Town & Country Adult Living, Inc. v Hearth at Mount Kisco, LLC
2019 NY Slip Op 31862(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 657551/2017
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

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TOWN AND COUNTRY ADULT LIVING, INC., THE WESTCHESTER RESIDENCE AND CLUB, LLC, ROBERT MISHKIN,

Plaintiffs,

- v -

THE HEARTH AT MOUNT KISCO, LLC, FORTUS MOUNT KISCO, LLC, FORTUS COMPANIES, LLC, HEARTH SENIOR CARE MOUNT KISCO, LLC, ADAM PROBST, CHRISTIAN SEXTON, CARL GUY, MAYNARD FAHS, DEBBIE PROBST

Defendants.

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INDEX NO. 657551/2017

MOTION DATE 11/28/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120, 121, 123, 125

were read on this motion to DISMISS.

This dispute stems from the development of an assisted living home for senior citizens in Mount Kisco, New York. The project has been plagued by delays, disappointments, and at least three lawsuits (including this one). Plaintiffs Robert Mishkin ("Mishkin"), Town and Country Adult Living, Inc. ("TCAL"), and the Westchester Residence and Club, LLC ("WRC") (collectively, "Plaintiffs") filed this lawsuit against the following defendants: The Hearth at Mount Kisco, LLC (the "Company"), Fortus Mount Kisco, LLC ("FMK"), Fortus Companies, LLC (the "Fortus Companies"), Hearth Senior Care Mount Kisco, LLC ("HSC"), as well as individuals Adam Probst, Debbie Probst, Christian Sexton, Carl Guy, and Maynard Fahs (collectively, "Defendants").

In their Amended Complaint, Plaintiffs allege nine causes of action against various groupings of Defendants: breach of contract (claims 1-3), breach of the implied covenant of good

faith and fair dealing (claim 4), tortious interference with contract (claim 5), breach of fiduciary duty as well as aiding and abetting such breach (claims 6-7), equitable estoppel (claim 8), and constructive trust (claim 9).

Defendants move to dismiss Plaintiffs' Amended Complaint in its entirety, on the grounds of purportedly conclusive documentary evidence (CPLR §3211(a)(1)), failure to state a cause of action (CPLR § 3211(a)(7)), and res judicata (CPLR §3211(a)(5)).

For the reasons set forth below, Defendants' motion is granted in part and denied in part.

Factual Background

For years, Plaintiffs have looked to develop a large new senior care facility in Mount Kisco to replace an older, smaller facility they were operating at 53 Mountain Avenue, which had been in use since the early twentieth century. (Amended Complaint ("Am. Compl.") ¶¶50-53). Eventually, Plaintiffs acquired the rights to purchase land located at 270 Kisco Avenue (the "Property") from the Village of Mount Kisco (the "Village"), which would serve as the site for Plaintiffs' planned project (the "Project").[1] Plaintiffs then entered into a Ground Lease with the Village in order to confirm the parties' interest in the purchase and sale of the Property while site plan approvals for the Project were being worked out. (*Id.* ¶55). Under the Ground Lease,

[1] Plaintiffs gained these rights as part of a settlement with the Village in another lawsuit in the United States District Court for the Southern District of New York. In that lawsuit, captioned *Town and Country Adult Living, Inc., et al. v. The Village / Town of Mount Kisco, et al.*, No. 02 CIV 444 (SCR/GAY) (S.D.N.Y.), TCAL sued the municipality under the Fair Housing Act, the Americans with Disabilities Act, and the Equal Protection Clauses of the United States and New York constitutions. As relevant here, the parties' settlement in that case included a promise by the Village to sell up to 18.5 acres of real estate located on the Property to TCAL so that TCAL could develop a senior housing residence. (*See* Westchester Action Verified Complaint ¶¶13-19) (NYSCEF Dkt. No. 9).

which was signed in 2007, the Village operated as the Landlord of the Property while TCAL and WRC became co-tenants. (*Id.* ¶56).

The Ground Lease was meant to provide a temporary stopgap until Plaintiffs could purchase the Property outright. But the purchase was contingent on obtaining site plan approval for the Project. As the years went by, that approval never materialized. In the meantime, Plaintiffs periodically amended and extended their Ground Lease with the Village.

