SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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STEVEN GUREWITSCH, ANNE SCHWARTZ,

Plaintiffs,

- v -

JOSEPH KORFF, UCL LP, UCL LLC,3618 LLC, RIVERDALE HEIGHTS LLC, RIVERDALE HEIGHTS I LLC, ARC DEVELOPMENT LLC, ARC REAL ESTATE GROUP LLC, ARC MARKETING LLC, JOHN DOES 1-10, ABC COMPANIES, BN REALTY, INC., BN REALTY ASSOCIATES, STANLEY GUREWITSCH

Defendants.

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INDEX NO. 651080/2020

MOTION DATE 08/02/2024

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for DISMISS.

Upon the foregoing documents, Steven Gurewitsch, Anne Schwartz (collectively, the **Minority Members**), Stanley Gurewitsch, and BN Realty Associates (collectively, the **Counterclaim Defendants**)' motion (Mtn. Seq. No. 6) is granted to the extent that the counterclaim for (i) breach (first counterclaim) of the Operating Agreement of 3618 LLC (hereinafter defined), (ii) damages (second counterclaim) for breach of the Parking Agreement (hereinafter defined) except as asserted by Riverdale Heights LLC (**Riverdale**) and Riverdale Heights I LLC (**Riverdale I**), (iii) specific performance of the Parking Agreement (third counterclaim) except as asserted by Riverdale Heights LLC and Riverdale Heights I LLC (**Riverdale I**), (iv) tortious interference (fifth counterclaim), and civil conspiracy (sixth counterclaim) are dismissed. The motion is however otherwise denied.

In their Answer with Counterclaims (NYSCEF Doc. No. 2; the **Counterclaim**), 3618 LLC (the **Company**), Riverdale, Riverdale Heights I LLC, UCL LP (the **Majority Member**), and Joseph Korff (collectively, hereinafter the **Counterclaimants**) assert the following six counterclaims against the Minority Members and BN Realty, Inc., BN Realty Associates (collectively, the **BN Realty Parties**), and Stanley Gurewitsch:

(i) breach of contract against the Minority Members for their alleged failure to make capital contributions under the operating agreement (hereinafter defined) of 3618 LLC (*id.*, ¶¶ 55-60);

(ii) breach of contract against the BN Realty Parties for breach of a parking agreement (hereinafter defined) that was memorialized in a restrictive declaration (hereinafter defined) and recorded in the Office of the City Register of the City of New York (*id.*, ¶¶ 61-66);

(iii) specific performance of the parking agreement and enforcement of the restrictive declaration against the BN Realty Parties (*id.*, ¶¶ 67-69);

(iv) breach of an implied covenant of good faith and fair dealing against the Minority Members in relation to the parking agreement (*id.*, ¶¶ 70-74);

(v) tortious interference with contract against the Minority Members and Stanley Gurewitsch in relation to the parking agreement (*id.*, ¶¶ 75-79); and

(vi) civil conspiracy against the Plaintiff Spouses, Stanley Gurewitsch, and the BN Realty Parties to extort economic concessions from Joseph Korff and UCL relating to the Company (*id.*, ¶¶ 80-84).

1. The counterclaim for breach of the Operating Agreement (the first counterclaim) is dismissed

CPLR 3211(a)(1) provides that "a party may move for judgment dismissing one or more causes of action asserted against him" on the ground that "a defense is founded upon documentary evidence." On a motion to dismiss, the court must accept the facts as alleged as true affording the allegations every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Grandelli v City of New York*, 237 AD3d 534, 534 [1st Dept 2025]). However, bare legal conclusions and factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Sandman v City of Ithaca*, 237 AD3d 1392, 1393 [3d Dept 2025]). CPLR 3211(a)(1) requires dismissal where documentary evidence "conclusively establishes a defense to the claims as a matter of law" (*Gawrych v Astoria Fed. Sav. and Loan*, 148 AD3d 681, 682 [2d Dept 2017]).

A cause of action sounding in breach of contract requires "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Okafor v Okafor Bldg. Corp.*, 2025 NY Slip Op 03731 [2d Dept June 18, 2025]).

Reference is made to that certain Amended and Restated Operating Agreement of 3618 LLC (the **Operating Agreement**) dated as of May 2, 2005, by and between the Minority Member and the Majority Member as represented by its President, Joseph Korff (NYSCEF Doc. No. 45). The Company was formed to develop to acquire land, develop a condominium building thereon (the **Solaria**) and to sell units in the building (the **Project**; NYSCEF Doc No. 121, ¶ 1).

