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

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CAPITOL HILL 505 ASSOCIATES, LLC,

Plaintiff,

- v -

CAPITAL HOTEL JV LLC, FEIL CAPITAL HOTEL LLC

Defendants.

INDEX NO. 654052/2023

MOTION DATE 01/13/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59

were read on this motion to/for DISMISS.

Upon the foregoing documents, the defendants' motion (Mtn. Seq. No. 003) to dismiss the Second Amended Complaint (the **SAC;** NYSCEF Doc. No. 39) is DENIED.

Reference is made to that certain Operating Agreement (NYSCEF Doc. No. 8; the **Operating Agreement**) of Capital Hotel Parent, LLC (the **Company**) dated September 25, 2019, by and between Capital Hill 505 Associates, LLC (**Capitol 505**), Capitol Hotel JV LLC (**Capital Hotel**), and Feil Capitol Hotel LLC (**Feil**). As relevant, the Operating Agreement provides that Capital Hotel can make capital calls only after attempting to obtain such capital from outside lenders or by using reserves:

> 3.3.1 Additional Capital. If BLDG-MV determines that the Company requires additional capital ("Additional Capital") for any Necessary Expense (as hereinafter defined), or any expenses included in the Approved Annual Budget or reasonably related to the implementation of the Approved Business Plan, **and in any of such events such Additional Capital cannot be obtained from any Third-Party Loan or reserves held by the Company which may then be drawn upon**, then, upon ten (10) Business Days prior written notice (a "Call Notice") to the other Propco

> Members, each Propco Member shall contribute its pro rata portion of such additional capital to the Company, determined in accordance with such Member's Propco Series Percentage Interest (its "Member Share"), by depositing the same into an account chosen by BLDG-MV. …

(*id*. § 3.3.1 [emphasis added]). According to the SAC, they did not attempt to obtain additional capital from third party lenders or reserves and thus did not have authority to make the capital calls that they made and continue to make (*tr*. 9.11.25).

Previously, the plaintiff filed this case seeking money damages based on alleged violations of Section 3.3.1 (NYSCEF Doc. No. 15 ¶ 20). By Decision and Order (NYSCEF Doc. No. 36, the **Prior Decision**), dated August 26, 2024, the Court granted the defendant's motion to dismiss the first Amended Complaint (the **FAC**) without prejudice because the FAC did not set forth a basis for money damages and gave the plaintiff's leave to amend the FAC indicating that the FAC set forth a cause of action for declaratory relief that the capital calls were *ultra vires* based on the alleged failure to satisfy a precondition to making such capital calls such that they did not have authority to make the capital calls that they are alleged to have made:

> **However, and as discussed, the complaint does not set forth a basis for money damages and dismissal without prejudice is required.** As discussed, however, dismissal with prejudice is not appropriate. **Among other things, the plaintiff may well be entitled to declaratory relief that the capital call was ulta virus** (sic) **and that there was a breach of the Operating Agreement, requiring reversal of the transaction and the reissuance of any K-1s.**
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> Leave is granted to file an amended pleading within 60 days.

(NYSCEF Doc. No. 36 at 2 [emphasis added]).

Thereafter, on October 7, 2024, the plaintiff filed the SAC seeking just that – *i.e.*, a declaration that the defendants did not satisfy a pre-condition set forth in Section 3.3.1 of the Operating

Agreement to making capital calls in that they did not attempt to obtain such capital from outside lenders and that as such the additional capital calls were *ultra vires* and void *ab initio*:

