Stang LLC v Hudson Sq. Hotel, LLC
2016 NY Slip Op 32434(U)
December 12, 2016
Supreme Court, New York County
Docket Number: 653600/15
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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STANG LLC, suing in its own capacity and in the name of and right of HUDSON SQUARE HOTEL, LLC, 489 SOUTHWEST CANAL ST., INC. and AVIHU GERAFI, suing in his individual capacity,

Plaintiffs,

-against- Index No. 653600/15

HUDSON SQUARE HOTEL, LLC, RAFI GIBLY, FOUR BOYS ONE GIRL, LLC, PAOLO MALDINI, BB MAX, LLC, CHRISTIAN VIERI, ROOM 45, LLC, ANDRIY SHEVCHENKO, FIVE BOYS ONE GIRL, ZINEDINE ZIDANE, Z DREAM LLC, JOEL BRAVER, HUDSON CANAL, LLC, FRED L. SEEMAN, EDWARD J. BRAVER, JR., AND BULLARD LAW GROUP PLLC A/KA BULLARD PLLC,

Defendants.

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SINGH, J.:

Plaintiff and nominal defendant Hudson Square Hotel, LLC (Hudson Square) was organized to serve as the investment entity controlling the development of a boutique luxury hotel on an undeveloped parcel of land bordering the SoHo and Tribeca neighborhoods of Manhattan. The idea to build a hotel came from defendant Rafi Gibly (Gibly), who was familiar with the vacant lot by virtue of his childhood friendship with plaintiff Avihu Gerafi (Gerafi), the lot's owner. Gibly agreed to find other investors to purchase portions of Hudson Square in order to bring the hotel

project to completion, while Gerafi would provide the land. In October 2013, Gerafi, through plaintiff 489 Southwest Canal St., Inc. (Southwest Canal), his wholly owned entity, conveyed the land to Hudson Square, in exchange for a substantial cash payment and a 30% interest in Hudson Square, which was vested in plaintiff Stang LLC (Stang), his wholly owned entity (the First Transaction). The four investors that Gibly brought to the project, defendants Paolo Maldini (Maldini), Christian Vieri (Vieri), Andriy Shevchenko (Shevchenko), and Zinedine Zidane (Zidane), each purchased 10% of Hudson Square through their own individual LLCs, and the members agreed to leave an unallocated 20% interest to allow for additional future investors.

After consulting with various architects, engineers and construction companies over the course of 2014, it became clear to the Hudson Square members that the hotel project would cost substantially more money than they initially anticipated, primarily due to the skyrocketing building costs and the plot of land's unique excavation and construction challenges. The members began to dispute, which ultimately resulted in the abandonment of the project, and the subsequent sale of Hudson Square to a third party, defendant Hudson Canal LLC (Hudson Canal), in late September 2013 (the Second Transaction).

Plaintiffs allege that the sale of the land was not authorized and was in

derogation of their rights. Specifically, plaintiffs allege that the other members had to complete $12 million in cash contributions to Hudson Square as a precondition to the sale, but that these contributions were never made. Plaintiffs commenced this action to recover title to the property, and for money damages.

Motion sequence nos. 005, 006, 007 and 008 are consolidated for disposition, and disposed of in accordance with this opinion.

In motion sequence no. 005, defendant Fred L. Seeman (Seeman) moves, pursuant to CPLR 3211 (a) (1), (3) and (7), for dismissal of the complaint as against him. Plaintiffs cross-move, pursuant to CPLR 3025 (b), for leave to serve an amended complaint.

In motion sequence no. 006, defendants Gibly, Maldini, Vieri, Shevchenko and Zidane (collectively, the individual defendants) move, pursuant to CPLR 3211 (a) (1), (3) and (7), for dismissal of the complaint as against them.

In motion sequence no. 007, defendants Four Boys One Girl, LLC (Four Boys), BB Max, LLC, Room 45, LLC, Five Boys One Girl, LLC and Z Dream, LLC (collectively, the LLC defendants) move, pursuant to CPLR 7501 and 7503, for an order dismissing or staying the complaint, and compelling Stang to arbitrate its claims against the LLC defendants.

In motion sequence no. 008, defendants Edward J. Bullard (Bullard) and

Bullard Law Group, PLLC (Bullard Law) (together, the Bullard defendants), move, pursuant to CPLR 3211 and 3212,for an order dismissing the complaint as against them.

For the reasons set forth below, the motions to dismiss are granted, and the cross motion to amend the complaint is denied.

Facts

In October 2004, Southwest Canal, an entity wholly owned by Gerafi, acquired the parcel of land located at 219/233 Hudson Street, a/ka 389/493 Canal Street, New York, NY (the Property) from 489 Canal Realty Corporation, an entity owned by Gerafi's father. At that time, New York City had filed tax liens against the Property over the prior nine years for Gerafi's father's unpaid real estate taxes, exceeding $100,000. By 2013, Southwest Canal had accumulated nearly $200,000 in property tax arrears (*see* Gibly aff, exhibit C). By late 2012, the Property was $170,068.41 in arrears (*see id.*). Without disclosing anything about this tax delinquency, Gerafi negotiated a potential joint real estate venture with Gibly, where Gibly would acquire the property from Southwest Canal, and obtain third-party investors to develop the Property (complaint, ¶¶ 43-45). After several months of negotiations, on February 4, 2013, Gibly and Southwest Canal entered into written letter of intent for a joint real estate venture (the LOI) (*see* Gibly aff, exhibit D).

Section 3 of the LOI, entitled "Equity Contributions to the Joint Venture," provides that:

> "In consideration of a seventy percent (70%) equity interest and [sic] the Joint Venture, Gibly shall provide sixteen million ($16,000,000) dollars on a date certain to be determined, but in no event to be beyond nine (9) months from the date hereof. Upon timely written confirmation by Gibly to 489 Southwest of the availability of the sixteen million ($16,000,000) dollars for deposit in the Joint Venture entity, 489 Southwest shall transfer/convey one hundred (100%) of the fee interest in 210 Hudson Street (Block: 594 Lot: 108). As of the date of such transfer, the subject premise shall be unencumbered by any liens, or claims, whatsoever. Such title must be conveyed by 489 Southwest to the Joint Venture in 'marketable' conditions as such term is generally defined by New York State Title companies. In exchange for contributing marketable fee title for 219 Hudson to the Joint Venture, 489 Southwest shall receive two million ($2,000,000) from Gibly as additional consideration for the conveyance of the subject property to the Joint Venture"

(*see* LOI, § 3 [a]).

After due diligence, Gibly discovered that, since 2008, Southwest Canal was embroiled in a lawsuit with the owners of 495 Canal Street, the neighboring parcel of real property (Gibly aff, ¶ 4). In that lawsuit, *489 Southwest Canal Street, Inc. v Stathis Enterprises and Celebrity Vision* (index No. 601279/2008), the owners of 495 Canal Street alleged that their building had encroached upon the Property for more than 10 years, and sought a decree awarding them title to that encroached-upon portion of the Property via adverse possession (*id.*, *see* exhibit D). Thus, this lawsuit

was a cloud on title that precluded Southwest Canal from conveying the Property in accordance with the LOI (*id.*).

In May 2013, Gibly also discovered, that due to the tax delinquency, Gerafi would be unable to deliver the Property unencumbered by any tax liens (*id.*, ¶ 5). Gibly learned that the Department of Finance had transmitted to Gerafi a notice that $177,784.72 in property tax arrears were due and owing. The February 22, 2013 statement warned that "[DOF] will sell a lien on your property unless you resolve the outstanding property tax and/or water sewer charges by May 17, 2013" (*see id.*, exhibit C).