Section 2.1.3 of the Operating Agreement provides that if the Company needs additional funds in connection with **the business of the Company**, then the Members, upon written notice, shall make additional capital contributions on **a pro rata basis**. In the event that a member fails to make a capital contribution, the amount advanced by any other member is treated as an additional capital contribution accruing interest at the rate set forth in the Operating Agreement:

> 2.1.3 The Members shall make such Capital Contributions, consisting of cash or real or personal property, to the Company as the Non-Member Manager deems appropriate from time to time. If the Company requires additional funds in connection with the business of the Company, then the Members shall, upon written notice from the Non-Member Manager, make additional Capital Contributions pro rata in accordance with their Membership Interests. If any Member fails to advance its share of such Capital Contributions, one or more of the remaining Members may advance the sums needed, and such sums shall be considered a loan to the Company (a "Member Loan"), on which such Member shall be paid interest at the 30-day LIBOR rate, plus 600 basis points, compounded monthly (the "Capital Advance Interest Rate") and shall be repaid as provided in Section 5.2. Notwithstanding anything to the contrary contained herein, any Member Loan shall be subordinate to the Financing Arrangements, and shall be repaid only out of Cash Available for Distribution unless Lender shall consent otherwise. For purposes of the priority of such Member Loans to that of creditors, any Member Loan shall be treated as a Capital Contribution and not as debt.

According to the Counterclaim, Mr. Korff, the Non-Member Manager, made capital calls to reimburse the Majority Member, Mr. Korff's company (*i.e.*, the other member in the three member Company), for approximately $16 million of loans that Mr. Korff elected to cause it to make between 2007 and 2018 (*id.*, ¶ 37) and at a potentially different rate then the rate set forth for Member Loans set forth in the Operating Agreement (*tr.* 7.7.25). To wit, taking the allegations as true which the Court must at this stage of the litigation (*Leon v. Martinez,* 84 NY2d 83, 87-88 [1994]), according to the Counterclaim, Mr. Korff did not make a capital call "in connection with the business of the Company" sending appropriate timely notice to the Minority Members, where there was a Member Loan made at the rate set forth in the Operating

Agreement for Member Loans. Instead, when the business suffered from the financial downturn caused by the COVID-19 pandemic, he decided, without making a capital call, to have his member entity (*i.e.*, the Majority Member**)** infuse capital into the business, putting such capital at risk and potentially reaping the rewards of such capital investment if the business turned successful.

Years later, he made a hindsight asymmetrical demand for reflective repayment. At this later date and for this purpose, this simply can no longer be said to be a legitimate capital call made pursuant to terms of the Operating Agreement. At this later date, the "capital call" was to share the loss of his unilateral investment decision. As such, it is impermissible. Put another way, having made the unilateral decision to refrain from making a capital call where the Minority Members could have potentially exercised their rights (including by objecting to the capital call as not in the best interests of the business at that date, or otherwise bringing an application for injunctive relief, or seeking to put the Company in bankruptcy), the non-Member Manager cannot make a non-pro rata capital call to share in his reflective loss. The Court notes further that Section 2.2 provides that "the Members are not liable for the debts of the Company." Thus, the motion to dismiss the breach of contract (first) counterclaim is granted.[1]

2. The counterclaim for damages (second counterclaim) for breach of the Parking Agreement is dismissed except as to Riverdale and Riverdale I

Pursuant to CPLR 3211(a)(7), on a motion to dismiss, a liberal construction of the claims is warranted, and the Court should confer on the party the benefit of every possible inference and

[1] For the avoidance of doubt, the Majority Member is not without remedy. It can sue to be repaid for its loan to the Company subject to a fairness analysis as an interested transaction.

determine whether the facts as alleged fit within any cognizable legal theory (*Torok v Moore's Flatwork & Foundations*, LLC, 106 AD3d 1421, 1421 [3d Dept 2013]).

Reference is made to an alleged parking agreement (the **Parking Agreement**) by and between the BN Realty Parties and Riverdale. Although the Parking Agreement itself is not alleged to have been in writing, the Parking Agreement was memorialized in an Off-Site Parking Restrictive Declaration dated April 6, 2009, and recorded on April 24, 2009, in the Office of the City Register of the City of New York (the **Restrictive Declaration**).

