

MDEV10 LLC v JDS Monad Terrace LLC

2024 NY Slip Op 32714(U)

August 2, 2024

Supreme Court, New York County

Docket Number: Index No. 656554/2021

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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MDEV10 LLC, ACK SCH MONAD INVESTOR LLC,
ACKERMD MONAD INVESTOR LLC,

Plaintiffs,

- v -

JDS MONAD TERRACE LLC, JDS MONAD TERRACE
DEVELOPER LLC, JDS CONSTRUCTION SERVICES
LLC, JDS CONSTRUCTION GROUP LLC, MONAD
TERRACE JV LLC, MONAD TERRACE INVESTMENT
LLC, MONAD TERRACE MANAGER LLC, MONAD
MANAGER LLC, MONAD TERRACE LLC, MONAD
TERRACE MEZZ LLC, MONAD TERRACE PROPERTY
OWNER LLC

Defendants.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297

were read on this motion to

DISMISS

This is a dispute among members of a joint venture created to develop waterfront properties in Miami. Plaintiffs¹ contend that Defendants², controlled by nonparty real estate developer Michael Stern (“Stern”), diverted a portion of Plaintiffs’ investment to Stern affiliates

¹ MDEV10, LLC, ACK SCH Monad Investor, LLC, and Ackermd Monad Investor, LLC (collectively, “Plaintiffs”) on behalf of themselves, and derivatively on behalf of Monad Terrace JV LLC, Monad Terrace Investment LLC, Monad Terrace Manager LLC, Monad Terrace LLC, Monad Terrace Mezz LLC, and Monad Terrace Property Owner LLC (collectively, the “Nominal Defendants”).

² JDS Monad Terrace, LLC (“Stern Holdings”), JDS Monad Terrace Developer LLC (“JDS Developer”), JDS Construction Services LLC, JDS Construction Group LLC (together with JDS Construction Services LLC, “JDS Construction,” and together with Stern Holdings, JDS Developer collectively, the “JDS Defendants”), and Monad Terrace JV LLC (together with the JDS Defendants, “Defendants”).

or otherwise for Stern's benefit in breach of the parties' agreements and failed to comply with financial reporting and disclosure obligations to cover up the scheme.

Defendants now move to dismiss the Fifth, Sixth, Seventh, Eighth, and Ninth causes of action in Plaintiffs' Second Amended Complaint (NYSCEF 267 ["SAC"]). For the reasons stated below, Defendants' motion is granted in part and denied in part.

BACKGROUND

I. Factual Background

In May 2015, developer Daniel Minkowitz ("Minkowitz"), through his wholly owned special purpose entity MDEV10, LLC ("MDEV"), and Stern, through his wholly owned subsidiary Stern Holdings, entered into an operating agreement to jointly develop a waterfront property in Miami, Florida as a luxury condominium project (the "GP JV") (SAC ¶ 27; *see* NYSCEF 268 ["Original GP Agreement"]).

Later in 2015, Stern and Minkowitz decided to add another group of investors to GP JV. On or about October 10, 2017, MDEV, Stern Holdings, and ACK SCH Monad Investor, LLC ("ACK"), managed by Ariel Ackerman ("Ackerman"), entered into a Second Amended and Restated Limited Liability Company Operating Agreement (SAC ¶¶ 29-30; *see* NYSCEF 269 ["Amended GP Agreement"]). Under the Amended GP Agreement, Stern Holdings was a 50 percent member, and MDEV and ACK were 25 percent members in the GP JV (SAC ¶ 31).

The Miami property is held by Monad Terrace Property Owner LLC ("Property Owner") which is wholly owned by Monad Terrace Mezz LLC ("Mezz"), which in turn is wholly owned by Monad Terrace LLC (Monad Project JV) (the Property Owner, Mezz, and Monad Project JV, collectively, the "JV Entities") (SAC ¶ 40).

