amended return for filing. Anne Chang says that Dhabuwala could not be trusted to file properly for the LLCs, so McSam Hotel, with Dhabuwala's full knowledge, consent, and approval, prepared all the returns and K-1s for many of the LLCs according to information provided by Dhabuwala. Any amounts to be paid to investors were Dhabuwala's responsibility as he was receiving his share of profits and distributions. Anne Chang further states that it is misleading for Dhabuwala to allege that he had no control over Chang's issuance of tax documents.

Finally, where there is no operating agreement or the operating agreement fails to address issues in dispute, the default provisions under LLCL § 503 govern (LLCL § 503; *Shapiro v Ettenson,* 146 AD3d 650, 650 [1st Dept 2017]; *Manitaras v Beusman,* 56 AD3d 735, 736 [2d Dept 2008]; *Man Choi Chiu v Chiu*, 38 AD3d 619, 621 [2d Dept 2007]; *Bezdek v Goz,* 2011 WL 11074363, at *5–6 [Sup Ct, NY County, March 3, 2011, Lowe, J., index No 650003/08]). Under LLCL § 503, if an operating agreement does not provide how profits and losses will be allocated among the members, then those profits and losses "shall be allocated on the basis of the value, as stated in the records of the limited liability company if so stated, of the contributions of each member" (*see* LLCL § 503). However, because the K-1s are not dispositive as to whether or not Lotwala was even a member of the LLCs and because defendants have not established Lotwala's contribution amounts, these issues of fact require the denial of the motion for summary judgment (*see Bezdek v Goz*, 2011 WL 11074363, at *7 [Sup Ct, NY County, March 3, 2011, Lowe, J., index No 650003/08] [denying summary judgment as to the parties' membership interests where the operating agreement did not set forth the specific membership interests and the parties disputed how much each party contributed]).

Causes of Action for Contract and Breach of Fiduciary Duty

Defendants argue that Lotwala alleges no facts that can support a claim for breach of contract, as the complaint does not identity any contracts between plaintiff and defendants, any terms of the supposed contracts, and any obligations defendants breached.

Plaintiff's opposition papers do not address defendants' arguments about the contract claim. The complaint refers to "the Contract wherein the aforesaid funds were given to Ashok Dhabuwala in consideration of [plaintiffs] receiving their respective five (5%) percent in the 'Dhabuwala Group's Interest'" in the LLC, and the "share of the proceeds due to Plaintiff

Lotwala based upon his agreement with Dhabuwala" (NYSCEF 181, ¶ ¶ 26, 52, *and see* ¶ 82), and that is all. Moreover, the LLCs referred to therein are not part of this motion.

Nonetheless, the contract claims will not be dismissed. During oral argument on defendants' CPLR 3211 motion to dismiss the complaint, plaintiffs' attorney stated that plaintiffs' investments were founded on contracts, that defendants breached by not paying plaintiffs returns in proportion to their ownership interests in the LLCs (NYSCEF 182 at 11-12). The court sustained the breach of contract claim, which will also be sustained here, despite the paucity of the allegations, given the evidence that Dhabuwala agreed that plaintiff would invest in the LLCs (*see Abbale*, 475 BR at 339-340 [investment in LLC purchased pursuant to implied oral contract between member of LLC and investor]).

To plead breach of contract, a plaintiff must allege that he and defendants entered into a contract, that plaintiff adequately performed under the contract, that defendants breached the contract, and that the breach damaged plaintiff (*Eternity Global Master Fund Ltd. v Morgan Guaranty Trust Co. of N.Y.,* 375 F3d 168, 177 [2d Cir 2004]). Plaintiffs allege as much and defendants do not show that there was no contract between Dhabuwala and Lotwala.

Defendants next contend that the complaint fails to provide a clear fact pattern that articulates breach of fiduciary duty by defendants and that the complaint only makes conclusory statements without substantiation. The manager of a limited liability company is a fiduciary and owes duties of loyalty and due care to members (*see Johnson v Asberry*, 190 AD3d 491, 492 [1st Dept 2021]). Members owe a fiduciary duty to other members to avoid self-dealing and situations where the members' interests clash with that of the LLCs (*Willoughby Rehabilitation & Health Care Ctr., LLC v Webster,* 13 Misc 3d 1230[A], 2006 NY Slip Op 52067[U], *4 [Sup Ct, Nassau Cty Oct 26, 2006]). The complaint sufficiently alleges that Dhabuwala and Chang, as

managers of the LLCs, owed a fiduciary duty to Lotwala and other members. If Lotwala was a member, he would be owed a fiduciary duty. The moving parties do not show that Lotwala was not a member or that they did not breach a fiduciary duty.