Pursuant to the Restrictive Declaration, the BN Realty Parties and Riverdale agreed as follows:

> WHEREAS, the Declarant B [i.e., RH] has requested the Department of Buildings of the City of New York (the "Department of Buildings") to act upon Application No. 200876437-01-NB to construct a new building [alter an existing building] on Parcel B (the "Building");
>
> WHEREAS, Parcel A [i.e., the BN Realty Property] contains a parking area ("Parking Lot") containing more than 114 spaces, of which 74 spaces are necessary to satisfy the parking requirements for the uses on Parcel A;
>
> WHEREAS, the Parking Lot is to be used in accordance with the applicable provisions of the Zoning Resolution of the City of New York, part of which will serve as an accessory parking area of the Building; and
>
> WHEREAS, the Department of Buildings requires the execution and recording of this Declaration in connection with the use of the Parking Lot as accessory off site parking for the Building pursuant to Section(s) 25-55; 36-45; and/or 44-34 of the Zoning Resolution of the City of New York.
>
> NOW, THEREFORE, in consideration of the issuance by the Department of Buildings of a building permit for the Building, the Declarant hereby declares as follows:
>
> 1. The Declarant hereby covenants and agrees for itself, its successors and assigns that 40 spaces, as required for the Building at the time of the issuance of a building permit thereof, shall be reserved in the Parking Lot as accessory parking spaces to the Building.

> * * *
>
> 3. This declaration may not be modified, amended or terminated without the prior written consent of the Department of Buildings;
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> * * *
>
> 4. The covenants set forth herein shall run with the land and be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns[.]

(NYSCEF Doc. No. 121, ¶ 49)

As alleged, the BN Realty Parties have breached the Parking Agreement by failing to provide the required parking since 2018:

> 52. Starting in 2009, BN Realty made spaces available to Solaria residents on demand. But in October 2018, the Gurewitsches began sharply escalating their demands against Korff and UCL, including threatening the lawsuit that they ultimately filed in 2020. At that time, BN Realty began refusing outright to allocate parking space to Solaria residents, even including vacant spaces formerly assigned to Solaria residents. The Gurewitsches and Stanley Gurewitsch made no bones about the extortionate purpose of BN Realty's refusal. They stated expressly several times that BN Realty was withholding parking spaces at their behest as leverage for their claims against Korff and UCL and that such spaces would not be made available so long as their claims remained unsatisfied. In all these conversations, neither the Gurewitsches nor BN Realty offered so much as a fig leaf of a legal or contractual justification for BN Realty's sudden refusal to honor its Parking Agreement and Restrictive Declaration to provide parking spaces to Solaria residents.
>
> 53. The refusal by the Gurewitsches, Stanley Gurewitsch, and BN Realty to allocate parking spaces to Solaria residents continues to this day. On information and belief, as of the filing hereof, BN Realty has assigned only twenty-one (21) spaces to current Solaria residents, and many current residents who have requested a parking space are being denied spaces.

(*Id.* at ¶¶ 52-53). This is sufficient to allege at this stage of the litigation (*Twitchell Tech. Products, LLC v Mechoshade Sys.*, LLC, 227 AD3d 45, 53 [2d Dept 2024]). As such, the cause

of action sounding in breach of the Parking Agreement is denied as to Riverdale and Riverdale I. The Agreement however is not alleged to have been with the Company, the Majority Member, or Mr. Korff. Nor are they alleged to have been unit owners or anyone who would constitute a third-party beneficiary to this alleged Parking Agreement[2]. As such, the cause of action for breach of the Parking Agreement levelled by them is dismissed.

3. The counterclaim for specific performance (third counterclaim) for breach of the Parking Agreement is dismissed except as to Riverdale and Riverdale I

The counterclaim for specific performance of the Parking Agreement, as alleged, involves the same parties, documents, and facts as the counterclaim for damages for breach of the Parking Agreement, and is subject to dismissal to the same extent. As such, the cause of action for specific performance of the Parking Agreement is likewise denied as to Riverdale and Riverdale I.

4. The counterclaim for breach of the implied covenant of good faith and fair dealing (fourth counterclaim) is <u>not</u> dismissed

Dismissal of the implied covenant of good faith and fair dealing counterclaim is not warranted based on the argument that the Parking Agreement is not enforceable or that the damages asserted are too speculative (*Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009]).

The implied covenant of good faith and fair dealing is breached "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" (*Twinkle Play Corp. v*

[2] It is entirely irrelevant that Mr. Korff argues that he would not have invested without the Parking Agreement as he is not alleged to have made the investment personally and the agreement was for the benefit of the unit owners as alleged.

Alimar Properties, Ltd., 186 AD3d 1447, 1448 [2d Dept 2020] *citing Atlas El. Corp. v United El. Group, Inc.*, 77 AD3d 859, 861 [2d Dept 2010]).