Because the tax and title issues made it unlikely that Southwest Canal could sell the Property in accordance with the LOI, counsel for Southwest Canal and Hudson Square continued to negotiate the terms of the sale of the Property to Hudson Square, but on different terms. The complaint makes no mention of the LOI, and instead, alleges that, in February 2013, Gerafi and Gibly entered into a completely different, unwritten agreement, pursuant to which Gerafi would convey the Property to Hudson Square, and in exchange, Stang, Gerafi's wholly-owned company, would receive $2.5 million in cash, and a 30% membership interest in Hudson Square (complaint, ¶ 46). Thereafter, Gibly was to find other investors to contribute capital to complete the project (*id.*, ¶¶ 47-48).

In early March 2013, defendant Seeman, an attorney, was retained to create and act as corporate counsel to Hudson Square (Seeman aff, ¶¶ 5-6). During the spring and summer of 2013, Gibly found co-defendants Maldini, Vieri, Shevchenko and Zidane to invest in the project (complaint, ¶ 47). The complaint alleges that, at some unspecified time, Gibly "represented" to plaintiffs that the other individual defendants would provide the funds needed to fully develop the project, in exchange for membership interests in Hudson Square. Specifically, the other individual defendants were each "to make a cash contribution of $3 million on behalf or through" their respective companies (for a total of $12 million) in exchange for a 10% interest, each, in Hudson Square (*id.*, ¶¶ 49-52). The complaint further alleges that, at some unspecified time prior to the closing, plaintiff were "led to believe by Gibly" that the $12 million in "required capital contributions had been made" (*id.*, ¶ 57). Allegedly relying on these representations, on October 9, 2013, Gerafi caused Southwest Canal to convey the Property to Hudson Square (*id.*).

Following the conveyance and sometime during October 2013, the parties entered into the Agreement of Members of Hudson Square Hotel LLC Operating Agreement (the Operating Agreement) (*id.*, ¶ 55). Pursuant to the Operating Agreement, 70% of Hudson Square (after accounting for Stang's 30%) was divided such that each of the five investor LLCs owned 10% of Hudson Square, while the

remaining 20% was reserved to Hudson Square to allow for additional future investors (*see* Operating Agreement at 3 [Gibly aff, exhibit B]).

In addition to failing to mention the LOI, the complaint also fails to mention any of the transaction documents that Gerafi personally executed in connection with the First Transaction. These documents are contrary to the oral agreement that plaintiffs allege in the complaint. Specifically, on October 9, 2013, Gerafi personally attended the closing on the First Transaction. At the closing, Gerafi executed the contract of sale (the Contract of Sale) and accompanying rider (the Rider), the documents conveying the Property to Hudson Square for $2,500,000 and a 30% interest for Stang in Hudson Square. However, nothing in any of the transaction documents executed by Gerafi required the other members of Hudson Square to contribute $12 million as a precondition to the transfer of the Property by Southwest Canal, as alleged in the complaint. To the contrary, the Contract of Sale and accompanying Rider contain two merger clauses and disclaimers of prior or extrinsic representations, as well as an express representation that Gerafi had undertaken a "full investigation" as to all matters relevant to the transfer prior to the closing (*see* Gibly aff, exhibits I [Contract of Sale] and J [Rider]). These agreements provided that:

" all understandings and agreements heretofore had between the parties

> hereto are merged in this contract, which alone fully and completely expresses their agreement, and the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other"

(Contract of Sale, ¶ 24).

> " all understandings and agreements heretofore had between the parties hereto are hereby merged in this Contract, which alone fully and completely expresses their agreement, and that same is entered into after full investigation, neither party relying upon any statement or representations . . . not embodied in this Contract"

(Rider, ¶ 5)

> "This Contract constitutes the entire contract and agreement between the parties with respect to the transaction contemplated herein, and it supercedes all prior understandings, discussions or agreements between the parties"

(*id.*, ¶ 6).

Likewise, the Operating Agreement that Gerafi executed, admitting Stang as a new member of Hudson Square with a 30% equity interest, also does not mention that a $12 million capital contribution had been promised by any of the individual defendants to ensure that their interests vested (Gibly aff, ¶¶ 7, 9; *see also* Operating Agreement, § 2; Seeman aff, ¶ 8). Moreover, consistent with the Contract of Sale and Rider, the Operating Agreement contained a merger clause that states:

> "This Agreement merges and supersedes all prior understandings and oral or written agreements of the parties hereto with respect to the subject matter hereof, including the Operational Agreement written in the Minute/Meeting Book of [Hudson Square]. Therefore, the written

> terms and conditions so stated herein are all the terms and conditions of said Agreement"

(Operating Agreement, § 18).

The duties and powers of Hudson Square's members and managing members are delineated with specificity in the Operating Agreement. "Decisions by the Company" are governed by section 8 of the Operating Agreement. Section 8 (b) provides:

> "That unless otherwise stated in this Agreement a majority vote of Members is required for all decision making authority and power, major and/or minor, with respect to the Company and its employees, agents and independent contractors, including but not limited to hiring, firing, expenses, business allowances, promotion, advertising, marketing, contracts, policy and tasks"

(*id.*, § 8 [b]).

From 2013 through 2015, Hudson Square incurred substantial expenses in attempting to develop the Property. It hired architects and engineers who prepared building plans for the construction of a boutique hotel, submitted the plans to the Department of Buildings for approval, and hired third-party contractors to analyze the Property's soil (Gibly aff, ¶ 10; *see* exhibit K). Throughout this period, the Hudson Square members, apart from Gerafi, disbursed over $1.5 million toward the development of the Property. They advanced the funds necessary to pay such expenses, with the understanding that Gerafi would thereafter contribute his share of

the expenses in proportion to his 30% equity interest (*id.*, ¶ 10).

However, the cost of developing the Property substantially increased due to market conditions and potentially hazardous environmental conditions on the Property (*id.*, ¶ 11; *see also* Seeman aff, ¶ 9). After receiving an updated budget reflecting the increased overall cost, the LLC defendants prepared to make the necessary capital contributions, and contacted Gerafi to verify that he would contribute (*id.*, ¶ 12). After receiving no confirmation from him that Stang's capital contributions would be forthcoming, in December 2014, pursuant to section 13 of the Operating Agreement, Hudson Square sent to Stang and to each of the other LLC defendants a "Contribution Notice," requesting capital contributions from each of the members (*id.*; *see* exhibit L). Under each such Notice, each member's contribution was to be proportionate to its equity interest in Hudson Square (*see id.*).

Stang received the first such Notice on December 16, 2014. In that Notice, Stang was notified that it was obligated to provide a capital contribution of $8,165,000 based on its 30% equity interest in Hudson Square (*see id.*, exhibit L). Following Stang's receipt of that Notice, Gerafi became combative, and the relationship between Gerafi and the principals of the other Members became increasingly contentious (*id.*, ¶ 13; *see also* Seeman aff, ¶ 11).

Thereafter, Stang received a subsequent notice on February 4, 2015 (*see id.*,

exhibit L). Each other member received the same Notice, adjusted to reflect the proportional sum each was obligated to contribute based upon its equity interest.

During March 2015, the members, including Gibly and Gerafi, met privately in an attempt to amicably resolve the dispute surrounding the budget and capital contributions (Seeman aff, ¶ 11). Such meeting was unproductive. Thereafter, Stang further stonewalled Hudson Square's attempt to raise the capital contributions necessary to finance the development of the Property, which caused Hudson Square to have to circulate to each of its Members further Notices on March 31, May 13, July 2, and August 10 of 2015 (*see id.*). On each occasion, Stang demanded and received an extension of the deadline to make its required contribution (*see id.*).

On August 12, 2015, after Stang had refused to tender the required capital contribution in accordance with the numerous Notices it had received, Stang approached the other Members and offered to buy out all of the remaining equity interests in Hudson Square (70%) for the amount of $5.5 million, thus valuing Hudson Square and the Property at $7,857,143 (Gibly aff, ¶ 15; *see id.*, exhibit M; *see also* Seeman aff, ¶ 15). The other Hudson Square members rejected the offer as too low, and began investigating the possibility of selling the Property (Gibly aff, ¶ 16).

On September 16, 2015, Hudson Square transmitted a notice withdrawing the outstanding capital call:

> "In view of the continued difficulty of a member in meeting the outstanding call for capital contribution (cash call) and there having been repeated extensions of the deadline to meet said cash call, it has been determined now in the best interest of the Company to withdraw said outstanding call for Capital Contributions"

(*see id.*, exhibit L).

In September 2015, the LLC defendants exercised their rights, under section 8 (b) of the Operating Agreement, as a majority in interest of the members, to sell the Property to a third-party purchaser, Hudson Canal, for $13.25 million, nearly double the sum previously offered by Gerafi (*id.*, ¶ 17; Seeman aff, ¶ 16). In furtherance thereof, on September 18, 2015, each of the authorized representatives of the LLC defendants executed an Action by Written Consent (the Consent) (*see* Gibly aff, exhibit O). In September 17, 2015, defendant Bullard was substituted as counsel for Hudson Square in place of Seeman, and represented Hudson Square in the sale of the Premises to Hudson Canal (Seeman aff, ¶ 16). On September 21, 2015, the closing took place.

On October 29, 2015, plaintiffs filed a notice of pendency against the Premises, and instituted the present action. The complaint seeks relief with respect to the two transactions: (1) the October 9, 2013 conveyance of the Property by Southwest Canal to Hudson Square (defined as the First Transaction); and (2) the September 21, 2015 sale of the Property by Hudson Square to Hudson Canal (defined as the Second

Transaction).

The first cause of action relates only to the First Transaction. Plaintiffs allege that Gibly and Four Boys defrauded Southwest Canal into conveying the Property to Hudson Square, and seek $20 million in damages (complaint, ¶¶ 99-105). The remaining causes of action arise from the Second Transaction. The claims asserted are for breach of fiduciary duty and unjust enrichment against Gibly and Four Boys (second and third causes of action); unjust enrichment against the remaining defendants (fourth cause of action); fraud and aiding and abetting fraud as against all defendants (fifth cause of action); a declaration by this court that the sale of the Property to Hudson Canal is void, as against all defendants (sixth cause of action); the imposition of a constructive trust over the Property, as against all defendants except Hudson Square (seventh cause of action); an accounting as against Hudson Square, Gibly and Four Boys (eighth cause of action); and a preliminary and permanent injunction enjoining Hudson Canal from encumbering and/or alienating the Property (ninth cause of action).

The parties then filed the various motions to dismiss and the cross motion to amend the complaint. The only defendants who have not moved for dismissal are Hudson Canal, and Joel Braver, its principal.

Discussion

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence relied upon by the defendant must "'conclusively establish [] a defense to the asserted claims as a matter of law'" (*David v Hack*, 97 AD3d 437, 438 [1st Dept 2012], quoting *Leon*, 84 NY2d at 88]; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Construing the complaint in the generous matter to which it is entitled, this court nevertheless concludes that defendants' motions to dismiss must be granted, and the complaint almost entirely dismissed.

The Individual Defendants' Motion to Dismiss (Motion Sequence No. 007)

Fraud (First Cause of Action)

The first cause of action pleads fraud against Gibly and Four Boys arising out

of the First Transaction. Plaintiffs allege that Gibly duped Gerafi into conveying the Property from Southwest to Hudson Square, even though Gibly had not completed the most important precondition to the First Transaction: $12 million in capital contributions. Specifically, plaintiffs' $20 million fraud claim hinges on allegations, that, in February 2013, Gibly and Four Boys represented to plaintiffs that:

> "(a) all members of Hudson Square Hotel would contribute capital in accordance with their intended membership ownership interests, (b) the capital contribution of Stang, LLC, Gerafi and Southwest Canal Inc. to Hudson Square Hotel would primarily be an in kind contribution of the Property; and (c) the capital contributions of the other members would be cash contributions in accordance with their respective membership ownership percentages. These defendants further represented that the cash contributions raised would be sufficient to complete the Project"

(complaint, ¶ 100; *see also* ¶¶ 48-53, 88). Plaintiffs then allege that Gibly and Four Boys "knew" that their representations as to what would occur "were false when made" (*id.*, ¶ 103).

Plaintiffs further allege that, at some unspecified date prior to the October 9, 2013 sale of the Property, although he had not yet honored those promises, Gibly "led [plaintiffs] to believe" that the $12 million in capital contributions had been made by the individual defendants (*id.*, ¶ 57). The complaint does not allege what statements Gibly made that "led" plaintiffs to this belief. The complaint then alleges that "having been led to believe by Gibly that the required [$12 million] in contributions had in fact been completed, Gerafi, on behalf of Southwest Canal Inc., conveyed the

Property to [Hudson Square]" (*id.*, ¶ 57).

These allegations, however, are completely belied by documentary evidence, and fail to plead a viable fraud claim.

To recover for fraud, a party must show (1) a representation of a material fact; (2) the falsity of that representation; (3) knowledge that it was false when made; (4) justifiable reliance by the plaintiff; and (5) resulting injury (*see Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006]).

Here, the operative agreements in connection with the First Transaction – the Contract of Sale, Rider and Operating Agreement – each contain a merger clause which expressly states that it constitutes "the entire contract and agreement between the parties" (Rider, ¶ 6), and that neither party has relied on "any statement or representation, not embodied in this contract, made by the other" (Contract of Sale, ¶ 24). Such a provision makes the written document the "exclusive evidence of the parties' intent" (*Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 368 [1st Dept 1996]). Thus, a claim for fraud is barred where, as here, the party asserting the claim contractually agreed not to rely on the other party's extra-contractual representations (*Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985]; *Rodas v Manitaras*, 159 AD2d 341, 342-343 [1st Dept 1990]; *see e.g. Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959] [dismissing fraud claim where "plaintiff has in the plainest language

announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded"]; *Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 305 [1st Dept 2003] [cause of action for fraud properly dismissed by motion court where there was a merger clause disclaiming reliance on extrinsic representations]).

Plaintiffs' argument that the merger clause is general in nature and fails to disclaim any specific representations is without merit. In all the operative documents – the Contract of Sale, the Rider and Operating Agreement – plaintiffs expressly disclaimed any reliance on any extra-contractual representations. Thus, any claim that Southwest Canal relied upon a belief that $12 million in capital contributions had been, or would be, transferred, is belied by Gerafi's signature on the Contract of Sale, Rider and Operating Agreement. Accordingly, the fraud claim fails.

Notably absent from each agreement is any provision requiring the individual defendants to make any capital contributions as a precondition to the First Transaction, or any representation that they had made capital contributions. More importantly, rather than including any such provisions or representations, the Contract of Sale and Rider executed by Gerafi contained two disclaimers of extra-contractual representations that flatly contradict the allegation that there was any such agreement. The absence of any provision in the Contract of Sale and Rider requiring

any capital contributions as a precondition to Southwest Canal's transfer of the Property, coupled with the documents' express disclaimers of extra-contractual representations and Gerafi's representation therein that the sale was being effectuated following a "full investigation" by him (*see* Rider, ¶ 5), bar plaintiffs' fraud claim as a matter of law. Accordingly, the first cause of action must be dismissed.

Plaintiffs' fraud claim also fails as Gerafi fails to adequately allege justifiable reliance. Gerafi admits that he undertook no efforts to verify that the allegedly crucial $12 million in capital contributions were, in fact, made prior to the conveyance of the Property by Southwest Canal. A plaintiff cannot plead justifiable reliance where he has "'the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means'" (*Arfa v Zamir*, 76 AD3d 56, 59 [1st Dept 2010], *affd* 17NY3d 737 [2011] [citation omitted]; *see also Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 76 AD3d 310, 320 [1st Dept 2010], *affd* 18 NY3d 269 [2011]). This principle is fatal to the fraud claim because plaintiffs could have checked, at or prior to the First Transaction, whether the individual defendants had made their contributions. Instead, plaintiffs conceded that the first time they ever sought information concerning Hudson Square's finances was after the closing (complaint, ¶ 60). Because Southwest Canal could have, with minimal effort, verified that the capital contributions had been raised and deposited,

but failed to, it is legally barred from pleading justifiable reliance on any alleged representations by Gibly.

Breach of Fiduciary Duty, Constructive Trust, and An Accounting (Second, Seventh and Eighth Causes of Action)

In the second, seventh and eighth causes of action, plaintiffs allege claims for breach of fiduciary duty, imposition of a constructive trust and an accounting, all arising out of the Second Transaction. However, these claims must be dismissed because the individual defendants did not owe plaintiffs any fiduciary duty, and plaintiffs have also failed to plead all of the elements of a constructive trust and an accounting claim.

Claims for breach of fiduciary duty, constructive trust and accounting each require that the plaintiff identify a fiduciary duty among the defendants owed to the plaintiff (*see Williams v Eason*, 49 AD3d 866, 869 [2d Dept 2008]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 798 [2d Dept 2011]; *Raske v Next Mgt., LLC*, 40 Misc 3d 1234[A], 2013 NY Slip Op 51514[U], *8 [Sup Ct, NY County 2013]). The sole allegation in the complaint as to the existence of a fiduciary duty is that "[a]ll of the members of [Hudson Square] had a fiduciary relationship among each of them, especially duties of loyalty and honesty" (complaint, ¶ 107]). There are no allegations in the complaint specifying what, if any, fiduciary duties were owed by any of the individual defendants. The individual defendants are not members of

Hudson Square – only Stang and the LLC defendants are. Thus, they owe no fiduciary duty to Stang. As such, the claims for breach of fiduciary duty, constructive trust and an accounting must be dismissed. In opposition, plaintiffs contend that the accounting and breach of fiduciary duty claims are viable because under the terms of the LOI, Gibly and Gerafi were co-venturers, and thus owed each other a fiduciary duty (opposition memorandum at 31). The court rejects this argument, as the LOI was abrogated in favor of a completely different deal, represented by the Operating Agreement. Further, Gerafi completely omits any mention of the LOI from all of his pleadings. As such, Gibly and Gerafi were not co-venturers and did not owe each other fiduciary duties.

Plaintiffs also contend that, with respect to the constructive trust cause of action, the complaint adequately pleaded a confidential relationship between the individual defendants and plaintiffs, based on the allegations that the individual defendants "represented" that development capital had been contributed prior to the closing (opposition memorandum at 33). Plaintiffs characterize this representation as a "promise," and argue that because Southwest Canal transferred the Property in reliance on this promise, the constructive trust claim is viable.

However, there is no merit to plaintiffs' assertion that a "confidential relationship" existed between plaintiffs and the individual defendants because of a

"promise" or a "representation" that capital contributions had been made. To the contrary, a confidential relationship does not exist where the parties are transacting business at arms length (*see Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]; *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). Moreover, the element of a "promise" is separate from that of a confidential relationship (*see Delgado v Oldenburg*, 30 Misc 3d 1219[A], 2011 NY Slip Op 50129[U], * 5 [Sup Ct, Suffolk County 2011]). Absent independent allegations showing how the element of a confidential relationship is satisfied, plaintiffs' claim fails.

Accordingly, the causes of action for breach of fiduciary duty, accounting and the imposition of a constructive trust must be dismissed.

Unjust Enrichment (Third Cause of Action and Fourth Causes of Action)

In the third and fourth causes of action for unjust enrichment, plaintiffs allege that the individual defendants "have been enriched at the expense of" plaintiffs (complaint, ¶¶ 113, 119). However, these causes of action must be dismissed as they are impermissible catchall claims that are duplicative of the complaint's fraud claims.

A claim for unjust enrichment is barred where used as a catchall cause of action when others fail (*see Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790-791 [2012]). Unjust enrichment is only available in unusual situations when, though the defendant

has not breached a contract or committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff (*id.*). Importantly, an unjust enrichment claim is not available where, as here, it simply duplicates, or replaces, a conventional contract or tort claim (*id.*).

Plaintiffs' allegations of wrongdoing by any of the individual defendants with respect to the First Transaction are only that Gibly committed "fraud" by not making good on promises to make capital contributions to Hudson Square in exchange for Southwest Canal's conveyance of the Property. The unjust enrichment claim is barred as completely duplicative of the failed fraud claim (*see Starlite Media LLC v Pope*, 2014 WL 1456965, *3, 2014 NY Misc LEXIS 1771, *8 [Sup Ct, NY County 2014], *affd* 128 AD3d 498 [1st Dept 2015] [dismissing plaintiff's unjust enrichment claim as duplicative, holding that "while dressed as an unjust enrichment cause of action, is, in fact, a restatement of [p]laintiff's fraud claim"]).

In addition, the unjust enrichment claim is barred because all of these transactions are governed by contracts, like the Contract of Sale and the Operating Agreement (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296

[1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]).

Accordingly, the third and fourth causes of action for unjust enrichment are dismissed.

Aiding and Abetting Fraud (Fifth Cause of Action)

The complaint alleges that the "[d]efendants . . . each aided and abetted the above-described fraud against plaintiffs" (complaint, ¶ 124). The complaint also conclusorily alleges that "[d]efendants" had actual knowledge of "this fraud," and that they were providing substantial assistance in carrying out "this fraud," (*id.*, ¶¶ 126-127).

A claim for aiding and abetting fraud must allege the existence of the underlying fraud, actual knowledge, and substantial assistance (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). The only fraud suggested by the allegations of the complaint that precedes the fifth cause of action are the allegations of fraud in the first cause of action for fraud against Gibly and Four Boys, arising out of the First Transaction. However, that fraud claim is barred by documentary evidence, and fails to state a claim. Because plaintiffs cannot demonstrate the existence of an underlying fraud, plaintiffs cannot plead the first element required to state a cause of action for

aiding and abetting fraud (*see id.*). Accordingly, the fifth cause of action for aiding and abetting fraud must be dismissed as against the individual defendants.

Declaration that Sale of the Property to Hudson Canal is Void (Sixth Cause of Action)

In the sixth cause of action, plaintiffs allege that "[t]here is a justiciable controversy between Plaintiffs and Defendants [as] to whether, inter alia, title to the Property was legally and properly conveyed by Hudson Square Hotel to Hudson Canal LLC," and that "[b]y virtue of the foregoing, plaintiffs are entitled to judgment declaring that the sale of the Property is void" (complaint, ¶¶ 134-135).

However, this claim must be dismissed as against the individual defendants because the individual defendants were not parties to the Second Transaction. The LLC defendants effectuated the Second Transaction, not the individual defendants. Because these defendants played no role in their individual capacities, plaintiffs are not entitled to a declaration that the Second Transaction was void as against them. Accordingly, the sixth cause of action must be dismissed as against the individual defendants.

Seeman's Motion to Dismiss (Motion Sequence No. 005)

Seeman acted as counsel for Hudson Square in the First Transaction, but never represented any of the other defendants (*see* Seeman aff, ¶ 5). Plaintiffs allege one

cause of action against Seeman, for aiding and abetting fraud (fifth cause of action). Specifically, plaintiffs allege that Seeman aided and abetted the alleged fraud perpetrated by Gibly and the other investors by: (1) intentionally delaying the production of Hudson Square's books and records to Gerafi; (2) failing to disclose Hudson Canal's $13.25 million purchase offer until after the sale had occurred; and (3) failing to disclose that Bullard had been retained to represent Hudson Square (complaint, ¶ 129).

As a threshold matter, the non-Hudson Square plaintiffs lack standing to bring this action derivatively on behalf of Hudson Square because Hudson Square did not suffer any alleged harm. As set forth below, since Seeman owed no fiduciary duties to Stang, Southwest Canal or Gerafi, the only plaintiffs who would receive the benefit of any recovery, this action must be dismissed as against Seeman.

In general, "[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 AD3d 108, 113 [1st Dept 2012]). In analyzing whether a plaintiff's claim is truly direct or derivative, courts "examine the nature of the wrongs alleged in the complaint, and not . . . the Plaintiffs' stated intention and characterization of their claims" (*Weber v King*, 110 F Supp 2d 124, 132, n 10 [ED NY 2000]).

In *Yudell v Gilbert*, the First Department held that "a court should consider '(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)'" (*Yudell*, 99 AD3d at 114 [citation omitted]). The First Department has also extended *Yudell's* holding to limited liability corporations (*see Scott v Pro Mgt. Servs. Group*, 124 AD3d 454, 454 [1st Dept 2015]).

In applying this test to the instant matter, it is clear that plaintiff's claims are direct only. A reading of the complaint demonstrates that Stang and Gerafi allege to have been damaged when the Premises was sold "well below market value" (complaint, ¶¶ 94, 97), without their knowledge or authorization (*id.*, ¶¶ 74-97). In fact, the complaint admits that the alleged harm was suffered by Stang and Gerafi only (*see id.*, ¶ 81 ["[t]he sale, which was held abruptly and without the prior knowledge of Stang and its sole member, Gerafi, was designed to defraud Stang LLC and Gerafi, which via their wholly owned affiliate, plaintiff [Southwest Canal], had supplied virtually all of the capital to [Hudson Square]; ¶ 89 [[u]pon information and belief, the $13,250,000.00 proceeds of the sale of Property are to be divided among the six members of [Hudson Square . . . If [Stang] is to receive only one-sixth share of those proceeds or approximately $2,473,599.47, Stang and Gerafi will have been

defrauded by at last $20,000,000 and likely far more"]).

Furthermore, it is clear that plaintiffs' claims are non-derivative because only the non-Hudson Square plaintiffs will benefit from any recovery. Indeed, the true nature of the recovery sought by plaintiffs is monetary damages which will compensate only the non-Hudson Square plaintiffs. None of the causes of action in the complaint purport to seek recovery of any damages on behalf of Hudson Square, only on behalf of Stang, Southwest Canal and Gerafi (*see* complaint, ¶ 105 ["[b]y virtue of the foregoing, [Stang], Gerafi and [Southwest Canal] have been damaged and are entitled to recover at least the sum of Twenty Million Dollars ($20,000,000), plus additional damages as may be proven at trial"; *see also id.*, ad damnum clause).

Therefore, plaintiffs' claims are direct, and the non-Hudson Square plaintiffs lack standing to sue on behalf of Hudson Square (*see Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 638-639 [1st Dept 2013]). Seeman may only properly be sued for claims arising out of the underlying transactions by Hudson Square in a derivative action. Since this not a legitimate derivative action, the claims as against Seeman must be dismissed.

Moreover, even if this were a legitimate derivative action, plaintiffs have failed to state a cause of action against Seeman for aiding and abetting fraud. First, as previously discussed, because plaintiffs cannot demonstrate the existence of an

underlying fraud, plaintiffs cannot plead the first element required to state a cause of action for aiding and abetting fraud (*see Oster*, 77 AD3d at 55). Accordingly, the fifth cause of action for aiding and abetting fraud must be dismissed as against Seeman.

Second, substantial assistance, another key element of a claim for aiding and abetting fraud, only exists "'where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated'" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [citation omitted]; *see also Fraternity Fund Ltd. v Beacon Hill Asset Mgt., LLC*, 479 F Supp 2d 349, 370 [SD NY 2007]).

When a plaintiff claims that an alleged aider and abettor failed to act, this "'mere inaction . . . constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff'" (*Pomerance v McGrath*, 124 AD3d 481, 484-485 [1st Dept 2015] [citation omitted]).

It is axiomatic in New York State that a business entity's attorney strictly represents the entity, rather than the owners, members, shareholders or employees of the entity (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562

[2009], *affd* 87 NY2d 826 [1995]; *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 149 [1st Dept 1994]). Thus, an attorney's "representation of [a] limited partnership, without more, [does] not give rise to a fiduciary duty to the limited partners" (*Eurycleia Partners, LP*, 12 NY3d at 561; *see also Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 [1st Dept 2004]). In a recent case, this court has extended the Court of Appeals' holding in *Eurycleia Partners, LP* to limited liability companies (*see Magder v Lee*, 2015 WL 7625828, *9; 2015 NY Misc LEXIS 4331, *27-28 [Sup Ct, NY County 2015] ["[b]y the same reasoning, here, the representation of a limited liability company, 'without more, [does] not give rise to a fiduciary duty to [its members]'"] [citation omitted]).

The aiding and abetting fraud claim against Seeman fails because plaintiffs have failed to adequately plead that Seeman assisted in the alleged fraud, in that Seeman owed no fiduciary duties to the non-Hudson Square plaintiffs. Each of the three allegations comprising plaintiffs' sole cause of action against Seeman for aiding and abetting fraud amount to a failure to act, rather than affirmative assistance of the alleged fraud (*see* amended complaint, ¶ 129 ["Seeman intentionally delayed the production of the books and records"; "Seeman failed to disclose to plaintiffs that there was an 'offer' by Hudson Canal"; and "Seeman failed to disclose that [Hudson Square] had retained" Bullard]).

Plaintiffs do not dispute that Seeman represented Hudson Square, but did not represent Stang, Southwest Canal or Gerafi. Consequently, Seeman owed no fiduciary duties to the non-Hudson Square plaintiffs, and the fifth cause of action must be dismissed as against him.

The Bullard Defendants' Motion to Dismiss and for Summary Judgment (Motion Sequence No. 008)

Given that the Bullard defendants have answered the complaint, they move both for dismissal of the complaint pursuant to CPLR 3211, as well as for summary judgment.

Plaintiffs assert one cause of action as against the Bullard defendants. In the fifth cause of action, for aiding and abetting fraud, plaintiffs allege that Bullard concealed from plaintiffs material information regarding the sale of the Premises, failed to disclose to plaintiffs that Hudson Canal had made an offer to purchase the Premises until one month after the sale, and knew that defendant Paolo Maldini was not authorized to sign the contract of sale or effectuate the sale (complaint, ¶ 130).

As previously discussed, this cause of action is insufficient as against the Bullard defendants because Stang lacks standing to bring a derivative claim on behalf of Hudson Square (*see Yudell*, 99 AD3d at 113-114). Moreover, because plaintiffs cannot demonstrate the existence of an underlying fraud, plaintiffs cannot plead the first element required to state a cause of action for aiding and abetting fraud.

Accordingly, the fifth cause of action for aiding and abetting fraud must be dismissed on these grounds alone as against the Bullard defendants.

In addition, the Bullard defendants were retained only to represent Hudson Square in the sale of the Property to Hudson Canal in the Second Transaction. The provision of routine legal services, like the services that the Bullard defendants provided here in connection with the sale of the Property, does not constitute aiding and abetting fraud as a matter of law (*see Learning Annex, L.P. v Blank Rome LLP*, 106 AD3d 663, 663 [1st Dept 2013]).

The LCC Defendants' Motion to Compel Arbitration (Motion Sequence No. 007)

The LLC defendants move to compel arbitration, on the ground that section 18 of the Operating Agreement contains an arbitration clause that requires arbitration of this dispute. Section 18 of the Operating Agreement, which is between Stang and the LLC defendants, provides:

> "That should any dispute arise amongst or between the shareholders regarding any provision or duties stated within said Agreement, and should any dispute not be resolved amicably between the parties, then the shareholders agree to resolve said dispute by submitting said dispute to binding arbitration with National Arbitration and Mediation (NAM)"

(Operating Agreement, § 18).

New York law dictates that because "[a] written agreement to submit any controversy . . . to arbitration is enforceable," the court "shall direct the parties to arbitrate" when "there is no substantial question whether a valid [arbitration] agreement was made" (CPLR 7501, 7503 [a]). It must be "evident from the totality of circumstances that the parties intended to be bound by documents containing arbitration obligations" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 370 [2005]). The determination "must be supported by evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes" (*Schubtex, Inc. v Allen Snyder, Inc.*, 49 NY2d 1, 6 [1979]).

It well settled that arbitration is a favored method of dispute resolution in New York, and that New York courts will "'interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration'" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007] [citation omitted]; *Board of Educ. of Bloomfield Cent. School Dist. v Christa Constr.*, 80 NY2d 1031, 1032 [1992]). Accordingly, any doubts regarding the scope of arbitrable issues are resolved in favor of arbitration (*State of New York v Phillip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006], *affd* 8 NY3d 574 [2007]).

Where a party to a civil action seeks to compel arbitration, the court must determine only "'whether parties have agreed to submit their disputes to arbitration

and, if so, whether the disputes generally come within the scope of their arbitration agreement'" (*id.*, quoting *Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 999 [1986]; *accord State of New York v Phillip Morris, Inc.*, 30 AD3d at 31). The court's "inquiry ends [once] the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate" (*Sisters of St. John*, 67 NY2d at 999). Thus, if both inquiries are answered in the affirmative, the court must compel arbitration (*see id.*).

Here, both inquiries must be answered in the affirmative, and accordingly, the court must compel arbitration and stay this proceeding as against the LLC defendants, pending the outcome of the arbitration.

With respect to the first prong of the test, it is clear that Stang agreed to arbitration. Stang executed the Operating Agreement knowingly and with awareness of the existence of this broadly worded arbitration provision mandating arbitration of all claims regarding "any provision or duties" set forth in the Operating Agreement. Accordingly, Stang is bound to its contractually assented-to commitment to arbitrate any dispute among Hudson Square's members arising with respect to "any provisions or duties" therein stated (*see Gold v Deutsche Aktiengesellschaft*, 365 F 3d 144 [2d Cir 2004]).

With respect to the second prong, the claims here fall squarely within the scope of the Operating Agreement's arbitration provision. The essence of the complaint's allegations is based upon conduct by the LLC defendants, during Hudson Square's ownership of the Property, that allegedly violated various provisions of the Operating Agreement, and the duties of the Members arising thereunder, including in connection with the sale of the Property to Hudson Canal, without having provided notice to, or obtaining consent from, Stang.

Accordingly, pursuant to the plain terms of the Operating Agreement, it is clear that all of Stang's claims against the LLC defendants must be compelled to proceed to arbitration. All of the claims in the complaint are arbitrable on the grounds that all such claims relate to provisions or duties set forth in the Operating Agreement that plaintiffs claim have been violated by the Second Transaction.

Plaintiffs do not dispute that Stang is bound by the arbitration clause in the Operating Agreement. Rather, plaintiffs argue that the claim is not arbitrable because "any reasonable investor would have expected a court not arbitrators" to decide whether the LLC defendants "have the right to abrogate the sole purpose of Hudson Square" by selling the Property without Stang's consent (opposition memorandum at 6). Plaintiffs maintain that the sale of the Property was in contravention of the purpose recital on the first page of the Operating Agreement. Plaintiffs also contend

that the sale to Hudson Canal required Stang's consent under section 18 of the Operating Agreement, and that the sale violated section 18. Whether the argument is framed as a dispute about "abrogating the purpose clause," or whether the LLC defendants were authorized to convey the property to Hudson Canal, at issue is whether the sale violated any of the "provisions or duties" contained in the Operating Agreement. The arbitration clause mandates that the parties arbitrate "any dispute" ... "regarding any provisions or duties stated with said Agreement." Accordingly, the dispute between the parties falls squarely within the scope of the broadly worded arbitration clause. Therefore, the parties must be compelled to proceed to arbitration (*see Boz Export & Import, Inc. v Karakus*, 32 Misc 3d 1242[A], 2011 NY Slip Op 51685[U], *4-5 [Sup Ct, Kings County 2011] [finding that "[c]ertainly all issues and claims, raised in plaintiffs' complaint, relating to defendants' performance of his duties . . . and his alleged breaches of duty to plaintiffs, are within the parameters of the broad arbitration clause of the Agreement"]; *see also National Arbitration & Mediation, Inc. v Olsen*, 2011 WL 1527177, 2011 NY Misc LEXIS 1792, *25 [Sup Ct, Nassau County 2011]).

Next, plaintiffs' contend that there is a question whether the LLC defendants ever made their required capital contributions, depriving them of their membership status, including their right to invoke the Operating Agreement's arbitration clause.

However, plaintiffs' contention that the LLC defendants were obligated to make capital contributions as a precondition to the vesting of their rights as members of Hudson Square is flatly contradicted by well settled law as well as the Operating Agreement. Plaintiffs concede – as they must – that New York's Limited Liability Company Law does not place any preconditions to the vesting of the rights of a member of a limited liability company (*see* opposition memorandum at 8). Rather, as the cases cited by plaintiffs demonstrate, any limitations on the rights of members must be contained in an operating agreement to be enforceable (*see Matter of KSI Rockville v Eichengrum*, 305 AD2d 681, 682-683 [2d Dept 2003] [where operating agreement itself mandated that capital contributions be made in cash as a prerequisite to receiving distributions, court held that because managing member had failed to make his capital contributions to the limited liability company in the manner expressly required by the operating agreement, he was precluded from participating in the distribution of its assets upon dissolution]).

Here, in contrast, there is no provision in the Operating Agreement that makes any mention of any obligation to remit capital contributions. Indeed, the plain terms of the Operating Agreement confirm that Stang and the LLC defendants are members of Hudson Square. Specifically, the first paragraph states that "the Members are the

owners of the equity interests of the Company listed in Exhibit A." Exhibit A, captioned "EQUITY MEMBERS AND EQUITY PERCENTAGE INTEREST," in turn, reflect that the membership of Hudson Square, as of the date upon which the Operating Agreement was executed, consisted of: "Four Boys One Girl, LLC"; "BB Max, LLC"; "Room 45, LLC"; "Five Boys One Girl, LLC"; "Z Dream, LLC"; and "Stang, LLC" (Operating Agreement, at 11).

Likewise, paragraph two of the Operating Agreement provides that "[t]he Members of the Company shall be those persons who have signed this Agreement and are admitted as a Member of the Company as reflected in the records of the Company" (*id.* at 3). A review of the signature page reveals that it is the LLC defendants who executed, and accordingly are parties to, the Operating Agreement (*id.* at 10).

Nothing in any of the Operating Agreement's provisions requires that the members make any capital contributions as a precondition to either their membership in the Company, or the vesting of their rights as members. Accordingly, it is clear that the LLC defendants have standing to invoke the arbitration clause of the Operating Agreement.

CPLR 7503 (a) states that if a motion to compel arbitration is granted, the order compelling arbitration "shall operate to stay a pending or subsequent action" (*see e.g.*

PromoFone, Inc. v PCC Mgt., 224 AD2d 259, 260 [1st Dept 1996] [affirming stay of action pending arbitration]). Consequently, Stang's causes of action against the LLC defendants in this action are stayed, pending arbitration.

Plaintiffs' Cross Motion to Amend the Complaint

On April 25, 2016, in opposition to Seeman's motion to dismiss, plaintiffs filed a cross motion to amend the complaint, to which the proposed amended complaint was attached.

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." As a general proposition, leave to amend pleadings "should be freely granted" (*RBP of 400 W. 42 St., Inc. v 400 W. 42nd St. Realty Assoc.*, 27 AD3d 250, 250 [1st Dept 2006]), although the court retains the sound discretion over whether to permit the amendment (*see Pellegrino v New York City Transit Auth.*, 177 AD2d 554, 557 [2d Dept 1991]). When the court is presented with a motion to amend the pleadings, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]).

On a motion for leave to amend, plaintiff must establish "that the proffered

amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see also Perotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498-499 [1st Dept 2011]). A motion for leave to amend in response to a motion to dismiss the complaint is "futile" and should be denied where "the defects [in the complaint] are [not] cured by the proposed . . . amended complaint" (*see Meimeteas v Carter Ledyard & Millburn LLP*, 105 AD3d 643, 643 [1st Dept 2013], and/or the proposed amendment "suffers from the same fatal deficiency as the original claims" (*see "J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 [1st Dept 2005]; *CARI, LLC v 415 Greenwich Fee Owner, LLC*, 91 AD3d 583, 583 [1st Dept 2012]; *Pearl Cash, LLC v EMD Produce Corp.*, 2013 WL 3389349, *4, 2013 NY Misc LEXIS 2839, *7 ("[i]f the proposed amended complaint contains the same defects as the original complaint, leave should be denied as futile"]).

Plaintiffs contend that the proposed amended complaint addresses all of the problems inherent in the original complaint. However, plaintiffs' proposed amended complaint does nothing to remedy the pleading deficiencies in the complaint, and save the existing causes of action from dismissal. Thus, because the proposed amendments are legally insufficient, plaintiff's cross motion for leave to amend is futile, and must be denied (*see Carol v Madison Plaza Assoc., LLC*, 95 AD3d 735 [1st

Dept 2012]).

With respect to the individual defendants and the LLC defendants, the changes in the proposed amended complaint are as follows. The first cause of action for fraud against Gibly and Four Boys is now the proposed seventh cause of action for fraud, brought by all plaintiffs. The second cause of action against Gibly and Four Boys for breach of fiduciary duty has been withdrawn against Gibly and Four Boys, and is now asserted by Stang only against the LLC defendants. The third and fourth causes of action against the individual defendants and the LLC defendants for unjust enrichment are reasserted as the proposed fifth cause of action for unjust enrichment, brought derivatively on behalf of Hudson Square, and the proposed thirteenth cause of action for unjust enrichment, brought directly by all plaintiffs. The fifth cause of action for aiding and abetting fraud is reasserted as the proposed eleventh cause of action for aiding and abetting fraud by all plaintiffs against all individual and LLC defendants, except Gibly and Four Boys. The sixth cause of action for a declaratory judgment is now reasserted as the proposed first (brought derivatively by Hudson Square) and fourteenth (brought individually by all plaintiffs) causes of action for a declaratory judgment. The seventh cause of action for a constructive trust is now reasserted as the proposed second (brought derivatively by Hudson Square) and fifteenth (brought individually by all plaintiffs) causes of action for a constructive

trust. The eighth cause of action for an accounting against Hudson Square and Gibly is now reasserted as the proposed sixteenth cause of action brought by Stang against Hudson Square, and all of the individual and LLC defendants, except Gibly and Four Boys.

With respect to Seeman, the fifth cause of action for aiding and abetting fraud is replaced by three new causes of action: (1) breach of fiduciary duty asserted derivatively by Hudson Square (the proposed third cause of action); (2) breach of fiduciary duty asserted individually by Stang (the proposed ninth cause of action) and (3) aiding and abetting the Hudson Square members' breach of fiduciary duties, asserted individually by Stang (the proposed twelfth cause of action).

As relating to the Bullard defendants, the fifth cause of action for aiding and abetting fraud is replaced by the proposed fourth (brought derivatively by Hudson Square) and tenth (brought individually by Stang) causes of action for breach of fiduciary duty owed to Hudson Square, and the proposed twelfth cause of action for aiding and abetting breach of fiduciary duty.

With respect to Hudson Canal, the ninth cause of action for a preliminary and permanent injunction enjoining Hudson Canal from encumbering and/or alienating the Property has been reasserted as the proposed sixth (brought derivatively) and seventeenth (brought individually) causes of action for a preliminary and permanent

injunction.

Additionally, the proposed eighteenth cause of action is a catch-all "equitable relief" claim that seeks a complete unwinding of both of the transactions, and a return of the Property to Southwest Canal.

Plaintiffs add no significant new allegations with respect to their proposed causes of action for breach of fiduciary duty, unjust enrichment, aiding and abetting fraud, declaratory judgment, constructive trust and an accounting. Because those causes of action were insufficient to withstand the motion to dismiss, plaintiffs' cross motion for leave to amend with respect to those causes of action is futile, and must be denied.

New Causes of Action Against Seeman and the Bullard Defendants

The proposed new causes of action against Seeman and the Bullard defendants also fail to remedy the defects in the original complaint. The proposed ninth and tenth causes of action for breach of fiduciary duty, brought individually by Stang, are palpably insufficient, because Seeman and the Bullard defendants, as counsel only to Hudson Square, owed no fiduciary duty to Stang (*see Eurycleia Partners, LP*, 12 NY3d 553 at 562; *Magder*, 2015 WL 7625828, 2015 NY Misc LEXIS 4331).

The proposed third and fourth causes of action, brought derivatively by Stang on behalf of Hudson Square, seek redress for breach of fiduciary duties owed by

Seeman and the Bullard defendants to Hudson Square. These proposed causes of action are also insufficient as a matter of law because, as previously discussed, Stang lacks standing to bring a derivative claim on behalf of Hudson Square (*see Yudell*, 99 AD3d at 113-114).

Plaintiffs' proposed twelfth cause of action for aiding and abetting a breach of fiduciary duty is also palpably insufficient, as plaintiffs have failed to establish an underlying breach of fiduciary duty claim (*see Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1st Dept 2008] ["[b]ecause the breach of fiduciary duty claim fails, there can be no cause of action for aiding and abetting breach of that fiduciary duty"]).

New Allegations Against the Individual Defendants

Plaintiffs' inclusion of additional factual allegations in the proposed seventh cause of action fail to remedy the pleading deficiencies raised by defendants' motion to dismiss. Gerafi now alleges that (1) he asked Gibly for proof that $16 million in capital contributions were made to Hudson Square within days of the closing, but never received it (Gerafi opposition aff, ¶ 13); (2) he also asked his lawyer to confirm, six weeks before the closing, the "availability of $9,000,000," and his lawyer never received such confirmation (*id.*); and (3) Gibly and his lawyer, prior to closing, allegedly "thwarted" and "frustrated" plaintiffs' due diligence efforts to obtain proof

of this representation (opposition brief at 14).

Despite these new allegations, the original bases for the dismissal of this claim remains – (1) the various merger clauses (*see V02Max, LLC v Greenhouse Intl. LLC*, 2008 WL 4461402, *6, 2008 NY Misc LEXIS 10182, *12 [Sup Ct, NY County 2008] [dismissing fraud claim seeking rescission of an agreement, and alleging misrepresentations by the seller concerning material facts about the patent and that diligence was frustrated, where plaintiff entered into agreement which "contained no representations and warranties about the matters it claims were material" and "contains a merger clause that states it is the entire agreement and that it, 'supersedes' any prior understanding and agreements, oral or written, between such parties, regarding the subject matter hereof "]); and (2) plaintiffs' inability to demonstrate justifiable reliance. Thus, the proposed fraud claim is palpably insufficient.

Indeed, the fact that Gerafi closed on the First Transaction without obtaining the documents or any of the protections he supposedly sought completely belies any claim that plaintiffs reasonably relied on any oral representations by Gibly that capital contributions had been completed. If anything, such allegations provide the basis for a further need by Gerafi and his attorney to undertake further inquiry, and not to blindly rely on such representations in the absence of proof.

Rodas v Manitaras (159 AD2d 341 [1st Dept 1990]) is directly on point. There, the plaintiffs sought rescission of a sale and lease agreement for a restaurant business on the grounds that defendants falsely represented that the weekly income of the business was $20,000, and that the false representation induced them to enter into the contract. There, as plaintiffs allege here, the plaintiffs allegedly requested proof that the representations were true, and their efforts to obtain such information were allegedly thwarted. The Court dismissed the claim, holding:

> "It is apparent that they were aware that the income of the business was a material fact in [sic] which they had received no documentation. In entering into the contract with the assistance of counsel and without conducting an examination of the books and records, plaintiff clearly assumed the risk that the documentation might not support the $20,000 weekly income that was represented to them. Plaintiffs could have easily protected themselves by insisting on an examination of the books as a condition of closing. Alternatively, the contract could have included a condition subsequent that the sale would be rescinded if the actual sales experienced were significantly less than the represented figure"

(*id.* at 342-343; *see also Katzrin Fin. Group, LLC v Arcapex LLC*, 2015 WL 6391092, *4,5, 2015 NY Misc LEXIS 3827, *13-14, 16 [Sup Ct, NY County 2015] [dismissing fraud claim that "partially hinged on the allegation that the defendants failed to disclose financial information necessary to determine the value of plaintiff's investment," where "[p]laintiffs knew that defendants had not supplied them with the financial information to which they were entitled, triggering 'a heightened degree of

diligence'"] [citation omitted]).

Likewise, here, plaintiffs had the option of insisting on an examination of Hudson Square's books and records as a condition of closing, or refusing to close until they had an opportunity to review such documents, and verify that the representations were true. Instead, they did nothing, and closed on the transaction as is, despite the alleged repeated frustration of plaintiffs' due diligence efforts.

New Cause of Action Against All Defendants

The proposed amended complaint contains an eighteenth cause of action, pleaded "in the alternative," seeking "equitable relief" under Article 6 of the New York State Constitution. The gravamen of this cause of action is a generalized allegation that the court should void both transactions, and return the Property to Southwest Canal. However, a catch-all cause of action which is devoid of a cognizable legal theory is barred as a matter of law (*see 1768-68 Assoc., L.P. v City of New York*, 2010 WL 4167243, 2010 NY Misc LEXIS 5061, *11 [Sup Ct, NY County 2010], *affd* 91 AD3d 519 [1st Dept 2010]). Consequently, this proposed cause of action patently lacks merit, and the cross motion to amend is denied as to this claim.

Causes of Action Against Hudson Canal

Although the proposed sixth and seventeen causes of action for a preliminary

and a permanent injunction cannot be deemed palpably insufficient, the motion for leave to amend to add these causes of action is denied, given that they are essentially the same as the ninth cause of action in the original complaint, and given the fact that the remainder of the proposed amended complaint is being denied as futile.

Accordingly, the motions to dismiss brought by Seeman, the individual defendants and the Bullard defendants (motion sequence nos. 005, 006 and 008) are all granted. The motion to compel arbitration brought by the LLC defendants (motion sequence no. 007) is also granted. Plaintiffs' cross motion for leave to serve an amended complaint (motion sequence no. 005) is denied. The only cause of action remaining in the complaint is the ninth cause of action for a preliminary and permanent injunction, brought against Hudson Square and Braver.

The court has considered the remaining claims, and finds that they are either moot, or without merit.

Accordingly, it is

ORDERED that the motion of defendant Fred L. Seeman to dismiss the complaint herein (motion sequence no. 005) is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that plaintiffs' cross motion for leave to amend the complaint (motion sequence no. 005) is denied; and it is further

ORDERED that the motion of defendants Rafi Gibly, Paolo Maldini, Christian Vieri, Andriy Shevchenko, and Zinedine Zidane to dismiss the complaint herein (motion sequence no. 006) is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants Edward J. Bullard and Bullard Law Group, PLLC to dismiss the complaint herein (motion sequence no. 007) is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants Four Boys One Girl, LLC, BB Max, LLC, Room 45, LLC, Five Boys One Girl, LLC and Z Dream, LLC to compel arbitration and to stay this action (motion sequence no. 008) is granted, and all proceedings in this action are hereby stayed as against said defendants, except for an application to vacate or modify said stay; and it is further

ORDERED that the parties may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that the remainder of the action is severed and shall continue in its entirety as to defendants Joel Braver and Hudson Canal, LLC; and it is further

ORDERED that a status conference shall be held on January 26, 2017 at 10:00 a.m.

Dated: December 12, 2016

ENTER:

J.S.C.

ANIL C. SINGH