

**Chan v TC Havemeyer Mgr. LLC**

2025 NY Slip Op 33799(U)

October 3, 2025

Supreme Court, New York County

Docket Number: Index No. 652359/2022

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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INDEX NO. 652359/2022

KAI CHO VINCENT CHAN, ALLEN FU, DAI YU, YUCA
CAPITAL PARTNERS LP,

MOTION DATE 04/04/2025,
09/08/2025

Plaintiff,

MOTION SEQ. NO. 009 010

- v -

TC HAVEMEYER MANAGER LLC, TAVROS HOLDINGS
LLC, NICHOLAS SILVERS, COLIN RANKOWITZ,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 251, 252, 253, 254,
255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275,
276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 299, 300, 301,
302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 332
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 010) 334, 335, 337, 338,
339, 340, 341, 342, 343, 344, 345, 346, 347
were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

Plaintiffs Kai Cho Vincent Chan, Allen Fu, Day Yu (“individual plaintiffs”), and Yuca
Capital Partners LP (collectively referred to as “plaintiffs”) commenced this action seeking the
return of their March 2020 investments, alleging that they had invested in reliance on an oral
misrepresentation that a \$230,000,000.00 refinancing was “already done.” Upon the foregoing
cited papers and after holding oral argument on June 12, 2025, the motion of defendants TC
Havemeyer Manager LLC, Tavros Holdings LLC, Nicholas Silvers and Colin Rankowitz
(collectively referred to as “defendants”) for summary judgment to dismiss plaintiffs’ third
amended complaint (MS #09) is denied. In addition, for the reasons stated below in this decision,
the court grants plaintiffs’ last-minute motion for leave to add a new party (MS #11).

## I. Relevant Facts

Defendant TC Havemeyer Manager LLC (“TC Havemeyer”) is the manager and a member of Havemeyer Holdings LLC (“HH”), which established the “Dime Project” (NY St Cts Elec Filing [NYSCEF] Doc No. 253, Third Amended Complaint (“TAC”) ¶ 5). The Dime Project was the development and sale of a real property located at 275 South 5<sup>th</sup> St, Brooklyn, New York (“The Dime”) (*id.* ¶ 16). Tavros Holdings LLC (“Tavros”) is a real estate investment management and development firm founded by Nicholas Silvers (“Silvers”), and a member of TC Havemeyer (*id.* ¶ 7). Silvers and Colin Rankowitz (“Rankowitz”) were authorized agents of TC Havemeyer, and members and/or employees of Tavros (*id.* ¶ 58). The individual plaintiffs are, or formerly were, professional investors in debt securities (*id.* ¶ 14). Yu joined Havemeyer in 2016, as a member, and made a \$100,000 initial capital contribution in return for a 0.53% membership interest in Havemeyer and investment in The Dime (*id.* ¶ 16). Yu informed Chan and Fu about the investment opportunity (*id.* ¶ 17). Fu and Chan each made initial contributions of \$200,000 in return for 0.58% membership interests in Havemeyer (*id.* ¶¶ 18-19). The individual defendants executed the “Amended and Restated Operating Agreement of Havemeyer Holdings (the “Operating Agreement”), which appointed TC Havemeyer as the manager of Havemeyer (*id.* ¶ 20). TC Havemeyer is a member of Havemeyer and made an initial capital contribution of \$2 million (*id.* ¶ 25).

Plaintiffs alleged that in February and March 2020, defendants solicited the individual plaintiffs and former plaintiff Yuca to invest a total of \$3.16 million in the Havemeyer venture based on alleged false and misleading representations that a beneficial loan refinancing was already done (i.e., that a refinancing was committed by a lender and set to close imminently), when

in fact a refinancing did not exist (*id.* ¶ 28). The following is a timeline of defendants' alleged misconduct:

