# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

***Justice***

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**INDEX NO.** 451873/2020

**MOTION SEQ. NO.** 001

JENNIFER SANTELLI, CARL MAZZELLA, FTC REALTY EQUITIES, INC.,C&J PARKING INC.,

Plaintiffs,

- v -

JOSEPH SPITZER, MORDECHAI ROSENBLUM, J&M EQUITIES MANAGEMENT, LLC,SPITZER INTERNATIONAL DEVELOPMENT HOLDINGS, LLC,356 WEST 48TH STREET REALTY, LLC,258 WEST 48TH STREET REALTY, LLC,692 9TH AVENUE REALTY, LLC,694 9TH AVENUE REALTY, LLC, 696 9TH AVENUE REALTY, LLC,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65

were read on this motion to/for DISMISSAL.

In 2012, Carl Mazzella and Joseph Spitzer entered into a written agreement to transfer ownership of distressed properties that Mazzella owned though his companies, F.T.C. and C & J Parking (the Mazzella Companies), to LLCs in which Spitzer would obtain a controlling interest in exchange for Spitzer facilitating a refinancing to avoid foreclosure (Dkt. 30 [the 2012 Agreement]).* That occurred. The LLCs are now governed by operating agreements and amendments thereto that were signed by all parties, who were represented by counsel (Dkts. 34 [the Operating Agreements], 35 [the 2014 Amendments], 38 [the 2016 Amendments]). There is no question that Spitzer, through his company, J&M Equities Management, LLC (J&M), now has a controlling 49.9% stake in the LLCs and that the Mazzella Companies have a non-controlling 50.1% stake (*see* Dkt. 35).

Mazzella passed away in 2019. This action is brought on behalf of his heirs, who allegedly currently own and control the Mazzella Companies. In addition to asserting claims of mismanagement, years after the parties' agreements were made, plaintiffs want to take

* The 2012 Agreement, among other things, provided that Spitzer would pay certain indebtedness and liens and that "sums paid by Spitzer in satisfaction of the obligations will be repaid by the LLCs" (Dkt. 30 at 1-2).

back full control of the properties, alleging that Mazzella was the victim of a "fraudulent foreclosure rescue scheme." None of their claims have merit.

Plaintiffs do not allege any misrepresentation of fact that could support a fraud claim (*see Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). Pursuant to the parties' comprehensive agreements, Spitzer performed his obligations to procure funding for the properties to stave off foreclosure. Notably, plaintiffs do not allege a breach of contract claim to the contrary (the contract claim, as noted below, only concerns whether J&M is entitled to distributions). The alleged representations that the properties "were worthless," that Spitzer "would pay the mortgage and other debt ... in exchange for an equity interest in those properties" and that he could "secure a rezoning of the properties ... that would result in a substantial profit for all" are "expressions of hope and opinion, and related to future expectations, and hence cannot constitute actionable fraud" (*International Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 641-42 [1st Dept 2011]; *see Castellotti v Free*, 138 AD3d 198, 211 [1st Dept 2016]). The complaint lacks particularized allegations that these statements were not made sincerely (*see Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 71 [1st Dept 2017]). Simply labeling defendants' conduct as a "fraudulent foreclosure rescue scheme" in a conclusory manner is not enough to state a claim. If Mazzella did not find the terms of the deal fair--providing nearly half of the equity and management rights for work procuring financing--he did not need to take the deal and could have sought financing elsewhere or taken his chances in foreclosure. He chose, however, to enter into the agreements and must be held to that bargain (*see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 [2002] ["if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"]).

The breach of fiduciary duty claims principally concern actions taken by Spitzer to the detriment of the LLCs for which the Mazzella Companies were not directly injured; thus, they would need to be asserted as derivative claims (*see Shyer v Shyer*, 170 AD3d 577 [1st Dept 2019]). Plaintiffs seem to recognize this and that they would need to plead demand futility. They ask for leave to amend (*see* Dkt. 55 at 23), but because they did not provide a proposed pleading, leave is denied (CPLR 3025[b]; *see Sutton Animal Hosp. PLLC v D & D Dev., Inc.*, 177 AD3d 467 [1st Dept 2019]). Regardless, the fiduciary duty claims are insufficiently pleaded because they do not allege recoverable damages or a viable remedy (*Estate of Spitz v Pokoik*, 83 AD3d 505, 506 [1st Dept 2011] ["an element of breach of fiduciary duty is damages"]; *see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 [2017]). A speculative risk of foreclosure, audit or prosecution is not an actual loss.

The distributions paid to J&M, which are the subject of the balance of the breach of fiduciary duty claim and the breach of contract claim, were not wrongful. J&M is entitled to pro rata distributions (*see* Dkt. 34 at 10 ["All Distributions shall be made to the Members pro rata **in proportion to their Membership Interests** as of the record date set for such

Distribution"] [emphasis added]). Membership Interests is defined to "mean with respect to the Company the value of all Capital Contributions and with respect to any Member the ratio of the value of the Capital Contribution of such Member to the aggregate value of all Capital Contributions" (*id.* at 2). Capital Contribution, in turn, is defined to "mean any contribution by a Member to the capital of the Company in cash, property or services rendered or a promissory note or other obligation to contribute cash or property or to render services" (*id.* at 1). Defendants had no contractual obligation to make a cash contribution to possess Membership Interests. Pursuant to the 2012 Agreement, and as reflected in the amendments, their contributions were the services they provided to the companies. Plaintiffs' contention that the parties did not intend to provide defendants with distributions commensurate with their Membership Interests is utterly refuted by the terms of the 2012 Agreement, which provided that "the parties will distribute income to each of the owners of the LLCs on a 50%/50% basis in accordance with their **ownership** interests in the LLC" (Dkt. 30 at 4 [emphasis added]). If the terms of the original Operating Agreements governed, then J&M would not be entitled to distributions because originally the "Managers" were the Mazzella Companies alone (*see* Dkt. 34 at 17, Exhibit A) and the Membership Interests were all held 100% by the Mazzella Companies (*id.* at 18, Exhibit B; and at 19, Exhibit C [only the Mazzella Companies made any Capital Contribution based on the properties]). The operating agreements were amended though and provided that J&M was the manager and that "the new ownership shares" were 50.1% belonging to the Mazzella Companies and 49.9% to J&M (*see* Dkt. 35 at 1). Thus, J&M undoubtedly has Membership Interests entitling it to pro rata distributions.

Notably, the Operating Agreements make certain rights and obligations dependent on Capital Contributions and not Membership Interests. Because distributions are based on Membership Interests, and the documentary evidence unmistakably establishes that J&M has 49.9% Membership Interests in the LLCs, there was no breach. Having agreed in the 2014 Amendments to provide J&M with Membership Interests without insisting on monetary Capital Contributions, plaintiffs have no right to object to its receipt of distributions. The 2012 Agreement on which the parties' relationship was founded, which provided for the transfer of the properties to the LLCs and execution of operating agreements, makes it unquestionably clear that Spitzer would be entitled to distributions and plaintiffs' unfounded allegations that this was the result of fraud cannot be squared with the documentary evidence. Reading these agreements together, plaintiffs' interpretation to the contrary is unreasonable as a matter of law. The only reasonable interpretation of the contracts is that they reflect the intention that each party was entitled to distributions.

There is no basis, moreover, to remove J&M as the Managing Member because the 2014 Amendments' 60% voting requirement has not been satisfied (Dkt. 35 at 1). The statutory default rule governing removal does not apply where, as here, the operating agreement expressly governs the issue (*Gibber v Colton*, 140 AD3d 660 [1st Dept 2016]). There also

is no basis to appoint a receiver since there are no viable claims for "waste or mismanagement" (*B.D. & F. Realty Corp. v Lerner*, 232 AD2d 346 [1st Dept 1996]).

That plaintiffs "are unable to furnish more particulars because [J&M], as Managing Member, has all of the information in its control" is not a basis to excuse their deficient pleading or to "grant a continuance to allow discovery that would permit the pleading of such particulars" (*see* Dkt. 55 at 28). On the contrary, plaintiffs could have, but did not, make a books and records demand (*see* Dkt. 34 at 22), which, even if refused, could have been pursued in a special proceeding (*see Lerner v Prince*, 119 AD3d 122, 130 [1st Dept 2014] ["the purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists"]).

The negligence claims are duplicative of the baseless fiduciary duty claims and in the absence of any viable cause of action for unjust enrichment, a claim that is barred based on contracts that govern (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005]), there is no basis for a constructive trust (*see AQ Asset Mgt. LLC v Levine*, 154 AD3d 430, 431 [1st Dept 2017]).

Plaintiffs' other arguments are unavailing.

Accordingly, it is ORDERED that defendants' motion to dismiss the complaint is GRANTED.

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6/1/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER