SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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FRED TAVERNA, INDIVIDUALLY, AND ON BEHALF OF HIEBER READE STREET, LLC,THE FRED TAVERNA 2009 TRUST, THE FRED TAVERNA 2009 INSURANCE TRUST,

Plaintiff,

- v -

HIEBER READE STREET, LLC,THE CHRISTINA J. HIEBER 2011 TRUST, THE JENNIFER M. HIEBER 2011 TRUST, CHRISTINA J. HIEBER, JENNIFER M. HIEBER, SUSAN FRUNZI

Defendant.

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INDEX NO. 655457/2021

MOTION DATE 08/24/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the Hiebers' motion to dismiss Consolidated Amended Complaint (the **CAC**; NYSCEF Doc. No. 60) is granted to the extent that all causes of action are dismissed with the exception of the claim sounding in breach of contract (sixth cause of action) and the notice of pendency filed on November 30, 2022 is canceled (CPLR 6514[a]).

Reference is made to this Court's Decision and Order dated June 14, 2023 (the **Prior Decision**; NYSCEF Doc. No. 70) pursuant to which the Court (i) consolidated the case captioned *Hieber Reade Street, LLC et al v Fred Taverna et al*, index No. 655454/2021 (the **Related Action**) into this action, (ii) dismissed the counterclaims asserted in the Related Action, and (iii) granted Mr. Taverna leave to file an amended pleading. Familiarity is presumed.

Following the Prior Decision, Mr. Taverna filed the CAC, asserting the following causes of action: (i) breach of fiduciary duty (first cause of action), (ii) aiding and abetting breach of fiduciary duty (second cause of action), (iii) specific performance on Mr. Taverna's Option (third cause of action), (iv) breach of Section 7.05 of the Operating Agreement (fourth cause of action), (v) promissory estoppel (fifth cause of action), (vi) breach of section 5.01 of the Operating Agreement (sixth cause of action), (vii) tortious interference with contract (seventh cause of action), (viii) conversion of the Option (eighth cause of action), (ix) conversion of the Tavernas' membership interests (ninth cause of action), (x) aiding and abetting conversion of the Tavernas' membership interest (tenth cause of action), (xi) breach of covenant of good faith and fair dealing (eleventh cause of action), (xii) unjust enrichment (twelfth cause of action), (xiii) constructive trust (thirteenth cause of action), (xiv) an accounting of the Hieber Reade Street, LLC (fourteenth cause of action), (xv) specific performance of the Hiebers' option (fifteenth cause of action), (xvi) breach of Section 7.04 of the Operating Agreement (sixteenth cause of action), (xvii) corporate waste (seventeenth cause of action), and (xviii) breach of Section 6.01 of the Operating Agreement (eighteenth cause of action).

I. All causes of action related to the Option are dismissed

The third, fourth, fifth, eighth, twelfth, and thirteenth causes of action of the CAC which are all predicated on Mr. Taverna's allegations that he properly exercised his option pursuant to the Section 7.05 of the Operating Agreement (the **Option**) must be dismissed.

Section 7.05 of the Operating Agreement provides:

> Section 7.05 Option to Purchase Unit. Subject to Article 8 hereof, provided at least two floors have been added to the existing building, Taverna, shall have the option to purchase an Unfinished Unit on the sixth and/or seventh floors of approximately 1850 square feet exclusive of any terrace, for the sum of six hundred thirty-three thousand three hundred and thirty-three dollars. If prior to conveying such Unit to Taverna, Company shall have expended any money towards "finishing" such Unit, then Taverna shall reimburse Company therefore at the time such Unit where all of the perimeter walls and windows as well as the slab ceiling are in place and all utilities have been brought to the Unit and stubbed up.
>
> Such option by Taverna shall be made no later than four months after commencement of construction of the Project. Any such election is subject to the provisions of Article 8 hereof.

(NYSCEF Doc. No. 71 § 7.05).

Article 8 provides:

> Section 8.01 If Taverna (a) defaults in making any additional contribution required of him under Section 4.02 and such default shall continue for twenty (20) days after notice thereof, (b) or if Taverna dies, becomes bankrupt or is incapacitated for more than four (4) months prior to substantial completion of the Project, (c) if construction of the additional floors to the Building does not commence by the earlier of January 1, 2009 or two years after the expiration or earlier termination of the Family Center Lease, or (d) if the Project is not substantially completed within four years of the expiration of earlier termination of the Family Center Lease, then upon happening of any such conditions Members constituting a Majority in Interest shall have the right, exercisable within one hundred twenty days of the occurrence of the condition giving rise to this right of election, may by notice to Taverna or his legal representative purchase Tavern's membership interest in the Company for a price equal to the total of (i) the balance of his Memorandum Account and (ii) any Accrued Preferred Return thereon. If Members constituting a Majority in Interest make such election, then (a) the option under Section 7.05 shall terminate and any prior exercise by Taverna of his option under Section 7.05 shall be deemed nullified and of no further force and effect and (b) the notice of election shall set forth a closing date which shall be no earlier than twenty days nor later than thirty days from the date of such notice. The closing shall be held at the office of the Company at which time Taverna and his legal representative shall execute and deliver such documents as are reasonably satisfactory to counsel for the Company to assign and transfer Taverna's membership interest in the Company, free and clear of all liens and encumbrances, to the Member(s) making such election and Taverna or his legal representative shall receive certified check for the purchase

> price. If Taverna shall fail or refuse to assign and transfer his membership interest in the Company at the scheduled closing upon the tender to him of a certified check for the purchase price as provided for above, then thereafter, upon the date of mailing to him by certified mail of such certified check, his entire membership interest in the Company shall be deemed assigned to the Member(s) making the election without any further act and he shall have no further interest in the Company. For purposes of this Agreement, substantial completion of the Project shall be deemed to have occurred on the later of the recording of the Declaration in the City Register's office and a temporary or permanent certificate of occupancy being issued for all of the Units, other than the Unit Taverna is to receive if he has made the election under Section 7.04(a), permitting the Units above the ground floor to be used for residential purposes and for the Units on the ground floor or below grade level to be used for stores or offices.

(*id.* at § 8.01).

Article 12 provides:

> Section 12.01. Address and Notice. The address of each member for all purposes shall be as set forth at the beginning of this Agreement, or such other address of which the Members has received notice. Any notice, demand or request required or permitted to be given or made to a Member under this Agreement shall be in writing and, except for routine financial reports, shall be deemed given or made when delivered or mailed by certified or registered mail, postage prepaid and return receipt requested, to such Member at such address.

(*id.* at § 12.01).

The CPLR 3211(a)(1) documentary evidence unequivocally establishes that the sixth and the seventh floors were never completed (NYSCEF Doc. No. 84) as required by Section 7.05 of the Operating Agreement and Mr. Taverna does not adequately allege that he exercised the Option in writing within the first four months that the construction project was commenced as required by the Operating Agreement. Instead, previously he argued that the Option set forth in Section 7.05 of the Operating Agreement was modified and any conditions to its exercise were waived.

Inasmuch as the allegations as set forth in the operative pleading were insufficient, the court dismissed the complaint without prejudice and explained that if Mr. Taverna were to replead:

> [I]t will be incumbent upon Mr. Taverna to explain among other things (i) what the option agreement was including when the money was due (i.e., was it due at exercise and not at closing given that the written agreement indicates that additional money is due for any build out), (ii) if the agreement was modified and how it was modified including whether there was a waiver of the condition that the two floors be built (and what the knowingly clear manifestation of the relinquishment of that right was and when it occurred), (iii) when and how the option was exercised in writing as required by the operating agreement [NYSCEF Doc. No. 2 § 12.02], (iv) whether he performed under the contract and made a demand for closing including indicating that he was ready willing and able to close (including making a demand for the additional costs associated with the build-out) either before or after the Court accepted his argument that attempt to buy him out and terminate his option by virtue of the buy-out was null and void (Finkelstein v Lynda, 166 AD3d 948, 949 [2nd Dept 2018]), and (v) any damages that accrued from the time in which he made a demand to close

(NYSCEF Doc. No. 70 at 3-4). The CAC utterly fails to do this. Even taking Mr. Taverna's allegations taken as true as a court must on a motion to dismiss, he fails to state a cause of action predicated on the proper exercise of an option and as such the branch of motion seeking to dismiss all causes of action related to the Option must be granted (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

To be clear, following the Prior Decision, Mr. Taverna emailed the Hiebers, purporting to perform under the "previously-exercised" Option to purchase Penthouse East:

> From:Fred Taverna (ftaverna@nyiconst.com)
> To:christinahieber@yahoo.com
> Cc:ftaverna@nyiconst.com
> Date:Friday, June 16, 2023 at 01:55 PM EDT
> Dear Christina:

> Pursuant to section 7.05 of the Hieber Reade Street, LLC ("HRS") Operating Agreement, as amended by letter agreement of October 1, 2005, and in furtherance of the proceedings held in the Supreme Court, New York County on June 12, 2023, I write to inform you that I am prepared, ready, willing, and able to close on my previously-exercised option to purchase Penthouse East.
>
> Please provide me with your calculation of the exercise price, taking into account the additional square footage and finishing costs, within 10 business days. Upon receipt of said calculation, and confirmation that it is correct, I am ready and able to immediately schedule a closing for the Penthouse East unit.
>
> I look forward to your prompt response.
>
> Best,
>
> Fred Taverna

(NYSCEF Doc. No. 83). Inasmuch as Mr. Taverna fails to identify what the Option is in his notice, when it was "previously exercised" and when there was a waiver of any of the Section 7.05 requirements, his email only serves to underscore that there was no agreement to modify the requirements set forth in Section 7.05 and that he did not previously exercise the Option **in writing**. To wit, had he done so he would have referred to such exercise in the body of this alleged confirmatory exercise.

For the avoidance of doubt, the attempt by the Tavernas to glom onto this e-mail to argue that they comported with the Prior Decision and have now stated claims related to the proper exercise of the Option is not correct and the causes of action predicated on the valid exercise of the Option are all dismissed with prejudice (*see Ess & Vee Acoustical & Lathing Contractors, Inc. v Prato Verde, Inc.*, 268 AD2d 332, 332 [1st Dept 2000]).

Inasmuch as the causes of action related to the Option are dismissed, the branch of the motion seeking to cancel the notice of pendency dated November 30, 2022 (*Hieber Reade Street, LLC et al v Fred Taverna et al*, index No. 655454/2021, NYSCEF Doc. No. 147) is also granted and the notice of pendency must be canceled (CPLR 6514[a]).

The Court notes that the parties appear to have misunderstood the import of the Prior Decision. Mr. Taverna argued that the buy-out was void because he had not been paid the amount set forth in his Memorandum Account as set forth in the Plaintiff's documents. The Court agreed that he had not been bought out based on the Plaintiff's then documents evidencing the value of his Memorandum Account. As the Court previously indicated, how the parties conduct themselves post decision matters. Inasmuch as the Hiebers had sent a number of capital call notices (NYSCEF Doc. Nos. 22-24) but may not have made appropriate adjustments to Mr. Taverna's Memorandum Account balance, they may do so. In addition, if there are or were additional appropriate capital calls which Mr. Taverna does not satisfy, the Hiebers appear to then be permitted to buy out Mr. Taverna within 120 days of such as set forth in Section 8. This is all the Court meant. Nothing more.

II. The causes of action related to breach of fiduciary duty must be dismissed

The CAC does not allege facts to sustain a cause of action for breach of fiduciary duty. To the extent that Mr. Taverna claims that the Hiebers exercised their option to purchase the building's fourth-floor unit and sold that unit for an amount less than contemplated in

the Offering Plan, this is not a breach of fiduciary duty. Once they properly exercised their option, the Hiebers were free to sell the unit at whatever price they liked.

To the extent, that Mr. Taverna alleges that the Hiebers failed to fully include him in the participation of the management of Hieber Reade Street, LLC after this Court determined his termination was void, this is refuted by documentary evidence which demonstrates his involvement (NYSCEF Doc. No. 94, 95). These claims also must be dismissed as duplicative of Mr. Taverna's breach of contract claims. For the avoidance of doubt, his aiding and abetting breach of fiduciary duty claim must be dismissed because there is no predicate viable breach of fiduciary duty claim (*McBride v KMPG Intl*, 135 AD3d 576, 579 [1st Dept 2016]).

III. The claim sounding in breach of contract solely to the extent that Mr. Taverna's approval of the offering plan was not obtained is not dismissed

The Hiebers filed an Offering Plan without Mr. Taverna's consent and approval as required in the Operating Agreement (NYSCEF Doc. No. 60, ¶ 172). In his papers, Mr. Taverna alleges that he was damaged by this breach because he alleges that the approved Offering Plan offered the building's units for sale at lower prices than could otherwise be achieved in the market. This is sufficient to state a cause of action for breach of contract (*Alloy Advisory, LLC v 503 W. 33rd St. Assocs. Inc.*, 195 AD3d 435, 436 [1st Dept 2021]).

IV. The tortious interference with contract claim is dismissed

Mr. Taverna claim against Christina Hieber, Jennifer Hieber, and Susan Frunzi in their individual capacity (collectively, the **Trustees**) for tortiously interferring with Operating Agreement is dismissed an inappropriate attempt to pierce the entity veil when there is no evidence or allegation that the acted outside the scope of their role as trustees (*National Union Fire Ins. Co. of Pittsburgh, Pa*, 221 AD2d at 212).

V. The claims predicated on the alleged conversion of Mr. Taverna's membership interest are dismissed

In the CAC, Mr. Taverna alleges that the Hiebers unlawfully exercised dominion and control over his membership interests. As discussed in the Prior Decision, Mr. Taverna is judicially estopped from making such claim:

> 2. Conversion occurs when someone, intentionally and without authority, assumes or exercises control over personal property of someone else, interfering with the person's right to possession (Fam. Health Mgmt., LLC v Rohan Devs., LLC, 207 AD3d 136, 139 [1st Dept 2022]. As he argued, the attempted buyout was null and void and he is judicially estopped from now claiming otherwise.

(NYSCEF Doc. No. 70 at 4). As such, the claim for conversion is dismissed. It also otherwise must be dismissed because Mr. Taverna still owns his membership interest.

Because the claim for conversion is dismissed, the claim for aiding and abetting conversion is also dismissed (*Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]).

VI. The claim for breach of the covenant of good faith and fair dealing is dismissed

In the CAC, Mr. Taverna alleges that by depriving him of his rights as a member and co-manager of Hieber Reade Street, LLC, the Hiebers diminished the value of his membership interests and the Option (NYSCEF Doc. No. 60, ¶ 206). As discussed above, Mr. Taverna alleged the same facts and sought the same damages in connection with his breach of contract claims. As such, this claim is duplicative of the breach of contract claims and must be dismissed.

VII. The claim for accounting must be dismissed

Mr. Taverna alleges that he is entitled to an accounting of the books and records of the Hieber Reade Street, LLC and that the Hiebers have refused his demands for an accounting (*id.*, at ¶¶ 219-220).

Section 10.02 of the Operating Agreement provides:

> Section 10.02 Inspection. All of the books of account and records of the Company, together with an executed copy of the original Articles, shall at all times be maintained at the principal office of the Company and shall be open to the inspection of, and may be copied by, Members or their representatives during normal business hours, at such Member's own expense, for any purpose reasonably related to the Member's interest as a member of the Company.

(NYSCEF Doc. No. 71 § 10.02).

Section 12.01 of the Operating Agreement provides:

> Section 12.01. Address and Notice. The address of each member for all purposes shall be as set forth at the beginning of this Agreement, or such other address of which the Members has received notice. Any notice, demand or request required or permitted to be given or made to a Member under this Agreement shall be in writing and, except for routine financial reports, shall be deemed given or made when delivered or mailed by certified or registered mail, postage prepaid and return receipt requested, to such Member at such address.

(*id.*, § 12.01).

After the Prior Decision was issued, Mr. Taverna produced two emails that he sent to Christina Hieber requesting access to Hieber Reade Street, LLC's books and records (NYSCEF Doc. No. 86).

The emails sent by Mr. Taverna do not comply with the Operating Agreement because they were not served in accordance with its notice provision, and because they demand documents and information outside the limited inspection rights granted by the Operating Agreement. As such, Mr. Taverna did not make a proper demand and the claim for an accounting is dismissed based on the documentary evidence.

VIII. The derivative claims related to the Hiebers' option are dismissed

In the CAC, Mr. Taverna alleges that pursuant to Section 7.04 of the Operating Agreement, the Hiebers exercised their option to purchase the Penthouse West unit for $10,600,000 and the Fourth-floor unit for $7,057,050 (NYSCEF Doc. No. 60, ¶¶ 63-67). Mr. Taverna alleges that

despite exercising their option, the Hiebers have failed to consummate the purchase and seeks to compel the Hiebers to immediately tender the amount due to Hieber Reade Street,LLC (*id.*, at ¶ 236). Pursuant to Section 7.04 of the Operating Agreement, should the Hieber exercise the option, payment is to be made by reducing the amount in the Preferred Capital Account:

> Section 7.04 Distribution in Kind. Hieber, in lieu of receiving all or part of the Preferred Capital Account, may elect to receive one or more Units. If Hieber makes such election, which election shall be made prior to the Offering Plan being declared effective, her Capital Account shall be deemed reduced by the amount set forth in the Offering Plan for such Unit or Units

(NYSCEF Doc. No. 71, § 7.04).

In other words, Section 7.04 does not require the Hiebers to tender cash for payment of the Penthouse West and Fourth-floor units. As such the fifteenth and sixteenth causes of action, both of which are predicated on the Hiebers failing to make payments to Hieber Reade Street, LLC after they exercised their option are dismissed.

IX. The claim for corporate waste is dismissed

A claim for corporate waste must be dismissed where there is no allegation of bad faith, a conflict of interest, or self-dealing sufficient to overcome the business judgment rule (*Kassover v Prism Partners, LLC*, 53 AD3d 444, 450 [1st Dept 2008]). In the CAC, Mr. Taverna alleges that the Hiebers (i) hired and retained a project manager who charged severely inflated prices relative to the market, (ii) failed to exercise proper oversight over the Project, (iii) entered into disadvantageous financing arrangements, (iv) caused the Hieber Reade Street, LLC to rely on outside financing rather than making capital contributions, (v) withdrew funds from Hieber

Reade Street, LLC, and (vi) initiated litigations against Mr. Taverna on behalf of Hieber Reade Street, LLC (NYSCEF Doc. No. 60, ¶ 242). However, Mr. Taverna does not allege that the Hiebers engaged in any of the above activity in bad faith, with a conflict of interest, or for the purposes of self-dealing. As such, Mr. Taverna cannot overcome the business judgment rule and the claim is dismissed.

X. The claim for breach of Section 6.01 of the Operating Agreement is dismissed

In the CAC, Mr. Taverna alleges that by bringing the Related Action, the Hiebers breached Section 6.01 of the Operating Agreement by causing Hieber Reade Street, LLC to engage in litigation unrelated to the management of the Project (NYSCEF Doc. No. 60, ¶ 246). In the Prior Decision the Court rejected Mr. Taverna's argument that he is entitled to indemnification for costs associated with his alleged breach:

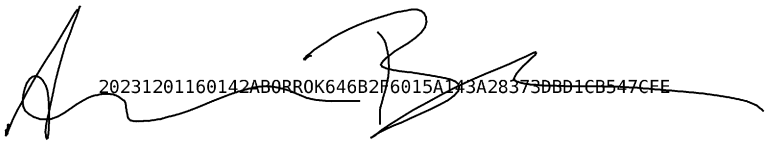
> Simply put, Mr. Taverna is not entitled to seek indemnification in this action from the Plaintiffs for his own alleged wrongdoing against the Plaintiffs who indemnified him – neither in this action now in the Ramirez Action where he is sued by the Plaintiff's for failing to maintain proper insurance.

(NYSCEF Doc. No. 70 at 1). Thus, the claim is dismissed.

It is hereby ORDERED that the motion to dismiss the CAC is granted to the extent that all causes of action are dismissed with the exception of the breach of contract claim (sixth cause of action); and it is further

ORDERED that the branch of the motion seeking to cancel the notice of pendency is granted; and it is further

ORDERED that the defendants shall serve a copy of this order on the Clerk of the Court.



12/1/2023
DATE

ANDREW BORROK, 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