

Hieber Reade St., LLC v Taverna

2023 NY Slip Op 31988(U)

June 13, 2023

Supreme Court, New York County

Docket Number: Index No. 655454/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> FRED TAVERNA, NY INTERIOR CONSTRUCTION OF NY, INC., DOWNTOWN DEVELOPMENT OF NY LLC, JEANETTE TAVERNA <p style="text-align: center;">Defendant.</p>	<table border="0"> <tr> <td style="padding-right: 20px;">INDEX NO.</td> <td style="border-bottom: 1px solid black; padding-bottom: 2px;">655454/2021</td> </tr> <tr> <td style="padding-right: 20px;">MOTION DATE</td> <td style="border-bottom: 1px solid black; padding-bottom: 2px;">01/06/2023</td> </tr> <tr> <td style="padding-right: 20px;">MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; padding-bottom: 2px;">008</td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	655454/2021	MOTION DATE	01/06/2023	MOTION SEQ. NO.	008
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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 193, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242

were read on this motion to/for DISMISSAL.

As discussed on the record (6.12.23), the plaintiffs' motion to dismiss the Answer and Counterclaims (the **Answer**; NYSCEF Doc. No. 102) is granted to the extent of dismissing all counterclaims without prejudice except for the Fifth and Ninth Counterclaims. The Fifth and Ninth Counterclaims are dismissed with prejudice. Simply put, Mr. Taverna is not entitled to seek indemnification in this action from the Plaintiffs for his own alleged wrongdoing against the Plaintiffs who indemnified him – neither in this action now in the Ramirez Action where he is sued by the Plaintiff's for failing to maintain proper insurance. Lastly, the defendants' cross motion to consolidate this action with *Fred Taverna, et al. v. Hieber Reade Street, LLC, et al.*, Index No. 655457/2021 is granted.

I. *Plaintiffs' motion to dismiss the Answer*

Reference is made to this Court's Decision and Order dated August 4, 2022 (the **Dismissal Decision**; NYSCEF Doc. No. 83). In support of the defendants' motion to dismiss, the defendants argued that they were entitled to dismissal of the plaintiffs causes of action seeking a declaration that he is no longer a member because, as they argued, the election to terminate him as a member and exercise their option to buy him out was null and void because they had failed to pay him the amount due under the Operating Agreement. The Court relied on this assertion by Mr. Taverna that he is still a member and granted his motion to dismiss those causes of action based on his assertion. Given the foregoing, Mr. Taverna is now judicially estopped from asserting counterclaims the predicate of which are that he is no longer a member (*Kalikow 78/79 Co. v State*, 174 AD3d 7, 11 [1st Dept 1992]).

Mr. Taverna indicated on the record (6.12.23) that he wishes to file an amended answer with counterclaims which the Court granted him leave to do. For the avoidance of doubt:

1. With respect to the claims sounding in breach of contract including seeking specific performance (first, second, third, and fourth), the elements of a claim sounding in breach of contract are (i) the existence of a contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Alloy Advisory, LLC v 503 W. 33rd St. Assocs. Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). As to Mr. Taverna's breach claims with respect to any purported termination of his membership interest, it will be incumbent on Mr. Taverna to plead that he adequately performed under the agreement and *resulting damages from the alleged breach particularly given his capital account balance was approximately \$2 million*. As to Mr. Taverna's breach claims with respect to any

purported termination of his option. He must set forth factual allegations that state a claim upon which relief can be granted. Previously, the plaintiff had moved for partial summary judgment because, among other things, (i) the option agreement did not satisfy the statute of frauds and (ii) the pre-conditions to the option as set forth in the Operating Agreement – i.e., the building of the two additional floors did not occur. In his opposition papers, Mr. Taverna indicated that there were sufficient writings to demonstrate that the statute of frauds was satisfied and that there were issues of fact as to what the agreement ultimately was with respect to the option including whether the plaintiffs had waived any condition that the two additional floors be built. This Court denied the motion holding that issues of fact prevented partial summary judgment but indicated that the Certificate of Occupancy was prima facie evidence that the two additional floors had not in fact been built. To state this claim affirmatively, it will be incumbent upon Mr. Taverna to explain among other things (i) what the option agreement was including when the money was due (i.e., was it due at exercise and not at closing given that the written agreement indicates that additional money is due for any build out), (ii) if the agreement was modified and how it was modified including whether there was a waiver of the condition that the two floors be built (and what the knowingly clear manifestation of the relinquishment of that right was and when it occurred), (iii) when and how the option was exercised in writing as required by the operating agreement [NYSCEF Doc. No. 2 § 12.02], (iv) whether he performed under the contract and made a demand for closing including indicating that he was ready willing and able to close (including making a demand for the additional costs associated with the build-out) either before or after the Court accepted his argument that attempt to buy him out and terminate

his option by virtue of the buy-out was null and void (*Finkelstein v Lynda*, 166 AD3d 948, 949 [2nd Dept 2018]), and (v) any damages that accrued from the time in which he made a demand to close.