By 2012, Plaintiffs were looking for partners to help them complete the approval process, and ultimately complete the Project. That is when Defendants entered the picture.

Plaintiffs' Agreements with Defendants

In August 2012, Plaintiffs and Defendants entered into a joint venture to move forward with the Project's development. Plaintiffs hoped that Defendants' experience in shepherding similar projects to completion—and the capital infusions Defendants would be making—would jumpstart the Project. (*See id.* ¶64; Affidavit of Robert Mishkin ("Mishkin Aff.") ¶6 (NYSCEF Dkt. No. 24)). To formalize their relationship, Plaintiffs and Defendants executed a series of interrelated contracts.

First, FMK, HSC, and WRC entered into a Formation Agreement to transfer their interests to a limited liability corporation called The Hearth at Mount Kisco, LLC (*i.e.*, the "Company"). Under the Formation Agreement, FMK and HSC each received a 50% membership interest and a 45% economic interest in the Company, while WRC received a 10% economic interest. (*See* Formation Agreement §1.3(a)) (NYSCEF Dkt. No. 6). TCAL conveyed its property interests in the Ground Lease and in its existing senior-care property to the Company, with the proviso that TCAL could repurchase those rights from the Company "if not expired or terminated." (*Id.* §2.5). Also as part of the Formation Agreement, FMK and HSC

became co-managers of the Company, and "had sole discretion in their decision-making authority related to the [P]roject, including the sole discretion to decide whether or not to proceed with the [P]roject at all." (Am. Compl. ¶6).

Second, WRC entered into an Operating Agreement with Hearth, FMK, and the Fortus Companies for the operation and management of the Company. (*Id.* ¶79). The membership structure of the Operating Agreement mirrored that of the Formation Agreement, with FMK and HSC each holding a 50% membership interest and a 45% economic interest, while WRC held a 10% economic interest. (*Id.* ¶82).

Third, Plaintiffs and Defendants signed a Fifth Amendment to the Ground Lease with the Village. (*Id.* ¶83). Under the Fifth Amendment, Plaintiffs assigned the Ground Lease to the Company (to be managed by FMK and Hearth). (*Id.* ¶85). Like the Formation Agreement, the Fifth Amendment recognized that Plaintiffs could repurchase its rights in the Project and succeed to the Ground Lease if the lease had not yet expired. (*Id.* ¶87). As Plaintiffs allege, this repurchase right "would only be meaningful if Defendants [did] not dissipate[ ] or los[e] the value of the [Company]'s assets." (*Id.* ¶10).

The Expiration of the Ground Lease

Notwithstanding these agreements, the Project continued to languish. Plaintiffs blame this situation primarily on Defendants' "pattern of delay," (*id.* ¶101), though the Village also comes in for criticism. (Mishkin Aff. ¶13). At any rate, the protracted delays necessitated additional amendments to the Ground Lease, culminating in the Tenth Amendment, which would expire on August 31, 2015. (*Id.* ¶15-16; Am. Compl. ¶¶100-103).

As alleged in the Amended Complaint, Defendants allowed the Ground Lease to expire without any amendment or extension in place. Further, Plaintiffs allege that Defendants did so

without providing them with any notice. (Am. Compl. ¶113). This, in Plaintiffs' view, "undermined the entire purpose and understanding of the [repurchase right], which was to allow Plaintiffs the opportunity to re-acquire the project *before* the Ground Lease expired." (*Id.* ¶114) (emphasis in original).

The following year, in June 2016, Defendants elected to terminate the Formation Agreement. (*Id.* ¶121). Since that point, Plaintiffs allege, "Defendants have literally spoken out of both sides of their mouth—telling the Village that they support Plaintiffs' repurchase while telling Plaintiffs that they are interfering with Defendants' efforts to negotiate with the Village." (*Id.* ¶129).

