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

PRESENT: HON. JENNIFER G. SCHECTER **PART** 54

Justice

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LA SCUOLA D'ITALIA GUGLIELMO MARCONI,

Plaintiff,

- v -

GATES CAPITAL CORP., NGUYEN (WIN) HUYNH, J. DOUGLAS CASEY, EPSTEIN BECKER & GREEN, P.C., ALAN KLEIMAN, STEFANO ACUNTO, CARLO MANTICA, JOHN DOES,

Defendants.

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INDEX NO 650419/2018

MOT SEQ NOS 011 012 013 014 015

DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 011) 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 341, 342, 343, 344, 345, 346, 347, 348

were read on this motion to/for STRIKE JURY DEMAND.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 684, 685, 688, 689, 690, 691, 692, 693, 694

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 451, 628, 629, 630, 686, 706, 707, 708, 709, 710

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

The following e-filed documents, listed by NYSCEF document number (Motion 014) 448, 449, 450, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 687, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 015) 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773

were read on this motion to/for AMEND CAPTION/PLEADINGS .

The alleged malpractice of defendants Epstein, Becker & Green, P.C. (EBG) and Alan Kleiman was not the proximate cause of plaintiff's injury (*see D.D. Hamilton Textiles, Inc. v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000]). Plaintiff claims they had an obligation to discuss the requirements of the N-PCL in connection with the January 28, 2015 vote (*see* Dkt. 470), despite the agreement to sell the property not having been executed until January 30, 2015 (*see* Dkt. 452 at 7). However, Kleiman's failure to advise plaintiff about the supposed requisite voting requirement and need to seek approval from the Attorney General did not harm plaintiff or plausibly affect the board's vote.* Regardless, on April 2, 2015, plaintiff's board unanimously ratified the January 2015 vote, the decision to proceed with the purchase agreement and Gates' fee (Dkt. 501). There is no question of fact about the validity of the April 2015 vote (*see Skytrack Condominium Bd. of Managers v Windberk Partners*, 167 AD2d 381 [2d Dept 1990], *accord Board of Managers of Soho Greene Condominium v Clear, Bright & Famous LLC*, 106 AD3d 462, 463 [1st Dept 2013]). Thus, plaintiff was not harmed by any malpractice that could have affected the January 2015 vote, nor is there any basis for plaintiff to complain that it was harmed by anything that occurred prior to the April 2015 vote.

Furthermore, the lack of written memorialization of Rocco Sebastiani's $5 million donation was not the cause of plaintiff's default or any of its damages since, among other things, plaintiff materially changed the character of the project by pivoting to trying to sell condominiums (Dkt. 616 at 32 ["my donation as long as it goes to the kids, I'm okay with it, but I'm not looking to do condos"]; *see* Dkt. 615 at 15-20, 42; *see also* Dkt. 617 at 23-24). Sebastiani never denied (and indeed there is no question of fact) that he made the donation or that such a pledge is enforceable (*see Matter of Versailles Found. [Bank of N.Y.]*, 202 AD2d 334, 335 [1st Dept 1994]; *see also* Dkt. 405 at 47 ["Plaintiff opted not to formalize the contribution at the request of Colosseo (at the acquiescence of all the parties involved) and then opted not to enforce the pledge)"]). Rather, he objected to the materially changed plans, as he took issue with a different type of project being pursued instead of what the parties had agreed upon. Thus, even if the donation had been memorialized in writing (and irrespective of the form contract used) there would still have been a legitimate dispute about his obligations by virtue of plaintiff's change of plans. And in light of that change there is no way to know whether Sebastiani's contribution would have been provided. Consequently, the question of whether EBG's failure to document his

* If plaintiff was actually correct that approval was required, it could have raised that issue with the Attorney General to avoid the consequences of its default. It did not.

contribution in writing harmed plaintiff is impermissibly speculative (*see Phillips-Smith Specialty Retail Group II, L.P. v Parker Chapin Flattau & Klimpl, LLP*, 265 AD2d 208, 210 [1st Dept 1999]).

The same is true of all of plaintiff's other pleaded theories of malpractice (Dkt. 405 at 39-46; *see Mah v 40-44 W. 120th St. Assoc., LLC*, 193 AD3d 549, 550 [1st Dept 2021]; *see also Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]).

Leave to amend to assert new theories of liability is denied (*see Price v TuneCore, Inc.*, 182 AD3d 481 [1st Dept 2020]; *see also Oil Heat Inst. of Long Island Ins. Tr. v RMTS Assoc., LLC*, 4 AD3d 290, 293 [1st Dept 2004]).

The breach of fiduciary duty, gross negligence, constructive fraud and negligent misrepresentation claims are duplicative of the malpractice claim (*see Boesky v Levine*, 193 AD3d 403 [1st Dept 2021]). The claim for aiding and abetting defendant Stefano Acunto's breach of fiduciary duty is dismissed since, as set forth below, the claims against Acunto are dismissed (*see McBride v KPMG Intl.*, 135 AD3d 576, 579 [1st Dept 2016]).

Since plaintiff's claims against EBG have been dismissed, EBG is entitled to summary judgment on its counterclaim for $85,387.99 in unpaid fees (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [1st Dept 2009]; *see* Dkt. 367).

Acunto also is entitled to summary judgment. His decisions are protected by the business judgment rule since there is no question of fact that his actions were taken in reliance on the board's advisors, including EBG (*People v Grasso*, 11 NY3d 64, 70 [2008], citing N-PCl § 717[b]; *see People v Lawrence*, 74 AD3d 1705, 1707 [4th Dept 2010]). Notably, plaintiff's own expert testified that plaintiff would not have suffered any damages but for Kleiman's legal advice (Dkt. 625 at 28). While the court has found that such legal advice did not cause plaintiff's losses, this admission reinforces that Acunto did nothing that could have possibly harmed plaintiff that was not based upon the advice of counsel.

There is also no evidence that Acunto misled the board or that it did not authorize his actions. As noted, there is no evidence that the board's April 2015 vote was not fully informed. Nor is there any question of fact about the propriety of Acunto's actions after the April 2015 vote in light of the resolutions approved at the August 20, 2015 meeting, including the approval of the construction contract (Dkt. 531 at 7; *see* Dkt. 452 at 16; *see also* Dkt. 449 at 26-27). Thus, as with EBG, plaintiff's ratification precludes its claims.

Plaintiff's jury demand was stricken for the reasons stated on the record (Dkt. 777 at 5-6), though that issue is now academic.

In the end, plaintiff failed to prove that its losses were anything other than the product of poor business decisions rather than misconduct on the part of defendants. It elected to take

a highly risky approach in January 2015, doubled down in April 2015, and kept going in August 2015. It did so with the benefit of all material information. Yet, plaintiff failed to procure the funds needed to make its plan work and its attempts to try to fix the problems were unsuccessful; thus, its plan foreseeably failed for financial reasons. Since Acunto's actions were consistent with the authority granted to him by the board and were made in reasonable reliance on the advice of counsel, and that advice was consistent with the resolutions of the board and did not proximately cause any of plaintiff's losses, plaintiff's attempt to avoid the consequences of its own decisions is unavailing.

Accordingly, it is ORDERED that plaintiff's motions for leave to amend and for summary judgment are DENIED, defendants' motions to strike plaintiff's jury demand and for summary judgment are GRANTED, and the Clerk is directed to enter judgment (1) dismissing plaintiff's claims with prejudice; and (2) in favor of defendant Epstein, Becker & Green, P.C. and against plaintiff La Scuola D'Italia Guglielmo Marconi in the amount of $85,387.99, with 9% statutory pre-judgment interest from January 10, 2017 to the date judgment is entered.

Defendants shall e-file a proposed judgment to the Clerk consistent with this order.

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9/14/2023
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER