Elberg v Crabapple Corp.
2021 NY Slip Op 30216(U)
January 20, 2021
Supreme Court, New York County
Docket Number: 653373/2016
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

----------X

RUBEN ELBERG,

Plaintiff,

- v -

CRABAPPLE CORP., TAMARA PEWZNER, ROYAL ONE REAL ESTATE, LLC,ROYAL REAL ESTATE MANAGEMENT LLC,ROYAL LIC REAL ESTATE MANAGEMENT LLC,ROYAL HOTEL & RESORTS LLC,ROYAL CP HOTEL HOLDINGS LP, ROYAL HI HOTEL HOLDINGS LP, ZHU QING, FENG LI, MENGSHA CHEN, RUIZHEN WANG, HONG GE, QIN SI, YANG ZHANG, ZHE FANG, XU NING,

Defendant.

----------X

INDEX NO. 653373/2016

MOTION DATE 02/14/2020, 02/18/2020

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 305, 306, 307, 308, 309, 310, 311

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338

were read on this motion to/for JUDGMENT - DECLARATORY.

The gravamen of the dispute between the parties concerns whether certain August LP Agreements (hereinafter defined) or November LP Agreements (hereinafter defined) are the governing partnership agreements for Royal CP Hotel Holdings LP (**Royal CP**) and Royal HI Hotel Holdings LP (**Royal HI;** Royal CP and Royal HI, hereinafter, collectively, the **LPs**). Upon the foregoing documents, for the reasons set forth on the record (1/14/2021) and as

otherwise set forth below, because the parties treated the November LP Agreements as the operative documents and because there was no cut-off as to when the November LP Agreements needed to be accepted by or termination of the offer of the November LP Agreements, which Mr. Jensen accepted by performance and executed, the November LP Agreements are the governing agreements for the LPs. The record does not support the sanction sought by the defendants of striking of the complaint. Therefore, Ms. Pewzner's motion for summary judgment and/or to strike the complaint (Mtn. Seq. No. 006) is denied and Mr. Elberg's motion for summary judgment (Mtn. Seq. No. 007) is granted.

The LPs were organized in connection with the development of two hotels in Long Island City, New York, undertaken by Jacob Elberg (now deceased) and Ruben Elberg, his son. The August 10, 2012 limited partnership agreement of Royal CP (NYSCEF Doc. No. 167; the **CP August Agreement**) and the August 3, 2012 limited partnership agreement of Royal HI (NYSCEF Doc. No. 166; the **HI August Agreement;** the CP August Agreement and the HI August Agreement, hereinafter, collectively, the **August LP Agreements**), were each by and between Royal One Real Estate LLC (**RORE**) as the General Partner, each person who was admitted as a Class A Limited Partner, as reflected on the books and records of the Partnership, Crabapple, Inc. (**Crabapple**) as the Class B Limited Partner, and RORE as the Class C Limited Partner. Jacob Elberg, as President of RORE, signed the August LP Agreements, Peter Jensen signed the August LP Agreements as President of Crabapple, and the signature page of the August LP Agreements acknowledges that the Class A Limited Partner is deemed to have executed the August LP Agreements by their signature of a subscription agreement accepted by the General Partner.

The November 30, 2012 Limited Partnership Agreement of CP (NYSCEF Doc. No. 168; the **CP November Agreement**) was by and between RORE as General Partner, each person who was admitted as a Class A Limited Partner, as reflected on the books and records of the Partnership, Crabapple as the Class B Limited Partner, RORE and Royal Real Estate Management LLC (**RREM**) as the Class C Limited Partners and Reuben Elberg as the Class D Limited Partner. The November 30, 2012 Limited Partnership Agreement of HI (NYSCEF Doc. No. 169; the **HI November Agreement;** the CP November Agreement and the HI November Agreement, hereinafter, collectively, the **November LP Agreements**), was by and between Royal LIC Real Estate Management LLC (**Royal LIC**), each person who was admitted as a Class A Limited Partner, as reflected on the books and records of the Partnership, Crabapple as the Class B Limited Partner, RORE as the Class C Limited Partner and "Reuben" Elberg as the Class D Limited Partner. Jacob Elberg signed the November LP Agreements as the Managing Member and Sole Member of RORE, (and [x] with respect to the CP November Agreement, as the Manager and sole Member of RREM and [y] with respect to the HI November Agreement, as the Manager and sole Member of Royal LIC), Ruben Elberg signed on behalf of himself, and Mr. Jensen signed as President on behalf of Crabapple. Just like the August LP Agreements, the signature page of the November LP Agreements acknowledges that the Class A Limited Partner was deemed to have executed the November LP Agreements by their signature on a Subscription Agreement accepted by the General Partner.