- On February 24, 2020, defendants learned from the Dime's existing lenders that, in order to extend the March 17, 2020 completion date for the Dime under the original \$230,000,000 construction loan and to avoid a default, defendants had to post funds (the "top up") to cover interest reserves of \$5,537,421 (*id.* ¶ 36). Absent those funds, Silvers and his mother, who personally guaranteed the original construction loan, would have to fund the interest reserve "top up" to avoid a default that would occur on March 17, 2020 (*id.*).
- On February 25, 2020, the existing lenders write to defendants, "it would be good if we could target executing the amendment by Friday, March 13" (NYSCEF Doc No. 312).
- On February 27, 2020, three days after receiving an email from the Dime's existing lenders about the interest rate "top up" requirement, defendants emailed individual plaintiffs about a "Derisked Investment Opportunity" for the purpose of seeking equity to fund costs and reserves associated with a construction loan refinancing, and claiming the opportunity would generate a 60%+ IRR with no construction risk. Plaintiffs were not notified of the imminent default, or the need for \$5 million to cure the default (NYSCEF Doc No. 271).
- A bank statement indicated that as of February 29, 2020, HH had \$472,154.71 available (NYSCEF Doc No. 310).
- On March 2, 2020, Silvers told plaintiffs on a call, falsely, that the refinancing is "already done" (Chan tr at 30; Fu tr at 34-35; Yu tr at 29-30).
- On March 6, 2020, Rankowitz wrote to plaintiffs two different times stating, "with the bridge financing we are putting in place now," and continued to mislead plaintiffs about the terms, returns, and risks of the non-existent refinancing (NYSCEF Doc No. 274).
- On March 10, 2020, Rankowitz emailed Yu that "we are targeting wires [for the refinancing] by tomorrow [March 11], or Thursday [March 12] at the latest (NYSCEF Doc No. 313). On March 11, 2020, Fu, concurrent with his investment, emailed Yu with a "cc" to Rankowitz, Silvers, and Chan, warning of the impending credit crunch, but stating that "Great you refinanced this loan already." Silvers failed to correct Fu's misstatement, instead he wrote back to Fu, Chan, and Yu thanking them for their "continued support" (*see* NYSCEF Doc No. 306). Rankowitz did not respond to Fu's email (*id.*).
- On March 10, 2020, and March 11, 2020, Yu, Yuca, and Fu wired to HH, \$200,000, \$1,300,000, \$596,000, and \$404,000, respectively (*see* NYSCEF Doc No. 319).
- On March 13, 2020, defendants signed the loan amendment agreement with the original loan's lenders to avoid the impending default on March 17, 2020, and wired \$5,400,132.68 from HH's bank account to the existing lenders on March 13, 2020, to fund the interest reserve "top up" (NYSCEF Doc No. 314).

- On March 27, 2020, plaintiffs believe the lender reneged on the refinancing due to a Material Adverse Change (“MAC”). Plaintiffs allegedly did not know there was no refinancing, no lender, and that their money was spent to avoid a default.

## II. Procedural History

Plaintiffs filed their initial complaint on September 12, 2022, against HH, TC Havemeyer and Tavros, asserting causes of action against all defendants for “rescission on the grounds of fraud,” fraud, and unjust enrichment, as well as breach of fiduciary duty and negligent misrepresentation against TC Havemeyer (NYSCEF Doc No. 8).

Plaintiffs amended the complaint on December 30, 2022, to include the causes of action for violation of various provisions of the 1934 Securities Exchange Act against HH LLC, TC Havemeyer, Tavros, Silvers and Rankowitz (*see* NYSCEF Doc No. 27). On May 23, 2023, this Court granted defendants’ motion to dismiss the first amended complaint in part (NYSCEF Doc No. 57). The cause of action for breach of fiduciary duty against TC Havemeyer was not dismissed as there was a question of fact regarding its duty to plaintiffs (*id.*). Plaintiffs filed an appeal (NYSCEF Doc No. 60).

Thereafter, plaintiffs moved for leave to serve a second amended complaint to assert the cause of action for breach of fiduciary duty against HH, Tavros, Silvers, Rankowitz, Havemeyer Owner LLC and Havemeyer MPE LLC, and assert a claim for aiding and abetting breach of fiduciary duty against TC Havemeyer and all the proposed defendants (NYSCEF Doc No. 83). On July 26, 2023, this Court denied the motion in part because plaintiffs failed to allege how HH’s fiduciary obligation arises, but granted it to include the aiding and abetting breach of fiduciary duty against Silvers, Rankowitz, and Tavros only (*id.*).

On July 30, 2023, plaintiffs filed a second amended complaint asserting causes of action for “recession on the grounds of fraud,” fraud, and violation of the Securities Exchange Act against

TC Havemeyer, Tavros, Silvers and Rankowitz, breach of fiduciary duty and negligent misrepresentation against TC Havemeyer, and aiding and abetting breach of fiduciary duty against individual defendants (NYSCEF Doc No. 89).

On January 4, 2024, the First Department held that this Court properly declined to dismiss the fifth cause of action for breach of fiduciary duty against TC Havemeyer as it owed to the individual plaintiffs the duty of full disclosure about the refinancing opportunity (NYSCEF Doc No. 155 at 1-2). Additionally, it held that TC Havemeyer did not owe a fiduciary duty to Yuca because it was not a preexisting investor, and therefore, Yuca's claims for fraud and rescission fail (*id.* at 2-3). That court further reinstated the individual plaintiffs' rescission, fraud and negligent misrepresentation causes of action (*id.* at 4).

Subsequently, Yuca moved to amend the causes of action for fraud and breach of fiduciary duty. By decision and order dated April 4, 2024, this Court granted plaintiffs' motion to amend the cause of action sounding in fraud in the inducement. The reason to allow such a late amendment was because plaintiffs did not know about Silvers' alleged lie, on a March 2, 2020 phone call, regarding the intended use of plaintiffs' funds (NYSCEF Doc No. 163 at 1). The court denied the part of Yuca's motion seeking to amend to add claim for breach of fiduciary duty because the First Department already affirmed that there was no fiduciary relationship between Yuca and defendants (*id.* at 2).

On May 1, 2024, plaintiffs filed their third amended complaint ("TAC") alleging claims for rescission, fraud, and breach of fiduciary duty against TC Havemeyer, Tavros, Silvers and Rankowitz, negligent misrepresentation against TC Havemeyer, and aiding and abetting breach of fiduciary duty against Silvers, Rankowitz and Tavros (*see* NYSCEF Doc No. 167).

Thereafter, defendants moved to dismiss Yuca's cause of action for fraud, the rescission cause of action under doctrine of laches and waiver, the cause of action for breach of fiduciary duty against the individual defendants, and all causes of action against Rankowitz. By decision and order dated December 19, 2024, this Court dismissed Yuca's fraud claim with prejudice (NYSCEF Doc No. 228 at 1). Thus, Yuca has no claims in this case. As to the rescission claim, this Court held that there is an issue of fact as to when plaintiffs demanded repayment, or whether plaintiffs waived any claim for rescission (*id.* at 1-2). The individual plaintiffs' claim for rescission based on breach of fiduciary duty was dismissed against Rankowitz with prejudice, because of the individual plaintiffs' concession (*id.* at 2). The claim for aiding and abetting was not dismissed against Rankowitz (*id.*). The claim for breach of fiduciary duty was dismissed against Rankowitz, with prejudice, and dismissed against Tavros and Silvers (*id.*).

#### Defendants' Motion

Defendants subsequently moved for summary judgment. Defendants assert that the Court should grant summary judgment in its favor on plaintiffs' claims for fraud, breach of fiduciary duty, fraudulent concealment and negligent misrepresentation because plaintiffs were provided with multiple writings making it clear that the refinancing did not occur and because they understood that their investments were necessary to close the refinancing (*see* NYSCEF Doc No. 293, Memorandum of Law in Support of Zaid Shukri, Esq. [memo] at 13). They further argue that plaintiffs' testimony establishes that the status of the refinancing was immaterial to plaintiffs' decision to invest because Fu testified that he executed the subscription agreement on June 7, 2020, months after learning that the refinancing had not closed. Defendants further contend that Fu asked Rankowitz to countersign the agreement knowing that the refinancing had been pushed out and might never close (*id.* at 16)

Second, defendants contend that plaintiffs failed to establish any damages because they did not present any evidence of out-of-pocket damages and testified that their value in the investment remained unchanged (*id.* at 18-19). They further argue that plaintiffs cannot show loss causation because they testified that before investing, they understood that investment losses were possible even if the refinancing closed, including an impact of COVID-19, and failed to proffer any expert testimony linking any potential losses caused by defendants' failure to consummate the refinance (*id.* at 22-23). They further rely on the First Department's stance as set in *Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.* (149 AD3d 146 [1st Dept 2017]) that a plaintiff is not entitled to the return of an investment on the theory that it would not have invested but for the alleged misrepresentation (*id.* at 22).

Third, defendants argue that plaintiffs' fraud, rescission and negligent misrepresentation claims fail because plaintiffs cannot prove justifiable reliance as they were provided, prior to investing, written disclosures that the refinancing had not occurred, and did not conduct any diligence to verify whether the refinancing had closed (*id.* at 25-26). They further argue that plaintiffs' rescission claim is barred under the doctrines of ratification, waiver, consent and laches because plaintiffs waited over two years after discovering the alleged misrepresentation (*id.* at 28). Lastly, defendants take issue with HH, a signatory on the subscription agreements, not being included as a defendant on the rescission claim because it is a necessary party.

