| **D & V Realty LLC v Klyukin** |
| --- |
| 2023 NY Slip Op 33064(U) |
| September 5, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 656782/2022 |
| Judge: Joel M. Cohen |
|  |
|  |

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

----------X

D & V REALTY LLC, DERIVATIVELY ON BEHALF OF THE MEMBERS OF 192 8TH AVENUE REALTY GROUP LLC, EAST 3 MEMBERS HOLDING LLC, DERIVATIVELY ON BEHALF OF THE MEMBERS OF 238-240 E3 STREET REALTY LLC, GDD REALTY LLC, DERIVATIVELY ON BEHALF OF THE MEMBERS OF 128 WEST 26TH STREET DEVELOPMENT LLC, CIP1 LLC, AND D & V REALTY LLC,

Plaintiffs,

- v -

MIKHAIL VASILYEVICH KLYUKIN, RI 128 26TH STREET, LLC, RI 192 8TH AVENUE, LLC, RI 238-240 EAST 3RD STREET, LLC, ORANGE REAL ESTATE DEVELOPMENT LLC, AND AHIMSA NY, LLC,

Defendants.

----------X

**INDEX NO.** 656782/2022

**MOTION DATE** 05/10/2023, 05/10/2023

**MOTION SEQ. NO.** 005 006

**DECISION + ORDER ON MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 156, 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, 213, 214, 217, 219, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 253

were read on this motion for PARTIAL SUMMARY JUDGMENT/CROSS-MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 212, 215, 216, 218, 224, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 254

were read on this motion for PARTIAL SUMMARY JUDGMENT/CROSS-MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT.

This case arises out of a series of agreements formed to purchase and develop properties located at 192 8th Avenue, New York, NY; 238-240 East 3rd Street, New York, NY; and 128 West 26th Street, New York, NY (*see* NYSCEF 212-13).

In this motion, Defendants and Counterclaim and Crossclaim Plaintiffs RI 128 26th Street LLC ("RI 26"), RI 192 8th Avenue LLC ("RI 8"), and RI 238-240 East 3rd Street, LLC ("RI E3") (collectively, the "Members") seek partial summary judgment on their First Counterclaim for breach of the LLC Agreements of 192 8th Avenue Realty Group LLC ("8th Ave. Realty"), E3 Street Realty LLC ("E3 Street Realty") , and 128 West 26th Street Development LLC ("West 26th Street") (collectively, the "Development Companies") and on their Third Counterclaim for a declaration that Plaintiffs and Counterclaim Defendants D&V Realty LLC and CIP1 LLC (collectively, the "Managers") were properly removed as managers of the Development Companies.

The Managers cross-move to dismiss the counterclaims or, in the alternative, seek partial summary judgment on their Fifth Cause of Action for a declaration that the Managers' removal was improper (NYSCEF 213-213). As the Managers' cross-motion implicates threshold issues such as standing, the Court will consider the cross-motion first.

For the following reasons, the Managers' cross-motion is **granted in part,** and the Members' motion is **granted in part**.[1]

*a. Plaintiffs' Cross-Motion to Dismiss, or in the Alternative, for Partial Summary Judgment*

A motion to dismiss a counterclaim is evaluated under the same standard as a motion to dismiss a complaint (*see McRedmond v Sutton Place Restaurant and Bar, Inc.*, 48 AD3d 258, 258 [1st Dept 2008]). Accordingly, the Court must "accept the facts as alleged in the [counterclaim] as true, accord [counterclaim] plaintiffs the benefit of every possible favorable

[1] The Court notes that despite the discrepancies in identifying the parties seeking relief on behalf of the Defendants/Counterclaim Plaintiffs (*see* NYSCEF 113, 115, 132, 133, 238), Counsel clarified at oral argument that both the movants here and the parties seeking relief in the Counterclaims are the Members (Tr. 5:14-25). Accordingly, the Court considers the Members the proper parties for purposes of this decision.

inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where the motion is based upon an "alleged lack of standing, the burden is on the moving [party] to establish, prima facie, the [counterclaim] plaintiff's lack of standing as a matter of law" (*Arch Bay Holdings, LLC-Series 2010B v Smith*, 136 AD3d 719, 719 [2d Dept 2016]). "To defeat the motion, a [counterclaim] plaintiff must submit evidence which raises a question of fact as to its standing" (*id.*).