With respect to distributions in the event of a Capital Event or from Dissolution, Section 3.4.2 of the November LP Agreements provides as follows:

The Net Proceeds from a Capital Event and/or distribution resulting from the dissolution of the Partnership shall be distributed within one hundred twenty (120) days of such Capital Event or dissolution of the Partnership in the following order and priority:

(a) First, to the Class A Limited Partners, pro rata in accordance with the Adjusted Capital Contributions, up to their unpaid Class A Preferred Return;

(b) Second, to the Class A Limited Partners, pro rata up to their Adjusted Capital Contributions;

(c) Third, to the Class B Limited Partner, up to its accrued unpaid Class B Preferred Return;

(d) Fourth, to the Class B Limited Partner, up to its Adjusted Capital Contributions, if any;

(e) Fifth, to the Class C Limited Partners, pro rata in accordance with their Adjusted Capital Contributions, up to their Adjusted Capital Contributions; and

(f) Sixth[,] the remaining amount 59% to the Class C Limited Partners, pro rata in accordance with their Adjusted Capital Accounts immediately prior to the distribution provided in clause (e) of this Section 3.4.2, ***40% to the Class D Limited Partner*** and 1% to the General Partner

(NYSCEF Doc. Nos. 168-169, §§ 3.4 [emphasis added]).

"Capital Event" is defined in the November LP Agreements as "the sale, refinancing, or other disposition by the Partnership of all of substantially all of its assets" (*id.* at 3, Definitions). For the avoidance of doubt, Ruben Elberg, as the Class D Limited Partner under the November LP Agreements, would be entitled to 40% distribution of the "remaining amount" of the "Net Proceeds of a Capital Event if the November LP Agreements are the operative agreements.

The LPs' limited partnership agreements contemplated investments in the hotels by interested EB-5 investors. The EB-5 program administered by United States Customs and Immigration Services (**USCIS**) allows foreign investors who invest at least $500,000 in projects creating at

least ten jobs each to obtain a visa to come to and remain in the United States. After the jobs created by such investment are shown to be productive, the visa may be converted to convey permanent residency to its applicant. The foreign EB-5 investors who invested in the hotel projects under the LP Agreements were to be Class A Limited Partners and Mr. Jensen, through his wholly owned entity, Crabapple, would serve as their bundler and representative, holding a Class B Limited Partner interest.

Although the August LP Agreements provided that the LPs would continue in perpetuity (NYSCEF Doc. No. 166, § 1.4; NYSCEF Doc. No. 167, § 1.4), Crabapple was to recruit $1.5 million of EB-5 investment for Royal HI and $6 million for Royal CP by September 30, 2012 or the LPs were required to return the capital contributions of the Class A Limited Partners by October 31, 2012 (NYSCEF Doc. No. 166, § 2.13; NYSCEF Doc. No. 167, § 2.13). It is undisputed that sufficient EB-5 money was not raised by September 30, 2012 or returned, to the extent raised, by October 31, 2012 (NYSCEF Doc. No. 187 at 27:15-22, 28:4-5).

Following the failure of this condition in the August LP Agreements, the November LP Agreements were drafted and signed by the Elbergs and sent to Mr. Jensen for signature. According to Catherine Holmes, the lawyer for the LPs, the parties treated the November LP Agreements as replacement agreements and not amendments of the August LP Agreements because there had been a failure of condition under the August LP Agreements.

> Q: To your knowledge, was there ever any written approval provided to you from the general partner of majority and interest of the Class A limited partners, the Class B and the Class C limited partners regarding approval of a decision to amend this agreement?

> A: No. ***I believe what happened is that they decided to treat this as never having – having formally gone into effect*** because we did not call it an amendment. As you pointed out – well, as you can see in the document that we just read in the November document, we were treating it as a new agreement, not as an amendment.

(NYSCEF Doc. No. 319 at 51:20-25, 52:3-10).