2. Conversion occurs when someone, intentionally and without authority, assumes or exercises control over personal property of someone else, interfering with the person's right to possession (*Fam. Health Mgmt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 139 [1st Dept 2022]). As he argued, the attempted buyout was null and void and he is judicially estopped from now claiming otherwise.
3. To establish a breach of fiduciary duty, the movant must prove (i) the existence of a fiduciary relationship, (ii) misconduct by the fiduciary, and (iii) damages (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). To the extent that Mr. Taverna alleges breach of contract claims, he will need to set forth facts to make clear why the claims sounding in breach of fiduciary duty are not duplicative of his breach of contract claims.
4. Breach of the covenant of good faith and fair deal occurs when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement (*Gettinger Associates, L.P. v Abraham Kamber Co. LLC*, 83 AD3d 412, 413 [1st Dept 2011]). Here, too, Mr. Taverna will need to allege facts which explain why this claim is not duplicative of any damages attendant from any breach of contract claim that he chooses to assert.
5. To sufficiently plead a claim for unjust enrichment, Mr. Taverna must allege that the plaintiffs were (i) enriched at his expense, and (ii) it would be against equity and good conscience to permit the plaintiffs to retain the membership interests (*Tutor Perini Bldg.*

Corp. v Port Auth. of New York & New Jersey, 191 AD3d 569, 571 [1st Dept 2021]). Mr. Taverna will need to set forth facts which demonstrate among other things how the plaintiffs were allegedly enriched at his expense and how any such claim is not duplicative of any breach of contract or breach of fiduciary duty claim he chooses to assert.

6. A constructive trust may be imposed when property has acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest (*Sharper v Harlem Teams for Self-Help, Inc.*, 257 AD2d 329, 332 [1st Dept 1999]). It requires a showing of (i) a confidential or fiduciary relationship, (ii) a promise, (iii) a transfer of property in reliance on that promise, and (iv) unjust enrichment (*id.*). Here, Mr. Taverna will need to allege the transfer of property – including the payment or proffer of the agreed upon amount due for the additional unit (if such option in fact exists given that it does not appear that the two floors were built that were preconditions to such option).
7. To state a claim for accounting, one must allege a demand and the failure to honor such demand (*New York Studios, Inc. v Steiner Digital Studios*, 151 AD3d 454, 455 [1st Dept 2017]). Although Mr. Taverna is a member as discussed above, he will need to allege that he sought access to the books and records and that he was in fact denied access upon demand.

II. *Defendants' cross-motion to consolidate*

The defendants' cross-motion to consolidate this action with *Fred Taverna, et al. v. Hieber Reade Street, LLC, et al.* (Index No. 655457/2021; the **Second Action**) is granted. The decision to consolidate rests within the sound discretion of the trial court (*Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d 518, 519 [1st Dept 2004]). Pursuant to CPLR § 602 (a), consolidation may be granted in the interests of judicial economy where there are common questions of law or fact (*id.*). However, consolidation will be denied if the opposing party can demonstrate prejudice to a substantial right (*id.*). The issues of fact in both actions are virtually identical. The causes of action in both actions are identical. The only substantial difference between the two actions is the Second Action adds a defendant – Susan Frunzi. This is an insufficient reason to deny consolidation (*Velasquez v C.F.T., Inc.*, 240 AD2d 178, 179 [1st Dept 1997]).

III. *The Second Action*

The defendants in this case (plaintiffs in the Second Action) indicated that they are in the process of filing an amended complaint and asked that they be excused from responding to the motion to dismiss that was filed. The motion to dismiss filed in the Second Action is deemed withdrawn without prejudice. If the defendants fail to file an amended pleading in this action by August 4, 2023, the plaintiffs may email part-53 and indicate that they wish to the motion to dismiss restored and heard by the Court.

Accordingly, it is

ORDERED that except for the Fifth and Ninth Counterclaims which are dismissed with prejudice, the defendants counterclaims are dismissed without prejudice; and it is further

ORDERED that Mr. Taverna may file an Amended Answer with Counterclaims in accordance with this decision and order on or before August 4, 2023 or the dismissal without prejudice as to Mr. Taverna's remaining counterclaims shall be with prejudice; and it is further

ORDERED that the defendants' cross-motion to consolidate is granted and the above-captioned action is consolidated in this Court with *Fred Taverna, et al. v. Hieber Reade Street, LLC, et al.*, Index No. 655457/2021, pending in this Court; and it is further

ORDERED that the consolidation and the consolidated action shall bear the following caption:

Fred Taverna, individually, and on behalf of Hieber Reade Street, LLC et al.,

Plaintiffs

-against-

Hieber Reade Street, LLC, et al.,

Defendants

And it is further;

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that counsel for the plaintiff shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

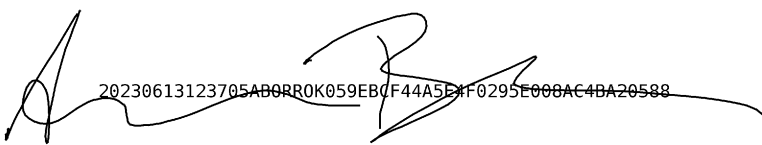
ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who

is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that the plaintiffs' motion to dismiss the Second Action (NYSCEF Doc. No. 37) is withdrawn without prejudice.

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6/13/2023
DATE

ANDREW BORROK, J.S.C.

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