Procedural History

On May 9, 2016, Plaintiffs filed a Verified Complaint in New York Supreme Court, Westchester County (Index No. 56677/2016) (the "Westchester Action"), alleging four causes of action: (1) a claim pursuant to Article 15 of the Real Property Actions and Proceedings Law ("RPAPL"); (2) breach of contract; (3) fraud in the inducement, and (4) breach of fiduciary duty. (*See* NYSCEF Dkt. No. 9). The defendants in that case—the Company, FMK, HSC, and individuals Probst, Guy, and Sexton—"mov[ed] for summary judgment and dismissal of plaintiff's entire complaint." (NYSCEF Dkt. No. 10).[2]

On October 24, 2016, the Court (Smith, J.) issued a Decision and Order (the "Westchester Decision") granting summary judgment in part. The Court dismissed plaintiffs' claim under RPAPL and their claim for fraud in the inducement, as well as the fiduciary duty claim brought by plaintiffs Mishkin and TCAL. The Court denied summary judgment on

[2] The Village was another defendant in the Westchester Action, but did not appear and did not join the other defendants' motion to dismiss. (NYSCEF Dkt. No. 10).

plaintiffs' claim for breach of contract and plaintiff WRC's claim for breach of fiduciary duty. (*Id.*).

The Westchester Action was terminated the following year, when the parties submitted a Stipulation of Discontinuance without Prejudice dated April 17, 2017. (*See* NYSCEF Dkt. No. 102). According to Mishkin, Plaintiffs discontinued the Westchester Action because in March 2017 the Village had "finally approved the agreement for us . . . to close the purchase of 270 Kisco Avenue." (Mishkin Aff. ¶33). That approval, however, proved short-lived: The Village "suspended its approval" of the Project in June 2017. That, in turn, prompted Plaintiffs "to continue pursuing the claims against Defendants." (*Id.* ¶36).

Plaintiffs filed the instant action in December 2017, some eight months after the Westchester Action was discontinued. Plaintiffs filed an Amended Complaint on July 27, 2018. Defendants now move to dismiss the Amended Complaint.

Legal Analysis

In assessing a motion to dismiss, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). "Allegations consisting of bare legal conclusions," however, "as well as factual claims that are contradicted by documentary evidence, are not entitled to such consideration." *CIBC Bank & Tr. Co. (Cayman) v. Credit Lyonnais*, 270 A.D.2d 138, 138 (1st Dep't 2000).

A. Breach of Contract (First, Second, and Third Causes of Action)

Plaintiffs' breach of contract claims against HSC, FMK, and the Fortus Companies fail because they seek to impose liability against the Company's *stakeholders* for contractual

obligations borne solely by the Company.[3] "Corporations . . . are legal entities distinct from their managers and shareholders and have an independent legal existence." *Worthy v. New York City Hous. Auth.*, 21 A.D.3d 284, 287 (1st Dep't 2005) (quoting *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 655 (1976)).

The Formation Agreement recognized the Company as a distinct legal entity capable of amassing its own powers, obligations, and assets separate from those of HSC, FMK, and the Fortus Companies. (*See, e.g.*, Formation Agreement Preamble (describing the Company as "a New York limited liability company"); *id.* §1.1(a) ("[E]ach Transferor hereby assigns, transfers, conveys and delivers to the Company and Company hereby acquires . . . Transferor's right, title and interest in and to all of its property and assets . . . ."); *id.* §4.3 ("[T]he Company agrees to fulfill the obligations of the Lessee as defined and set forth in the Lease.")).

The specific contractual violations alleged by Plaintiffs under the Formation Agreement go directly to the *Company's* rights and responsibilities. For example, Plaintiffs allege that Defendants "breached Section 2.5 of the Formation Agreement by interfering with TCAL's repurchase rights." (Am. Compl. ¶136). But the repurchase right provides that TCAL may "purchase the TCAL Property and the Lease, if not expired or terminated, and all Project Contracts and Project Approvals *from the Company*." (Formation Agreement §2.5) (emphasis added). Similarly, Plaintiffs allege that Defendants "breached Section 4.3 of the Formation Agreement because having decided to acquire the Property, they failed to fulfill the obligations

[3] Plaintiffs' first three causes of action are alleged against the Company, HSC, FMK, and the Fortus Companies. (*See* Am. Compl. ¶¶131-160). Defendants argue that these claims should be dismissed "as against HSC, FMK, and [the] Fortus Companies," but make no argument for dismissing the claims as against the Company. (*See* Defs.' Mem. of Law at 15) (NYSCEF Dkt. No. 95).

of the Lessee under the Ground Lease, including, but not limited to, the pursuit of site plan approval." (Am. Compl. ¶138). But again, that part of the Formation Agreement concerns the "obligations of the Company under the Lease," providing that if "the Company makes the decision to acquire the Property, the Company agrees to fulfill the obligations of the Lessee as defined and set forth in the Lease." (Formation Agreement §4.3).

Plaintiffs' contract claims under the Fifth Amendment to the Ground Lease suffer from the same legal infirmity. In their Amended Complaint, Plaintiffs assert that Defendants "breached Paragraph 7 of the Fifth Amendment because they failed to pay all real [sic] taxes that became due on 270 Kisco Ave even though it was Defendants' responsibility to do so." (Am. Compl. ¶146). That paragraph from the Fifth Amendment requires, among other things, that "Tenant shall be responsible for payment of all outstanding real taxes for both the 53 Mountain Avenue and 270 Kisco Avenue properties to the date of closing." (Fifth Amendment ¶7). The key word there is "Tenant," because under the Fifth Amendment, "The Hearth at Mount Kisco, LLC . . . assume[d] all obligations of Tenant hereunder . . . and [was] the 'Tenant' under the Lease." (*Id.* ¶2). Thus, the Company—not HSC, FMK, or the Fortus Companies—agreed to accept the responsibilities that were allegedly flouted here.

In addition, HSC, FMK, and the Fortus Companies "cannot be held liable for the company's obligations by virtue of [their] status as a member thereof." *Matias ex rel. Palma v. Mondo Properties LLC*, 43 A.D.3d 367, 367–68 (1st Dep't 2007); *see Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (1980) ("As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and consequently, will not impose liability upon shareholders for the acts of the corporation."). Nor can these entities be held liable by virtue of their status as *managers* of the Company under New York Limited

Liability Law §609: "Neither a member of a limited liability company, [nor] a manager of a limited liability company managed by a manager or managers . . . is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities." *See Collins v. E-Magine, LLC*, 291 A.D.2d 350, 351 (1st Dep't 2002) ("Plaintiff's breach of contract causes of action against the defendants other than [the LLC] were also properly dismissed since, under Limited Liability Company Law § 609 (a), those defendants, as members and managers of [the LLC], a limited liability company under New York's Limited Liability Company Law, are expressly exempt from personal responsibility for the obligations of [the LLC].").

"Broadly speaking," the law will disregard the corporate form in certain circumstances "to prevent fraud or to achieve inequity." *Int'l Aircraft Trading Co. v. Manufacturers Tr. Co.*, 297 N.Y. 285, 292 (1948). But to "pierce the corporate veil or to establish an alter ego relationship," Plaintiffs must carry a "heavy burden." *Etex Apparel, Inc. v. Tractor Int'l Corp.*, 83 A.D.3d 587, 587 (1st Dep't 2011). In this case, Plaintiffs have not pleaded facts sufficient to show "that the privilege of conducting business in the corporate form was abused so as to warrant piercing the corporate veil to impose personal liability on the corporate officer[s]." *Worthy v. New York City Hous. Auth.*, 21 A.D.3d 284, 287–88 (1st Dep't 2005).[4]

[4] Defendants also argue that the Fortus Companies are not named as parties to the Formation Agreement. Both the preamble and the signature page of that Agreement list FMK, not the Fortus Companies, as the relevant party. The Fortus Companies did sign the Formation Agreement, but only (on the face of the signature block) as FMK's "Manager." Even if the Fortus Companies' signature can be construed as overriding the express terms of the Formation Agreement, Plaintiffs' contract claims against them still fail for the reasons stated above. Therefore, the Court makes no ruling at this time as to whether the Fortus Companies are in fact parties to the Formation Agreement.

Therefore, Plaintiffs' first, second, and third causes of action are dismissed as against HSC, FMK, and the Fortus Companies, but not as against the Company (which has not moved to dismiss those claims).

B. Breach of the Implied Covenant of Good Faith and Fair Dealing (Fourth Cause of Action)

For at least two reasons, Plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing must also be dismissed.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance," which "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). This covenant runs parallel to a contract, and "encompass[es] any promises which a reasonable person in the position of the promisee would be justified in understanding were included" in the contract. *Id.* At the same time, the duties of good faith and fair dealing do not "imply obligations inconsistent with other terms of the contractual relationship." *Id.*

First, Plaintiffs' implied covenant claims essentially repeat their breach of contract allegations, and that alone warrants dismissal. *See, e.g.*, *Rimrock High Income Plus (Master) Fund, Ltd. v. Avanti Commc'ns Grp. PLC*, 157 A.D.3d 543 (1st Dep't 2018) (dismissing "claim for breach of the implied covenant of good faith and fair dealing [as] duplicative of the breach of contract claim"); *Bostany v. Trump Org. LLC*, 73 A.D.3d 479, 481 (1st Dep't 2010) (affirming dismissal of implied covenant claim "on the ground of redundancy" because the claim was "intrinsically tied to the damages allegedly resulting from a breach of the contract"). As set forth in the Complaint, Plaintiffs' implied covenant claim arises from the same alleged actions (or

inaction) that underpin the breach of contract claims. For example, Plaintiffs allege that Defendants' "allowing the Ground Lease to expire . . . without any extension or amendment" and "failing to pursue site plan approval for the [Project] diligently . . . impair[ed] Plaintiffs' economic interests." (Am. Compl. ¶167). These allegations echo the allegations made as part of Plaintiffs' contract claims. (*See id.* ¶158 (alleging that Defendants "breached their obligations . . . of the Formation Agreement, by among other things, . . . allowing the Ground Lease to expire without extension or amendment . . . ."); *id.* ¶148 (alleging that "Defendants improperly delated [sic] the completion of site plan approval and the closing of the purchase of the [Property]")).

Second, Plaintiffs' implied covenant claims against HSC, FMK, and the Fortus Companies also fail to the extent that they "imply obligations inconsistent with other terms of the contractual relationship." *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 153. As discussed in Part A, *supra*, the Formation Agreement confers certain contractual obligations on the Company as an entity legally distinct from HSC, FMK, and the Fortus Companies. Since those stakeholders[5] do not bear the obligations individually, they cannot be held liable for breach of contract or breach of an implied covenant arising from such contract. *See Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 A.D.3d 463 (1st Dept 2012) ("There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract.").

Therefore, Plaintiffs' fourth cause of action is dismissed as against all Defendants.

[5] Again, the Court need not decide at this juncture whether the Fortus Companies are a party to the Formation Agreement or are merely a non-party signatory. Under either view, Plaintiffs do not state a claim for breach of the implied covenant as against the Fortus Companies.

C. Fiduciary Duty Claims (Sixth and Seventh Causes of Action)

1. Breach of Fiduciary Duty

"Breach of fiduciary duty requires (1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages." *Jones v. Voskresenskaya*, 125 A.D.3d 532, 533 (1st Dep't 2015). As to the existence of a duty, "members of an LLC may stand in a fiduciary relationship to each other and the LLC." *Id.* Here, Plaintiffs are alleging that FMK, HSC, the Fortus Companies and Debbie Probst breached their fiduciary duties to WRC. (Am. Compl. ¶¶180-194).

The parties dispute whether Plaintiffs have pleaded sufficient facts to survive a motion to dismiss as to (1) whether WRC is a "Member" of the Company, and (2) whether WRC's claims are direct or derivative. The Court finds that although Plaintiffs adequately allege that WRC is a "Member" of the Company, the allegations describe a derivative, rather than a direct, claim and must be dismissed on that ground.

Plaintiffs adequately allege that WRC holds a membership interest in the Company—at the very least, Defendants' arguments to the contrary raise issues of fact that warrant discovery, not dismissal. The Formation Agreement grants WRC "a 10% Economic Interest in the Company." (Formation Agreement §1.3(a)). According to Defendants, "[a]s the holder of an Economic Interest, without the accompanying Membership Interest, WRC does not have standing to sue for breach of fiduciary duty." (Defs.' Mem. of Law at 24). But the Formation Agreement also provides that "each of WRC, Fortus and Hearth shall be deemed to be . . . a 'Member' under the Operating Agreement . . . and shall have all of the rights and obligations of a Member." (Formation Agreement §1.3(c)). And the Operating Agreement defines "Initial Members" as "Hearth, Fortus and WRC." (Operating Agreement §3(o)) (NYSCEF Dkt. No. 7).

In addition, the Operating Agreement defines "Economic Interest Holder" to mean "any Person who holds an Economic Interest, whether as a Member or [a non-Member assignee]." (*Id.* §3(l)). Reading the two agreements together, it is certainly possible that WRC held its 10% Economic Interest as a "Member" of the Company. A non-managing Member, perhaps, but a Member nonetheless. In that case, "[a]s the managing member of the LLC," FMK and HSC could still "owe[ ] plaintiff—a nonmanaging member—a fiduciary duty." *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014).

Plaintiffs' claims, however, are derivative in nature and cannot properly be brought on behalf of WRC individually. "A plaintiff asserting a derivative claim seeks to recover for injury to the business entity," while "[a] plaintiff asserting a direct claim seeks redress for injury to him or herself individually." *Yudell v. Gilbert*, 99 A.D.3d 108, 113 (1st Dep't 2012). To discern between the two types of claims, New York courts ask "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 114 (citing *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). "A complaint the allegations of which confuse a shareholder's derivative and individual rights will . . . be dismissed." *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). This is so even if a plaintiff "assert[s] direct claims . . . [that] are embedded in an otherwise derivative claim for partnership waste and mismanagement." *Yudell*, 99 A.D.3d at 115.

Although the Amended Complaint purports to bring fiduciary duty claims on behalf of WRC individually, the allegations evince harms suffered, and benefits foregone, by the Company. The Company embodied a joint undertaking between Plaintiffs and Defendants to complete the Project, and what Plaintiffs are now alleging is that Defendants' foot-dragging

foiled that principal corporate mission, which would impact all stakeholders (not just WRC). In fact, Plaintiffs themselves say that "Defendants breached their fiduciary duties to WRC by impairing the value of the assets of *the LLC*." (Am. Compl. ¶191) (emphasis added). Other allegations also point to corporate waste and mismanagement. (*See id.* ¶187 (alleging that, "[o]nce Defendants decided to pursue the purchase of [the Property] and the development of the [Project], Defendants' fiduciary duties to WRC required Defendants to obtain site plan approval diligently and in good faith, which Defendants failed to do"); *id.* ¶9 ("[O]nce Defendants made the decision (in their sole discretion) to withdraw from the project and the LLC (early-2015 through 2016), Defendants' implied good faith obligations and their fiduciary duties required them to conduct that withdrawal in good faith and with due care for the LLC's assets.")). These kinds of claims are properly brought as derivative actions on behalf of the Company, not WRC individually.

Like in *Yudell*, "[t]o the extent, if any, that [P]laintiffs have asserted direct claims, they are embedded in an otherwise derivative claim for partnership waste and mismanagement." 99 A.D.3d at 115; *see Chan v. Louis*, 303 A.D.2d 151, 152 (1st Dep't 2003) (noting that plaintiff "may properly bring a derivative action . . . for mismanagement and waste"). To be sure, the law permits direct actions by individual shareholders "where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation." *Serino v. Lipper*, 123 A.D.3d 34, 39 (1st Dep't 2014). But "[t]his is a narrow exception," and "must be factually supportable by more than . . . [allegations] that conflate [its] derivative and individual rights." *Id.* at 39-40. Otherwise, "where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand." *Id.* at 40; *Abrams*, 66 N.Y.2d at 953.

Therefore, Plaintiffs' sixth cause of action is dismissed.

2. Aiding and Abetting Breach of Fiduciary Duty

Because Plaintiffs have not stated a cause of action for breach of fiduciary duty, their claim for aiding and abetting such breach also must be dismissed.

D. Res Judicata and Collateral Estoppel

Finally, Defendants argue that certain of Plaintiffs' claims are precluded by the doctrines of res judicata and collateral estoppel.[6]

The Court of Appeals recently summarized the law of preclusion as follows:

> The preclusive effect of a judgment is determined by two related but distinct concepts—issue preclusion and claim preclusion—which collectively comprise the doctrine of 'res judicata.' . . . While issue preclusion applies only to issues *actually* litigated, claim preclusion (sometimes used interchangeably with 'res judicata') broadly bars the parties or their privies from relitigating issues that were or could have been raised in that action. The doctrine encompasses the law of merger and bar—it precludes the relitigation of all claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated. As such, claim preclusion serves to bar not only every matter which was offered and received to sustain or defeat the claim or demand, but also any other admissible matter which might have been offered for that purpose. In other words, claim preclusion may foreclos[e] litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

Paramount Pictures Corporation v. Allianz Risk Transfer AG, 31 N.Y.3d 64, 72 (2018) (internal quotation marks and citations omitted).[7]

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[6] In their reply brief, Defendants note that they "showed in their initial memorandum that res judicata bars Plaintiffs' Fifth, Eighth, and Ninth Causes of Action." (Reply Mem. of Law at 12) (NYSCEF Dkt. No. 118). But the initial memorandum also appeared to argue that res judicata bars Plaintiffs' first, second, third, and fourth causes of action, (Defs.' Mem. of Law at 28-29) (NYSCEF Dkt. No. 95), which are dismissed, in whole or part, above. For completeness, the Court's discussion of the res judicata issue will cover Plaintiffs' claims 1-5 and 8-9.

[7] Defendants appear to lump together res judicata and collateral estoppel as bases for dismissal. Since Defendants' actual argument focuses only on res judicata, that will be the Court's focus here. (*See* Defs.' Mem. of Law at 26-27) (NYSCEF Dkt. No. 95).

New York "has adopted the transactional analysis approach in deciding res judicata issues." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981). Under this approach, res judicata will bar "successive litigation based upon the same transaction or series of connected transactions if: (i) there is a final judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 122 (2008). Notably, res judicata "broadly bars the parties or their privies from relitigating issues that were or *could have* been raised." *Paramount Pictures Corp.*, 31 N.Y.3d at 72 (emphasis in original). As a result, "a plaintiff cannot avoid the effects of res judicata by 'splitting' his claim into various suits, based on different legal theories." *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 110 (2d Cir. 2000). This principle does not, however, preclude claims based on events which occurred only after the previous lawsuit. *See O'Brien*, 54 N.Y.2d at 358 (noting that "the second category of allegations . . . are not barred by res judicata to the extent that they describe acts occurring after the [previous] lawsuit").

The Westchester Decision partly granted and partly denied summary judgment, and those two results produce divergent res judicata effects. "The *grant* of summary judgment, the procedural equivalent of a trial, results in a final judgment on the merits, which bars another action between the same parties based upon the same cause of action." *Collins v. Bertram Yacht Corp.*, 42 N.Y.2d 1033, 1034 (1977) (emphasis added); *see Boorman v. Deutsch*, 152 A.D.2d 48, 53 (1st Dep't 1989) ("Where a party appears in a proceeding and judgment is subsequently entered against him based on a default upon a motion for summary judgment, the judgment is on the merits"); *see also Vinci v. Northside P'ship*, 250 A.D.2d 965, 965 (3d Dep't 1998) ("An award of summary judgment . . . is generally deemed a resolution on the merits.").

By contrast, "[i]t is well settled that the *denial* of a motion for summary judgment is not an adjudication on the merits." *Metro. Steel Indus., Inc. v. Perini Corp.*, 36 A.D.3d 568, 570 (1st Dep't 2007) (emphasis added). That is because "the function of a court on a motion for summary judgment is issue finding, not issue determination." *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100, 103 (1st Dep't 1998).[8]

Because the Westchester Decision conclusively determined the merits of Plaintiffs' RPAPL and fraudulent inducement claims, any claims in this action tied to the same "factual grouping" as those adjudicated claims would be precluded. *Marinelli Assocs. v. Helmsley-Noyes Co.*, 265 A.D.2d 1, 5 (1st Dep't 2000); *O'Brien*, 54 N.Y.2d at 357 ("[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."). "Whether facts are deemed to constitute a single factual grouping for res judicata purposes depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage." *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 86 A.D.3d 469, 474 (1st Dep't 2011).

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[8] The voluntary discontinuance in the Westchester Action is irrelevant to the res judicata analysis here—it cannot rescue claims from the preclusive effects of the Westchester Decision, nor can it bar claims on its own accord. Contrary to Defendants' argument, a voluntary withdrawal of claims *without prejudice* does not constitute a final adjudication on the merits for res judicata purposes. Because "[t]he parties agreed that [Plaintiffs] would discontinue its first action against [Defendants] without prejudice to reinstating its claims . . . it would be inequitable to preclude [Plaintiffs] from bringing this action" on the basis of res judicata. *Travelers Prop. Cas. Co. of Am. v. Sanco Mechanical, Inc.*, 126 A.D.3d 527, 527–28 (1st Dep't 2015); *compare Hughes v. Lillian Goldman Family, LLC*, 153 F. Supp.2d 435, 449 (S.D.N.Y. 2001) (dismissing claims under res judicata where plaintiff "withdrew those very claims with prejudice") (cited by Defs.' Mem. of Law at 27). Therefore, the res judicata analysis turns on Judge Smith's adjudication of Plaintiffs' claims, not the parties' subsequent discontinuance.

In applying this rule, it is important to delineate the facts specific to the RPAPL and fraudulent inducement claims that were dismissed in the Westchester Action. The RPAPL claim concerned Plaintiffs' purported interest in the 53 Mountain Avenue property, the site of the existing facility. (*See* Westchester Action Complaint ¶51 (seeking a judgment compelling the Company "to execute a deed transferring ownership of the property at 53 Mountain Avenue . . . to TCAL")). The fraudulent inducement claim, meanwhile, alleged that certain Defendants "induc[ed] plaintiffs to assign the Ground Lease to defendant Hearth and sign the Formation Agreement by making misrepresentations of their intentions to obtain site plan approval, close on the project and eventually build the senior living facility." (Westchester Decision at 7).

For res judicata purposes, the "transaction" on which the previously dismissed claims were based is not the Formation Agreement writ large, but rather a property acquisition and alleged fraud *leading to* execution of the contract. Defendants view the relevant transaction more expansively, arguing that res judicata bars any "causes of action bottomed on the [Formation] Agreement." (Defs.' Mem. of Law at 29). But that sweeps too broadly, because such a rule would preclude contract-based claims on which summary judgment was previously denied, which is incompatible with basic principles of res judicata.

Viewing Plaintiffs' causes of action through this lens, the Court finds that res judicata does not bar the challenged claims in the Amended Complaint. First, Plaintiffs' claims 1-5 (breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract) are based on the same transaction and "factual grouping" as the breach of contract claim as to which summary judgment was denied in the Westchester Action. (*See* Westchester Decision at 7 ("[T]he branch of defendant's motion seeking dismissal of plaintiffs' second cause of action is denied.")).

In the same vein, Plaintiffs' equitable estoppel and constructive trust claims also are not precluded. While the Westchester Action stemmed from the Formation Agreement, the Ground Lease, and other agreements between the parties, Plaintiffs' equitable estoppel claim is focused on Defendants' conduct after they purportedly terminated their own interests in those agreements. (*Id.* ¶¶206-207). At this stage, therefore, this claim cannot be said to arise from the same transaction or series of transactions as the claims that were resolved on the merits in the Westchester Action. And finally, because Plaintiffs' constructive trust claim stems from Defendants' purported breach of and interference with the Formation Agreement—not the inducement to sign the Agreement—this claim is not precluded.

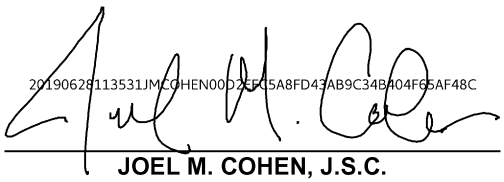
* * * *

Accordingly, it is:

ORDERED that Defendants' motion to dismiss is **GRANTED** with respect to: (i) Plaintiffs' fourth, sixth, and seventh causes of action; and (ii) Plaintiffs' first, second, and third causes of action as against HSC, FMK, and the Fortus Companies. The motion is **DENIED** with respect to Plaintiffs' fifth, eighth, and ninth causes of action; and it is further

ORDERED that the parties are to appear for a Preliminary Conference on July 30, 2019 at 10 a.m.

This constitutes the Decision and Order of the Court.



6/28/2019
DATE

JOEL M. COHEN, 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