The GP JV had several direct and indirect subsidiaries related to the development project, including the direct subsidiary Monad Terrace Investment LLC (“Ackerman JV”), which was formed to take on additional limited partnership investment on the project (SAC ¶ 32). The GP JV holds a 70 percent membership interest in the Ackerman JV, and the remaining 30 percent is owned by ACKERMD Monad Investor LLC (“ACKERMD”), which is also managed by Ackerman (SAC ¶ 33). The Ackerman JV is governed by the “Ackerman Agreement” (*id.* ¶ 47; *see* NYSCEF 271 [“Ackerman Agreement”]). Through several additional layers of limited liability companies (the “JV Entities” – some of which also have independent, third-party investors), Property Owner is an indirect, partly-owned subsidiary of the Ackerman JV (*see* SAC ¶¶ 25-42, 47).

Additionally, Vector Group Ltd., through New Valley LLC and NV Monad Terrace LLC (“NV Member”), holds an indirect interest in Property Owner through a 33.33 percent ownership interest in the Monad Project JV (*id.* ¶¶ 35-38). The “NV Agreement” governed the relationship between NV Monad and Monad Manager in the Monad Project JV (*id.* ¶ 38; *see* NYSCEF 270 [“NV Agreement”]).

As alleged in the SAC, Stern, through control of Stern Holdings, the managing member of the GP JV, effectively managed and controlled all of the subsidiaries (SAC ¶ 42). However, Stern’s management rights in the Monad Project were not unlimited, and various rights were reserved for MDEV and ACK under the Original and Amended GP Agreements and for ACKERMD under the Ackerman Agreement (*id.* ¶¶ 46-47). According to Plaintiffs, Stern, operating through Stern Holdings and the Subsidiaries, violated these agreements by among other things repeatedly failing to cause amended Project Budgets and Annual Budgets to be delivered or approved, operating the Monad Project outside of such approved budgets, and

failing to provide timely reporting and production of information to MDEV, ACK, and ACKERMD (*id.* ¶¶ 54, 67). Additionally, Plaintiffs allege that Stern Holdings failed to distribute available cash to MDEV and ACK per the Amended GP and Original GP Agreement; failed to observe ACK and MDEV's consent rights by carrying out major decisions without procuring the requisite consent from those entities; and failed to comply with MDEV and ACK's request to produce information and failing to maintain accurate and specific financial records (*id.* ¶¶ 129, 145).

In addition, as part of the Original GP Agreement and the Amended GP Agreement, Property Owner entered into a Development Management Agreement with JDS Developer (*id.* ¶ 76; *see* NYSCEF 272 [“Development Agreement”]), a Stern affiliate. Property Owner also entered into Purchase and Sale Agreements (“PSAs”) with the buyers of the condominiums that the project developed (SAC ¶¶ 176-79; *see* NYSCEF 288). Both agreements required “developer fees and other fees” to be proportionally shared with MDEV and ACK though, according to Plaintiffs, Stern failed to fulfill that obligation and diverted the funds elsewhere (SAC ¶¶ 173-181).

II. Procedural Background

On December 7, 2021, Plaintiffs filed the Complaint (NYSCEF 95), which was dismissed with leave to amend on April 15, 2022 (NYSCEF 194).

Plaintiffs filed the Amended Complaint on June 10, 2022 (NYSCEF 203). Following oral argument, this Court dismissed Plaintiffs' breach of fiduciary duty claims with prejudice, dismissed in part certain breach of contract claims, and dismissed the claims for breach of the implied covenant of good faith and fair dealing, declaratory relief, unjust enrichment, and

specific performance (NYSCEF 262 [Order and Decision dated May 3, 2023]; NYSCEF 263 [“Transcript” dated May 3, 2023]).

Plaintiffs filed the Second Amended Complaint on June 9, 2023, alleging nine causes of action: (1) breach of Amended GP Agreement, brought directly; (2) breach of Amended GP Agreement, brought derivatively on behalf of GP JV; (3) breach of Original GP Agreement, brought directly; (4) breach of Original GP Agreement, brought derivatively on behalf of GP JV; (5) declaratory relief, brought directly; (6) declaratory relief, brought directly and derivatively on behalf of GP JV; (7) breach of implied covenant of good faith and fair dealing, brought directly; (8) breach of Development Agreement, brought derivatively on behalf of Property Owner; (9) and unjust enrichment, brought derivatively on behalf of Property Owner (NYSCEF 267).

Defendants now move to dismiss Plaintiffs’ Fifth, Sixth, Seventh, Eighth, and Ninth causes of action pursuant to CPLR 3211(a)(1), (3), (7). Oral argument was held on June 28, 2024.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a claim, the court is to “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). A motion to dismiss pursuant to CPLR 3211(a)(1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

To defeat a defendant’s motion pursuant to CPLR 3211(a)(3) for lack of standing to sue, “the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will

be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*New York Community Bank v McClendon*, 138 AD3d 805, 806 [2d Dept 2016]).

I. Declaratory Relief

Defendants' motion to dismiss the fifth cause of action for declaratory relief under the Ackerman Agreement (asserted by ACKERMD against the GP JV directly), and the sixth cause of action for declaratory relief under the Amended GP Agreement (asserted by MDEV and ACK Individually and Derivatively on Behalf of GP JV Against Stern Holdings) is granted in part.

1. Previously Asserted Allegations (SAC ¶¶ 161(a)-(i), 166(a)-(m))

First, in connection with the motion to dismiss the First Amended Complaint, the Court noted that there was no utility to dismissing the sixth cause of action, and deferred consideration of the merits of that claim to a later stage in the proceedings (*see* NYSCEF 263 at 57 ["the best time [for] me to decide whether that is legitimate relief is not at this pleading stage."]). The Court adheres to that position on this motion.

The fifth cause of action, which is asserted against the GP JV, was previously dismissed on the ground that the GP JV was only listed as a nominal defendant (*see* NYSCEF 263 at 56–57). In the Second Amended Complaint, Plaintiffs have added GP JV as a defendant to the action, and thus, Plaintiffs have remedied this defect. The previously asserted allegations in the fifth cause of action (SAC ¶¶ 161(a)-(i)) largely mirror those asserted in the sixth cause of action (SAC ¶¶ 166(a)-(m), and these allegations are sufficient to withstand a motion to dismiss.

2. Newly Asserted Allegations (SAC ¶¶ 161 (j), 166(n))

However, Plaintiffs' newly asserted claim for a declaration dealing with consents made by Ariel Ackerman on behalf of ACKERMD and Daniel Minkowitz on behalf of MDEV (SAC ¶¶ 161(j), 166(n)) must be dismissed. Plaintiffs seek a declaration that the consents made by

Ackerman and Minkowitz “purporting to authorize a member loan by Stern Holdings are void *ab initio*, including for lack of consideration, because Stern Holdings already had an existing contractual obligation to fund the underlying costs as Managing Member Overruns” under the respective agreements, and “had Stern Holdings complied no such funds would have been necessary” (SAC ¶¶ 161(j), 166(n)).

Putting aside whether such allegations, if true, would render the consents voidable or void *ab initio* (*see In re Coinmint, LLC*, 261 A3d 867, 890–91 [Del Ch 2021] [“Action that is otherwise permissible, but fails to adhere to provisions of a [] company agreement, is voidable, not void”]), Plaintiffs have failed to allege why such consents required additional consideration. The consents are not stand-alone contracts, but rather approvals that the governing agreements specifically require for any affiliated-party transaction.

At bottom, this is really a breach of contract claim, alleging a breach of the Managing Member Overruns and At-Fault Overruns provisions in the Amended GP Agreement 3.6 and NV Agreement 3.5, which states, “JDS shall fund any amounts required to be funded pursuant to Section 3.5 of the NV Agreement and such amounts shall not be treated as Additional Capital Contributions of JDS.” (Amended GP Agreement § 3.6; *see* NV Agreement § 3.5). To the extent these sections were breached by using funds from affiliated parties, that is a breach of contract claim rather than a declaratory judgment claim. Accordingly, paragraphs 161(j), and 166(n) of the Second Amended Complaint are dismissed.

Finally, Defendants’ argument that they are entitled to attorney’s fees as the “prevailing party” under the agreements upon dismissal of these claims is premature (*Drummond Decatur & State Props., LLC v 10500 Drummond Rd. Partners LP*, 2017 NY Slip Op 30727[U], *21 [Sup

Ct, NY County 2017] [“As Plaintiff has claims that survive Defendants’ motion to dismiss, Defendants have not prevailed and the request for attorneys’ fees is premature”]).

II. Breach of the Implied Covenant

Plaintiffs have adequately stated a claim for breach of the implied covenant of good faith and fair dealing. Accordingly, Defendants’ motion to dismiss the seventh cause of action is denied.

Under Delaware law, the implied covenant of good faith and fair dealing, which is inherent in all contracts, “embodies the law’s expectation that ‘each party to a contract will act with good faith toward the other with respect to the subject matter of the contract’” (*Baldwin v New Wood Resources LLC*, 283 A3d 1099, 1116 [Del 2022] [citations omitted]). “The covenant also encompasses ‘the principle of contract construction that ‘if one party is given discretion in determining whether [a] condition in fact has occurred[,] that party must use good faith in making that determination’” (*id.*). “Courts utilize the implied covenant ‘to infer contract terms ‘to handle developments or contractual gaps that the asserting party pleads neither party anticipated[,]’ and courts will invoke the implied covenant to imply terms when necessary to protect the reasonable expectations of the parties” (*id.*). “The party asserting the implied covenant has the burden of proving ‘that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected’” (*id.* at 1118).

Here, Plaintiff has limited its claim to Section 6.10 of the Amended GP Agreement, which provides that if Developer receives any development fee pursuant to the terms of the Development Management Agreement and/or any other fee, then MDEV and ACK would get a portion of those fees. Plaintiffs allege that Stern Holdings arbitrarily and in bad faith caused

development fees paid by condominium buyers at the closing of each unit to be paid to Property Owner, for the sole purpose of preventing “receipt” of the fees by Developer (which would then have to be shared with MDEV and ACK), for Stern Holding’s sole benefit.

Based on these allegations, Plaintiffs have adequately alleged a breach of the implied covenant. While not explicitly part of Section 6.10, there is a viable claim that the implied covenant imposes an obligation that Stern Holdings would not act arbitrarily to prevent Plaintiffs from enjoying the fruits of the contract. Under similar circumstances, Delaware courts have found a breach of the implied covenant of good faith (*see e.g., In re P3 Health Group Holdings*, 2022 Del. Ch. LEXIS 314, at *8 [Ch Nov. 1, 2022] [denying dismissal of breach of implied covenant claim against LLC manager because based on reasonable inference from complaint allegations “Manager Defendants committed a bad faith breach of Sections 4.1(b) and (c) of the LLC Agreement by failing to make a good faith determination of Fair Market Value, as required by the LLC Agreement” for the purpose undermining a distribution waterfall]).

Defendants’ argument that Plaintiffs’ claim is foreclosed because the purchase and sale agreements (“PSAs”) between the Property Owner and the condominium buyers expressly required those development fees to be remitted to and retained by the Property Owner (NYSCEF 290 at 15) is unavailing. The circumstances of those agreements, including whether they were executed before or after the Original and Amended GP agreements were signed, is unclear. Depending on the circumstances, the PSA provisions could either provide a defense to the implied covenant claim or could simply be the mechanism through which the breach was effected (*see Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886 [1st Dept 2010] [complaint sufficiently alleged that the defendant entering into a secondary agreement frustrated the basic purpose of the original agreement and thus denied the plaintiffs the fruits of the contract]). At

this stage, however, they do not conclusively negate the claim. Because the documentary evidence that Defendants presents does not utterly refute the allegations in the Second Amended Complaint, the motion to dismiss the seventh cause of action is denied.

III. Demand Futility

Plaintiffs' eighth and ninth causes of action—asserted derivatively on behalf of Property Owner—fail as a matter of law because Plaintiffs do not sufficiently allege that it would be futile to demand that Property Owner sue on its own behalf.³

Under the NV Agreement, any decision by Property Owner to bring suit with respect to any matters related to the Development Agreement is within the “sole authority” of NV Monad. Plaintiffs must, therefore, adequately allege that it would be futile to demand that NV Monad enforce Property Owner's rights (*see* NV Agreement 270 § 6.11.3 [NV Member has the “sole authority” to enforce and “take all actions under any agreement” between any Subsidiary and Managing Member/Managing Member's affiliates]).

Under Delaware law, courts apply a three-part test on a director-by-director basis to determine whether demand should be excused as futile: (1) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (2) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (3) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of

³ Defendants do not dispute at this stage that that demand futility is sufficiently alleged against Stern and the JDS affiliates.

the claims that are the subject of the litigation demand (*United Food & Commer. Workers Union v Zuckerberg*, 262 A3d 1034, 1059 [Del 2021]).

Plaintiffs focus on the third category of demand futility—lack of independence—by alleging that NV Monad “lacks independence from JDS Developer (as well as all other JDS affiliates and [Michael] Stern)” because it is an affiliate of Douglas Elliman, a firm that has “deep and ongoing business ties with JDS Development Group” in that (a) it serves or served as the “broker-of-record” on this Project and other projects developed by defendants’ affiliates; and (b) a former “partner” of defendants’ principal recently “joined Douglas Elliman as a real estate broker.” (SAC ¶¶ 187–90).

However, these allegations of a general business relationship are insufficient to establish demand futility (*see United Food and Commercial Workers Union v Zuckerberg*, 250 A3d 862, 894 [Del Ch 2020], *affd sub nom. United Food and Commercial Workers Union and Participating Food Indus. Employers Tri-State Pension Fund v Zuckerberg*, 262 A3d 1034 [Del 2021] [“It is not enough, however, for a plaintiff simply to argue in the abstract that a particular director has a conflict of interest because she is affiliated with a particular type of institution.”]). Plaintiffs’ allegations do not provide a basis for concluding that a Douglas Elliman-owned entity is so conflicted by its parent’s periodic business with Stern-related entities that it would be incapable of making an independent determination whether grounds exist for enforcing the legal interests of Property Owner.

Plaintiffs’ reliance on three pre-*Zuckerberg* Delaware decisions is unpersuasive. In *Marchand v Barnhill*, the court concluded that demand futility was adequately pled because Rankin's successful career was due in large part to opportunities and mentoring given to him by members of the Kruse family and thus there were “very warm and thick personal ties of respect,

loyalty, and affection” such that Rankin could not act impartially (212 A3d 805, 818-819 [Del 2019]). In contrast, Plaintiffs do not (and presumably could not) allege that Douglas Elliman (one of the largest real estate firms in the country) owes its success “in large part to opportunities” given to by JDS Developer. In *Sandys v Pincus*, the court concluded that demand futility was adequately pleaded because one director owned a private airplane with defendant, which signaled “an extremely close, personal bond” (152 A3d 124, 130-31 [Del 2016]).⁴ Plaintiffs have not alleged that NV Monad (or Douglas Elliman) and JDS Developer own personal assets together so as to suggest a “personal bond” between the two such that demand would be futile (*see id.*). Finally, in *Sciabacucchi v Liberty Broadband Corp.*, the court concluded that demand futility was adequately pleaded because “joint ventures totaling almost \$1 billion are material to the firms involved” and impugns the director’s independence (CV 11418-VCG, 2018 WL 3599997, at *14 [Del Ch July 26, 2018]). Here, the allegations do not establish that NV Monad (or Douglas Elliman) and JDS Developer have engaged in similar joint venture activities that would impugn NV Monad’s independence (*see id.*).

Therefore, the eighth and ninth causes of actions are dismissed.

* * *

Accordingly, it is

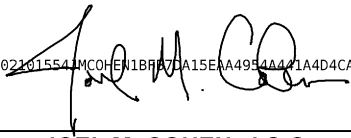
ORDERED that Defendant’s motion to dismiss the Second Amended Complaint is **GRANTED IN PART**, as follows: The fifth and sixth causes of action for declaratory judgment

⁴ The company additionally conceded that it had publicly disclosed that two directors did not qualify as independent directors under the NASDAQ listing Rules (*Sandys v Pincus*, 152 A3d 124, 130-31 [Del 2016]).

are dismissed in part, and the eighth and ninth causes of action are dismissed; the motion is otherwise **DENIED**; and it is further

ORDERED that the parties upload to NYSCEF a copy of the oral argument transcript upon receipt.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

8/2/2024
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE