At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 11th day of December 2025.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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AKIVA REICH, individually and derivatively in the right of and on behalf of PURSLANE LLC,

Plaintiffs,

-against-

PURSLANE LLC,

Defendant/Nominal Defendant.

-and against-

PURSLANE BOATHOUSE LLC and HENRY RICH,

Defendants.

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Index No. 506922/2025

Cal. No. 17-18 MS 5-6

Decision and Order

The following e-filed papers read herein:	NYSCEF Doc Nos.
MS 5	104-106, 150
MS 6	118-128, 151-158

Plaintiff's motion to dismiss defendants' counterclaims and defendants' cross-motion for a declaratory judgment and partial summary judgment are decided as follows:

Background

This action arises out of defendants' alleged scheme to unlawfully strip plaintiff Akiva Reich ("Reich") of his membership interest in Purslane LLC through a sham merger into Purslane Boathouse LLC, while continuing to operate the lucrative Purslane LLC catering business and

receive government funds and event revenues under the Purslane LLC name. A detailed summary of the background of this action is set forth in the Court's June 24, 2025 Decision and Order.

Plaintiff moves under CPLR 3211(a)(5) and (7) to dismiss defendants' second counterclaim for breach of fiduciary duty and third counterclaim for fraudulent inducement as both time-barred and duplicative of their breach of contract claim. Plaintiff contends that any alleged fiduciary breaches necessarily occurred no later than November 2019 and seek only money damages, exhausting the applicable three-year statute of limitations. Plaintiff asserts that the fraud claim, based on supposed misrepresentations leading to the June 2016 Operating Agreement and allegedly discovered "almost immediately," is likewise untimely under both the six-year and two-year fraud limitations periods and merely repackages alleged nonperformance of contractual obligations rather than any independent fraud injury.

Defendants cross-move for a declaratory judgment that the merger of Purslane LLC into Purslane Boathouse LLC was valid and effective, and that Reich has no continuing membership, ownership, or management interest in Purslane LLC nor any remedy to contest such merger. Defendants argue their breach of fiduciary duty and fraudulent inducement counterclaims are timely under continuing-wrong and tolling principles, are not duplicative of the breach of contract claim because they rest on independent fiduciary breaches and misrepresentations, and are properly plead in the alternative. Defendants assert the merger was duly approved and filed, Reich received notice and a $5,000 offer but never sought appraisal, so that Reich cannot now collaterally attack the merger or assert post-merger claims under LLCL §1002 and BCL §623.

In opposition to the cross-motion, plaintiff argues that the Court should deny defendants' second summary judgment attempt because it simply rehashes the same merger and standing arguments already rejected on defendants' first summary judgment motion and on reargument, and is barred both by the strong policy against successive summary judgment motions and by law-of-

the-case. Plaintiff contends that the Operating Agreement, particularly §§ 6.1(f) and 8.1(b), governs removal of a member and was not complied with, so defendants cannot rely on default LLC Law merger and appraisal provisions or the cases cited to extinguish his rights or limit him to an appraisal remedy. Plaintiff further asserts that defendants' Rule 19-a statement is unsupported by admissible evidence, and that there are numerous factual disputes precluding summary judgment.

In reply, defendants argue that plaintiff's opposition never actually refutes the core legal question: whether the 2019 merger was effective. Defendants contend that LLCL §§ 1002, 1004, and 1005 govern and were complied with; that Section 8.1(b) of the Operating Agreement does not and cannot override the statutory merger framework; and that Section 6.1(b) in fact authorizes the managers to effect a merger resulting in members receiving fair value. They further assert that Purslane LLC's continued operations and use of the "Purslane LLC" name are fully consistent with LLCL § 1004(c), that a written offer under § 1005 was made and plaintiff cannot defeat compliance by denying receipt or ignoring it, and that plaintiff's sole remedy was a timely appraisal proceeding, which he waived. Defendants reassert that, as a matter of law, the merger validly extinguished Reich's membership and standing.

Discussion

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*USCHAG Corp. v Flagstar Bank, FSB*, 220 AD3d 823, 823-24 [2d Dept 2023] [citation omitted]). "Although a court may consider materials submitted by the defendant in support of its motion, the materials must establish conclusively that the plaintiff has no cause of action" (*id.*). Moreover, "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" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [citation and internal quotation marks omitted]). "The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint" (*Dunn v Gelardi*, 59 AD3d 385, 386 [2d Dept 2009] [citation omitted]).

"A defendant who moves to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired" (*Berger v Stolzenberg*, 158 AD3d 738, 739 [2d Dept 2018] [citations omitted]). "The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period" (*id.*).

Breach of Fiduciary Duty (The Second Counterclaim)

"Generally, [a] cause of action [alleging] breach of fiduciary duty is governed by a six-year statute of limitations where the relief sought is equitable in nature, or by a three-year statute of limitations where the only relief sought is money damages" (*Berejka v Huntington Med. Group, P.C.*, 235 AD3d 821, 823 [2d Dept 2025] [citations and internal quotation marks omitted]). "Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" (*id.*). "The statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*id.*).

Here, plaintiff met his prima facie burden of establishing that the second counterclaim is time-barred. As plaintiff correctly notes, defendants seek solely money damages: "The breach of

fiduciary duty harmed the Defendants in an amount to be proven at trial," and therefore the applicable statute of limitations is three years. The counterclaim alleges that all of plaintiff's purported fiduciary breaches occurred while he "was a member and manager" of Purslane LLC and that he interfered with operations, failed to make health-code corrections, refused to sign a liquor-license application, and demanded improper commissions. Yet defendants simultaneously assert that plaintiff "was removed from the Company" in November 2019. Accepting defendants' allegations as true, any fiduciary relationship terminated in November 2019, and the statute of limitations began to run no later than November 2019. Defendants did not assert this counterclaim until August 2025, well beyond the three-year limitations period.

Defendants fail to raise any triable issue of fact in opposition. Their reliance on the continuing-wrong doctrine is misplaced. "[T]he doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Coe v Vil. of Waterloo*, 229 AD3d 1119, 1121 [4th Dept 2024], lv to appeal denied, 42 NY3d 912 [2025] [citation omitted]). Defendants contend that their counterclaims allege misconduct "through 2024," but they cite no paragraph of the pleading reflecting any wrongdoing after 2019. To the contrary, the counterclaim expressly limits plaintiff's alleged breach of fiduciary duty to the period "when he was a member and manager," and defendants themselves allege plaintiff ceased being a member after November 2019.

Defendants' equitable-tolling argument is similarly unavailing. "Equitable estoppel may be invoked to defeat a statute of limitations defense when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Vigliotti v N. Shore Univ. Hosp.*, 24 AD3d 752, 754 [2d Dept 2005] [citations and internal quotation marks omitted]). Here, defendants fail to identify any fraudulent concealment or deceptive conduct by plaintiff that

prevented them from timely asserting their breach of fiduciary duty claim. Nor do defendants plead any allegations that could support the application of equitable estoppel.

Accordingly, the branch of plaintiff's motion seeking dismissal of defendants' second counterclaim for breach of fiduciary duty is granted.

Fraudulent Inducement (The Third Counterclaim)

A cause of action sounding in fraudulent inducement is "governed by the greater of two statutes of limitations, i.e., six years from the date the cause of action accrued, or two years from the time the plaintiff discovered the fraud or could have discovered the fraud using reasonable diligence" (*Pugni v Giannini*, 163 AD3d 1018, 1020 [2d Dept 2018] [citation omitted]).

Here, plaintiff established, prima facie, that the time within which defendants could pursue a fraudulent inducement claim has long since expired. The counterclaim alleges that plaintiff "fraudulently induced Defendants to enter into … the Operating Agreement," which is dated June 3, 2016, "by misrepresenting his ownership interest at the Green Building (501 Union Street) which was a commissary kitchen and event venue." Thus, any alleged fraud accrued in 2016, when the operating agreement was executed.

Moreover, defendants allege that the misrepresentation was discovered "[a]lmost immediately," and that they were aware plaintiff "never owned" the Green Building and had been evicted from there "some years ago." Defendants further repeated this same allegation in their November 25, 2019 letter, confirming discovery of the supposed fraud no later than 2019 (*see* NYSCEF Doc No. 10). Therefore, under either the six-year accrual period or the two-year discovery rule, the statute of limitations expired well before defendants first asserted this fraudulent inducement counterclaim in August 2025.

Accordingly, the branch of plaintiff's motion seeking dismissal of defendants' third counterclaim for fraudulent inducement is granted.

Defendants' Cross-Motion for Partial Summary Judgment

By Decision and Order dated June 24, 2025, the Court found that "Defendants fail to establish as a matter of law that Akiva is no longer a member of Purslane given the provision in the Operating Agreement governing removal of a member, in particular section 8.1(b)." Section 8.1(b) provides: "(b) Cessation of Membership. A Member shall cease to be a Member only upon the occurrence of one of the following events: (i) the Transfer of a Member's entire Interest back to the Company at par value, i.e., in exchange for the price the Member initially paid for the Interest; or (ii) the occurrence of an Event of Bankruptcy with respect to the Member (in which case the Member or its transferee shall become an Assignee)."

By Decision and Order dated September 29, 2025, on defendants' motion to reargue, the Court again adhered to its prior ruling and reaffirmed that defendants had failed to establish as a matter of law that plaintiff's membership had been terminated under the Operating Agreement. The Court explained:

> "[D]efendants' submissions merely reiterate the arguments raised in their original motion, namely, that plaintiff lacks standing as a result of the merger and that appraisal was his sole remedy. The Court addressed and rejected those arguments in its June 24, 2025 Decision, relying on the plain text of the Operating Agreement, specifically section 8.1(b), which governs cessation of membership, holding that "[d]efendants fail to establish as a matter of law that Akiva is no longer a member of Purslane given the provision in the Operating Agreement governing removal of a member, in particular section 8.1(b)."

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" (*Hillrich Holding Corp. v BMSL Mgt., LLC*, 175 AD3d 474, 475 [2d Dept 2019] [citations omitted]). "Evidence is not newly discovered simply because it was not submitted on the previous motion (*id.* [internal quotation marks omitted]). "Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through

alternative evidentiary means" (*id.*). "Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment" (*id.*).

Defendants' instant motion seeking a declaration that the 2019 merger was "valid and effective," that plaintiff "has no continuing membership, ownership, or management interest in Purslane LLC," and that plaintiff "has no continuing claims after December 2020," as well as seeking summary judgment in favor of defendants "to the extent that Mr. Reich has no continuing claims after December 2020," directly contradicts and attempts to relitigate issues that this Court has already decided twice. Defendants do not identify any new facts, change in law, or other extraordinary circumstances that would justify revisiting the Court's prior rulings. Instead, they repeat the same merger-based arguments that were rejected on June 24, 2025 and again on September 29, 2025.

Accordingly, defendants' cross-motion is denied.

Conclusion

Based on the foregoing, plaintiff's motion is granted, and defendants' second counterclaim alleging breach of fiduciary duty and third counterclaim alleging fraudulent inducement are hereby dismissed. Defendants' cross-motion for a declaratory judgment and partial summary judgment is denied. Any arguments not expressly addressed herein were considered and deemed without merit or unnecessary to address given the court's determination.

ENTER:

Honorable Reginald A. Boddie
Justice, Supreme Court
HON. REGINALD A. BODDIE
J.S.C.