#### Plaintiffs' Opposition

In opposition, the individual plaintiffs argue that there are disputed facts regarding defendants misleading statements about the refinancing being "already done" to solicit the funds, concealment of the imminent default of the existing construction loan and Silvers and his mother's personal liability in the event of the default (NYSCEF Doc No. 317, Memorandum of Law in

Opposition of Ethan A. Brecher, Esq. [opp memo] at 22-23). As to the rescission claim, plaintiffs argue that this Court already held that there is an issue of fact as to whether plaintiffs timely sought rescission in Yu's May 12, 2020, e-mail, therefore the law of the case requires trial on this claim (*id.* at 28, citing Doc 288 [emails]). They further argue that they seek to rescind only the subscription agreement, not the operating agreement, and HH is not a party to the subscription agreement. Therefore, it is not a necessary party to the action (*id.* at 29).

### III. Discussion

“[T]he proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “[F]ailure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Ayotte*, 81 NY2d at 1063 [internal quotation marks and citation omitted]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562). “Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see also American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]). “On a summary judgment motion, facts must be viewed in the light most favorable to the

non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

**A. Fraud and Negligent Misrepresentation Causes of Action**

The elements of a fraud cause of action require a material representation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-79 [2018]). Similarly, a claim for negligent misrepresentation requires the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information, the information provided was incorrect, and reasonable reliance on the information (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Fraud may rely on acts of concealment where the defendant had a duty to disclose material information (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). “Concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentation of fact” (*Nasaba Corp. v Harfred Realty Corp.*, 287 NY 290, 295 [1942] [citations omitted]). Reasonable or justifiable reliance is a material element of any fraud or negligent misrepresentation claim (*see Izhaky v Izhaky*, 215 AD3d 588, 589 [1st Dept 2023]). Ordinarily, the elements of material misrepresentation and reasonable reliance are not subject to summary disposition (*see Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]).

The evidence fails to establish entitlement to summary judgment on the causes of action for fraud and negligent misrepresentation. Defendants failed to prove that they did not make a material misrepresentation of fact to the individual plaintiffs. There are questions of fact as to whether Silvers, an authorized agent for TC Havemeyer, concealed material information from

individual plaintiffs, such as that Silvers and his mother personally guaranteed the existing construction loan, and absent plaintiffs' funds, Silvers and his mother would be liable to fund the "top up" to avoid a default (*see* Rankowitz tr at 27-28; Silvers tr at 148-150). Rankowitz testified that the first time he told individual plaintiffs that the funds intended for the refinancing were used on the current loan was in May 2020 (Rankowitz tr at 170-171). Additionally, in the e-mail dated May 27, 2020, Yu asked Rankowitz "[w]hat happens if refinancing doesn't happen," to which Rankowitz responded "[i]n a scenario where there was no refinancing the equity raised this spring will receive its pro rata shares of go forward distributions." This did not occur (*see* NYSCEF Doc No. 288). The parties' intent is a fact-laden inquiry and is inappropriate for determination on summary judgment (*see National Union Fire Ins. Co. of Pittsburg, Pa. v Robert Christopher Assocs.*, 257 AD2d 1, 6 [1st Dept 1999]). Taken as a whole, the parties' testimony and written communications indicate that "[m]aterial issues of fact exist as to whether plaintiffs were innocent parties who were 'duped' by defendants ..." (*Stuart v Tomasino*, 148 AD2d 370, 373 [1st Dept 1989]).

Further, New York courts have repeatedly held that a court can determine reasonable reliance at the summary judgment stage under only rare circumstances (*see Norddeutsche Landesbank Girozentrale v Titon*, 178 AD3d 539, 539 [1st Dept 2019], as "[t]he question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010] [citations omitted])). Here, the parties present diametrically opposed narratives about the individual plaintiffs' fraud and negligent misrepresentation claims. On one hand, the individual plaintiffs rely on: (1) the March 2nd phone call where Silvers stated the refinancing was done (*see* Yu tr at 88; Fu tr at 295-296), (2) the March 11th e-mail indicating that the refinancing was complete, and (3) Silvers' and Rankowitz's failure

to correct any “misconception” (*see* NYSCEF Doc No. 306). On the other hand, defendants testified that they told the individual plaintiffs on both February 27, and March 3, that the refinancing was closing in Q2 2020/April 2020 (*see* Rankowitz tr at 182; Silvers tr at 178). Therefore, genuine issues of material fact preclude summary judgment.