As alleged, the Minority Members and Stanley Gurewitsch breached their covenant of good faith and fair dealing with respect to the Operating Agreement "by conspiring with and influencing BN Realty to breach its obligation to provide parking spaces to Solaria residents" (NYSCEF Doc. No. 121, ¶ 73). This is sufficient at this stage of the litigation. As such, the branch of the motion seeking dismissal of the implied covenant of good faith and fair dealing is denied.

5. The counterclaim for tortious interference (fifth counterclaim) is dismissed

A claim for tortious interference is subject to a three-year statute of limitation (*Ullmannglass v Oneida, Ltd.*, 86 AD3d 827, 828 [3d Dept 2011]), and the time of the claim begins to run when the person performs the act that constituted the alleged interference, and does not begin anew each the party is unable to enter into a contract (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]).

The Counterclaimants allege that, in 2018 and 2019 the Minority Members and Stanley Gurewitsch committed tortious interference when they induced the BN Realty Parties to violate the Parking Agreement by denying parking spaces to Solaria residents in order to extort economic concessions from Counterclaimants (*id.*, ¶¶ 77-78), to wit:

> 12. In October 2018, the Gurewitsches' long-standing dissatisfaction with the Company's economic performance escalated to threats of imminent litigation (which they ultimately commenced in February 2020). From that time, BN Realty maliciously began denying parking spaces to Solaria residents who requested them and refusing to make available to Solaria residents the full forty parking spaces required, in flagrant breach of its contractual obligations and restrictive

> declaration. BN Realty's breach was induced by the Gurewitsches and Stanley Gurewitsch in furtherance of their ongoing efforts to force Korff and the Company to agree to their extortionate demands, which by then included an $8 million cash payment to the Gurewitsches. In both 2018 and 2019, the Gurewitsches and Stanley Gurewitsch openly stated to Korff and others that BN Realty would not recommence providing parking to Solaria residents until the Gurewitsches' claims were resolved.
>
> […]
>
> 52. Starting in 2009, BN Realty made spaces available to Solaria residents on demand. But in October 2018, the Gurewitsches began sharply escalating their demands against Korff and UCL, including threatening the lawsuit that they ultimately filed in 2020. At that time, BN Realty began refusing outright to allocate parking space to Solaria residents, even including vacant spaces formerly assigned to Solaria residents. The Gurewitsches and Stanley Gurewitsch made no bones about the extortionate purpose of BN Realty's refusal. They stated expressly several times that BN Realty was withholding parking spaces at their behest as leverage for their claims against Korff and UCL and that such spaces would not be made available so long as their claims remained unsatisfied. In all these conversations, neither the Gurewitsches nor BN Realty offered so much as a fig leaf of a legal or contractual justification for BN Realty's sudden refusal to honor its Parking Agreement and Restrictive Declaration to provide parking spaces to Solaria residents.

(NYCEF Doc. No. 121, ¶¶ 12, 52). Thus, as alleged, the damages, including to the ability to sell units occurred when the BN Realty Parties refused to make the required number of parking spaces available. Thus, the time on which the claim accrued was back in 2018 or at the latest in 2019. The Counterclaim was not levelled until June 26, 2024, some at least five years later. As such, it is time-barred (*Thome*, 70 AD3d at 108 *citing Kronos, Inc. v. AVX Corp.*, 81 NY2d 90, 94 [1993]).

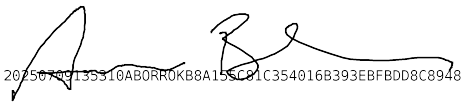
6. The counterclaim for civil conspiracy (sixth counterclaim) is dismissed

New York does not recognize an independent cause of action for civil conspiracy (*Whitfield v Law Enf't Employees Benevolent Assn.*, 237 AD3d 1139, 1140-41 [2d Dept 2025]). At most, a claimant can plead the conspiracy in connection to a common scheme to commit an underlying

tort (*id.* at 621). However, inasmuch as the tortious interference (fifth) counterclaim is dismissed, the civil conspiracy (sixth) counterclaim must also be dismissed.

Accordingly, it is hereby

ORDERED, that the motion to dismiss (mtn. seq. no. 6) is GRANTED to the extent that (i) the counterclaims sounding in (x) breach of the Operating Agreement (first counterclaim), (y) tortious interference (fifth counterclaim), and (z) civil conspiracy (sixth counterclaim) are dismissed, and (ii) the counterclaims sounding in damages for breach of the Parking Agreement (second counterclaim) and for specific performance of the Parking Agreement (third counterclaim) of the Company, the Majority Member, and Mr. Korff are dismissed.



7/9/2025
DATE

ANDREW BORROK, 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**