Kovacs v Weis
2017 NY Slip Op 31275(U)
June 14, 2017
Supreme Court, New York County
Docket Number: 654466/2016
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ZOLTAN KOVACS, PETER KOVACS, ARKAL LLC, and SQUARE TREE LLC,

Plaintiffs,

-against-

ADAM WEIS, 30 THOMPSON LLC, 30 THOMPSON AW HOLDINGS LLC, and 9 MINETTA AW HOLDINGS LLC,

Defendants,

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Index No.: 654466/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiffs Zoltan Kovacs (Zoltan), Peter Kovacs (Peter, together the Kovacses), Arkal LLC (Arkal), and Square Tree LLC (Square Tree) move, by order to show cause, for a preliminary injunction restraining defendants Adam Weis, 30 Thompson LLC, 30 Thompson AW Holdings LLC (Thompson AW), and 9 Minetta AW Holdings LLC (Minetta AW) from collecting or enforcing two confessions of judgment against plaintiffs based on personal guarantees. Defendants cross-move to dismiss plaintiffs' amended complaint (Dkt. 23) (AC)[1] pursuant to CPLR 3211(a)(1), (3), and/or (7), or, in the alternative, for summary judgment pursuant to CPLR 3212, and oppose plaintiffs' motion. Plaintiffs oppose defendants' cross-motion. Seq. 001.

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to those of the e-filed PDF file.

Defendants also move, by order to show cause, to supplement their cross-motion with new evidence. Seq. 002. The motion is granted because plaintiffs had an opportunity to respond, and there is no prejudice. For the reasons that follow, the order to show cause seeking a preliminary injunction is denied, and defendants' cross-motion to dismiss the action is granted.

Factual Background & Procedural History

The AC pleads the following causes of action, numbered here as in the AC: (1) fraud; (2) constructive fraud; (3) declaratory judgment of unconscionability and unenforceability and for vacatur of the entered judgments; (4) breach of fiduciary duty; (5) fraud permitting rescission; (6) intentional misrepresentation; (7) breach of oral contract; (8) promissory estoppel; (9) negligent supervision; and (10) permanent injunction.

The facts set forth below are undisputed unless otherwise noted.

Zoltan and Peter have been engaged in the construction business in New York since 1999 and have invested in several New York real estate projects since that time. Dkt. 126 (Zoltan Jan. 3, 2017 Decl.) ¶ 6 & n.7. Arkal and Square Tree are New York limited liability companies owned by the Kovacses. Defendant Weis is a Harvard MBA with more than 20 years of experience investing in and managing real estate. Thompson AW and Minetta AW are New York limited liability companies owned by Weis.

On October 30, 2014, non-party Mavrix Equity Group, Inc. (Mavrix) entered into a sale and purchase agreement (Dkt. 9, Thompson Purchase Agreement) with Silver Street (2010) LLC (Silver Street) for real property located at 30 Thompson Street, New York, NY 10013 (Thompson Property).[2] In March 2015, the Kovacses became involved with Mavrix's plans to

[2] In 2014, the primary source of cash for the Thompson Property project was John DeLillo, who had loaned $1.2 Million dollars to the Mavrix Developers in October 2014. AC ¶ 27. The

purchase and develop the Thompson Property and another property located at 9 Minetta Street, New York, NY, 10013 (Minetta Property, with Thompson Property, Properties). The Kovacses allege they invested "substantial time and effort" in developing the Properties, but admittedly incurred no personal financial liabilities. AC ¶¶ 31-32, 112(c).

In early April 2015, the Kovacses introduced Weis to two principals of Mavrix, Erin Wincomb and Joseph Ferrigno (collectively, the Mavrix Developers). Over the course of several weeks of negotiations, Weis, the Mavrix Developers, and the Kovacses agreed that Weis would provide $5 million in interim financing to acquire and develop the Properties ($1 million for the Minetta Property and $4 million for the Thompson Property) over six months, at an interest rate of 18% per annum, in exchange for equity in the projects, a security interest in the membership interests in the future LLCs of both the Mavrix Developers and the Kovacses, and personal guarantees from each of the Mavrix Developers and the Kovacses. A term sheet was signed on April 27, 2015. Dkt. 11.

On May 6, 2015, the Kovacses (through member Square Tree), Weis (through member Minetta AW), and the Mavrix Developers (through member Mavrix Minetta LLC) formed Minetta Off 6th LLC (Minetta Off 6th) and executed an operating agreement (Dkt. 95, Minetta Operating Agreement).[3] Additionally, Weis, Peter, and Ferrigno executed, as authorized persons

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Kovacses co-signed a note (Dkt. 158) with Mavrix and the Mavrix Developers, promising to repay a loan from John DeLillo in the amount of $1.25 Million. The Kovacses assert that the note was not signed until early 2015, that it was undertaken after DeLillo had already loaned the $1.2 million to the Mavrix Developers, and that the Kovacses only signed the note upon DeLillo's insistence as a "friend" that he would never enforce it against them. Dkt. 164 (Verified Answer to Complaint from *Delillo v Kovacs*, Index No. 650265/2017) ¶¶ 15–22.

[3] In the AC, plaintiffs assert that they "have no ***specific*** recollection of any closing taking place on May 6, 2015 regarding Interim Financing" for the Minetta Property project, but admit that "the documents seem to bear their signatures." AC ¶ 59 n.5 (emphasis added). Plaintiffs

on behalf of their respective LLC members of Minetta Off 6th, a $1 million, secured promissory note (Dkt. 96, Minetta Note), dated May 6, 2015, in favor of Minetta AW, at an interest rate of 18% per annum, with a maturity date of November 6, 2015. Ferrigno and Peter, as authorized persons on behalf of Square Tree and Mavrix Minetta LLC, signed a pledge and security agreement (Dkt. 97, Minetta Pledge) dated May 6, 2015, pledging their membership interests in Minetta Off 6th to Minetta AW. Finally, the Kovacses and the Mavrix Developers executed a recourse guaranty (Dkt. 98, Minetta Guaranty), also dated May 6, 2015, individually and on behalf of Square Tree and Mavrix Minetta LLC, guaranteeing the payment and performance of the obligations of Minetta Off 6th under the Minetta Note.

On May 20, 2015, the Kovacses (through member Arkal), Weis (through member Thompson AW), and the Mavrix Developers (through member Mavrix Thompson LLC) formed defendant 30 Thompson LLC and signed an operating agreement (Dkt. 104, Thompson Operating Agreement) (with Minetta Operating Agreement, Operating Agreements) for the Thompson Property. On the same day: 1) Ferrigno, Weis, and Peter executed, as authorized persons on behalf of their respective LLC members of 30 Thompson LLC, a secured promissory note (Dkt. 105, Thompson Note) (with Minetta Note, Notes) agreeing to pay $1 million to Weis's entity, Thompson AW, at an interest rate of 18% per annum and with a maturity date of November 6, 2015; 2) Ferrigno and Peter executed, as authorized persons on behalf of Arkal and Mavrix Thompson LLC, a pledge and security agreement (Dkt. 106, Thompson Pledge) (with

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expressly admit that Peter signed documents "at the May 2015 ***closings***." Dkt. 126 (Zoltan Jan. 3, 2017 Decl.) ¶ 12 (emphasis added); Dkt. 127 (Peter Jan 3, 2017 Decl.) ¶ 2 ("[T]o the extent that I have personal knowledge of the events mentioned [in Dkt. 126], I adopt each of the statements of fact therein…."). In any event, plaintiffs do not deny having signed any of the documents in the record that appear to bear their signatures.

Minetta Pledge, Pledges) pledging their membership interests in 30 Thompson LLC to Thompson AW; and 3) the Kovacses and the Mavrix Developers executed a recourse guaranty (Dkt. 107, Thompson Guaranty) (with Minetta Guaranty, Guarantees) individually and on behalf of Arkal and Mavrix Thompson LLC, guaranteeing the payment by and performance of the obligations of 30 Thompson LLC under the Thompson Note. Also, on the same date, Mavrix Equity Group's interest in the Thompson Purchase Agreement was assigned to 30 Thompson LLC, and the sale of the Thompson Property closed. *See* Dkt. 12 (Closing Statement for May 20, 2015 for 30 Thompson Street Financing and Purchase).

The Guarantees, in relevant part, state as follows:

> SECTION 1. Guaranty. Guarantor hereby ***unconditionally, absolutely, irrevocably, jointly and severally guarantees*** the payment and performance of the obligations of the Maker set forth in the Note (the "Guaranteed Obligations"). ... Guarantor agrees to each of the following; and agrees that its obligations under ***this Guaranty shall not be released, diminished, impaired, reduced or adversely affected by any of the following, and waives any common law, equitable, statutory or other rights*** (including without limitation rights to notice) which Guarantor might otherwise have as a result of or ***in connection with ... (3) the invalidity, illegality or unenforceability of all or any part of the Guaranteed Obligations*** ... . ***It is the intention of Guarantor that it shall be obligated to pay*** the Guaranteed Obligations when due, ***notwithstanding any occurrence, circumstance, event, action, or omission whatsoever, whether contemplated or not contemplated, and whether or not otherwise or particularly described herein***. ...
>
> SECTION 2. Amendments: Waiver. No amendment or waiver of any provision of this Guaranty, nor consent to any departure by Guarantor therefrom, shall in any event be effective unless the same shall be in writing and signed by Guarantor and the Holder, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

Dkt. 98 at 1–2 & 107 at 1–2 (emphasis added). Plaintiff Zoltan admits that, at the time the loans were negotiated, he and his brother "generally understood what personal guarantees were." AC at 12 n.3. Moreover, when he provided the loans, Weis requested personal financial information from each of the Kovacses and the Mavrix Developers as proof that their individual assets and income were sufficient to cover repayment.[4]

Under § 3.01(a) of the Operating Agreements, Minetta AW and Thompson AW were appointed sole member of the Management Committee of Minetta Off 6th and 30 Thompson LLC, respectively, until the outstanding loans were repaid. Dkt. 95 at 13 & 104 at 13. Section 3.01(a) of the Operating Agreements provide:

> The Management Committee shall manage, develop and operate the Company in ***good faith and in a fair and commercially reasonable manner*** substantially in accordance with the marketing plans attached hereto as Exhibit C.

