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

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JDS HIGHLINE LLC, ON BEHALF OF ITSELF AND DERIVATIVELY ON BEHALF OF JDS-LARGO 514 WEST 24TH STREET, LLC

Plaintiff,

- v -

514 WEST 24TH STREET PARTNERS LLC, SUNRISE CONSTRUCTION, LLC, 514 WEST 24TH SR INVESTOR LLC, JDS-LARGO 514 WEST 24TH STREET

Defendants.

INDEX NO. 651976/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28

were read on this motion to DISMISS.

This case concerns a joint venture to acquire and develop a Manhattan property known as The Fitzroy. Plaintiff JDS-Highline LLC ("JDS-Highline" or "Plaintiff") and Defendant 514 West 24th Street Partners LLC ("Largo West 24th" or "Defendant") created an entity, JDS-LARGO 514 West 24th Street ("Joint Venture" or "Company"), to undertake the project.

In its Complaint, JDS-Highline alleges that Largo West 24th and its affiliate, Sunrise Construction, LLC ("Sunrise" and, collectively with Largo West 24th, the "Defendants") failed to uphold their contractual and other obligations with respect to the project, resulting in losses to JDS-Highline and the Company. In the present motion, Defendants seek to dismiss the Complaint for failure to state legally viable causes of action.

For the reasons described in detail below, Defendants' motion is granted in part and denied in part.

Factual Background

The Joint Venture

Plaintiff JDS-Highline is a real estate development, construction and acquisition firm based in New York City, focusing on luxury residential, hospitality and mixed-use projects (NYSCEF 1 ¶ 13). Defendant Largo West 24th is an entity created by Nicholas E. Werner and Nissim Ben-Nun, the founders and principals of a real estate development firm based in New York (*id.* at ¶¶ 14, 18).

On July 1, 2014, JDS-Highline and Largo West 24th entered into and executed the Limited Liability Company Agreement of the Company (*id.* at ¶ 18). At that time, JDS-Highline contributed approximately $5 million for a 50 percent interest in the Company, and Largo West 24th contributed an additional $5 million for the remaining interest (*id.* at ¶ 22). Under the original Joint Venture Agreement (NYSCEF 12), Largo West 24th would be the Day-to-Day Administrator of the project and be responsible for managing quotidian operations and affairs, including overseeing management, construction, condominium sales, third-party service contracts, loan administration, and complaints (NYSCEF 1 ¶ 23).

On February 18, 2018, the Joint Venture Agreement was amended (NYSCEF 1 ¶ 59; hereinafter the "JVA"). Under the JVA, 514 West 24th SR Investor LLC was admitted as a member of the Company (NYSCEF 1 ¶ 59).

The Construction Management Agreement

On February 4, 2015, following the execution of the initial Joint Venture Agreement, 514 West 24th Owner LLC ("514 Owner"), an indirect subsidiary of the Company, entered into a Construction Management Agreement (NYSCEF 13) with Sunrise Construction LLC ("Sunrise"), pursuant to which Sunrise would act as the Construction Manager and oversee

all portions of the construction and redevelopment of the joint venture project at the Fitzroy (*id.* at ¶¶ 29-33). In August 2017, 514 Owner and Sunrise agreed to assign the CMA to JDS-Highline's affiliate, JDS Construction LLC (NYSCEF 19 at 10).

The Forbearance Agreement

On July 17, 2015, the Company received a construction loan consisting of approximately $60 million in a senior loan, and $17.5 million in preferred equity (NYSCEF 1 ¶ 25). On February 16, 2018 the Company closed on a new construction loan which provided $91 million to pay off the existing loan and fund the construction of the project (*id.* at ¶ 58). In or about January 2019, the lender of the construction loan declared an Event of Default (*id.* at ¶ 61). Four months later, in or about April 2019, the lender declared another Event of Default under the loan due to an Out of Balance condition (*id.* at ¶ 63). On May 31, 2019 the Company entered into a Forbearance Agreement with the lender, which required the Company to make specific lump sum payments to the lender (*id.* at ¶ 64).