Regarding damages in general, defendants have not met their burden. Defendants argue that plaintiffs have no evidence that they suffered any damages, but that argument is misplaced and prematurely shifts the burden to plaintiffs. Claiming that plaintiffs will not be able to establish damages is not sufficient at the summary judgment stage.

Regarding loss causation specifically, although the First Department recognizes that it is the plaintiff’s burden to demonstrate loss causation, a defendant moving for summary judgment must come forward with competent evidence that a market downturn caused plaintiffs losses, regardless of the defendant’s malfeasance. Then the burden shifts to plaintiff to raise a material question of fact about whether plaintiff’s loss can indeed be traced to defendant’s fraudulent actions independent of adverse market forces (*see Basis PAC-Rim Opportunity Fund (Master)*, 149 AD3d at 149-50). Defendants do not meet their burden because they fail, for example, to proffer any expert report that plaintiffs’ alleged investment losses caused market-wide forces/COVID-19, rather than defendants’ alleged misconduct, and rely on only their own conclusory remarks (*see* NYSCEF Doc No. 293 at 22-23). Moreover, defendants’ reliance on *Basis* is completely misplaced. In *Basis*, the First Department held that the defendant met its burden while the plaintiff failed to produce any evidence that the defendant’s misrepresentations, rather than the market forces, caused their investment losses (*see Basis PAC-Rim Opportunity Fund (Master)*, 149 AD3d at 150). Further, in *Basis*, the plaintiff’s expert failed to address that the defendant lied about the lack of collateral (*id.* at 150-151).

“In a fraud action, a plaintiff may recover only the actual pecuniary loss sustained as a direct result of the wrong” (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010]), “[o]r what is known as the ‘out-of-pocket’ rule” (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996] [citations omitted]). “The damages are to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained” (*Continental Cas. Co.*, 15 NY3d at 271). Here, the individual plaintiffs are seeking their original investment that they wired in anticipation of the refinancing, and defendants admitted that the project at issue is “underwater” (*see* NYSCEF Doc No. 311 at 22). In these circumstances, plaintiffs may recover damages from defendants “[t]o an amount which will put [them] in the same position as if the fraud had not been practiced on [them]” (*Mack v Latta*, 178 NY 525, 529 [1904]).

This Court’s function on a motion for summary judgment is issue finding, not issue determination (*see De Paris v Women’s Natl. Republican Club, Inc.*, 148 AD3d 401, 403 [1st Dept 2017]). Given the issues of fact here and viewing the facts in the light most favorable to plaintiffs, the court must deny the defendants’ motion on these claims (*see Vega*, 18 NY3d at 503).

#### **B. Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty**

Similarly, this Court is unable to grant summary judgment to dismiss the breach of fiduciary duty and aiding and abetting breach of fiduciary duty causes of action. A claim for breach of fiduciary duty requires the existence of a fiduciary relationship, misconduct by the defendant, and damages directly or proximately caused by the defendant’s conduct (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). The First Department held that the fiduciary duty that TC Havemeyer owed to the individual plaintiffs included the duty of full disclosure about the refinancing opportunity (*see* NYSCEF Doc No. 155). On these facts, there is a question about whether defendants committed any misconduct (*see Sepulveda v Aviles*, 208 AD2d 1, 8 [1st Dept

2003)) [“There must be a clear proof of the integrity and fairness of the transaction...”). More specifically, there are outstanding fact questions as to whether defendants breached their fiduciary duty by misleading plaintiffs about the status, terms and return profile of a refinancing, and concealing material information regarding the defendants’ purported actual motive for seeking the investment funds.

### **C. Rescission, Necessary Party, and Plaintiffs’ Motion #10**

Defendants have not met their burden to with respect to laches, waiver, and estoppel. However, defendants have demonstrated that Havemeyer Holdings (HH) is a necessary party to this cause of action (*see* CPLR 1001 [a]). New York courts have long held that all parties to the agreement must be joined in any action for rescission (*see Tudor v Riposanu*, 93 AD2d 718 [1st Dept 1983]). The failure to join all signatories to the agreement as necessary parties to the action precludes partial rescission (*see Bonoff v Troy*, 187 AD2d 302, 304 [1st Dept 1992]). The Court of Appeals has recognized that, in an action at law for cancellation of the subscription, the corporation is to be a defendant (*see Mack*, 178 NY at 531-32). In this matter, the agreement is between the individual plaintiffs and HH as the Company, with TC Havemeyer having executed it as the authorized member (*see* NYSCEF Doc No. 266). Further, defendants demonstrated that the individual plaintiffs wired their funds to HH’s bank account (*see* NYSCEF Doc No. 319). Therefore, defendants would be entitled to dismissal of plaintiffs’ rescission claim (*see Mack*, 178 NY at 529 [“[U]pon a rescission of a contract the aggrieved party may recover as [its] damage, from the agent making the misrepresentations inducing the contract, the money paid the principal, which in that case was a corporation”).