On the record before the court, although it is not clear ***when*** Mr. Jensen signed the November LP Agreements (NYSCEF Doc. No. 290 at 71-72) and notwithstanding that Mr. Jensen sent back emails in March 2013 that appear to be an attempt to renegotiate certain terms of the November LP Agreements, Mr. Jensen not only signed the agreements, but also in fact accepted the November LP Agreements when he (x) represented to the United State Government (NYSCEF Doc. No. 324; the **December 2012 USCIS Letter**) in ***December of 2012***, that the November LP Agreements were the governing agreements in connection with the EB-5 application for Ms. Ruizhen Wang and (y) brought a lawsuit in 2015 based on the November LP Agreements against RORE, RREM, Mr. Elberg, Royal CP and Royal HI, attaching the November LP Agreements as exhibits A and B to the verified complaint in that action (the **Crabapple Litigation**; *Crabapple Corp. v Royal One Real Estate LLC et al.*, Index No. 650492/2015; NYSCEF Doc. No. 263, ¶¶ 18, 30 ["Crabapple, each of the Royal HI [or Royal CP] Investors, RORE, and Reuben Elberg are each a party to the Limited Partnership Agreement of Royal HI [or Royal CP] Hotel Holdings, L.P. dated November 30, 2012"] where he verified to the court that the November LP Agreements were the operative and controlling partnership agreements for Royal CP and Royal HI (*id.*)

Mr. Jensen was not the only person who represented to the USCIS that the November LP Agreements were the governing documents. By letter, dated November 25, 2013 (NYSCEF

Doc. No. 325; **the EB-5 USCIS Letter**), Curt D. Schmidt of the Law Offices of Joe Zheng Hong Zho and Associates, PLLC, in response to a Request for Evidence represented to the USCIS that the November LP Agreements were, in fact, the operative agreements.

In fact, other than Ms. Pewzner and her revised position since the position that she took in the Foreclosure Action (defined below) as to whether the November LP Agreements are the operative agreements (discussed below), who was not a partner or otherwise involved in the project prior to Jacob Elberg's death, it does not appear that any person regarded the August LP Agreements as the operative documents.

For completeness, according to the affidavit of Brenda Whitacre (NYSCEF Doc. No. 382), Jacob Elberg's secretary, no hardcopy of the November LP Agreements were returned to the office and, while she had access to Jacob Elberg's email account, he did not receive a copy of the executed November LP Agreements from Mr. Jensen. Significantly, however, the record does not include a single communication from the Elbergs indicating that if Mr. Jensen failed to execute the November LP Agreements by a date certain, the offer of the November LP Agreements terminated. In fact, the record indicates that in response to Mr. Jensen's attempt to renegotiate the November LP Agreements, the Elbergs indicated that they were not prepared to renegotiate the terms of the November LP Agreements and that Mr. Jensen could either accept them or not. By email, dated March 22, 2013, from Ms. Holmes to Mr. Jensen, copying both Jacob and Ruben Elberg, Ms. Holmes wrote:

> Jacob and Ruben do not want to change the terms of the transactions that they have with you and your investors ***as previously agreed upon*** in the Royal CP and Royal HI Partnership Agreements.

> If you intend to keep your investors funds in the two projects, Jacob and Ruben ask that you please send the fully signed copies of the two partnership agreements to them.
>
> If your investors do not [] intend to keep their investment funds in the Crowne Plaza project, Jacob and Ruben ask that you please advise them that you desire to receive a return of those funds to your investors. Jacob and Ruben do not wish to take any actions that would harm the investors, and want to receive your direction regarding what should be done with their funds. If the investors want their funds returned, Jacob and Ruben would like to discuss a timeframe for return of the funds.

(NYSCEF Doc. No. 175 [emphasis added]).

Similarly, although she now contests the validity of the November LP Agreements and argues that she should not be judicially estopped from contesting the validity of the November LP Agreements, Ms. Pewzner, previously submitted to the court the November LP Agreements as the operative agreements for the LPs in connection with a foreclosure action in Queens County captioned *New Fund LP v Royal One Real Estate, LLC* (the **Foreclosure Action**; Index No. 709631-2014, NYSCEF Doc. Nos. 91-92, 95-96, ***executed and filed on November 9, 2015***). In fact, in connection with the LP Agreements submitted in the Foreclosure Action, Ms. Pewzner attested that RREM and RORE entered into the November LP Agreements (NYSCEF Doc. No. 92, ¶¶ 4-5).

Indeed, all of the signatories of the LPs (Mr. Jensen – the person's whose acceptance of the November LP Agreements is at issue, Jacob Elberg and Ruben Elberg) and including Ms. Pewzner, herself, has at one time or another either agreed to the terms of the November LP Agreements or otherwise taken the position that the November LP Agreements were the operative limited partnership agreements of the LPs.

However, Ms. Pewzner now argues that her position in the Foreclosure Action resulted solely from Ruben Elberg cutting her off from her father's email account and otherwise not disclosing certain communications (NYSCEF Doc. No. 175) from Mr. Jensen to her father's email account, which she incorrectly argues (as discussed above) indicate that Mr. Jensen rejected the November LP Agreements and terminated the Elbergs' offer to enter into such agreements. To wit, after Jacob Elberg's death in 2013 (i.e., after Mr. Jensen's December 2012 USCIS letter), Ruben Elberg and his sister, Ms. Pewzner, were appointed co-executors of their father's Estate. As noted above, Ms. Pewzner claims that she initially relied on Ruben Elberg to guide her through their father's affairs as Ruben Elberg worked with their father on a daily basis and had knowledge of all of his dealings, but at some point, Ms. Pewzner claims (NYSCEF Doc. No. 161) that she realized that Ruben Elberg was acting to take control of Jacob Elberg's assets for himself and that he misrepresented the state of the LPs' affairs accordingly. Among other things, Ms. Pewzner claims that Ruben Elberg changed the password to Jacob Elberg's email account so that his office secretary could no longer gain access to email communications after his passing. Ms. Pewzner asserts that this was done to prevent her from gaining access to emails showing that, in fact, Mr. Jensen repudiated the November LP Agreements. As discussed above, this is not what they show. What they show is Mr. Jensen's unsuccessful attempt to renegotiate certain terms of the November LP Agreements that he had accepted.

In addition, the record does not support the notion that the email accounts of Jacob Elberg were not available to Ms. Pewzner prior to her submission in the Foreclosure Action. According to Ms. Whitacre, because Jacob Elberg's email account had been hacked, Ms. Whitacre had to change Jacob Elberg's password twice, she provided that changed password to both Ms. Pewzner

and Ruben Elberg, she never deleted documents from Jacob Elberg's account and to her knowledge Ms. Pewzner never checked Jacob Elberg's email account (NYSCEF Doc. No. 387, ¶ 8). On ***January 11, 2016, two months after Mr. Pewzner had already submitted her affidavit and the November LP Agreements as the operative agreements in the Foreclosure Action,*** when Jacob Elberg's email account was hacked again, Ms. Whitacre indicates that she contacted Ruben Elberg and asked him to change the password again and that he did not give the password to her at that time and she did not believe he had given it to anyone else (*id.*, ¶ 9). In other words, at all times prior to the submission of her affidavit in the Foreclosure Action, where she indicated the November LP Agreements were the operative agreements, the record indicates that Ms. Pewzner had unfettered access to her father Jacob Elberg's email account. In support of her motion, Ms. Pewzner adduces the testimony of Ruben Elberg where he testified that he did not remember whether he had changed the password of Jacob Elberg's email account (NYSCEF Doc. No. 251 at 342:18-20). She does not, however, otherwise adduce any evidence of deletions from Jacob Elberg's email account or a forensic examination of such email account. Prior to the filing of the Note of Issue and her motion for summary judgment, she also did not ask this court for relief arising from this discovery dispute so that the record could be adequately developed, and, in any event, the record is not sufficiently developed to warrant sanctions.

After Jacob Elberg's death, his will was admitted to probate, and on January 16, 2014, the Kings County Surrogate's Court issued letters testamentary to Ms. Pewzner and Ruben Elberg as co-executors for the Estate (Estate of Elberg, File No. 46-2014; the **Surrogate Court Action**). At least as of August 28, 2014, the relationship of Ms. Pewzner and Ruben Elberg turned sour and Ms. Pewzner moved by order to show cause in the Surrogate's Court for a declaration, inter alia,

that the Estate of Jacob Elberg be declared the sole member and owner of RREM and RORE and to require Ruben Elberg to deliver such documentation to Ms. Pewsner as may be required to confirm and establish that the Estate was the sole member and owner of such entities (NYSCEF Doc. 88). Ruben Elberg moved to dismiss Ms. Pewzner's claims. The Surrogate's Court denied the motion and granted Ms. Pewzner's relief to the extent of preliminarily enjoining distribution of the assets in question (164 AD3d 497 [2d Dept 2018] [modifying Surrogate's Court order only insofar as it did not require Ms. Pewzner to post an undertaking]).

The court notes two other agreements between the parties. First, as evidenced by emails, dated December 31, 2012, and January 1 and 3, 2013 (NYSCEF Doc. 170), at some point Mr. Jensen agreed to provide $2 million toward the purchase of the hotel lots (the **Loan**). Ms. Pewzner claims this was a stand-alone loan transaction and that no other agreement, including the November LP Agreements, were ever fully executed by the parties. Ruben Elberg, on the other hand, argues that this is further evidence of the parties' acknowledgment that the November LP Agreements were the operative documents for the LPs and Mr. Jensen's intent to perform.

Second, there came a time subsequent to Jacob Elberg's death and following the filing of this lawsuit where the parties did enter into an Agreement and Plan of Merger dated as of August 25, 2016 (NYSCEF Doc. No. 241; the **Merger Agreement**) by and among Royal One Real Estate II, LLC and Royal CP, Royal HI, Crabapple, RORE, Royal LIC, RREM and NYC Fund, L.P. and NYC Metro Regional Center, LLC and Westlead Capital, which reflects that there was a dispute as to whether the August LP Agreements or the November LP Agreements were the governing

documents and, as such, whether Ruben Elberg was a Class D Limited Partner (NYSCEF Doc. No. 242, Recitals at 2, §§ 2.1, 2.3, 3.2[a]).

I. Ms. Pewzner's Motion to Strike the Complaint and/or for Summary Judgment is Denied

To prevail on a motion for sanctions for spoliation of evidence, the moving party must establish:

> [1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a "culpable state of mind," and [3] "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense"

(*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015], quoting *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012]). A "culpable state of mind" includes ordinary negligence for purposes of a motion for spoliation sanctions (*VOOM*, 93 AD3d at 45). Trial courts in the exercise of discretion may impose sanctions to the affected party including (i) preclusion of evidence favorable to the spoliating party, (ii) awarding costs associated with obtaining replacement evidence, or (iii) employing an adverse inference instruction at trial (*id.* at 551, *citing* CPLR § 3126 ["If any party…refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed…the court may make such orders with regard to the failure or refusal as are just"]).

Spoliation sanctions are not appropriate in this case on the record before the court. Ms. Pewzner fails to identify any destruction of evidence that occurred or to show that she otherwise did not have access to the email account for the years of litigation that predated this lawsuit including prior to her submissions in the Foreclosure Action, which she now seeks to disavow and during the Surrogate Court Action. To be sure, Ruben Elberg's recollection as to whether he changed

the password to his father's email account raises concerns, but the record is simply not developed to support the notion that Ms. Pewzner did not otherwise have the universe of information available to her. No forensic analysis of Jacob Elberg's email account was requested or performed. Nor have any emails or documents been produced that she otherwise did not have available to her. Thus, the branch of the motion seeking to have the complaint struck is denied.

Ms. Pewzner is also not entitled to summary judgment. Summary judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Contrary to Ms. Pewzner's position, there was no repudiation and rejection of the November LP Agreements by Mr. Jensen. As discussed above, Mr. Jensen's emails reflect nothing more than an attempt to renegotiate terms. Although it may not be clear when he actually signed the November LP Agreements, Mr. Jensen accepted the agreements when he performed under the November LP Agreements by (x) representing to the United States Government in the December 2012 USCIS Letter that the November LP Agreements were the operative agreements when he applied for the EB-5 visa for Ms. Ruizhen Wang and (y) when he represented that the November LP Agreements were the operative agreements in the Crabapple Litigation. It is of no moment that he testified that often EB-5 applications are presented without fully executed agreements or that he can't recall when he signed the November LP Agreements. The fact is that although he may have tried to renegotiate the November LP Agreements, he executed them, no one ever rescinded the offer to enter such agreements and the offer to enter into such November LP Agreements did not have a sunset provision. Equally significant, as it relates to the dispute between the parties, he does not object to the November LP Agreements and it is beyond cavil that the other signatories to those

agreements (i.e., Jacob Elberg and Ruben Elberg) executed them. Indeed, it was in all of their economic interests (including, ultimately, Ms. Pewzner's as the successor to Jacob Elberg's position) to enter into the November LP Agreements as the EB-5 fundraising for the Class A Limited Partners was not achieved in accordance with the August LP Agreements.

In addition, Ms. Pewzner's argument that to the extent that Mr. Jensen's conduct can be viewed as acceptance by performance, it should be viewed as acceptance by performance of the Loan only and not the November LP Agreements, fails. The $2 million loan to the project for the purchase of the hold-out lots for the hotels, does not in any way negate his acceptance of the November LP Agreements by signing the same and by representing that they were the operative documents to the USCIS in the December 2012 USCIS Letter and by subsequently bringing the Crabapple Litigation.

Moreover, Ms. Pewzner cannot so easily whisk away the submissions that she made in the Foreclosure Action. The doctrine of "judicial estoppel," also known as the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior litigation and secured a judgment in its favor from assuming a contrary position in another action simply because their interest may have changed (*Baje Realty Corp. v Cutler*, 32 AD3d 307 [1st Dept 2006]). At the time of her submissions to the court in that action, according to Ms. Whitacre, Ms. Pewzner had access to Jacob Elberg's email account as she had been provided the password by Ms. Whitacre (and Ruben Elberg had not yet been asked to change the password and had not changed the password to address the hacking issues raised by Ms. Whitacre). Thus, the record suggests that Ms. Pewzner's position in the Foreclosure Action resulted simply from her failure

to do her own due diligence (i.e., to the extent that she suggests she might have submitted the August LP Agreements and not the November LP Agreements). In any event, as discussed above, the emails in Jacob Elberg's email account only suggest Mr. Jensen's attempt to renegotiate terms of the November LP Agreements – and are not a repudiation and rejection of the same, having previously accepted them.

Finally, Ms. Pewzner's argument that the November LP Agreements are not effective because Section 12.3 of the August LP Agreements (NYSCEF Doc. Nos. 166-167, §12.3) required written approval of the Class A Limited Partners, which she argues was not obtained, also fails. As discussed above, and per Ms. Holmes' testimony, because of the failure to raise the EB-5 funds in accordance with the terms of the August LP Agreements, all of the parties involved in the Royal CP and the Royal HI, including (i) the Elbergs, (ii) Mr. Jensen (who accepted the November LP Agreement by both [x] representing that the November LP Agreements were the operative agreements to USCIS and [y] bringing the Crabapple Lawsuit based on the November LP Agreement), (iii) Mr. Schmidt who sent the EB-5 USCIS Letter representing to USCIS the November LP Agreements as the operative documents (and including the November LP Agreements and the subscription agreements as exhibits to such EB-5 USCIS Letter) and (iv) the Class A Limited Partners by virtue of their subscription agreements (NYSCEF Doc. No. 326) referring to such November LP Agreements (i.e., and not the August LP Agreements) treated the November LP Agreements as the operative agreements.

II. Ruben Elberg's Motion for Summary Judgment is Granted

For the reasons set forth above, inasmuch as the November LP Agreements are the governing agreements, Ruben Elberg's motion for summary judgment seeking declaration that (i) the November LP Agreements are the governing agreements for the LPs must be granted, and (ii) as a Class D Limited Partner, he is entitled to receive 40% of the Net Proceeds from a Capital Event or dissolution from Royal CP Royal HI consistent with Article 3.4 of the November LP Agreements, is granted.

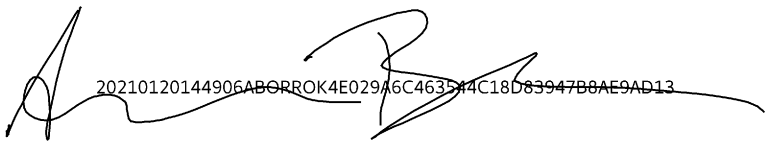
Accordingly, it is

ORDERED that the defendant's motion (seq. no. 006) for sanctions and summary judgment is denied in its entirety, and it is further

ORDERED that the plaintiff's motion (seq. no. 007) for summary judgment is granted and it is further,

ADJUDGED and DECLARED that the Limited Partnership Agreements, dated November 30, 2012 are valid and govern the affairs of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP; and it is further

ADJUDGED and DECLARED that under the Limited Partnership Agreements, dated November 30, 2012, that Ruben Elberg is a Class D Limited Partner of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP and as such is entitled to receive 40% of the Net Proceeds from a Capital Event or dissolution from Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP consistent with Article 3.4 of the November LP Agreements.



1/20/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE