

Hieber Reade St., LLC v Taverna
2022 NY Slip Op 34321(U)
December 16, 2022
Supreme Court, New York County
Docket Number: Index No. 655454/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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HIEBER READE STREET, LLC, CHRISTINA J HIEBER,
JENNIFER M. HIEBER,

INDEX NO. 655454/2021

Plaintiff,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 004

FRED TAVERNA, NY INTERIOR CONSTRUCTION OF
NY, INC., DOWNTOWN DEVELOPMENT OF NY
LLC, JEANETTE TAVERNA

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89,
92, 93, 94, 96, 97, 98, 99

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The defendants' motion for leave to reargue the Decision and Order of this Court, dated August
3, 2022 (the **Prior Decision**; NYSCEF Doc. No. 83) must be denied.

The plaintiffs brought this lawsuit by summons and complaint dated September 13, 2021
(NYSCEF Doc. No. 1) asserting causes of action for (i) a declaratory judgment that (x) the
plaintiffs had the right to purchase the Taverna Defendants' membership interests in the
Partnership, (y) such purchase was carried out by sending checks by certified mail, and (z) the
Taverna Defendants' membership was assigned to the plaintiffs and they had no further interest
in the Partnership (first cause of action), (ii) a declaratory judgment that the plaintiffs validly
expelled the Taverna Members from the Partnership and terminated their interest (second cause
of action), (iii) a declaratory judgment that Mr. Taverna's option to purchase an Unfinished Unit
never vested, was never exercised, and was validly terminated (third cause of action), (iv) breach

of contract against the Taverna Defendants for breach of the Operating Agreement (fourth cause of action), (v) breach of contract against NYIC for breach of the Construction Contract (fifth cause of action), (vi) breach of the covenant of good faith and fair dealing (sixth cause of action), (vii) conversion (seventh cause of action), (viii) breach of fiduciary duty (eighth cause of action), (ix) fraudulent inducement against Mr. Taverna (ninth cause of action), (x) fraudulent concealment (tenth cause of action), (xi) constructive trust (eleventh cause of action), and (xii) an accounting (twelfth cause of action).

The defendants moved to dismiss the lawsuit arguing, as relevant, that dismissal of the causes of action predicated on Mr. Taverna no longer being a member of the Partnership needed to be dismissed because under the express terms of the agreement, any attempt to oust him was invalid unless they paid him the amount set forth in his capital account (*i.e.*, approximately \$2 million), and it was undisputed that this was not done. This was discussed extensively at oral argument as the defendant's attorney correctly pointed out the plaintiff's own papers indicating the relevant memorandum capital account balance and that a \$40 payment clearly did not comply with the mechanism set forth in the Operating Agreement for buy-out.

Indeed, based on this argument, the Court dismissed the first and second causes of action because the complaint and its attachments "firmly establish that the procedure set forth in Section 8.01 of the Operating Agreement for buying out Mr. Taverna's interests were not followed" (NYSCEF Doc. No. 83, at 5). As the Court held:

To wit, as relevant, in the August Letter, the plaintiffs indicate that the defendants had a capital account of \$2 million and were approximately \$900,000 deficient – *i.e.*, they were supposed to have a capital account \$2,942,856.60. When the plaintiffs exercised their option to buy the defendants out based on the \$25,000

capital call in August 2020, which they did not make, the plaintiffs only paid the defendants \$40 (NYSCEF Doc. No. 15). This simply does not comply with the mechanism set forth in Section 8.01 of the Operating Agreement for buying Mr. Taverna out

(*id.*).

The Court further held that it does not matter whether the defendants breached the Operating Agreement or engaged in other conduct giving rise to claims, because

[A]lthough the plaintiffs may have exercised their option to buy him out, they have not complied with the provisions of the Operating Agreement to accomplish this and Mr. Taverna remains a member until he is paid in accordance with the terms of the Operating Agreement. The plaintiffs simply can not oust him without paying his memorandum account balance (*i.e.*, \$2 million) and then claim that he merely has a breach of contract claim. This is not the deal the parties struck

(*id.*, at 6).

Now, the defendants seek to reargue the Court's finding that Mr. Taverna remains a member of the Partnership, arguing that "such statement or finding overlooks the record on the motion to dismiss and would constitute a limitation on defendants' rights to seek full and proper relief and damages for plaintiffs' unlawful termination and conversion of their interests, in contravention of prevailing law" (NYSCEF Doc. No. 86, ¶ 8). They seek to clarify the Prior Decision "to eliminate the remark that the defendants 'remain' as members of the LLC, leaving it to the adjudication of the defendants' claims to determine the relief to which defendants may be entitled" (*id.*).

A motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion but cannot include any matters of

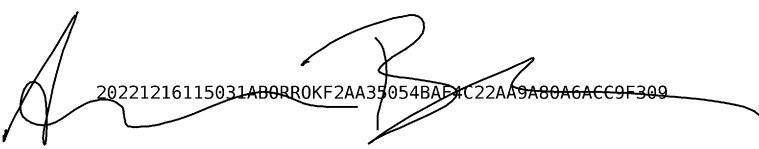
fact not offered on the prior motion (CPLR 2221[d]). Judicial estoppel is the doctrine that prevents a party who assumed a certain position in a prior proceeding and secured a ruling in their favor from advancing a contrary position in another proceeding, simply because their interests have changed (*Herman v 36 Gramercy Park Realty Associates, LLC*, 165 AD3d 405, 406 [1st Dept 2018]).

The defendants argue that the Prior Decision should be clarified to eliminate the finding that Mr. Taverna remains a member of the Partnership until he is paid out under the Operating Agreement. This position is directly contrary to the position that the defendants correctly took on the motion to dismiss, as set forth above, and must therefore be denied.

For the avoidance of doubt, the Prior Decision does not address any post-decision conduct or the consequences thereof.

It is hereby ORDERED that the defendants' motion for leave to reargue is denied.

12/16/2022
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE