

**SD Second Ave. Member LLC v SD Second Ave.
Venture, LLC**

2024 NY Slip Op 33073(U)

September 3, 2024

Supreme Court, New York County

Docket Number: Index No. 152270/2024

Judge: Joel M. Cohen

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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 03M

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SD SECOND AVENUE MEMBER LLC,

Plaintiff,

- v -

SD SECOND AVENUE VENTURE, LLC, SD SECOND AVENUE CS MEMBER, LLC, CLAUDIO SOIFER, SD SECOND AVENUE HOLDING, LLC, SD SECOND AVENUE PROPERTY, LLC, 250 LEGACY HOLDINGS, LLC

Defendants.

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INDEX NO. 152270/2024

MOTION DATE 06/03/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 140, 141, 142, 143, 144, 145, 146, 147, 150, 151, 152, 153, 156, 157, 158, 159

were read on this motion to DISMISS.

Defendants 250 Legacy Holdings, LLC (“250 Legacy”), SD Second Avenue CS Member, LLC (“CS Member”), Claudio Soifer (“Soifer”), SD Second Avenue Venture, LLC (“SD Venture”), SD Second Avenue Holding, LLC (“SD Holding”), and SD Second Avenue Property, LLC (“SD Property”) (collectively, “Defendants”) move for an Order (a) pursuant to CPLR § 3211(a)(4), dismissing the First and Second Causes of Action of the Verified Complaint (“Complaint”) filed by Plaintiff SD Second Avenue Member LLC (“Plaintiff” or “JS Member”); (b) pursuant to CPLR § 602(a), consolidating the Complaint’s Third, Fourth, and Fifth causes of action for all purposes with the action currently pending in New York State Supreme Court, New York County, styled *Claudio Soifer, et al. v. SD Second Avenue Member LLC, et al.*, Index No.

654475/2021 (the “Soifer Action”).¹ According to Defendants, JS Member’s first and second causes of action in the Complaint should be dismissed as admittedly duplicative of its counterclaims in the Soifer Action.

Plaintiff partially opposed this motion (NYSCEF 153). Thereafter, the parties attempted to resolve this motion by stipulation but they did not agree on the resolution of the first two causes of action (NYSCEF 157-158). Accordingly, the Court will address this motion.

DISCUSSION

An action may be dismissed when “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires” (CPLR 3211[a][4]). To determine whether an action is subject to dismissal under that provision, New York courts analyze whether there is substantial identity of the parties, whether the causes of actions are “substantially similar,” with a “critical element [] that both suits arise out of the same subject matter or series of alleged wrongs.” (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013] [citation omitted]). Dismissal on this ground is in the broad discretion of the court (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]).

Here, the parties in this Action and the Soifer Action are substantially the same. CPLR 3211(a)(4) requires “substantial, not complete, identity of the parties.” (*Syncora Guarantee Inc.*, 110 AD3d at 96). JS Member is the Plaintiff in this action and a Defendant in the Soifer Action.

¹ The Soifer Action was previously consolidated for purposes of joint discovery and trial with the action currently pending in New York State Supreme Court, New York County, styled *J.S.I.K. International LLC, et al. v. Joshua Schuster et al.*, Index No. 650898/2023 (the “Karten Action”)

Additionally, all of the Defendants in this action except 250 Legacy are Plaintiffs in the Soifer Action.

Further, JS Member's First and Second Causes of Action for breach of contract and breach of fiduciary duty are substantially similar to the Counterclaims in the Soifer Action for breach of contract and breach of fiduciary duty. Both are asserted against CS Member, allege that CS Member breached the JV Agreement and breached its fiduciary duties as Managing Member under the JV Agreement (*compare* NYSCEF 101 ["Counterclaims"] ¶¶ 24-35 with NYSCEF 1 ["Compl"] ¶¶ 47-58).

As Plaintiff points out, the majority of Plaintiff's claims regarding CS Member's mismanagement in this Action—which relate to a series of improper distributions made by Defendants in the wake of Defendants' fraudulent conveyances—took place *after* the relevant Answer with Counterclaims was filed in the Soifer Action. However, these allegations still arise from same the underlying facts as the claims set forth in the Answer with Counterclaims. Given these circumstances, the Court finds that dismissing the first and second causes of action without prejudice to amending those causes of action in the Soifer Action to bring the allegations up to date is appropriate. This will preserve resources and prevent inconsistent rulings.

Finally, Plaintiff does not oppose the portion of Defendants' motion which seeks consolidation of the Complaint's Third, Fourth, and Fifth causes of action for all purposes with the Soifer Action pursuant to CPLR 602(a), and therefore this request is granted.

Accordingly, it is

ORDERED that Defendants' Motion to Dismiss and Consolidate is **GRANTED**, and Plaintiff's first and second causes of action are dismissed without prejudice to amending the corresponding counterclaims in the Soifer Action; Plaintiff is granted to leave to amend its

Answer and Counterclaims in the Soifer Action within twenty (20) days of the date of this Order and may, if it chooses, file a Third-Party Complaint in the Soifer Action against 250 Legacy that will relate back to the filing of its corresponding claim in this action; responsive pleadings shall be filed within twenty (20) days thereafter; it is further

ORDERED that within seven (7) days of the responsive pleadings being filed, the parties in the new consolidated Soifer Action and the Karten Action shall submit a proposed discovery order to the Court; it is further

ORDERED that the Third, Fourth, and Fifth causes of action in the above-captioned action are consolidated in this Court with *Claudio Soifer, et al. v. SD Second Avenue Member LLC, et al.*, Index No. 654475/2021, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 654475/2021 and the consolidated action shall bear the following caption:

CLAUDIO SOIFER; SD SECOND AVENUE
VENTURE, LLC; SD SECOND AVENUE CS MEMBER,
LLC; SD SECOND AVENUE HOLDING, LLC; and
SD SECOND AVENUE PROPERTY, LLC.

Plaintiffs,

-against-

SD SECOND AVENUE MEMBER LLC; JOSHUA
SCHUSTER; 359 SECOND AVENUE GRAMERCY LLC;
JVEM SILVERBACK GRAMERCY LLC; SD
SECOND AVENUE MANAGE LLC; SCHUSTER
ENTERPRISES LLC; SILVERBACK ACQUISITIONS
AND DEVELOPMENT LLC; 67 LIVINGSTONS LLC;
and SILBER ACQUISITIONS LLC;

Defendants.

SD SECOND AVENUE MANAGER LLC, SD
SECOND AVENUE MEMBER LLC, and JOSHUA
SCHUSTER,

Counter-Claimants,

-against-

CLAUDIO SOIFER, SD SECOND AVENUE
VENTURE, LLC, SD SECOND AVENUE
CS MEMBER, LLC, SD SECOND AVENUE
HOLDING, LLC; and SD SECOND AVENUE
PROPERTY, LLC;

Counterclaim-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 from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court, who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

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

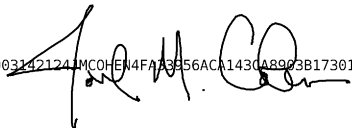
ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website); 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 from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office, who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the aforesaid *Protocol*.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

9/3/2024

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