The Present Claims

Plaintiff brings seven causes of action: (1) Breach of the Joint Venture Agreement; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Request for Declaratory Judgment; (4) Fraudulent Inducement to the Construction Management Agreement; (5) Breach of the Construction Management Agreement; (6) Waste; and (7) Unjust Enrichment.

Plaintiff alleges that Largo West 24th breached the JVA by allegedly transferring its interest in the Company without getting the consent of JDS-Highline in violation of Section 9.3 of the JVA, by refusing to consent to the Forbearance Agreement, and by refusing to fund Additional Capital Contributions as required under Section 3.2(b) of the JVA. Plaintiff alleges that Largo West 24th also breached its implied covenant of good faith and fair

dealing. Plaintiff separately seeks declaratory judgment that Largo West 24th's alleged transfer of its ownership interest to third parties is void.

Plaintiff alleges that Sunrise fraudulently induced Plaintiff to enter into the CMA by misrepresenting its capabilities, and subsequently breached its duties under the CMA.

Finally, Plaintiff alleges that Defendants' conduct constitutes waste and that they were unjustly enriched at Plaintiff's expense.

Legal Analysis

In assessing a motion to dismiss a complaint pursuant to Rule 3211[a][7], the Court must afford the complaint a liberal construction, accepting all facts alleged in the complaint as true, and accord the benefit of every possible inference to determine whether the facts, as alleged, fit within any cognizable legal theory (*Janetti v Whelan*, 97 AD 3d 797, 798 [2d Dept 2012]). While the Court must consider the factual allegations as true, bare legal conclusions are not entitled to a presumption of truth (*Symbol Tech., Inc. v Deloitte & Touch, LLP,* 69 AD3d 191, 195 [2d Dept 2009]).

Where the document (or, in this case, documents) at issue is a contract between the parties, dismissal under Rule 3211[a][1] is warranted only when the agreement "unambiguously contradicts the allegations supporting a litigant's cause of action" (*150 Broadway N.Y. Assocs. L.P. Assocs., L.P. v Bodner,* 14 AD 3d 1, 5 [1st Dept 2004]). An agreement is unambiguous "if the language it uses has a definite and precise meaning" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 [2002]). When a written agreement is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms (*id.* at 569). On a motion to dismiss, the motion "must be denied if from the pleadings' four corners 'the factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*511*

W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]).

A. Breach of the Joint Venture Agreement (First Cause of Action)

Plaintiff alleges that Largo West 24th breached the Joint Venture Agreement by: (1) transferring its interest in the Company to third parties without obtaining Plaintiff's consent; (2) refusing to consent to the Forbearance Agreement; and (3) refusing to fund required capital contributions.

Under New York law, the elements of a cause of action for a breach of contract are: (1) formation of a valid contract between the parties; (2) performance by the plaintiff; (3) defendant's failure to perform; (4) resulting in damage (*see, e.g.*, *Riccio v Genworth Fin.*, 184 AD3d 590 [2d Dept 2020]). In order to plead a breach of contract cause of action, a party must identify the provisions of the contract upon which the claim is based (*N.Y. Univ. v Int'l Brain Research Found., Inc.*, No. 652954/2013 2016 WL 1059409, at *3 [Sup Ct, New York County 2016]). On a motion to dismiss a breach of contract claim, the test to be applied is whether the complaint gives "sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*JP Morgan Chase v J.H. Elec. Of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

1. The Transfer of Joint Venture Interest

Section 9.3 of the JVA provides that any transfer or assignment of interests in the Company will be "void and ineffective" without the consent of both parties. In its entirety, the provision reads:

> Notwithstanding any other provision of his Agreement, any Transfer, sale, alienation, assignment, encumbrance, or other disposition in contravention of any of the provisions

> of this Agreement shall be **void and ineffective**, and shall not bind, or be recognized by, the Company.

Under New York law, assignments made in contravention of such a restriction are void if, as in this case, the contract contains clear, definite and appropriate language declaring the invalidity of such an assignment (*see Macklowe v 42nd St. Dev. Corp.*, 170 AD2d 388, 389 [1st Dept 1991]).

Even assuming the alleged transfer occurred (which Defendants deny), the remedy for such a breach of the agreement is limited by its terms to nullification of the transfer (*see Gass v Mamedova-Braz*, No. 15 CIV. 3799 [ER], 2017 WL 358894, at *16 [SD NY Aug. 18, 2017]). Plaintiff's reliance on section 9.7 is unavailing. The plain meaning of that provision is that the putative transferor remains bound by its obligations as a party to the agreement as if it had not transferred its interests. It does not impose an independent financial liability for breaching the non-assignment provision, for which the explicit remedy is nullification.

Plaintiff's reliance on Section 11.11 of the JVA ("Remedies Cumulative") is similarly misplaced. That section provides that "the rights and remedies given in this Agreement. . . shall not operate to bar the exercise of any other rights and remedies reserved to a Member under the provisions of this Agreement or given to a Member by law." This is not, however, a question of whether Plaintiff may choose among otherwise available remedies. Here, the contract itself specifies that nullification *is* the appropriate remedy (*see Highbridge House Ogden LLC v Highbridge Entities LLC*, 48 Misc 3d 976, 990 [Sup Ct, New York County 2015] [limiting the buyer of property to the remedies to which it agreed in the contract]; *see also RCN Telecom Servs., Inc. v 202 Centre St. Realty, LLC*, 204 Fed Appx 920, 922 [2d Cir. 2006] ["Under New York law, a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts find that these remedies are

exclusive."]; *Ace Secs. Corp. Home Equity Loan Trust, Series 2007-HE3 ex rel. v DB Structured Prods, Inc.*, 5 F Supp 3d 543 [SD NY 2014]). The general choice-of-remedies provision cannot reasonably be read to negate the specific language of Section 9.3.

2. Refusal to Consent to the Forbearance Agreement

Plaintiff identifies no provision in the JVA that obligates Largo West 24th to consent to a forbearance agreement. Section 7.2(a) requires only that parties to the contract "act at all times in good faith and in such manner as may be required to promote the best interests of the Company." That language cannot fairly be read to obligate a party to consent to entering into a separate agreement with a third party. Moreover, as Defendants note, section 7.6 of the JVA contains a broad waiver of fiduciary duties, which undermines any purported imputation of a generalized obligation to do whatever is necessary to promote the best interests of the Company. The parties' obligations are set forth in, and limited by, the contract itself.

3. Refusal to Fund Additional Capital Contributions

Under the JVA, members "shall be obligated to contribute to the Company . . . the aggregate amounts of Additional Capital Contributions" (NYSCEF 15 § 3.2[b]).

Section 3.3 of the JVA provides certain actions a "Contributing Member" may, at its option, take if another Member fails to make an Additional Contribution. The Contributing Member may, for example, advance the Non-Contributing Member's pro rata share of the capital contribution, which would in turn trigger other rights and obligations (NYSCEF 15 § 3.3[a] and [b]).

Significantly, for present purposes, Section 3.3 (c) of the JVA provides that "[e]ach Member acknowledges and agrees that in the event any Member fails to make its Capital Contributions pursuant to this Agreement, the other Member will suffer substantial damages

and the remedy provisions set forth above are the *sole remedy* of a Contributing Member and are fair, just and equitable in all respects" (*id.* § 3.3(c) [emphasis added]).

Thus, the plain language of the agreement forecloses a claim for damages flowing from Defendants' alleged failure to make an Additional Capital Contribution (*see Beal Sav. Bank v Sommer*, 10 Misc 3d 1062[A], 2005 WL 3487803, at *4 [Sup Ct, New York County, Dec. 15, 2005]). Again, the general choice-of-remedies provision (Section 11.11) does not negate the specific remedy limitation contained in Section 3.3(c).

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

Implicit in all contracts is a covenant of good faith and fair dealing (*Dalton v Educational Testing Service*, 87 NY2d 384, 389 [1995]). "Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included … 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" (*id.* at 389 [internal quotations and citations omitted]). Broadly, the implied covenant of good faith and fair dealing prevents parties to a contract from acting in such a manner that would "deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v Paramount Comm'ns*, 222 AD2d 17, 22-23 [1st Dept 1996]).

JDS-Highline alleges that Largo West 24th breached its covenant of good faith and fair dealing by refusing to negotiate and accede to the forbearance agreements in good faith (NYSCEF 1 at 88). As noted above, however, the JVA does not impose fiduciary obligations or otherwise require Members to enter into independent agreements with third parties (*Fesseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268, 268 [1st Dept 2003] [cautioning that covenant

of good faith and fair dealing "cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"]). If the parties intended to impose such obligations, they could have done so. A claim for breach of the implied covenant cannot stand where it is "merely a substitute for a nonviable breach of contract claim" (*Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003]).

C. Declaratory Judgment (Third Cause of Action)

On a motion to dismiss a declaratory judgment claim, the "only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him. Declaratory judgment is appropriate where it would "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]).

In its Complaint, Plaintiff alleges that on April 27, 2020, JDS-Highline was contacted by "counsel representing investors who had allegedly acquired a member interest" in the Joint Venture. (NYSCEF 1 ¶ 69). They also allege that "[p]rior to this date, JDS-Highline had not been informed of, or been requested to approve, any transfer of Largo West 24th's membership interest in the Company" (*id.* ¶ 70). Although these allegations do not expressly state that these new "investors" acquired their member interest *from Defendants*, that allegation can be inferred from the language used, as Plaintiff's counsel confirmed during oral argument.

Plaintiff seeks a declaratory judgment that the alleged transfer of Largo West 24th's interests is void. Although Defendants do not contest that such a transfer would be void *if it had occurred*, they dispute that these purported "investors" acquired any interests from them. There is therefore a live controversy, albeit one that appears to turn on resolution of a relatively

straightforward question of fact (*i.e.*, whether Largo West 24th did or did not transfer membership interests to a third party without the contractually required consent). On a motion to dismiss, the Court must accept Plaintiff's factual allegations to be true.

The Complaint thus states a viable claim for declaratory judgment.

D. Fraudulent Inducement to the Construction Management Agreement (Fourth Cause of Action)

In order to state a legally cognizable claim of fraudulent inducement, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 537 [1st Dep't 2016], affd, 29 N.Y.3d 137 [2017]; *Oxbow Calcining USA Inc. v Am. Indus. Partners*, 96 A.D.3d 646, 650 [1st Dept 2012]).

Generally, an individual's statements about the caliber of work to be performed or her or his ability to perform a task is not an actionable fraud (*see, e.g., Renaissance Equity Holdings v. Al-An Elevator Maint. Corp.*, 121 AD3d 661, 664 [2nd Dept 2014] [an alleged misrepresentation regarding intent or ability to perform under a contract does not give rise to a cause of action for fraud]). Such statements of opinion as to a party's qualifications cannot form the basis for a fraudulent inducement claim (*id.*; *see also Yablon v Stern*, 161 AD3d 594, 594-95 [1st Dept 2018] [plaintiff's cause of action alleging fraud in the inducement was properly dismissed, as it was founded upon "non-actionable promises of future conduct or events, rather than present fact, and non-actionable opinion of defendant as to his entity's resources and capability of undertaking the luxury renovation sought by plaintiffs."]; *Lax v. Design Quest, N.Y., Ltd.*, 101 AD3d 431, 431 [1st Dept 2012] ["Plaintiffs' fraud in the inducement claim was based on the alleged misrepresentation by defendants of their expertise and licensing. This claim was properly

dismissed as duplicative of the breach of contract claims that alleged defective and deficient work."]; *CC Pay Operations Ltd. v Alokush*, 2019 N.Y. Slip Op. 30048[U], 3 [N.Y. Sup Ct, New York County 2019] ["generalized allegations regarding Defendants' representations as to their skill and ability to perform under the Agreement are not sufficient to state a cause of action for fraudulent inducement."]).

Plaintiff alleges that Sunrise Construction made certain representations as to its ability to perform the construction work and the quality with which they would perform it. Specifically, Plaintiff alleges that Sunrise misrepresented that it had the appropriate and necessary construction experience; that it had the skills, ability and labor to manage and complete the project; that it intended to undertake the project in good faith; and that it would be able to complete the project on schedule (NYSCEF 1). Representations of this kind, regarding an intent or ability to perform under the contract, do not give rise to a cause of action for fraud (*see Renaissance Equity Holdings*, 121 AD3d at 664). Given that the cause of action rests on the Defendant's subjective statements about its abilities and capabilities, rather than on misrepresentations of objective facts, the fraud claim must be dismissed (*see Yablon*, 161 AD3d at 594-95).

E. Breach of the Construction Management Agreement (Fifth Cause of Action)

Claimants who are not parties to the contract may not bring a breach of contract claim (*see Mullin v WL Ross & Co. LLC*, 173 AD3d 520, 521 [1st Dept 2019]). While New York recognizes that double derivative standing can be conferred on the minority shareholders of a controlling shareholder, that is not the case here (*Pessin v Chris-Craft Indus.*, 181 AD2d 66, 72 [1st Dept 1992]). The CMA is between Sunrise Construction and 514 Owner (NYSCEF

13). Neither JDS-Highline nor the Company are parties to the CMA and therefore lack standing to bring a claim for an alleged breach of the CMA.

F. Waste (Sixth Cause of Action)

Under New York law, the essence of a corporate waste claim is the "diversion of corporate assets for improper or unnecessary purposes" (*SantiEsteban v Crowder,* 92 AD3d 544, 546 [1st Dept 2012] [citation omitted]). Such a claim may lie where "directors irrationally squander or give away corporate assets" (*City of Roseville Emples. Retirement Sys. v Dimon,* No. 6502942012, 2014 WL 7643004, at *11 [Sup Ct, New York County 2015]). As the Delaware Supreme Court has noted, the "stringent requirements of the waste test" envision "'an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration'" (*Brehm v Eisner*, 746 A2d 244, 263 [Del 2000] [citation omitted]).

Even affording the complaint a liberal construction, Plaintiff's conclusory allegations that Largo West 24th "enriched itself" at the expense of the Company, or that it negligently managed the Company (NYSCEF 21 at 21), are insufficient to state a claim for corporate waste. Moreover, insofar as a claim of waste is predicated on a breach of fiduciary duty, the Court notes again that the parties forswore imposition of such duties in their agreement.

G. Unjust Enrichment (Seventh Cause of Action)

To prevail on a claim for unjust enrichment, the proponent must allege "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Critically, unjust enrichment claims are

barred where there is an executed valid and enforceable contract governing the subject matter, even if the party to the claim is not a party to the contract (*Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017] ["The unjust enrichment claim is also foreclosed by the existence of a valid and enforceable written contract governing the subject matter . . . even though defendant is a third-party nonsignatory to the agreement]; *Mueller v Michael Janssen Gallery Pte. Ltd.*, 225 F Supp 3d 201, 207 [SD NY 2016]).

Where, as here, there is a valid and enforceable contract governing the subject matter, the unjust enrichment claim must be dismissed. Neither party disputes the validity of the JVA, and therefore its existence bars the unjust enrichment claim.

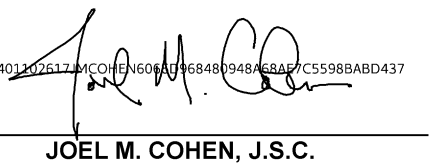
* * * *

Accordingly, it is:

ORDERED that Defendants' motion to dismiss the Complaint is granted with respect to the First, Second, Fourth, Fifth, Sixth, and Seventh Causes of Action, and denied with respect to the Third Cause of Action (Declaratory Judgment); and it is further

ORDERED that the parties appear for a telephonic preliminary conference on **April 13, 2021 at 10:30 a.m.**

This constitutes the decision and order of the Court.



4/1/2021
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