Dkt. 95 at 13 & 104 at 13 (emphasis added). Section 3.09(a) of the Operating Agreements set forth the following "Standard of Care" for its Members and Managers:

> (a) No Member (including the members of the Management Committee and the Managers) or an Affiliate thereof (each an "Indemnified Person" and collectively the "Indemnified Persons") shall be liable to the Company or to any Member for (i) any act or omission performed or failed to be performed by her, him or it, or for any losses, claims, costs, damages or liabilities (collectively, as used in this Section, "Loss" or "Losses," depending upon the context) arising therefrom, ***unless such act or omission constituted willful misconduct, fraud, bad faith or gross***

[4] *See* Dkt. 145 at 2 (Weis Apr. 22, 2015 email to the Kovacses, the Mavrix Developers, and counsel for each of Weis and the Mavrix Developers, regarding documentation for personal guaranty), 90 (personal financial statement for Zoltan), 91 (statement of net worth for Zoltan), 92 (income and expenses for Zoltan), 93 (Universal Residential Loan Application for Ferrigno and Wicomb), & 146 at 2 (Weis Apr. 22, 2015 follow-up email to the Kovacses, the Mavrix Developers, and counsel for each of Weis and the Mavrix Developers, regarding documentation for personal guaranty).

> ***negligence***, ... or (iii) any Losses due to the gross negligence, fraud, bad faith or willful misconduct of any employees, brokers, or other agents of any Indemnified Person (whether or not such Persons are directly employed by such Indemnified Person), as long as such Persons are not retained or otherwise selected in bad faith or with gross negligence.

Dkt. 95 at 19 & 104 at 19 (emphasis added).

In addition to the Notes, Pledges, and Guarantees, in May and June 2015, the Kovacses and the Mavrix Developers executed confessions of judgment in the amounts of $1,090,000 and $4,360,000, reflecting the principal and the 18% per annum interest on the Notes. Dkt. 99 (Minetta Confession) & 108 (Thompson Confession) (collectively, Confessions). The Kovacses executed the Thompson Confession approximately two weeks after the closing on the Thompson Property, upon review of the Confessions, at the request of Zoltan, by counsel for the Mavrix Developers. *See* Dkt. 121 (email chain dated between June 2, 2015 and June 5, 2015 between Weis, the Mavrix Developers, and the Kovacses, and counsel for each of Weis and the Mavrix Developers); AC ¶ 64.

Plaintiffs allege that Weis made various oral representations to induce the loans to Minetta Off 6th and 30 Thompson LLC, including representations that the relevant documents were "standard form" and that Weis would not hold the Kovacses personally liable on the Notes, Guarantees, or Confessions. *See* AC ¶¶ 91, 133, 140. Plaintiffs assert that they were not represented by counsel at either closing and that, beyond the titles of each document, they did not read the agreements that they signed at the May 20, 2015 closing.[5] AC ¶¶ 61–62.

[5] Plaintiffs apparently do not specifically recall the May 6, 2015 closing, but do not dispute having signed the documents on that date.

On November 25, 2015, counsel for Weis sent letters to the Kovacses and the Mavrix Developers stating that they were in default of their obligations to repay the Minetta and Thompson Notes, and that Minetta AW and Thompson AW were exercising their rights to take possession and ownership of the other members' rights in Minetta Off 6th and 30 Thompson LLC. *See* Dkt. 14, 102, & 111.[6] Under the terms of the Minetta and Thompson Notes, the proceeds accruing to Minetta AW and Thompson AW of any "collection, recovery, realization or sale" on or of the pledged equity, less expenses, were to be applied to the guaranteed payment obligations of Minetta Off 6th and 30 Thompson LLC. Dkt. 97 at 3 & 106 at 3. The record is silent as to whether Weis, Minetta AW, or Thompson AW received proceeds that reduced the guaranteed obligations under the Minetta and Thompson Notes.[7]

On February 23, 2016, Thompson AW filed a judgment in New York County Supreme Court against the Mavrix Developers and the Kovacses based on the Thompson Confession of Judgment. Dkt. 6 at 8–13 (Thompson Judgment). The Thompson Judgment was entered and docketed at Index No. 652908/2016. On June 1, 2016, Minetta AW filed a judgment in New York County Supreme Court against the Mavrix Developers and the Kovacses based on the Minetta Confession of Judgment. Dkt. 6 at 2–7 (Minetta Judgment). The Minetta Judgment was

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[6] Plaintiffs allege that Weis "recovered all of the … equity from plaintiffs and Mavrix leaving him 100% owner." AC ¶ 86. Defendants, through counsel, assert that they have not exercised any takeover option, and that plaintiffs' equity in 30 Thompson LLC remains intact. Dkt. 162 (1/6/17 Tr. at 10–11).

[7] According to the parties, the closing on the Minetta Property never took place due to the Mavrix Developers' failure to secure additional funds, which resulted in the loss of the deposit consisting of the bulk of Weis's loan. Defendants assert, and plaintiffs do not dispute, that the Thompson Property project is "underwater". Both parties allege that the Mavrix Developers absconded with funds from the Thompson Property project. Dkt. 77 (Weis Oct. 17, 2016 Aff.) ¶¶ 55–56; AC ¶¶ 70–73; Dkt. 126 (Zoltan Jan. 3, 2017 Aff.) ¶ 28.

entered and docketed at Index No. 652901/2016. On June 9, 2016, Minetta AW and Thompson AW filed a complaint in Suffolk County Supreme Court (Index No. 608809/2016) (Suffolk County Action) against the Kovacses and others, alleging fraudulent conveyance of real property. Plaintiffs' motion seeks to enjoin enforcement of the Judgments and collection or enforcement of the Confessions of Judgment and asks to stay the Suffolk County Action.

On August 31, 2016, this court issued the TRO (Dkt. 21) restraining plaintiffs from disposing of assets other than in the ordinary course of business and for living expenses and restraining defendants from proceeding against plaintiffs to collect or enforce the Minetta and Thompson Confessions. At oral argument on January 6, 2017,[8] the court extended the TRO and required plaintiffs to post $100,000 in cash or bond. *See* Dkt. 162 (1/6/17 Tr. at 24–25). Plaintiffs failed to file proof of such a bond until April 26, 2017. *See* Dkt. 174 (proof of bond). [9] Upon plaintiffs' motion (Seq. 003), by order to show cause, the court reinstated the TRO on May 1, 2017. Dkt. 187.

I. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro*

[8] The transcript for oral argument (Dkt. 162) misstates the date of oral argument as "January 16, 2016."

[9] On March 29, 2017, counsel for plaintiffs notified the court via letter that plaintiffs could not post the bond without violating the TRO. *See* Dkt. 173 (Peter April 26, 2017 Aff.) ¶ 9. The court refused to grant plaintiffs permission to sell assets to secure funds for bonding.

Fabrics, Inc., 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, 1 AD3d at 250, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Fraud Claim

The First Cause of Action allege fraud on the part of defendants as to all of the obligations. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Fraud claims must be pleaded with the specificity required by CPLR 3016(b). *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491–92 (2008); *see CIFG Assur. N. Am., Inc. v J.P.*

Morgan Secs. LLC, 146 AD3d 60, 63 (1st Dept 2016) ("CPLR 3016(b) 'imposes a more stringent standard of pleading' than otherwise applicable," quoting *DDJ Mgmt., LLC v Rhone Grp. L.L.C.*, 78 AD3d 442, 443 (1st Dept 2010). "'[C]onclusory allegations are insufficient'" to make out fraud. *CIFG*, 146 AD3d at 63, quoting *Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 (1st Dept 2015).

Defendants argue that plaintiffs are barred from asserting fraudulent inducement of the Guarantees and Notes by the "absolute" and "unconditional" terms of these agreements. The court agrees. *See Citibank, N.A. v Plapinger*, 66 NY2d 90 (1985). Moreover, even were this not so, plaintiffs have failed to state a claim for fraud.

As an initial matter, of the ten alleged misrepresentations, many are not facts or material facts. Plaintiffs allege the following misrepresentations induced the Guarantees, Confessions and Notes: a) "We're friends and I am your mentor"; b) "I will take care of you and your brother"; c) "You can rely upon me to protect you"; d) "I will show you how we can all be successful doing big projects"; e) "Everything in these transactions is standard form for these kinds of transactions;" f) "I will never hurt you and would not hold you personally liable"; g)"I must protect my capital and will help you, not hurt you"; h) "If you resign your day-to-day management positions with the Joint Venture, I will not enter the Confessions against you"; i) "We are all in this together as friends"; and j) "I will never get to the Personals because that would ruin your lives and business." AC ¶ 91.

Statements (a), (b), (c), and (i) are exhortations of friendship, not facts. Statement (b), (d), (f), (g), (h) and (j) convey future promises regarding performance and, thus, are not actionable as fraud. *See Int'l Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 641-42 (1st Dept 2011)

("[S]tatements amount[ing] to little more than expressions of hope and opinion, and related to future expectations, ... cannot constitute actionable fraud ... ."); *Sidamonidze v Kay*, 304 AD2d 415, 416 (1st Dept 2003) ("[T]he motion court correctly found that the alleged misrepresentations did not support a fraud claim because they consisted of mere puffery, opinions of value or future expectations rather than false statements of value." [citations omitted]). Statement (e) is tautological and meaningless opinion, not a material fact. Nor have plaintiffs sufficiently pled falsity of this statement, because they do not indicate what, precisely, about the Notes, Pledges, or Guarantees is not "standard".

