

D & V Realty LLC v Klyukin
2025 NY Slip Op 33498(U)
September 16, 2025
Supreme Court, New York County
Docket Number: Index No. 656782/2022
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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D & V REALTY LLC, DERIVATIVELY ON BEHALF OF
THE MEMBERS OF 192 8TH AVENUE REALTY GROUP
LLC, EAST 3 MEMBERS HOLDING LLC, DERIVATIVELY
ON BEHALF OF THE MEMBERS OF 238-240 E3
STREET REALTY LLC, GDD REALTY LLC,
DERIVATIVELY ON BEHALF OF THE MEMBERS OF 128
WEST 26TH STREET DEVELOPMENT LLC, CIP1 LLC, D
& V REALTY LLC,

Plaintiffs,

- v -

MIKHAIL VASILYEVICH KLYUKIN, RI 128 26TH STREET,
LLC, RI 192 8TH AVENUE, LLC, RI 238-240 EAST 3RD
STREET, LLC, ORANGE REAL ESTATE DEVELOPMENT
LLC, AND AHIMSA NY, LLC, INSPIRON MANAGEMENT,
INC., GARY VINBAYTEL, 128 WEST 26TH STREET
DEVELOPMENT LLC, 192 8TH AVENUE REALTY GROUP
LLC, 238-240 E3 STREET REALTY LLC,

Defendants.

INDEX NO. 656782/2022MOTION DATE 03/24/2025MOTION SEQ. NO. 020**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 4, 5, 6, 401, 385, 402, 549, 550, 551, 552, 553, 560, 562, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 609, 629, 630, 631, 632, 633, 634, 635, 639, 668, 669

were read on this motion for SUMMARY JUDGMENT.

Defendants RI 128 26th Street, LLC (“RI 26”), RI 192 8th Avenue, LLC (“RI 8”), RI 238-240 East 3rd Street, LLC (“RI 3,” together with RI 26 and RI 3, “RI entities”), Orange Real Estate Development, LLC (“ORED”), Ahimsa NY, LLC (“Ahimsa”), and Inspiron Management, Inc. (“Inspiron”) move for summary judgment dismissing all claims asserted against them in the First Amended Complaint. Plaintiffs D&V Realty, LLC (“D&V”), East 3 Members Holding, LLC (“E3 Members”), GDD Realty, LLC (“GDD”) cross move for summary judgment in their favor as to liability on the same claims.

For the reasons that follow, Defendants' motion is granted in part and Plaintiffs' cross-motion is denied.

BACKGROUND

This case arises out of a series of agreements formed to purchase and develop properties located at 192 8th Avenue, 238-240 East 3rd Street, and 128 West 26th Street. These properties are held in single-purpose LLCs¹ of which certain Plaintiffs and the RI entities are members (NYSCEF 588 [Plaintiffs' Response to Defendants' Statement of Undisputed Facts] ¶¶ 3-4, 6-7, 9-10). Defendant ORED, which is beneficially owned by Defendant Mikhail Vasilyevich Klyukin ("Klyukin"), owns the RI entities. Plaintiff Gary Vinbaytel owns GDD, E3 Members, and D&V (*id.* ¶¶ 4, 7, 10). RI 8 and RI 3 are the majority members of 8th Avenue and E3 Street, respectively, and Plaintiffs D&V and E3 Members are the minority members, respectively (*id.* ¶¶ 4, 7). Plaintiff GDD is the majority member of West 26, and RI 26 is the minority member (*id.* ¶ 10).

Plaintiffs D&V and CIP1, also owned by Vinbaytel, were the managers of the Development Companies until the RI entities removed them in February 2022 and replaced them with another ORED-owned entity, Ahimsa (*id.* at ¶¶ 19, 20). In March 2022, Klyukin was sanctioned by the U.S. Department of Treasury Office of Foreign Assets Control ("OFAC"), and by virtue of his majority ownership stake, RI 8, RI 3, 8th Avenue, E3 Street, RI 26, and Ahimsa became OFAC-blocked entities by operation of law (NYSCEF 405 [Answer to First Amended Complaint] ¶ 3). After the sanctions, RI 26 replaced Ahimsa with Inspiron as the manager of the

¹ These are 192 8th Avenue Realty Group, LLC ("8th Avenue"), 238-240 E3 Street Realty, LLC ("E3 Street"), and 128 West 26 Street Development, LLC ("West 26," collectively, "Development Companies").

West 26—the only Development Company that was not itself blocked (NYSCEF 588 ¶ 20). The parties dispute whether and to what extent Inspiron is owned and/or controlled by ORED or Klyukin.