Part of the Motion concerning third-party defendant Jai Shree, Inc

The notice of motion states that Dhabuwala is seeking relief related to defendant Jai Sai. However, the rest of the motion papers make it clear that relief is sought in connection with Jai Shree, Inc, third-party defendant.

Dhabuwala is moving for summary judgment on liability on the amount of dividends Jai Shree, Inc owes him. Dhabuwala and Lotwala were shareholders in Jai Shree, Inc Dhabuwala alleges that Lotwala controls Jai Shree, Inc, that Lotwala did not pay him dividends, and that Lotwala removed Dhabuwala as president of Jai Shree, Inc without consent. Dhabuwala does not show that Lotwala breached a fiduciary duty or oppressed him, however, the expert does show that Jai Shree, Inc owes Dhabuwala some money.

Thomas Hoberman, defendants' expert accountant, appends a lengthy analysis of the LLC finances (NYSCEF 271). As he notes, the parties are not clear whether Dhabuwala owns 50% or 25% of Jai Shree, Inc. Also, apparently, defendants object to the salaries paid to those Jai Shree, Inc employees who are Lotwala's relatives. Hoberman's analysis takes the salaries into account.

The expert calculated that the profits available to the owners for the eleven years ending December 31, 2016 totaled $1,182,549 after consideration of Lotwala family members' payroll, and $1,772,500, before consideration of such payroll. According to the expert, if Dhabuwala owns 25% of Jai Shree, Inc, he is entitled to $295,637 of the profits after payroll, or $443,125 of

the profits before payroll. If Dhabuwala owns 50% he is entitled to $591,275 of the profits after payroll, or $886,250 of the profits before payroll (NYSCEF 271 at 23-24 of 67).

In his opposing affidavit, Lotwala says that he owns 50% of the company and that Dhabuwala owns or controls the other 50% (NYSCEF 279, ¶ 20). According to Dhabuwala's counterclaim and a 2011 K-1, Lotwala owns 50%, Dhabuwala 25%, and a third individual, identified as the widow of Dhabuwala's brother, 25% (NYSCEF 38 at 24, NYSCEF 260).

Lotwala states that throughout this litigation, "no financial documentation has been forthcoming from Dhabuwala, who apparently has no documents to look at or, if he has documents, does not wish them to be divulged" (NYSCEF 279, ¶ 28). Lotwala says that he has not been given a chance to cross-examine the expert, whose analyses are biased and based on selective data. He alleges that Dhabuwala did not want anything to do with the Jai Shree motel. Lotwala made the decision to name himself president on his own without consulting Dhabuwala for the sake of convenience, as Dhabuwala did not want to act as president (*id.*, ¶ 21). He faithfully paid all due dividends to Dhabuwala. "Never was a distribution made to Mr. Lotwala without a concurrent distribution made to Mr. Dhabuwala" (NYSCEF 279, ¶ 23). When Dhabuwala asked for shares to be transferred to his brother and then to his brother's widow, and for the company to lend $300,000 to Chang, Lotwala complied with his requests. Lotwala says that his wife and father work at the motel for low wages in difficult conditions, in a poor, high crime area, and that they are underpaid.

Lotwala does not make anything but perfunctory objections to the expert's figures. The documents the expert utilized were the product of disclosure by Lotwala, who does not offer alternative analyses of the data or raise any reason that the expert's findings are not reliable. Nonetheless, summary judgment on liability will not be granted because of the uncertainty about

percentages of ownership and the reasonableness of employee salaries. These underlying questions are too unsettled for the court to deem that only damages remain to be calculated.

Motion against Chang

Dhabuwala seeks a declaration that Chang is liable for $535,550 reflecting missing escrow money in three LLCs, Metro Six, Metro Eleven, and FGC, and that Dhabuwala holds a 100% ownership interest in McSam Tribeca.

Dhabuwala cross-claimed against Chang, based on Chang's promise to build a hotel(s) on property belonging to McSam Tribeca and to pay the mortgage on the property. Dhabuwala's answer alleges that, in reliance on this promise, he transferred to Chang 49% of McSam Tribeca (NYSCEF 38 at 49). In his moving affidavit, Dhabuwala alleges that it was after completing the hotels that Chang was to receive 45% of McSam Tribeca (NYSCEF 270, ¶ 8). Dhabuwala alleges that Chang transferred money to himself, did not give Dhabuwala his due portion as an investor and owner, and froze out Dhabuwala from company affairs.

Based on the contributions to and distributions received from McSam Tribeca, the expert determined that Dhabuwala contributed $1,838,731 in excess of the distributions that he received, and that Chang received $299,109 more than he contributed (NYSCEF 271 at 22, 24 of 67). The expert "identified expenses, including construction loan interest, real estate taxes, other expenses and legal fees, totaling $2,404,413, that were paid for the benefit of McSam Tribeca, however, we cannot opine as to whether they were funded from operations or contributions from Chang, Dhabuwala, or both" (*id.*). Chang states that he contributed the $2.4 million.

Chang's opposing affidavit alleges that upon its founding in 2002, Chang, Dhabuwala, and another individual were listed as McSam Tribeca members (NYSCEF 302). In 2005, Dhabuwala purported to transfer 49% of his interest in McSam Tribeca to Chang. Not until

2006, when he saw the 2005 K-1 for McSam Tribeca, did Chang find out about the other persons from whom Dhabuwala had been collecting monies for investment. Chang had believed that he and Dhabuwala were the sole owners. The 2005 K-1 shows that Dhabuwala had 33.75% of the LLC and six other people had 16.25%.

Chang states that the original purpose of McSam Tribeca was as a holding company for a hotel in Jamaica, NY (NYSCEF 302). McSam Tribeca took out a mortgage to buy three properties in Brooklyn on which to build hotel(s). Of the loan proceeds, $2,039,069 was loaned to nonparty Sarla Sai, LLC (Sarla Sai), an entity Dhabuwala owned. Sarla Sai did not repay the loan to McSam Tribeca. The remaining loan proceeds were used for closing costs, to repay Chang for his original capital investment of $1 million, and for taxes, fees, insurance, and other costs. In addition, Chang says that he invested the above mentioned $2.4 million of his own funds to preserve the interest of McSam Tribeca in the Brooklyn properties, without any contribution from Dhabuwala. The $2.4 million went for loan interest, loan extension fees, insurance, and real estate taxes. Chang says that he paid for the same sort of items for the benefit of Sarla Sai, which had purchased a parcel neighboring McSam Tribeca's parcels in Brooklyn.

Chang alleges that he did not build the hotels on McSam Tribeca's Brooklyn parcels because he could not interest hotel franchisors in the location, and a downturn in the real estate market made it impossible to build in a financially prudent manner. Chang made the payments described above to keep the properties from going into foreclosure, but he was not able to keep up the payments, Dhabuwala was not willing to assist, and, as a result, the properties went into foreclosure. Soon after, New York City took the properties in an eminent domain proceeding, "and an initial advance from NYC has resulted in the mortgages on the Brooklyn Properties (including the neighboring Sarla Sai parcel) being satisfied, and provided a balance of funds

available to [Chang], Dhabuwala and his third-party investors to recoup [their] investments" (NYSCEF 302, at 11). Chang states that it was not his fault that he could not develop McSam Tribeca's properties.

The court finds that there is an issue of fact as to whether Dhabuwala is entitled to own 100% of McSam Tribeca and as to what is owed to whom. The analysis of contributions and distributions relating to McSam Tribeca attached to the affidavit of Thomas Hoberman reflects that in 2005, Chang and Dhabuwala made contributions to McSam Tribeca, but that there also was $2,404,413 in unallocated property disbursements whose origin the expert could not determine (NYSCEF 271 at 38 of 67). Chang claimed in his affidavit that he had contributed approximately $2.4 million of his own money to cover McSam Tribeca costs, including interest on an equity loan, loan extension fees, insurance premiums, and real estate taxes (NYSCEF 302, ¶ 9). Moreover, the 2005 K-1 reflects that parties other than Chang and Dhabuwala had a 16.25% interest in McSam Tribeca. Therefore, even if Chang did agree to construct hotels "in exchange for [his] interest in McSam Tribeca" Dhabuwala has not established as a matter of law that his total interest is 100%, accounting for any other parties that may have interests, and has not established the total amounts that each party contributed to McSam Tribeca and is now entitled to.

Concerning Metro Six, Metro Eleven, and FCG, Dhabuwala and Chang were the owners. After these LLCs sold their real properties/hotels, the sales proceeds were held in escrow pending disbursement for various purposes, mostly having to do with new constructions. Dhabuwala alleges that Chang was in charge of new construction and escrow accounts. The expert identified a total of $1,571,101 that was placed in escrow. Of this amount, he had information sufficient to trace the disposition of $500,000 taken out of escrow. Owing to a lack

of documentation, the expert was not able to trace the disposition of the remaining $1,071,101 (NYSCEF 271 at 22 of 67). Dhabuwala claims $535,550, half of the unaccounted for sum.

Chang alleges that Dhabuwala is not entitled to this amount, because the $1,071,101 was used, according to plans both he and Dhabuwala approved, for construction purposes. Wrynn's affidavit addresses the escrow amount that the expert was unable to account for (NYSCEF 305). Wrynn produces documents to show that some of the unaccounted for escrow amount went towards construction costs of the three LLCs, including environmental remediation.

Based on Wrynn's affidavit, defendants' expert reduced the unaccounted for amount from $1,071,101 to $681,182.27 (NYSCEF 323). The expert states that Dhabuwala is entitled to his pro rata share of the latter amount. The expert took issue with some of Wrynn's documentation, arguing that it was not enough to prove the source and disposition of certain funds and that Wrynn did not do an accounting.

Summary judgment is denied on the question of the escrow accounts. While Dhabuwala's expert, Thomas Hoberman, manages to show that a certain amount placed in escrow was not accounted for, Chang has managed, through the Wrynn affidavit, to establish issues of fact regarding the amount not accounted for that Dhabuwala may be entitled to. In particular, the Wrynn affidavit sets forth in detail how escrows associated with Metro Six, Metro Eleven, and FCG either have already been depleted or will be depleted through costs associated with the properties, including environmental remediation (NYSCEF 305, ¶3), repairs to a neighboring property (NYSCEF 305, ¶ 4), money set aside for a breakup fee on a potential sale (NYSCEF 305, ¶ 7), and money ordered by a court to be disbursed in a separate action (NYSCEF 305, ¶ 8). While Hoberman reduced the claim on the escrows to only Dhabuwala's pro rata share of $681,182.27 in his reply affidavit, he still disputed a number of claims in

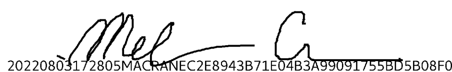
Wrynn's affidavit, including the cost of environmental clean-up and post-closing expenses relating to FGC (NYSCEF 323, ¶¶ 9, 10, 12). In addition, it is not clear who owns what percentage of the three LLCs. In particular, the operating agreement for Metro Eleven referenced three members while Dhabuwala submitted tax returns showing twelve members (NYSCEF 314, ¶ 4; NYSCEF 315; NYSCEF 207). The affidavit of Anne Chang, submitted with Chang's opposition, claims that Dhabuwala proceeded similarly as to Metro Eleven (NYSCEF 314, ¶ 6). Therefore, summary judgment is denied as to the escrow claims because there are material issues of fact as to the amounts of the escrows and the percentages of ownership.

Conclusion

It is hereby

ORDERED that the motion for summary judgment by defendants Ashok Dhabuwala, Airport Sai Hospitality, LLC, Presidential Suite, LLC (Presidential), Raj Sai Hospitality, LLC, JFK Sai Hospitality, LLC, 29 Sai Hotel, LLC, McSam Tribeca, LLC, and Jai Sai Hospitality, LLC is granted to the extent that plaintiff Rajendra Lotwala is barred from recovering damages that accrued before June 1, 2006 and is otherwise denied; and it is further

ORDERED that the parties are to attend a pre-trial conference on August 19, 2022 at 11:00 am over Microsoft Teams.



8/3/2022				
DATE			MELISSA CRANE, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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