> 21. In November and December, 2020 and November 2021, June 2022 and December 2022, BLDG-MV issued Capital Calls (the "Additional Capital Calls") without first attempting each time to obtain the Additional Capital from outside lenders, whether as a new loan from Deutsche Bank or another lender or as a forbearance or modification of the Initial Loan.
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> 22. Upon information and belief, the reason that BLDG-MV did not seek a forbearance or modification of the Initial Loan from Deutsche Bank is that Lloyd Goldman, one of the principals of BLDG-MV, did not want to jeopardize his family's interests or existing and prospective relationship with Deutsche Bank.
>
> 23. Plaintiff objected to the Additional Capital Calls and demanded that the Additional Capital Calls be rescinded. BLDG-MV declined.
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> 24. Upon information and belief, BLDG-MV and defendant Feil each paid some or all of the amounts of the Additional Capital Calls.
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> 25. Also, BLDG-MV claims to have advanced Plaintiff's Capital Calls and to be owed $7,921,621.99 as of December2022 plus accrued interest.
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> 26. As a result of their payment of the Additional Capital Calls, defendants claim to be entitled to a preferential return to the detriment of plaintiff.
>
> 27. BLDG-MV's issuance of the Additional Capital Calls, without first applying for the Additional Capital from outside lenders, was not authorized by the Operating Agreement, was in breach of Sections 3.3.1 and 6.4.2 of the Operating Agreement and was ultra vires.
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> 30. Plaintiff requests a declaratory judgment that the Additional Capital Calls were issued in violation of the Operating Agreement and are ultra vires and that distributions for the Additional Capital Calls amounts paid by defendants come after distributions of the initial and secondary capital contributions made by the parties. Additionally, the Court should declare that defendants are not entitled to any interest on the funds delivered by either of them to the Company in response to the Additional Capital Calls, and that any and all other benefits taken by defendants be reversed so that plaintiff is restored to the position it was in prior to the defendants' contributions made in response to the Additional Capital Calls.

(NYSCEF Doc. No. 39 at 21-27, 30). The SAC also impleaded an additional defendant, Feil.

The defendants have now moved to dismiss the SAC pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7).

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law, while under CPLR 3211 (a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*id.*).

To constitute a justiciable controversy for purposes of declaratory judgment, there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]). The parties dispute whether the defendants had the authority to make the capital calls that they made. Unquestionably, this determination will have a substantial impact on the legal interests of the parties. The SAC thus set forth a proper basis for declaratory relief and dismissal is not appropriate.

The defendants are incorrect that the capital calls made by Capitol Hotel are not *ultra vires* as a matter of law. As previously discussed, Section 3.3.1 of the Operating Agreement has a pre-

condition to the defendants' authority to making capital calls which is alleged to have not been satisfied:

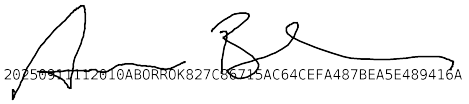
> For the avoidance of doubt, and as discussed, the Court notes that the defendants are not correct that they are entitled to dismissal based on their argument that Section 3.3.1 authorizes capital calls without regard to whether additional capital can be obtained from any Third-Party Loan (which as defined is not limited to loans from "then" existing lenders) reserves held by the Company. This simply is not what Section 3.3.1 of the Operating Agreement provides. The Operating Agreement does not use the words "then existing" or anything like that. Nor do the definitions of Third-Party Loan or Third-Party Lender or Section 6.4.5 support this interpretation warranting dismissal at this stage. Stated differently, and as discussed, the well drafted Operating Agreement does not limit the pre-condition to capital calls to "then existing Third Party Lenders" or the "Initial Lender." This interpretation is not supported by the text of the Operating Agreement or its definitions. As discussed, it also does not matter that the then existing debt prohibited additional debt. A waiver or an inter-creditor agreement possibly could have been obtained (if appropriate and requested) or an additional line of credit or a release of any potential escrows from the then-existing lender possibly could have been obtained if requested to address cash shortfalls.

(NYSCEF Doc. No. 36 at 2). This is sufficient at this stage of the proceeding.

For completeness, the Court notes that the defendants are also not correct that equity bars the plaintiff's challenge based on their argument that the Company, and by extension the plaintiff, allegedly benefited from these capital calls because the Company was able to avoid defaulting on existing debt. Putting aside that this defense is not properly considered on a motion to dismiss, if the defendants had obtained financing from a third-party lender which they were required to attempt to obtain prior to making capital calls, refinancing or forbearance from its existing lenders, the same benefit would have been obtained without impairing the plaintiffs' rights.

The Court has considered the defendants' remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that the defendants' motion (Mtn. Seq. No. 003) to dismiss the SAC is DENIED.



9/11/2025
DATE

ANDREW BORROK, J.S.C.

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