Plaintiffs allege in their First Amended Complaint that appointing Ahimsa as the manager of E3 Street and 8th Avenue and failing to timely appoint an appropriate replacement after Ahimsa became blocked “(i) prevented the sale of condominium units relative to the East 3rd Street and 192 8th Avenue Projects; (ii) caused increased loan servicing costs for the East 3rd Street Project in the form of loan extension payments...; (iii) increased maintenance and insurance costs; and (iv) incurred penalties relating to missed tax payments[,]” as well as preventing OFAC from issuing licenses required to sell units (NYSCEF 401 [“FAC”] ¶¶ 94, 97). They additionally allege that RI 26’s appointment of Inspiron caused the project’s lender to declare an event of default (*id.* ¶¶ 92-93).

Plaintiffs’ moving papers refer to additional conduct alleged in a proposed second amended complaint. However, after this motion was fully briefed, the Court largely denied Plaintiffs’ motion to amend, directing that (1) Plaintiffs have leave to amend to add claims based only on the withholding of condominium sale proceeds from the members of West 26th Street Development, and (2) “unless otherwise agreed by the parties, the pending motion for summary judgment shall proceed as a motion for partial summary judgment as applied to the existing claims in the first amended complaint” (NYSCEF 650). Accordingly, the Court will evaluate Defendants’ motion based on the claims as stated in the FAC.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the movant has established that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

[1986]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law based on evidentiary proof in admissible form (*id.*; see also *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the moving party meets its burden, the opposing party “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562). Moreover, “[i]t is well settled that a court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint” (*Price v TuneCore, Inc.*, 182 AD3d 481, 481 [1st Dept 2020]).

I. Breach of Contract

Plaintiffs’ breach of contract claim alleges that the RI entities “breached the [Development Companies’] Operating Agreements by, for example, terminating CIP1 and D&V as managers of the Companies and failing to timely appoint suitable replacement managers in their stead” (FAC ¶ 111). Plaintiffs identify several provisions of the operating agreements that were allegedly breached, but none of them can be the basis of a viable claim against the RI entities (NYSCEF 588 ¶ 35). First, Section 4.2(c) relates to the appointment of managers, and the Court has already determined that “removing and replacing D&V Realty LLC and CIP1 LLC as Managers constituted a proper removal under the express terms of the LLC Agreements.” (NYSCEF 278 at 10). Next, Sections 3.2(a), 3.4(e), and 3.4(g) relate to the term and duties of the manager and thus cannot be the basis for a breach of contract claim against the RI entities (NYSCEF 588 ¶¶ 14-15). Finally, Sections 5.3 and 5.4 relate to capital contributions of

members, and Plaintiffs have not articulated how these would give rise to a breach of contract claim based on the conduct alleged (*id.* ¶ 18). Accordingly, summary judgment is granted to Defendants dismissing the breach of contract claim insofar as it is premised on those provisions of the operating agreements and the removal of D&V/CIP1 as managers.

The Court has not, however, previously addressed whether the choice of Ahimsa and Inspiron as replacement managers may have breached the operating agreements, as Plaintiffs claim. Plaintiffs point to no express provision in the operating agreements setting out qualifications or criteria for replacements, but they argue that failure to appoint an independent, non-sanctioned manager violates the implied covenant of good faith and fair dealing in the operating agreements (NYSCEF 598 [Plaintiffs' Memorandum in Opposition] at 7). While the FAC does not expressly contain a claim for breach of the implied covenant, Plaintiffs allege that the failure to appoint "suitable" replacement managers has deprived them of contractual benefits (FAC ¶ 111, 112). In the Court's view, Plaintiffs' breach of contract claim was pleaded so as to encompass a breach of the implied covenant of good faith and fair dealing on this theory, such that it is not improperly raised for the first time in opposition to Defendants' motion (*cf. Price*, 182 AD3d at 481). Considering this theory is not prejudicial to Defendants as these allegations have been central at all stages of this action and discovery is still open (*cf. Darabont v AMC Network Entertainment, LLC*, 193 AD2d 500 [1st Dept 2021] [dismissing implied covenant theory raised at summary judgment where complaint did not allege the complained of conduct deprived plaintiffs of contractual benefits and was asserted after discovery had closed]). As noted above, Defendants' argument that Plaintiffs' argument is foreclosed by law of the case is unpersuasive. Accordingly, Defendants' motion is denied as to this theory of Plaintiffs' breach of contract claim.

Turning to Plaintiffs' motion for summary judgment on this claim, there are disputed issues of fact as to whether the appointment of Ahimsa and Inspiron breached the agreements or caused damage to the Development Companies. While Plaintiffs do not offer evidence that OFAC would have been more likely to grant licenses to sell condominium units had the RI entities appointed managers not associated with Klyukin, discovery—including party depositions and expert discovery—remains outstanding. Accordingly, Plaintiffs' cross-motion is denied as to this claim.

II. Breach of Fiduciary Duty

Defendant ORED, which owns the RI entities, moves for summary judgment dismissing Plaintiffs' claim for breach of fiduciary duty. While ORED as a non-member of the Development Companies ordinarily would not owe fiduciary duties to the Development Companies or their members, Plaintiffs have alleged and provided some evidence that ORED exercised control over Ahimsa,² which could give rise to fiduciary duties under Delaware law³ (*see Feeley v NHAOCG, LLC*, 62 A3d 649, 662-63 [Del Ch 2012] [“As with a limited partnership, a ‘person’ may owe fiduciary duties depending on whether that person controls a manager of the LLC or otherwise has a fiduciary relationship to the LLC”]; *Largo Legacy Group, LLC v Charles*, 2021 WL 2692426, at *14 [Del Ch, June 30, 2021, CV 2020-0105-MTZ]

² At oral argument, Defendants argued that the Court should not consider such control-related arguments because the Court did not permit Plaintiffs to amend the original complaint to add a claim for piercing the corporate veil. However, the Court did not opine on the propriety of a veil piercing as a *theory of liability*, but rather denied leave to amend because “[t]here is no independent cause of action for veil piercing... That’s just not a claim.” (NYSCEF 402 [Oral Argument Transcript] at 41).

³ The LLC Agreements provide that the validity, construction and interpretation of the agreements and all questions arising out of or concerning the companies or the agreements “are to be governed by the Laws of the State of Delaware” (NYSCEF 4 at 40, NYSCEF 5 at 40-41, NYSCEF 6 at 40-41).

[“the duty of loyalty may extend to the individuals and entities that control a managing entity if such persons exercise control over the [managed] entity’s property”], citing *In re USACafes, L.P. Litig.*, 600 A2d 43, 48–50 [Del Ch 1991]; *Mullin v WL Ross & Co. LLC*, 173 AD3d 520, 522 [1st Dept 2019] [citing *USACafes* for the proposition that under Delaware law, one that controls a fiduciary of another may also be deemed to be a fiduciary]; NYSCEF 588 ¶¶ 32-33; NYSCEF 668-69). As discovery relevant to these allegations remains outstanding, summary judgment is denied pursuant to CPLR 3212(f).

Summary judgment is, however, granted dismissing this claim as against the RI entities because it is duplicative of the breach of contract claim against them. “Delaware respects the primacy of contract law over fiduciary law in matters involving contractual rights and obligations and does not allow fiduciary duty claims to proceed in parallel with breach of contract claims unless there is an independent basis for the fiduciary duty claims apart from the contractual claims. To determine whether there is an independent basis for fiduciary claims arising from the same general events, the Court inquires whether the fiduciary duty claims depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy” (*Renco Group, Inc. v MacAndrews AMG Holdings LLC*, 2015 WL 394011, at *7 [Del Ch, Jan. 29, 2015, CV 7668-VCN] [cleaned up]). In this case, the fiduciary duty and contract claims against the RI entities depend on the same allegations and seek the same damages. Accordingly, the duplicative fiduciary duty claim is dismissed.

As to Ahimsa and Inspiron, Defendants argue that these entities cannot be liable for breach of fiduciary duty based on a failure to appoint different managers because the operating agreements vest the power to replace the managers with the Development Companies’ members, not the managers themselves, citing *JER Hudson GP XXI LLC v DLE Inv’rs., LP* (275 A3d 755,

788 [Del Ch 2022] [“a failure to take an *ultra vires* act cannot be breach of fiduciary duty”]).

This is unpersuasive. Though Ahimsa and Inspiron may have lacked the power to replace themselves, the operating agreements permit them to resign (NYSCEF 4, 5, 6 at § 3.2 [b]).

Plaintiffs allege that Ahimsa and Inspiron’s appointment as managers damaged relationships with the Development Companies’ lenders and frustrated their ability to obtain OFAC licenses.

If true, the Ahimsa and Inspiron may have a fiduciary obligation to resign. Accordingly,

Defendants’ motion is denied on this claim against Ahimsa and Inspiron.

As for Plaintiffs’ motion, there are disputes of fact on the effect of Ahimsa and Inspiron’s appointment as managers on the Development Companies’ ability to do business. As noted above, there is outstanding discovery that would speak to this claim. Plaintiffs’ motion is denied pursuant to CPLR 3212(f).

Accordingly, it is

ORDERED that Defendants’ motion for summary judgment is **granted in part** to the extent that the claim for breach of fiduciary duty is dismissed against the RI entities and the claim for breach of contract is dismissed except insofar as it is based on the choice of Ahimsa and Inspiron as replacement managers, and the motion is otherwise **denied**; and it is further

ORDERED that Plaintiffs’ cross-motion is **denied**.

This constitutes the decision and order of the Court.

9/16/2025

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

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JOEL M. COHEN, J.S.C.