Nor has plaintiff pled the requisite scienter. *See Eurycleia*, 12 NY3d at 559. Statements, which relate to whether and under what circumstances Weis would hold the Kovacses personally liable for the amount due under the Notes, could arguably comprise a material misrepresentation of fact. In essence, the Kovacses assert that Weis lied [(f), (g), (h), and (j)] about his intent, prior to execution of the Guarantees and Confessions. Representations of present intentions may constitute fraudulent statements of material existing fact. *See Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168 (1st Dept 2015). However, the Kovacses' bare allegation that Weis's statements were false and that he knew they were false when he made them, is insufficient. *See Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995), citing *Lanzi v Brooks*, 54 AD2d 1057, 1058 (3rd Dept 1976) ("A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement."), *aff'd* 43 NY2d 778 (1977). The Kovacses fail to support their allegation with any facts that permit a reasonable inference of intent ***at the time that the statements were made***. *See Lanzi*, 54 AD2d at 1058 ("[A]ny inference

drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions."). If the statements were indeed made, Weis simply may have changed his mind. More than five months elapsed between plaintiffs' execution of the Guarantees and Confessions in May and June 2015 on the one hand, and the defaults on the Notes in November 2015 on the other. Several more months passed before Weis filed for Judgments on the Confessions in February and June 2016. Dkt. 6 (judgments by confession).[10] As plaintiffs have sufficiently pled neither intent to deceive at the outset of the transaction nor a basis for inferring such intent, plaintiffs' claim for fraud fails.

Plaintiffs also fail to plausibly allege their own justifiable reliance on Weis's representations that he would not enforce the Guarantees. Where, as here, the fraud claim is refuted by the contract itself, the claim is not viable. *See Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498–99 (1st Dept 2011) ("[A] party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract executed by the allegedly defrauded party."). Plaintiffs cite no apposite authority for the proposition that an alleged representation contradicting the terms of an agreement can form the basis for a fraud claim.[11] Weis's alleged statements that he would not

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[10] A notable event occurring in the intervening months: The Mavrix Developers, who were the only other individuals against whom Weis could have enforced the Notes, allegedly absconded to California.

[11] Plaintiffs cite *Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57 (1966), for the proposition that "summary judgment should not be granted where the oral inducements to enter into such a guarantee consist of promises of no personal liability and the unconditional written guarantees say nothing as to the alleged representations." Dkt. 153 (Plaintiffs' Reply Br.) at 14. As explained by the Court of Appeals in a subsequent case, "Millerton held no more than that summary judgment should not have been granted plaintiffs in that case, defendants' affidavits having presented sufficient evidence of reliance on the claimed fraudulent representation to require a trial." *Citibank*, 66 NY2d at 95. Further, *Millerton* did not involve a ***waiver of liability***

hold the Kovacses personally liable contradicts the Guarantees and Confessions which clearly state that the Kovacses were personally liable on the Notes.

The Kovacses' argument that they were "relative babes in the woods" is also unavailing. Dkt. 153 (Plaintiffs' Reply Br.) at 18. By their own admission, the Kovacses, businessmen who have long been involved in New York's construction and real estate development industry, knew what a guarantee was, and submitted proof to Weis, at his insistence, that they had adequate assets and income to cover the amount of the Notes. The Kovacses knew that the documents they were signing conferred on Weis a legal right to recover the amount of the Notes from them. In fact, they could easily have hired their own counsel and chose not to do so. Instead, after weeks of negotiation, they signed a number of contracts which reflected those negotiations. Justifiable reliance, therefore, has not been pleaded. The fraud claim is dismissed.[12]

C. Constructive Fraud Claim

Plaintiffs' Second Cause of Action alleges constructive fraud in connection with the same misrepresentations alleged in their First Cause of Action. This claim also fails.

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on a signed instrument, but an oral inducement promising ***forbearance on liability until a condition was met***; namely, that the total indebtedness of the guarantor met or exceeded the amount of the guaranty. *See Millerton*, 17 NY2d at 62.

[12] Plaintiffs fail to plead any additional facts in connection with the Confessions that would militate their separate treatment from the Guarantees. Indeed, the Kovacses signed the Thompson Guaranty approximately two weeks after the May 20, 2015 closing on the Thompson Property, only after the Kovacses requested that counsel for the Mavrix Developers review it. *See* Dkt. 121 (email chain dated between June 2, 2015 and June 5, 2015 between Weis, the Mavrix Developers, and the Kovacses, and counsel for each of Weis and the Mavrix Developers); AC ¶ 64 ("Plaintiffs returned and signed them fully believing Weis's representation that such cooperation would avoid any legal action against Plaintiffs to collect against them personally on his Interim Financings.").

The elements for constructive fraud are the same as those for actual fraud, except that the party making the misrepresentation must be a fiduciary; the plaintiff need not prove the fiduciary's actual knowledge that the representation was false. *See Del Vecchio v Nassau County*, 118 AD2d 615, 618 (2d Dept 1986). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005), quoting Restatement [Second] of Torts § 874, Cmt. a. Reliance on superior knowledge and expertise in an arm's-length transaction between sophisticated parties does not give rise to a fiduciary relationship. *See Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 (1st Dept 2010).

Plaintiffs allege a fiduciary relationship between Weis and the Kovacses based on a personal friendship. "Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry" (*Eurycleia*, 12 NY3d at 561) that the court need not reach here. Irrespective of whether a fiduciary relationship existed between Weis and the Kovacses, plaintiffs have not adequately pled constructive fraud. As discussed above, none of the alleged misrepresentations are material facts regarding which plaintiffs adequately pleaded justifiable reliance. Further, plaintiffs have not adequately pleaded facts showing that Weis's statements regarding his present intent to enforce the personal Guarantees were false at the time that he made them.

D. Declaratory Judgment Claim

In their Third Cause of Action, plaintiffs seek a declaratory judgment excusing them from performing their obligations under the Operating Agreements, Notes, Guarantees, and Confessions on grounds of unconscionability, and seek to vacate the Judgments.

Under CPLR 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." While "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract," *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988). Although plaintiffs' declaratory judgment claim is not duplicative of their other claims in this litigation, they have failed to plausibly allege that any of the Operating Agreements, Notes, Pledges, Guarantees, and Confessions (collectively, Agreements) are unconscionable.

"An unconscionable contract has been defined as one which 'is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible according to its literal terms.'" *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 (1988), quoting *Mandel v Liebman*, 303 NY 88, 94 (1951). "As a general proposition, unconscionability, a flexible doctrine with roots in equity, requires some showing of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *State v Avco Fin. Serv. of N.Y. Inc.*, 50 NY2d 383, 389 (1980) (citations omitted), quoting *Williams v Walker-Thomas Furniture Co.*, 350 F2d 445, 449 (DC Cir 1965). These requirements are referred to as "procedural unconscionability" and "substantive unconscionability", respectively.

Plaintiffs have not pled sufficient facts to plausibly allege that the Agreements here are procedurally unconscionable. While plaintiffs assert that they were in a "very weak bargaining position," (AC ¶ 112), the mere exercise of superior bargaining power is an insufficient basis to

find a contract unconscionable. *See Burnell v Morning Star Homes, Inc.*, 114 AD2d 657, 658 (3d Dept 1985). Further, they fail to plead facts sufficient to show a lack of meaningful choice. At any point, plaintiffs were free to walk away from the negotiations and to seek what they sought elsewhere. *See Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456, 457 (1st Dept 2010) ("Here, plaintiffs failed to plead anything regarding an alleged lack of meaningful choice regarding the electricity provisions, and it is noteworthy that plaintiffs were free to walk away from the lease negotiations at any time and rent space elsewhere."). They could have sold or mortgaged their own properties in order to raise the substantial amount of cash needed for the Thompson and Minetta Property projects. *See* AC ¶ 112(b); *see also* Dkt. 91 (Zoltan statement of net worth). And, until Weis loaned his own funds, plaintiffs stood to lose only their "sweat equity" and would have incurred no financial liability. *See* AC ¶¶ 31–32, 112(c). Instead, plaintiffs elected to accept Weis's terms and to gamble with Weis's money. These facts fatally undermine plaintiffs' assertions of procedural unconscionability.

Nor have plaintiffs sufficiently alleged that the Agreements here are substantively unconscionable. "[A]t common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other." *King v Fox*, 7 NY3d 181, 191 (2006); *see also B.D. Estate Planning Corp. v Trachtenberg*, 114 AD3d 477, 478 (1st Dept 2014). The terms of the Agreements do not meet this standard.

Plaintiffs allege that three terms made the Agreements unconscionable: that the equity shares belonging to Weis, but not the Kovacses and Mavrix Developers, were undilutable; that the Kovacses and Mavrix Developers stood to lose their equity upon default; and that the

Kovacses were afforded no profit on their construction services, while Weis was to receive 18% annual interest on his loans, in addition to control of the projects and non-dilutable one-third equity.[13] AC ¶ 113. As a matter of law, these terms are not substantively unconscionable. Had Weis refused to loan his money for use in the projects, by plaintiffs' own assertions, plaintiffs and the Mavrix Developers would have been unable to purchase either of the Properties. Weis agreed to provide the loans, comprising approximately 80% of the total cash invested in the projects, in exchange for the stated interest and equity in the projects. To ensure that he would be able to recover on his loans, Weis negotiated for managerial control over the relevant entities until the loans were repaid and for personal guarantees from the Kovacses and the Mavrix Developers.[14] The court will not disturb the allocation of risk achieved through superior bargaining power in the absence of oppression and unfair surprise. *See Avco*, 50 NY2d at 389. Plaintiffs' claim for declaratory judgment is dismissed.

E. Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." *Castellotti v. Free*, 138 AD3d 198, 209 (1st Dept 2016). Plaintiffs allege that Weis

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[13] The court was unable to find any documentary evidence in the record that plaintiffs had agreed to provide construction services "at cost", but assumes, for the purpose of deciding the instant motions, that plaintiffs did agree to do so.

[14] Under the terms of the Operating Agreements and Pledges, Weis would retain his one-third interest in 30 Thompson LLC and Minetta Off 6th LLC regardless of loan repayment status, but he could not "double recover" the amount of his loan by profitably taking over plaintiffs' equity ***and*** enforcing the guarantees. *See* Dkt. 97 (Minetta Pledge) at 3 ("Pledgee shall apply the net proceeds of any such collection, recovery, realization or sale of Interests, after deducting all reasonable costs and expenses …, to the payment of the Obligations of the applicable Borrower.") & 106 (Thompson Pledge) at 3 (same).

breached his fiduciary duty[15] to them by: 1) intentionally and fraudulently inducing plaintiffs to enter into the transaction to finance and purchase the Thompson Street Project; 2) intentionally and fraudulently inducing plaintiffs "to continue their contractual relationship, and to refrain from seeking other replacement sources of financing"; 3) withholding and concealing information about the 30 Thompson LLC bank accounts; 4) misrepresenting the status of the Thompson Property project; 5) misrepresenting that the Kovacses were not personally liable on the Notes even after the Guarantees and Confessions had already been signed; and 6) failing to use his best efforts to successfully manage the Thompson and Minetta Property projects. (Dkt. 23 ¶¶ 122-124.) Plaintiffs have not stated a claim with respect to any of these alleged actions.

First, item (1) is duplicative of plaintiffs' actual and constructive fraud claims, claims which have been dismissed for the reasons discussed above.[16] Items (2), (3), (4), and (5) fail to allege what harm accrued to them as a result of the alleged breaches, which occurred after plaintiffs had ***already signed*** the Guarantees and Confessions. Then too, plaintiffs do not explain how Weis's alleged failure to provide accurate information about the status of the projects and plaintiffs' personal liability directly caused losses to plaintiffs -- namely, what plaintiffs would have done with the information to avoid such losses.

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[15] As discussed above in connection with Plaintiffs' claim for constructive fraud, the presence of a fiduciary duty is a fact-intensive inquiry. Here, too, the court does not reach the issue due to the failure to adequately plead a breach of such duties.

[16] Plaintiffs' argument that Weis "breached his obligations of loyalty to plaintiffs when he placed his interest as a lender in opposition to his interest as a controlling partner of Joint Venture," (Dkt. 17 (Plaintiffs' Opening Br.) at 12)—which they fail to plead in the AC—is nonsensical. Plaintiffs consented to this alleged "conflict of interest" as soon as they signed the term sheet in April 2015, and ratified their consent by signing the Operating Agreements and Notes. *See* Dkt. 11 (Term Sheet) at 2.

Finally, with respect to (6), defendants correctly point out that any alleged harm caused by mismanagement of 30 Thompson LLC and its bank accounts would have accrued to 30 Thompson LLC, and not to Arkal as a member or to the Kovacses individually. *See Yudell v Gilbert*, 99 AD3d 108, 114 (1st Dept 2012) ("Allegations of mismanagement or diversion of corporate assets ... plead a wrong to the corporation."); *see also Serino v Lipper*, 123 AD3d 34, 39 (1st Dept 2014) ("[A] stockholder has no individual cause of action against a person or entity that has injured the corporation. This is true notwithstanding that the wrongful acts may have diminished the value of the shares of the corporation, or that the shareholder incurs personal liability in an effort to maintain the solvency of the corporation ...."). Claims based on alleged harms to a corporation may be maintained only as derivative claims, requiring demand or demand futility, which the plaintiffs have failed to plead in the AC. *See* BCL § 626(c); *Najjar Group LLC v West 56th Hotel LLC*, 110 AD3d 638, 638–39 (1st Dept 2013). Plaintiffs' failure to plead derivative claims warrants dismissal under CPLR 3211(a)(3).[17]

Alternatively, even if plaintiffs could have pled a direct cause of action for Weis's management of 30 Thompson LLC or Minetta Off 6th, the Operating Agreements expressly bar plaintiffs' claims. Under § 3.09 of those agreements, Weis, as an Affiliate of a member of the Management Committee, cannot be held liable for any act or omission leading to a loss for the company, "unless such act or omission constituted willful misconduct, fraud, bad faith or gross negligence." Dkt. 95 at 19 & 104 at 19. An LLC operating agreement may exempt its managing members from liability for acts that fall short of tortious misconduct. *See Kagan v HMC-N.Y.,*

[17] Plaintiffs allege in the AC that Arkal no longer retains its membership interests in 30 Thompson LLC, (*see* AC ¶ 86), in which case, Arkal cannot even plead a derivative claim. *See Ciullo v Orange & Rockland Utils., Inc.*, 271 AD2d 369, 369 (1st Dept 2000), *appeal denied*, 95 NY2d 760 (2000); *Silverman v Schwartz*, 248 AD2d 332, 332 (1st Dept 1998).

Inc., 94 AD3d 67, 71 (1st Dept 2012) (upholding dismissal of allegations under operating agreement that limited managers' liability to intentional misconduct, knowing violation of law, gross negligence, and self-dealing); *see also* LLC Law § 417. As plaintiffs do not allege willful misconduct, fraud, bad faith, or gross negligence in connection with Weis's management of 30 Thompson LLC or its bank accounts, their claims based on his alleged mismanagement of 30 Thompson LLC cannot stand in the face of the Thompson Operating Agreement.

F. Fraud Permitting Rescission

Plaintiffs' Fifth Cause of Action, "Fraud Permitting Rescission" merely paraphrases the fraud cause of action, which the court has held to be wanting. It is dismissed for the reasons previously stated.

G. Intentional Misrepresentation

Plaintiffs' Sixth Cause of Action, "Intentional Misrepresentation" again relies on the misrepresentations alleged in the fraud cause of action and is dismissed.

H. Breach of Oral Contract

Plaintiffs assert that Weis entered into an oral contract with them "whereby Weis would oversee and manage the Thompson Street Project and although Plaintiffs signed the Personals, Weis would not hold Plaintiffs personally responsible." Plaintiffs assert that Weis breached this oral contract by failing to "reasonably oversee" the Thompson and Minetta Property projects and related bank accounts. *See* AC ¶¶ 140–43. Plaintiffs' assertions that Weis failed to "reasonably oversee" the projects and bank accounts are conclusory. Further, an oral promise by Weis to oversee the Thompson Property project would have been superseded by the merger clause in the 30 Thompson LLC Operating Agreement:

> This Agreement sets forth the entire agreement between the Members pertaining to the subject matter hereof. This Agreement supersedes and replaces any and all prior agreements, discussions, negotiations, documents, understandings or other oral or written communications between the Members relating to the Company and may be modified or amended only by the written consent or the affirmative vote of the Super Majority of Members.

Dkt. 104 at 34; *see Gebbia v Toronto-Dominion Bank*, 306 AD2d 37, 38 (1st Dept 2003) (upholding dismissal of breach of oral contract claims in light of integration clause in written agreements).[18] Plaintiffs' claim for breach of oral contract (Seventh Cause of Action) is dismissed.

I. Promissory Estoppel

Plaintiffs allege that they relied on Weis's promise not to enforce the Notes against them[19] and, as a result, executed the Guarantees and Confessions. AC ¶¶ 145–49. "The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 841–42 (1st Dept 2011). As explained above with respect to the fraud claims, plaintiffs have not sufficiently

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[18] Plaintiffs further assert that Weis's failures breached the "implied covenant of good faith and fair dealing" incorporated into the oral contract. AC ¶ 143. "All contracts imply a covenant of good faith and fair dealing in the course of performance." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). However, "[a] claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." *See Skillgames*, 1 AD3d at 252.

[19] Plaintiffs' Eighth Cause of Action, which is not a model of clarity, incorporates the previous paragraphs of the AC by reference and simply states that plaintiffs reasonably relied on "Weis's promises." Paragraph 147, which refers to an unspecified "contract" whose very existence would bar a promissory estoppel claim, *see, e.g., Coleman & Assocs. Enterprises, Inc. v Verizon Corp. Servs. Grp., Inc.*, 125 AD3d 520, 521 (1st Dept 2015).

pleaded reasonable reliance. Accordingly, plaintiffs' promissory estoppel claim (Eighth Cause of Action) is dismissed.

J. Negligent Supervision

Plaintiffs' Ninth Cause of Action (titled "Negligent Supervision"), like their Fourth Cause of Action, relies on Weis's alleged mismanagement of the Thompson and Minetta Property projects. For the reasons discussed above with respect to the Fourth Cause of Action, this cause of action fails.[20]

K. Permanent Injunction

Plaintiffs, by motion, request a preliminary injunction and in their Tenth Cause of Action request a permanent injunction, restricting defendants' ability to enforce the Guarantees, Confessions, and Judgments. The AC further asks that the original Guarantees be abrogated. As all of plaintiffs' underlying claims fail, their requests for injunctions are denied. Accordingly, it is

ORDERED that the motion (Seq. 001) by plaintiffs for a preliminary injunction is denied, defendants' cross-motion to dismiss is granted, and defendants' cross-motion for summary judgment is denied as moot; and it is further

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[20] Defendants note correctly that the tort of "negligent supervision" typically requires an employer-employee relationship. *See generally, e.g., Bumpus v N.Y. City Transit Auth.*, 47 AD3d 653 (2d Dept 2008). While the Mavrix Developers were not employed by defendants, in the court's understanding, plaintiffs' Ninth Cause of Action alleges that Weis failed to exercise due care in supervising the ***projects***. To the extent that plaintiffs assert that Weis improperly delegated responsibilities to the Mavrix Developers (*see, e.g.*, AC ¶ 153), the Operating Agreements also disclaim liability of its members for "gross negligence, fraud, bad faith or willful misconduct of any employees, brokers, or other agents … as long as such Persons are not retained or otherwise selected in bad faith or with gross negligence." Dkt. 95 at 19 & 104 at 19. Plaintiffs have not sufficiently pled Weis's bad faith or gross negligence in managing the projects.

ORDERED that the motion (Seq. 002) by defendants to supplement the record on Motion 001 is granted; and it is further

ORDERED that the TRO (Dkt. 21) issued on August 31, 2016 and reinstated on May 1, 2017 (Dkt. 187), is hereby vacated; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing this action with prejudice.

Dated: June 14, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.