Here, the relevant LLC Agreements provide that the validity, construction and interpretation of the agreements and all questions arising out of or concerning the companies or the agreements "are to be governed by the Laws of the State of Delaware" (NYSCEF 4 at 40; NYSCEF 136 at 40-41; NYSCEF 137 at 40-41). Delaware Courts have taken a similar approach on the issue of standing (*see Omnicare, Inc v NCS Healthcare*, 809 A2d 1163, 1168 [Del Ch 2002] [holding "standing to maintain a lawsuit refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance'" and "[i]n deciding whether a party has standing to bring a claim, the court shall 'consider[] who is entitled to bring a lawsuit rather than the merits of the particular controversy'"] [internal citations omitted]).

The Managers advance two arguments in support of their position that the Members lack standing. First, the Managers argue that because the Members were sanctioned by OFAC they must first seek a license to maintain this action (*see* NYSCEF 212, 213). However, "a Treasury Department authorization or license is not a prerequisite to initiating an *in personam* lawsuit. The Assets Control Regulations forbid only those judicial acts that transfer a property interest" (*Dean Witter Reynolds, Inc. v Fernandez*, 741 F2d 355, 361-62 [11th Cir 1984]). Here, the First, Fourth, Sixth, and Seventh Counterclaims seek money damages (NYSCEF 42 ¶ 149). Therefore, "it [is] not until after judgment that a transfer of property [would become] possible" (*Dean Witter*, 741

F2d at 362). In that event, "all subsequent proceedings to enforce the judgement [would have to] be licensed" (*id.*; *see also American Bank and Trust Co. v Bond Intern. Ltd.*, 464 F Supp2d 1123, 1128 [ND Okla 2006] [holding the failure to obtain a license does not "deprive [the court] of jurisdiction to review plaintiff's security interests in property leased…but the court has no authority to issue a transfer of (including appointment of a receiver for) property rights…without evidence that plaintiff has obtained a license from OFAC to maintain such security interests"]).

With respect to the Second and Fifth Counterclaims, for Specific Performance and an Accounting, respectively, the Members seek to enforce rights and obligations contemplated under the Operating Agreements as a result of the Managers' alleged breaches, which occurred prior to any sanctions (NYSCEF 42 ¶ 14). These alleged breaches are likewise foundational to the Third Counterclaim for a declaratory judgment that the Managers' removal was proper. Therefore, the Members may assert, and this Court may adjudicate, claims regarding whether the Members are entitled to the relief they seek (*see e.g., American Airways Charters, Inc. v Regan*, 746 F2d 865, 869 [D DC 1984] [permitting a sanctioned entity to hire counsel and maintain a lawsuit, noting that while assets may not be touched without OFAC's permission, "Congress has not authorized the Executive to seize the corporation [and] control all its internal operations"]). In any event, the Managers seek a judgment declaring that the removals were improper (NYSCEF 1 ¶¶ 109-116) and thus themselves put the propriety of the removals at issue before the Court. Accordingly, the OFAC sanctions do not bar the Members' from asserting the Counterclaims.[2]

[2] As Counsel for the Members acknowledged at oral argument on these motions, the only counterclaim that they argue seeks a transfer of property is the declaratory judgment counterclaim (NYSCEF 277 at 36:14-37:19).

Second, the Managers argue that the Members do not have standing to assert claims in their individual capacity rather than as derivative claims in the name of the Development Companies (*see* NYSCEF 212 at 10, 213 at 11). This argument is correct as to some counterclaims, but not as to others. Specifically, the Second and Fifth Counterclaims seek enforcement of the Members' alleged individual rights to require the Managers to produce or otherwise make documents available for inspection (NYSCEF 42 ¶¶ 104-113; 128-132) and the Third Counterclaim seeks a declaration that the Members had the individual right to remove the Managers based on their alleged breaches (*see Pharmacy Corp. of Am. v Askari*, 2018 WL 2108200, at *5 [D Del May 7, 2018] [applying Delaware law, finding a party that is a signatory of an operating agreement "possess[es] direct standing to enforce its provisions"]). Likewise, the harm alleged in the Sixth and Seventh Counterclaims, which allege that D&V Realty LLC and Vinbaytel have respectively breached and tortiously interfered with RI 8th Ave.'s right to a distribution under the 8th Ave. Realty LLC Agreement, is individual to RI 8th Ave. and therefore proper under Delaware law (*Kuroda v SPJS Holdings, LLC*, 971 A2d 872, 887 [Del Ch 2009] ["Delaware law is clear that direct claims are available only where the member has suffered damage that is independent of any damage suffered by the limited liability company"]).

The remaining counterclaims for breach of the LLC Agreements (First Counterclaim) and breach of fiduciary duty (Fourth Counterclaim), however, assert derivative claims and must be dismissed without prejudice to attempting to re-assert them as derivative claims. With respect to the First Counterclaim for breach of the LLC Agreements, the Members fail to allege any damage independent of the damages suffered by the Development Companies (*Kuroda*, 971 A2d at 887; *see also Elf Atochem N. Am. Inc. v Jaffari*, 727 A2d 286, 293 [Del 1999] ["the derivative form of action permits an individual shareholder to bring suit to enforce a corporate cause of

action against officers, director, and third parties"] [internal quotation omitted]). With regards to the Fourth Counterclaim, while the Members argue they have the right to assert the claim derivatively (NYSCEF 252 at 5), the Answer with Counterclaims and Crossclaims does not meet the pleading requirements for a derivative action (*see e.g., In re Walt Disney Co. Derivative Litigation*, 825 A2d 275, 285 [Del Ch 2003["When a plaintiff alleges a derivative claim, demand must be made on the board or excused based upon futility"]).

Accordingly, the Managers' cross-motion to dismiss counterclaims is granted with respect to the First and Fourth Counterclaims, and otherwise denied.

*b. The Members' Motion for Partial Summary Judgment*

To obtain summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law" by advancing "sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once established, "the burden then shifts to the [non-movant] to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment" (*Flores v City of NY*, 29 AD3d 356, 358 [1st Dept 2006]). Where "the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment" (*CIT Group/Credit Finance, Inc. v Weinstein*, 261 AD2d 203, 204 [1st Dept 1999] [internal quotation omitted]).

As stated above, Delaware law governs the Members' Counterclaims against the Managers (*see Nineteen Eighty-Nine LLC v Icahn*, 96 AD3d 603, 604 [1st Dept 2012] [Delaware law properly applied where "the dispute between the parties is governed by a limited liability company (LLC) agreement which specifies that Delaware law applies"]).

The LLC Agreements at issue here unambiguously impose heightened consent requirements and other limitations on the Managers' conduct. For example, Section 3.4(b)(i) of the LLC Agreements requires the Managers to "segregate and otherwise account for the Company Assets and not allow funds or other Company Assets to be commingled with the funds or other assets owned by, or registered in the name of, the Manager or any member or any Affiliate of the Manager or a Member" (NYSCEF 117 at 16; NYSCEF 136 at 16; NYSCEF 137 at 16). Section 4.2(c)(vii) requires unanimous consent before the Managers can transfer any company assets with a value in excess of $10,000, while Section 4.2(c)(xv) requires unanimous consent before the Managers enter into any agreement having a value of, or cost over, $50,000, and Section 4.2(c)(xvi) requires unanimous consent before the Managers enter into a contract between the company and the Managers or Members, or any affiliate of the Managers or Members (NYSCEF 117 at 19-20; NYSCEF 136 at 19-20; NYSCEF 137 at 19-20). Finally, Article 8, in relevant part, lays out the Members' rights concerning reporting and inspection of books and records (NYSCEF 117 at 27-31; NYSCEF 136 at 27-31; NYSCEF 137 at 27-31).

Here, the Members have proffered evidence demonstrating the Managers' breaches of each provision described above and the Managers have failed to rebut this showing. Specifically, the Members demonstrate, and in some cases Vinbaytel admits to, breaches of LLC Agreement provisions: (i) prohibiting the commingling of assets and funds between the Development Companies (*see e.g.*, NYSCEF 124 at 10-11, NYSCEF 158 ¶ 28); (ii) requiring unanimous consent before transactions in excess of certain values (*see e.g.*, NYSCEF 116 ¶ 61, NYSCEF 124 at 4; NYSCEF 135 ¶¶ 47, 89-90; NYSCEF 53 ¶ 186; NYSCEF 158 ¶¶ 68-69, 72-74); and (iii) requiring approval for the terms of the construction contracts with the Managers' affiliates (*see e.g.*, NYSCEF 116 ¶¶ 53, 56-58; NYSCEF 125; NYSCEF 135 ¶¶ 32-35, 79-83). With

respect to West 26th Street and E3 Street Realty, the record also shows that the Managers failed to adhere to the reporting and inspection requirements outlined in Article 8 of the LLC Agreements (*see e.g.*, NYSCEF 116 ¶¶ 33, 36, 38-39, 43; NYSCEF 118, 120-123; NYSCEF 135 ¶¶ 61-68; NYSCEF 225 ¶ 15).

The Managers' explanations for the various breaches are unavailing and do not create legitimately disputed issues of fact for trial. For example, Vinbaytel argues the commingling of funds between the Development Companies' bank accounts was necessary and in furtherance of the projects (NYSCEF 158 ¶¶ 28, 30-45). However, the LLC Agreements clearly and unambiguously prohibit these intracompany transfers. The Managers were not permitted to ignore the provisions simply because they felt it was prudent to do so. The same is true with respect to the withdrawal of $20,000 from West 26th Street's bank account (NYSCEF 124 at 4; NYSCEF 186 ¶ 53), the four change orders in excess of $50,000 in connection with 8th Ave. Realty (NYSCEF 135 ¶ 47), and the overseas wire and withdrawal of $50,000 from E3 Street Realty's bank account (NYSCEF 135 ¶¶ 89-90; NYSCEF 158 ¶¶ 68-69, 72-74). Similarly, the Managers' contention that the Members allowed Vinbaytel Developments to act as the General Contractor for the projects does not absolve the Managers of their duty to obtain unanimous approval of the terms of the construction contracts (*see e.g.*, NYSCEF 125).

Nor are the Managers' arguments that the Members were aware of and condoned the breaches outlined above sufficient to preclude summary judgment. "Waiver is the voluntary and intentional relinquishment of a known right" and "Delaware's standard for proving waiver is quite exacting" (*In re Coinmint, LLC*, 261 A3d 867, 893 [Del Ch 2021] [internal quotations omitted]). The proof relied upon to establish waiver "must be unequivocal" (*id.*). Though a "non-waiver clause in a contract may itself be waived through knowledge, coupled with silence and

conduct inconsistent with the terms of the contract" (*Mergenthaler v M&K Bus Serv., Inc.*, 1995 WL 108883, at *2 [Del Super Feb. 22, 1995]), the provision "gives a contracting party some assurance that its failure to require the other party's strict adherence to a contract term…will not result in a complete and unintended loss of it contract rights if it later decides that strict performance is desirable" (*Rehoboth Mall Ltd. Partnership v NPC Intern, Inc.*, 953 A2d 702, 704 [Del 2008]).

The Managers do not tender evidence sufficient to create an issue of fact as to whether the Members' conduct meets this exacting waiver standard. In fact, the Members' repeated requests for documents and reporting indicates they did not have "knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those [] rights" (*Bantum v New Castle Cnty. Vo-Tech Educ. Ass'n*, 21 A3d 44, 50 [Del 2011]), but instead were seeking information to gain an understanding of the Managers' conduct. Further, the cases relied upon by the Managers involved instances of conduct inconsistent with the terms of the contract by the party seeking to enforce the agreement (*see e.g., In re Coinmint LLC*, 261 A3d at 899-900 [finding the party seeking to enforce the operating agreement's terms was "an active participant in shirking those terms and spearheaded" the breaching conduct]). The record here is devoid of any such evidence creating an issue of fact as to whether the Members actively engaged in the breaching conduct.

The Manager's arguments that the Members breached the implied covenant of good faith and fair dealing as a result of the frequency and volume of their document requests also fails. "The implied covenant of good faith and fair dealing is the doctrine by which Delaware law cautiously supplies terms to fill gaps in the express provisions of a specific agreement" (*Allen v El Paso Pipeline GP Co., LLC*, 113 A3d 167, 182 [Del Ch 2014]). The doctrine cannot be used

"to override the express terms of the contract" (*Kuroda v SPJS Holdings, LLC*, 971 A2d at 888) and will "only be applied when the contract is truly silent with respect to the matter at hand" (*Allen*, 113 A3d at 183).

Article 8 of the LLC Agreements places heightened transparency requirements on the Managers and each of the Members' requests falls within one of the enumerated categories (*see* NYSCEF 117 at 28-29; NYSCEF 136 at 28-29; NYSCEF 137 at 28-29). Despite the Managers' arguments, the fact that the projects were under budget does not negate the Members' rights to seek and obtain information to understand how the budget was being allocated. The LLC Agreements expressly address the reporting and information requirements and there is no gap that needs to be filled via the implied covenant of good faith and fair dealing (*see Allen*, 113 A3d at 182-183).

Section 4.2 (c)(xxiv) of the LLC Agreements provides that in the event of a breach by the Manager of the agreement "the Manager may be replaced by the Voting Majority (*see e.g.*, NYSCEF 137 at 21). It is undisputed that the Members are the "Voting Majority" contemplated by the LLC Agreements. Moreover, each written action explicitly states that the Members determined the Managers to be in breach of the LLC Agreement and the LLC Agreements set forth no requirement that the Members specify the provision they determined the Manager to have violated (NYSCEF 126, 150-151). As a result of the foregoing breaches, the February 15, 2022 Written Action without a Meeting for each of the Development Companies (NYSCEF 126, 150-151) removing and replacing D&V Realty LLC and CIP1 LLC as Mangers constituted a proper removal under the express terms of the LLC Agreements.

Accordingly, it is

**ORDERED** that the Managers' cross-motion to dismiss or, in the alternative for partial summary judgment, is **granted** to the extent of dismissing the First and Fourth Counterclaims, without prejudice, and is otherwise **denied**; it is further

**ORDERED** that the Members' motions for partial summary judgment (Motion Sequences 05 & 06) are **granted** with respect to the Third Counterclaim for a declaratory judgment and are otherwise **denied**; and it is further

**ORDERED, ADJUDGED and DECLARED** that D&V Realty LLC and CIP1 LLC were properly removed as Managers of the Development Companies pursuant to the February 15, 2022 Written Actions with Meetings (NYSCEF 126, 150-51).

This constitutes the Decision and Order of the Court.

20230905122402JMCOHEND43DC5874C8426D9DDD724E372E0326

9/5/2023
DATE

JOEL M. COHEN, J.S.C.

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