However, in Motion Seq. No. 010, plaintiffs seek leave to amend “pursuant to CPLR . . . 1001 and/or 1002 to add [Havemeyer] as a relief party, solely to avoid a technical issue raised by

Defendants in an effort to foreclose the application of rescission as a potential remedy in this case”

(Doc 335 at 1 [pls’ mem, MS 11]). Plaintiffs assert:

“The only change sought by this motion, in an abundance of caution to avoid an unnecessary issue, is to add HH to the caption and as a party and to add the following to ¶ 5 of the Third Amended Complaint, which already identifies Havemeyer Holdings LLC: ‘Havemeyer is joined as a party to this action as the other defendants are its agents and Havemeyer is consequently a proper party defendant to give complete relief to Plaintiffs, including rescission.’ ”

(Doc 335 at 2-3 [pls’ mem]).

After moving for summary dismissal on the basis that plaintiffs failed to sue a necessary party [Havemeyer], defendants now oppose plaintiffs’ motion for leave to amend. Defendants’ positions are plainly inconsistent. In any event, plaintiffs’ belated motion for leave to amend is not so defective, procedurally, to warrant denial. A motion for leave to amend must “be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading” (CPLR 3025 [b]). While plaintiffs’ motion is not accompanied by a proposed fourth amended complaint and a proposed supplemental summons, the limited “changes or additions to be made” are clear enough. Further, while the amendment is inherently somewhat prejudicial to defendants, it is neither unfair nor palpably without merit. As noted above, defendants have not eliminated all triable issues of fact with respect to plaintiffs’ rescission-related claims, and HH knew or should have known it would be a party to rescission-based claims but for plaintiffs’ litigation errors.

“The decision whether to permit an amendment to the complaint is committed to the discretion of the trial court, and leave to amend pleadings shall be freely granted absent a showing of prejudice or unfair surprise” (*Astudillo v Port Auth. of New York and New Jersey*, 7 Misc 3d 1004(A) [Sup Ct, NY County 2004]). Here, the court grants Motion 10 because defendants will

not be unduly prejudiced, the newly added defendant is not unfairly surprised, and the amendment is not palpably without merit.

Defendants are correct that the amendment may necessitate further discovery. Among other things, HH may be entitled to discovery relating to whether the pre-investment status quo can even be restored. “Rescission[] . . . is sometimes available when there is no other recourse for fraud. Specifically, the equitable remedy of rescission is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored” (*JTED46, Inc. v Espresso Dream, LLC* [Sup Ct, New York County 2023] [internal citation and quotation marks omitted], *aff’d JTED46, Inc. v Espresso Dream, LLC*, 227 AD3d 618, 213 [1st Dept 2024]). Even if no discovery is needed, the court must vacate the note of issue to permit HH to answer the forthcoming fourth amended complaint. If warranted, defendants may apply to shift costs to plaintiffs.


The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendants’ summary judgment motion (MS 09) is denied; and it is further ORDERED that plaintiffs’ motion to amend the pleadings (MS 10) is granted, and plaintiffs shall serve a fourth amended complaint amending only the caption [adding Havemeyer Holdings as a defendant] and paragraph 5 [adding only the proposed language from plaintiffs’ memorandum in support of MS 10] by 10/7/25. Plaintiffs shall serve a supplemental summons by 10/10/25 and shall efile an affidavit of service by 10/14/25. All defendants shall answer the fourth amended complaint by 10/28/25; and it is further

ORDERED that the court vacates the NOI to permit defendants to answer the forthcoming fourth amended complaint. The new NOI shall be filed no later than 11/28/25 unless the court orders otherwise; and it is further

ORDERED that the parties shall appear for a status conference over MS Teams on 10/29/25 at 11:30 a.m.

<u>10/3/2025</u>						
DATE			MELISSA A. CRANE, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE