NP Dumbo II Invs. LLC v Fortis Prop. Group, LLC
2025 NY Slip Op 33976(U)
October 15, 2025
Supreme Court, New York County
Docket Number: Index No. 152541/2025
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **53**

Justice

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INDEX NO. 152541/2025

NP DUMBO II INVESTORS LLC AND NP DUMBO INVESTOR LLC,INDIVIDUALLY, AND DERIVATIVELY ON BEHALF OF FPG DUMBO INVESTOR NP, LLC AND FPG DUMBO INVESTOR LLC,

MOTION DATE 05/08/2025

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

FORTIS PROPERTY GROUP, LLC,FPG DUMBO INVESTOR NP, LLC,FPG DUMBO INVESTOR LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the Defendants' Motion (Mtn. Seq. No. 001) to dismiss is GRANTED solely to the extent that the claim for breach of the Pledge, Assignment, and Security Agreement (**Pledge Agreement**) (fifth cause of action) is DISMISSED.

THE RELEVANT FACTS AND CIRCUMSTANCES

As discussed more particularly below, this is a case involving the defendants alleged fraudulent inducement of two investments – one in the amount of $2.5 million, the other in the amount of $3 million. The initial investment was made simultaneously with the execution of the transaction documents. The second was made after. Both are alleged to have been induced based on total fabrications as to what the investment opportunity was and what the then appraised values were.

To wit, according to the well pled complaint (the **Complaint**; NYSCEF Doc. No. 1), the Defendants presented project valuations to the Plaintiffs that were totally made up without reliable basis, to induce the Plaintiffs into investing in the Project [hereinafter defined] (*id.* ¶¶ 26, 53-55). The Complaint alleges that the Plaintiffs reasonably relied on those valuations in making their initial investment and that the Defendants continued to standby and never corrected their material misrepresentations:

> 19. On January 15, 2019 at NPC's office in Manhattan, Fortis executives, including then-CEO Jonathan J. Landau, President and CEO Joel Kestenbaum, and Chief Investment and Chief Operating Officer Terrence Storey, pitched NPC to invest in the Project.
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> 20. At that meeting, Landau boasted about Fortis' supposed track record of success with development projects in the residential and commercial contexts in New York City.
>
> 21. Among other things, Landau, Kestenbaum and Storey presented NPC and its principals, Payam Zar and Shawn Hakimian, with Fortis's sales valuation and analysis of the Project.
>
> 22. Fortis's written valuation and analysis represented net values of: (i) $72,053,760 for a 75,000 sq. ft. community facility (the "Community Center"); (ii) $50,526,316 to a 375-space commercial parking (the "Garage"); (iii) $16,625,000 to a residential parking lot; and (iv) $289,841,208 to a 26-story tower containing 77 luxury condominium units (the "Condominium Units").
>
> 23. The Fortis executives represented that the foregoing valuations were accurate, and that Fortis would ultimately obtain a sales price of at least $72 million for the Community Center and $50 million for the Garage, by employing Fortis' marketing strategies, experience, and extensive and longstanding relationships with stakeholders in the real estate community
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> ...
>
> 26. Unfortunately, these representations were outright fabrications designed to defraud NPC into investing with Fortis. Fortis knew that the valuations and representations were bogus at the time they were made. Indeed, in January 2024,

> Fortis's COO – Storey – finally admitted to Payam Zar of Plaintiffs that the representations of value provided to induce NPC's investment in 2019 and 2021 were problematic and unrealistic since they were simply "made up" by Landau and Kestenbaum.
>
> ...
>
> 38. On that teleconference, the Fortis executives reaffirmed Fortis's prior misrepresentations from the 2019 sales valuation, doubling down on their deceit.

(*id.* ¶¶ 19-23, 26, 38).

In the two years following the initial investment, the Complaint alleges that far from painting an accurate picture that the Project might underperform, Fortis did the opposite, doubling down on their 2019 sales valuation and perpetuating their "alleged deceit:"

> 36. During the next two years, Fortis touted how well the Project was performing, leading NPC to inquire about further opportunities to invest more money into the Project.
>
> 37. In September 2021, Landau, Kestenbaum and Storey – all on Fortis's behalf – hosted a teleconference with Plaintiffs.
>
> 38. On that teleconference, the Fortis executives reaffirmed Fortis's prior misrepresentations from the 2019 sales valuation, doubling down on their deceit.
>
> 39. On that teleconference, the Fortis executives falsely claimed the Project was thriving. They assured Plaintiffs that construction was ahead of schedule, costs were under control, and everything was proceeding without major complications.
>
> 40. Landau also outright lied claiming there was no variance between the original 2019 valuation and most recent 2021 valuation of the Community Center and Garage. To bolster this fiction, Fortis provided an August 10, 2021 Investment Summary Comparison spreadsheet, which misrepresented a "$0.00" variance. It even falsely suggested that the value of the Community Center increased by $3 million from $72,053,760 to $75,056,000 and that the Garage was still worth over $45.5 million.
>
> 41. Fortis further misrepresented that the condominium sales were on track, and that it was aggressively marketing the Community Center and Garage. Fortis claimed these efforts had already attracted serious buyers and that Fortis would

> secure over $75 million for the Community Center and over $45.5 million for the Garage.
>
> 42. These representations were false, and Fortis knew it

(*id.* ¶¶ 36-42).

The Plaintiffs relied on these representations and agreed to invest an additional $3 million as a loan:

> 43. On September 2, 2021, Fortis provided Plaintiffs with condominium sales sheets and other documents which purported to support Fortis's representations, furthering the deception.
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> 44. In further phone conversations between Plaintiffs and Fortis in October 2021, Fortis restated the foregoing representations and the representations made at the outset of Plaintiffs' investment in 2019.
>
> 45. Relying on these representations and assurances, Plaintiffs agreed to invest an additional $3 million in the Project.
>
> 46. However, Fortis insisted that it could not issue additional equity in the Project, and required that Plaintiffs' new investment be structured as a loan.

(*id.* ¶¶ 43-46).

In fact, the Complaint alleges that rather than being forthright with information about the true state of the Project, the Defendants slow rolled the release of material information while and so that they could continue to accept development/management fees:

> 51. After securing Plaintiffs' $3 million investment in the Project, and reducing their own equity investment, while at the same time receiving the benefits of the development/management fees, the illusion of success surrounding the Project collapsed.
>
> 52. Over the next three years, Fortis provided a slow trickle of selective information, concealing the full extent of its mismanagement.

> 53. In January 2024, Fortis finally disclosed devastating facts: the Project was plagued by gross mismanagement, loan defaults, cost overruns and severe construction delays.

(*id.* ¶¶ 51-53).

Ultimately, according to the Complaint, the Defendants came clean that the Valuations were a sham:

> 54. Fortis admitted that it was in the process of selling the Community Center and Garage – previously touted as being worth over $122 million – for a mere $26 million, a fraction of the represented value. Fortis also admitted that the Garage contained only 277 spaces, falling nearly 100 spaces short of the 375-space Garage represented by Fortis.
>
> 55. When confronted about these glaring discrepancies, in January 2024, to his credit, Storey – on Fortis's behalf – admitted to Payam Zar that Fortis's prior valuations were problematic and unrealistic because they were simply "made up" by Landau and Kestenbaum.
>
> 56. That Fortis is seeking to sell the Community Center and Garage at just 20% of its previously stated value demonstrates that Fortis knew its representations were false when it made them in 2019 and 2021 – all to fraudulently induce Plaintiffs into investing so that Fortis could reduce its equity in the Project.

(*id.* ¶¶ 54-56).

To be clear however the Complaint alleges more than just false representations about property values. It also alleges false representations about sales of condominium units (*id.* ¶ 57), the status of the construction, a default under the loan documents, and continued distributions that the plaintiffs indicate violate the Pledge Agreement.

> 57. Fortis did not just misrepresent property values – it also lied about the status and sales of the Condominium Units.

> 58. On January 23, 2024, after Fortis announced that the construction phase of the Project was complete, Plaintiffs visited the Project and were appalled. The so-called ultra-luxury Condominium Units were unfinished, uninhabitable, and filthy. Electrical outlets and sinks remained uninstalled. Moldings were either missing or unfinished. Smoke detectors were broken and beeping incessantly. The Units were littered with garbage.
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> 59. Making matters worse, by email on June 7, 2024, Fortis revealed that it allowed the condominium offering plan to expire on May 28, 2024, effectively halting all sales prospects and permanently damaging the Project's reputation.
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> 60. Plaintiffs also learned that Fortis failed to make payments on the Project's loan from G4 Capital Partners (the "G4 Loan"), leading to a loan default on November 20, 2023. This default triggered higher interest rates, penalties, and related fees – further draining Project funds. This loan default was not disclosed to Plaintiffs until well afterwards, by email on May 30, 2024.
>
> 61. Fortis also blatantly violated the Pledge Agreement by causing FPG NP II to breach its capital contribution obligations to the Project. This deprived the Project of critical funds, significantly diminished NP II's prospects of receiving payments under the Promissory Note and impaired the Pledged Project Collateral.

(*id.* ¶¶ 57-61).

Additionally, the Complaint alleges that the defendants promised to make a specific capital call on May 19, 2022 and confirmed in writing on July 28, 2022 that the capital call had been made (*id.* ¶¶ 62-63). However, the Complaint alleges this was false too.

The Complaint also alleges that the Defendants took in approximately $10 million in "inflated development and management fees" while the Plaintiffs in this case suffered the financial consequences of the Defendants' fraud (*id.* ¶ 103). Lastly, as discussed more below, the well-pled Complaint also alleges that the Defendants breached their fiduciary duties (*id.* ¶¶ 99-104).

As relevant, the Court notes that the parties codified their relationship pursuant to two operating agreements (NYSCEF Doc. Nos. 8, 10) and a certain Pledge and Security Agreement (NYSCEF Doc. No. 9). Pursuant to Section 8.1 and 8.2 of the Operating Agreements, the Plaintiffs allege that Fortis was required to maintain complete and accurate financial records and provide Plaintiffs with quarterly and annual financial statements and that those records were to be maintained at FPG and FPG NP's principal place of business and available for inspection. According to the Complaint, the defendants have breached these contractual provisions.

Additionally, the Operating Agreements includes a merger clause:

> A. This Agreement, together with all schedules and exhibits hereto, contains the entire understanding and agreement among the parties hereto with respect to the subject matter hereof, and supersedes all prior discussions and understandings (whether oral or written) between them with respect thereto.

(NYSCEF Doc. No. 8 § 9.6 [A]). The Pledge Agreement, which governs the additional investment, contains a similar merger provision:

> This Agreement, together with the other Loan Documents, constitutes the final and entire agreement and understanding of the parties and any term, condition, covenant or agreement not contained herein or therein is not a part of the agreement and understanding of the parties.

(NYSCEF Doc. No. 9 at 9, collectively with the Operating Agreements, the **Merger Clause**).

Ultimately, the Plaintiffs brought this derivative lawsuit. They adequately allege demand futility:

> 72. NP brings its claims derivatively in the right, and for the benefit, of FPG NP and FPG, to redress injuries suffered by FPG NP and FPG as a result of Fortis's breaches of its fiduciary duties and the FPG Agreement.
>
> 73. NP, through FPG NP, held at least a 21.329% membership interest in FPG at the time of the wrongful course of conduct constituting the basis for the derivative

claims asserted herein and continues to hold at least a 21.329% membership interest in FPG.

74. NP held a 100% membership interest in FPG NP at the time of the wrongful course of conduct constituting the basis for the derivative claims asserted herein and continues to hold a 100% membership interest in FPG NP.

75. NP will adequately and fairly represent the interests of FPG, FPG NP, and their members in prosecuting and enforcing its rights and have retained counsel competent and experienced in derivative litigation.

76. NP has not made any demand on FPG or FPG NP to bring a lawsuit asserting the derivative claims set forth herein because such a demand would be futile and thus should be excused as a matter of law.

77. Demand on FPG NP is futile because Fortis is FPG NP's manager.

78. Demand on FPG is futile because Fortis is FPG's manager, and Fortis holds 70.139% of the membership interests in FPG.

79. Accordingly, neither FPG nor FPG NP would have been able to impartially consider a demand by NP.

(*id.* ¶¶ 72-79).

DISCUSSION

A party may move to dismiss one or more causes of action pursuant to CPLR 3211(a)(1) and (7). CPLR 3211(a)(1) requires dismissal where documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). On a motion to dismiss pursuant to CPLR § 3211(a)(7), 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.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

A. The Cause of Action (First) Sounding in Fraudulent Inducement is Not Warranted

The Defendants argue that they are entitled to dismissal of the cause of action sounding in Fraudulent Inducement because the Valuations were "hypothetical projections—classic non-actionable opinions or estimates of future outcomes" and that documentary evidence confirms that the Plaintiffs viewed these Valuations as estimates indicating that there were certain assumptions (NYSCEF Doc. No. 13 at 14) and based primarily on the merger clause set forth in the Operating Agreements (NYSCEF Doc. Nos. 13 at 12, 8 § 9.6 [A], 9 at 9). They also say the Complaint does not meet the requirements of CPLR 3016(b). The arguments fail.

To state a cause of action for fraud, a plaintiff must allege (1) a material misrepresentation of fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Eurycleia Partners L.P. v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). "Although under section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

As discussed above, the Complaint alleges (1) Fortis made specific misrepresentations on specific occasions relating to the Valuations of properties within the investment portfolio and that these specific representations formed the basis for entering into the Operating Agreements and making these investments, (2) Fortis knew that these statements including the assumptions in the Valuations were entirely without basis, (3) Fortis made these misrepresentations to induce

the Plaintiffs into both initially investing and investing additional capital, and (4) the Plaintiffs relied on those misrepresentations in making investment decisions (*see, e.g.,* NYSCEF Doc. No. 1 ¶¶ 23, 26, 53-55, 83; *see* CPLR 3016[b]; *Ramos*, 31 AD3d at 295; *Leon*, 84 NY2d at 87–88). The Plaintiffs additionally allege that they have been damaged by virtue of this fraud out of the lionshare of value of their investment. This is sufficient at this stage of the litigation.

B. Dismissal of the Cause of Action (Second) Sounding in Negligent Misrepresentation is Also Not Warranted

The Defendants argue that they are entitled to dismissal of the cause of action sounding in Negligent Misrepresentation (second cause of action) primarily on the grounds that no special relationship existed. According to the Complaint, this is simply not correct.

A cause of action for negligent misrepresentation requires (1) a special relationship, that "does not arise out of an ordinary arm's length business transaction," that imposes a duty to impart correct information to the plaintiff, (2) that the information imparted was incorrect, and (3) reasonable reliance on the incorrect information (*Mandarin Trading Ltd. V Wildenstein*, 16 NY3d 173, 180 [2011]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]).

In this case, the Complaint alleges that Defendants were fiduciaries who represented that they the requisite skills to manage the investment opportunity and they were paid for it. This was not a simple arm's length transaction. Thus, the Complaint adequately alleges that (1) there was a special relationship between Fortis and the Plaintiffs, (2) Fortis made specific false

representations to the Plaintiffs (NYSCEF Doc. 1 ¶¶ 26, 53-55) and (iii) the Plaintiffs reasonably relied on this false information (*id.* ¶¶ 23, 83). Thus, the motion is denied.

C. The Cause of Action (Third) Sounding in Gross Negligence is Not Dismissed

The Defendants argue that they are entitled to dismissal of the cause of action sounding in Gross Negligence (third cause of action) because "the pleadings do not approach the egregious misconduct needed to sustain a gross negligence claim" (NYSCEF Doc. No. 13 at 6-7). The are not correct.

Gross Negligence requires conduct that "smack[s] of intentional wrongdoing or evince[s] a reckless indifference to the rights of others" (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011] [internal quotation marks and brackets omitted]). "Ordinarily, the question of gross negligence is a matter to be determined by the trier of fact" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014]).

The Complaint alleges a series of misrepresentations, mismanagement, and attempts to conceal such misrepresentations and mismanagement over a sustained period of time (*see e.g.*, NYSCEF Doc. No. 1 ¶¶ 58-60; *see Ryan*, 88 AD3d at 683; *Leon*, 84 NY2d at 87–88). This is sufficient. As such, the motion is denied.

D. The Breach of Fiduciary Duty (Fourth) Cause of Action is Not Dismissed

The Defendants argue that they are entitled to dismissal of the cause of action sounding in Breach of Fiduciary Duty (fourth cause of action) on the grounds that the claim is duplicative of the breach of contract claim and that the pleadings are not particularized. The Defendants are incorrect.

A claim for breach of fiduciary duty requires, that the "(1) defendant owed [the plaintiff] a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Besen v Farhadian*, 195 AD3d 548, 549 [1st Dept 2021]). Notably, a cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 17 [1st Dep't 2000]). Nevertheless, a claim sounding in breach of fiduciary duty is not barred when "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself" (*37 E. 50th St. Corp. v Rest. Group Mgt. Services, L.L.C.,* 156 AD3d 569, 570 [1st Dept 2017]).

The Complaint alleges that (1) Fortis owed NP a fiduciary duty under Delaware law, (2) Fortis committed acts of misconduct, such as, among other things, loan default, (3) and that FPG NP, FPG, and their equity holders suffered damages as a result of Fortis's misconduct, dismissal of the fourth cause of action sound in fiduciary duty is not warranted (*see* NYSCEF Doc. No. 1 ¶¶ 101-104); *Besen*, 195 AD3d at 549). This is sufficient and alleges conduct independent of the cause of action for breach of contract such that it is not duplicative. To wit, the Defendants are alleged to have improperly managed the project in violation of their fiduciary duties by among

other things taking significant management fees when it would be imprudent to do so given the decline in value and that they otherwise failed to keep the Plaintiffs reasonably informed of any change in circumstances including the significant drop in parking spaces discussed above. Thus, the motion is denied.

E. Dismissal of the (Fifth) Cause of Action Sounding in Breach of Contract is Warranted in Part

The Defendants argue that they are entitled to dismissal of the cause of action sounding in Breach of Contract (fifth cause of action) on the basis that neither the Pledge Agreement nor the Operating Agreements "imposed…[an]…obligation on Fortis to contribute additional capital or cover project loans, and [the Operating Agreements] explicitly delineated the repercussions of a failure to contribute" (NYSCEF Doc. No. 13 at 7). Although correct, the Defendants omit the alleged specific 2022 Agreement that they are alleged to have breached which forms the basis for this claim.

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]).

The Complaint alleges (1) the existence of a July 2022 Agreement regarding capital calls, (2) that a capital call was made in May 2022, (3) that Defendants failed to contribute the capital in violation of an agreement that was memorialized in writing by the July 2022 Agreement, and (4)

that NP has been damaged as result of that breach (*see* NYSCEF Doc. No. 1 ¶¶ 106-112; *Okafor*; NYSCEF Doc. No. 1 ¶ ¶ 107, 62-63). This is sufficient to sustain a breach of contract claim.

The Defendants however are entitled to dismissal of the breach of contract cause of action to the extent that it is predicated on a distribution of funds. Nothing in the Pledge Agreement restricts that (it could have). As such, the branch of the motion seeking dismissal based on distributions is granted without prejudice.

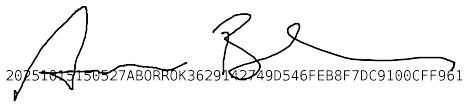
F. The Accounting Claim is Not Dismissed

The Defendants withdrew their request that the Court dismiss this cause of action (*tr.* 10.9.25). As such, this branch of the motion is denied as moot.

Accordingly, it is hereby

ORDERED that Defendants' Motion to dismiss is GRANTED solely to the extent set forth above; and it is further

ORDERED that the Defendants shall file an answer within 30 days of this Decision and Order.



10/15/2025
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:							
		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER