SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

----------X

FEDERAL REALTY NEW YORK, LLC, and PINNACLE MANAGING CO., LLC,

Plaintiffs,

- v -

FC FOLEY, LLC, BROOKFIELD ASSET MANAGEMENT, INC., BROOKFIELD PROPERTIES (USA II) LLC, and FC FOLEY SQUARE ASSOCIATES, LLC,

Defendants.

----------X

INDEX NO. 656999/2021

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69

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

I. INTRODUCTION

In this action arising from the disputed sale of interests in a real estate venture, the plaintiffs, Federal Realty New York, LLC, and Pinnacle Managing Co., LLC, seek a judicial declaration that a purported transfer of membership interests in nominal defendant FC Foley Square Associates, LLC, by defendant FC Foley, LLC, to defendants Brookfield Asset Management, Inc., and Brookfield Properties (USA II), LLC, is null and void and of no force and effect, plus money damages for breach of contract and tortious interference with contract, and attorney's fees. The defendants assert seven counterclaims seeking a contrary declaration and related relief. The defendants now move pursuant to CPLR 3212(e) for partial summary judgment dismissing the complaint and awarding judgment on the first and second counterclaims. The plaintiffs oppose the motion and cross-move pursuant to CPLR 3212(e) for

partial summary judgment dismissing the first and second counterclaims and awarding judgment on their first cause of action. The defendants oppose the cross-motion.

For the following reasons, the defendants' motion is granted and the plaintiffs' cross-motion is denied.

II. BACKGROUND

The following facts are derived from the admissible evidence submitted in connection with the instant motions and are undisputed unless otherwise indicated.

A. The Operating Agreement

On August 29, 2000, the defendant FC Foley, LLC (FC Foley), and the plaintiff Federal Realty NY, LLC (Federal), entered into an operating agreement (the Operating Agreement) for the formation and governance of the nominal defendant FC Foley Square Associates, LLC (the Property Owner). The Operating Agreement provided, in relevant part, that the Property Owner's purpose was to construct, develop, and exercise ownership over certain residential and commercial property located at 111 Worth Street in Manhattan (the Property). As set forth in Exhibit A to the Operating Agreement, the sole members of the Property Owner were FC Foley, holding 70% of the membership interests, and Federal, holding 30% of the membership interests. FC Foley was designated as the managing member of the Property Owner. An affiliate of Federal was to serve as property manager and residential leasing agent for the building on the Property and FC Foley was to act as leasing agent with respect to the retail space in the building. Pursuant to the foregoing provision, Federal appointed the plaintiff Pinnacle Managing Co. (Pinnacle) as property manager.

At the time the Operating Agreement was executed, FC Foley was an affiliate of Bruce Ratner (Ratner). Federal was an affiliate of Joel Wiener (Wiener). 71.43% of the interests in FC

Foley were owned by FC/RRG Foley Square Associates, LLC (NY) (FCRRG Member), and the remaining 28.57% of interests in FC Foley were owned by S/K Foley Square Associates, LLC (SK Member). FCRRG Member, was indirectly owned, through intervening entities, by Forest City Enterprises, Inc. (FCE Inc.).

Article 8 of the Operating Agreement governs the transfer of membership interests in the Property Owner. "Transfer" is defined for purposes of the Operating Agreement as:

> (i) the issuance, transfer, sale, gift, grant, conveyance, assignment, encumbrance, pledge, hypothecation or redemption, directly or indirectly, of any equity ownership interest (whether stock, partnership or membership interest or otherwise) in the [Property Owner] or in any entity holding a direct or indirect interest in the [Property Owner], or the merger or consolidation of any such Person or with another Person, as the case may be; and (ii) the execution and delivery by any Person holding a direct or indirect interest in the [Property Owner] of a contract of sale, option or other agreement providing for any of the foregoing.

FC Foley and Federal agreed that, with specified exceptions, neither entity could transfer its interests in the Property Owner without the other's consent. Section 8.1(a) of the Operating Agreement provides:

> Except for those Transfers described in Section 8.1(b), no Members shall be permitted to Transfer, or cause or permit a Transfer of any interest in such Member or any entity which, directly or indirectly, holds an interest in such Member without the Approval of the Members. Any such attempted or actual Transfer without the Approval of the Members shall be null and void ab initio and of no force and effect.

"Approval of the Members" is defined as "the prior written consent or approval of members holding ninety percent (90%) or more of the outstanding Interests."

Notwithstanding the foregoing, Section 8.1(b) permits the following Transfers "without Approval of any Member:"

> (i) Transfers by a Member of all or any portion of its Interest to the [Property Owner] or another Member (or an Affiliate of such other Member);
>
> (ii) Transfers to one or more Family Members of Weiner or Ratner; and
>
> (iii) With respect to [FC Foley]'s Interest, (i) Transfers by [FC Foley] of such Interest and Transfers or other disposition of stock, partnership or other interests in [FC Foley], directly or indirectly, to any Person as long as at least fifty-one percent (51%) of [FC Foley] or such other Person is directly or indirectly owned by Ratner and/or one or more of his Family Members (or his heirs or trusts for the benefit of any one or more Family Members of Ratner), Forest City Enterprises, Inc. or any of his Affiliates after such Transfer or other disposition . . .; and with respect to Federal's Interest, Transfers by Federal of such Interest and Transfers or other disposition of stock, partnership or other interest in Federal, directly or indirectly, to any Person as long as at least fifty-one percent (51%) of Federal or such other Person is directly or indirectly owned by Wiener (or his heirs or trust for the benefit of one or more Family Members of Wiener), or any of his Affiliates after such Transfer or other disposition.[1]

B. The FC Enterprises Conversion

On December 31, 2015, FCE Inc., an Ohio corporation, converted to a Delaware limited partnership, Forest City Enterprises, L.P. (FCE LP), pursuant to Ohio and Delaware corporate law (the FC Enterprises Conversion). Contemporaneously with the FC Enterprises Conversion, Forest City Realty Trust, Inc. (FCRT) was formed as a publicly traded company. After the FC Enterprises Conversion, FCE LP was a wholly-owned subsidiary of FCRT.

C. The Brookfield Transaction

On or about December 10, 2018, the defendant Brookfield Asset Management, Inc., (BAM) purported to complete the acquisition of 100% of the publicly traded shares of FCRT for

[1] The quoted text of Section 8.1(b)(iii) reflects amendments to that subsection dated February 21, 2001.

$11.4 billion (the Brookfield Transaction). On December 19, 2018, Federal formally objected to the transfer of FCRT's shares to BAM inasmuch as it resulted in BAM's indirect control of a majority interest in FC Foley and, in turn, the Property Owner, through FCE LP, FCRRG Member, and other intervening entities. Federal contended that the Brookfield Transaction required its consent pursuant to the terms of the Operating Agreement.

D. Procedural Background

On December 15, 2021, Federal and Pinnacle commenced this action. The plaintiffs seek a judicial declaration that the purported transfer of FC Foley's membership interest in the Property Owner was and is null and void and of no force and effect (first cause of action), monetary damages for FC Foley's breach of the transfer restrictions in the Operating Agreement (second cause of action), and monetary and punitive damages for tortious interference with the Operating Agreement by BAM and Brookfield Properties (USA II), LLC (Brookfield Properties) (third cause of action). On February 18, 2022, the defendants filed an answer and asserted seven counterclaims seeking a judicial declaration that the FC Enterprises Conversion was not a Transfer within the meaning of the Operating Agreement (first counterclaim), a judicial declaration that the Brookfield Transaction was an excepted Transfer under Section 8.1(b)(iii)(i) of the Operating Agreement (second counterclaim), access to the Property Owner's books and records pursuant to the Operating Agreement (third counterclaim), a judicial declaration that FC Foley and/or the Property Owner may terminate Pinnacle as property manager and appoint Brookfield Properties in its stead pursuant to the Operating Agreement and the management agreement between Pinnacle and the Property Owner (fourth and fifth counterclaims), and monetary damages exceeding $1.8 million for Pinnacle's breaches of the management agreement

between Pinnacle and the Property Owner and conversion of the Property Owner's funds (sixth and seventh counterclaims). The plaintiffs filed a reply to the counterclaims on March 30, 2022.

The instant motions ensued immediately thereafter. In support of their motion, the defendants submit, *inter alia*, the pleadings; the affidavit of Ketan Patel, an officer of FCE LP and each of its subsidiaries, including FC Foley; the Operating Agreement; the First Amendment to the Operating Agreement; the Ohio and Delaware Conversion Certificates of FCE Inc.; the Limited Partnership Agreement of FCE LP; a compilation of certain of FCRT's 2018 SEC filings; and a compilation of articles in the media about the FC Enterprises Conversion and the Brookfield Transaction. In support of their cross-motion, the plaintiffs submit, *inter alia*, the pleadings; the affidavit of Wiener; the Operating Agreement; the First Amendment to the Operating Agreement; an earlier draft of the Operating Agreement; Federal's written objection to the Brookfield Transaction; a 2001 regulatory agreement with respect to the Property between the New York State Housing Finance Agency (HFA) and the Property Owner (the Regulatory Agreement); and a 2003 reimbursement agreement between Fannie Mae and the Property Owner (the Reimbursement Agreement).

III. LEGAL STANDARD

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish his or her prima facie entitlement to judgment as a matter of law by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant fails to meet this burden and establish his or her claim or defense sufficiently to warrant a court's directing judgment in the movant's favor as a matter of law, the motion must be denied regardless of the sufficiency of the opposing papers. See Alvarez v Prospect Hosp., 68

NY2d 320 (1986); Winegrad v New York Univ. Med. Ctr., supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). Should the movant meet his or her burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra.

IV. DISCUSSION

Pursuant to CPLR 3001, the 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," (CPLR 3001), for the "primary purpose" of "stabiliz[ing] an uncertain or disputed jural relationship with respect to present or prospective obligations." Chanos v MADAC, LLC, 74 AD3d 1007, 1008 (2nd Dept. 2010), citing Goodman v Reisch, 220 AD2d 383 (2nd Dept. 1995); see Touro Coll. v Novus Univ. Corp., 146 AD3d 679 (1st Dept. 2017). Here, the parties have identified a present justiciable controversy as to whether the Brookfield Transaction required Federal's consent under the Operating Agreement. The plaintiffs aver that it did, and seek a judicial declaration voiding ab initio the transfer to BAM of FCRT's indirect interests in FC Foley. The defendants aver that it did not, and seek a judicial declaration that the transfer was excepted from the consent requirement under the Operating Agreement. Relatedly, the defendants also seek a declaration that the FC Enterprises Conversion did not constitute a Transfer within the meaning of the Operating Agreement, and thus likewise did not require Federal's prior approval.

A. First Counterclaim—The FC Enterprises Conversion

The defendants have demonstrated that the FC Enterprises Conversion did not constitute a Transfer within the meaning of the Operating Agreement. The Operating Agreement defines a

"Transfer" as the "issuance, transfer, sale, gift, grant, conveyance, assignment, encumbrance, pledge, hypothecation or redemption, directly or indirectly, of any equity ownership interest . . . in the [Property Owner] or in any entity holding a direct or indirect interest in the [Property Owner], or the merger or consolidation of any such [entity] into or with another [entity]." The FC Enterprises Conversion does not satisfy this definition because, under both Ohio and Delaware law, FCE Inc. merely changed its corporate form and was continued in FCE LP, without any transfer of its assets, including its direct and indirect ownership interests in the Property Owner and the relevant intervening entities.

Under Ohio law, "[u]pon a conversion becoming effective . . . [t]he converting entity is continued in the converted entity." Ohio Rev. Code Ann. § 1701.821(A)(1). Further, upon the completion of such a conversion, the converted entity automatically possesses all assets and property of the converting entity, as well as the rights, privileges, immunities, powers, franchises and authority of the converting entity. Id. § 1701.821(A)(3). A conversion is thus merely a change in corporate form. It does not entail the dissolution of the converting entity and the transfer of its assets to a new entity, because the converting entity and the converted entity are one and the same. See Joseph Bros. Co., LLC v Dunn Bros., 148 NE3d 1260, 1270 (6th Ct. App. Ohio 2019) ("A conversion avoids the dissolution of one form of entity with the transfer of the assets to the owners and then a second transfer of the distributed assets to a new entity.") (internal quotation marks omitted).

Similarly, under Delaware law, when a corporation converts to a Delaware limited partnership, "the conversion shall not be deemed to constitute a dissolution of [the converting] other entity" and "the limited partnership shall be deemed to be the same entity as the converting other entity and the conversion shall constitute a continuation of the existence of the converting

other entity in the form of a domestic limited partnership." 6 Del. C. § 17-217(g). When such a conversion is completed, "all of the rights, privileges and powers of the other entity that has converted, and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall remain vested in the domestic limited partnership to which such other entity has converted and shall be the property of such domestic limited partnership[.]" Id. § 17-217(f). Consequently, "[t]he rights, privileges, powers and interests in property of the [converting] other entity, as well as [its] debts, liabilities and duties . . . shall not be deemed, as a consequence of the conversion, to have been transferred to the domestic limited partnership to which [it] has converted[.]" Id.

Indeed, the limited nature of the conversion and the essential continuity of FCE Inc.'s substantive business and assets in FCE LP was explicitly recognized in FCE LP's Limited Partnership Agreement, which states, at Section 2.1, that FCE LP "has been formed for purposes of the seamless continuation of the business and assets of [FCE Inc.] for all purposes and without transfer or deemed transfer of any assets[.]" Plainly, then, under both Ohio and Delaware law, the FC Enterprises Conversion constituted a mere change in FCE Inc.'s corporate form, without any transfer or shifting of its assets, including its direct and indirect ownership interests in the Property Owner and the relevant intervening entities, such as would constitute a Transfer under the Operating Agreement.

In opposition, the plaintiffs point to a single line in Joseph Bros. Co., LLC v Dunn Bros., supra, in which the court states that "a 'conversion' is a type of merger." Based on this statement, the plaintiffs argue that the FC Enterprises Conversion must necessarily constitute a Transfer under the Operating Agreement. This contention is unavailing. The merger or consolidation of an entity holding a direct or indirect interest in the Property Owner is only a

Transfer under the Operating Agreement if it is "of any such [entity] into or with another [entity]." That is, a merger or consolidation qualifies as a Transfer under the Operating Agreement only if it involves at least two separate entities. That is not the case here because, under Ohio law, FCE Inc. was not merged or consolidated with any other entity but was instead continued in FCE LP. See Ohio Rev. Code Ann. § 1701.821(A)(1); Joseph Bros. Co., LLC v Dunn Bros., supra at 1270.

Accordingly, the branch of the defendants' motion seeking summary judgment on their first counterclaim for a declaration that the FC Enterprises Conversion did not constitute a Transfer under the Operating Agreement and, consequently, did not require Federal's prior approval, is granted; and the branch of the plaintiffs' cross-motion seeking summary judgment dismissing the first counterclaim is denied.

B. Second Counterclaim—The Brookfield Transaction

Section 8.1(a) of the Operating Agreement prohibits FC Foley and Federal from causing or permitting the Transfer of any interest in "any entity which, directly or indirectly, holds an interest in such Member" absent the requisite prior written consent or approval of 90% of the Members of the Property Owner. Thus, the Transfer of 100% of the publicly traded shares of FCRT, an entity indirectly holding 71.43% of the interests in FC Foley, required Federal's prior written consent unless it fell within one of the exemptions provided in Section 8.1(b) of the Operating Agreement.

The applicable exemption, according to the defendants, is found in Section 8.1(b)(iii)(i), which provides, as relevant here, that Federal's prior consent is not required for a Transfer of FC Foley's interest in the Property Owner "as long as at least fifty-one percent (51%) of [FC Foley] . . . is directly or indirectly owned by Ratner and/or one or more of his Family Members (or his

heirs or trusts for the benefit of any one or more Family Members of Ratner), *Forest City Enterprises, Inc.* or any of his Affiliates after such Transfer" (emphasis added). As discussed above, the FC Enterprises Conversion entailed only a change in FCE Inc.'s corporate form, which otherwise continued its business uninterrupted as FCE LP, having automatically retained all its assets, rights, privileges, powers, interests, debts and liabilities. The defendants argue that references in the Operating Agreement to FCE Inc. should therefore be understood, following the FC Enterprises Conversion, to refer to FCE LP. Specifically, they contend that just as FCE LP automatically retained all FCE Inc.'s contractual rights and obligations without any need to amend the relevant contracts to substitute FCE LP wherever FCE Inc. was referenced, so too should FCE LP be understood to substitute for FCE Inc. whenever the latter is referenced in contracts, such as the Operating Agreement, to which it was not a party. And, the defendants continue, because FCE Inc. (now FCE LP) still maintained indirect ownership of at least 51% of FC Foley following the Brookfield Transaction, Section 8.1(b)(iii)(i) applies, and Federal's prior consent to the Brookfield Transaction was not required.

The plaintiffs respond that the Operating Agreement, pursuant to Section 10.15 thereof, may not be amended or modified without Federal's approval, and the court may not, therefore, "rewrite" the agreement to substitute FCE LP for FCE Inc. Further, the plaintiffs argue that, even if Section 8.1(b)(iii)(i) of the Operating Agreement could be rewritten in this way, the plain meaning of the provision makes clear that its consent exception is applicable only so long as FC Foley's interest in the Property Owner is transferred to an affiliate of Ratner. According to the plaintiffs, at the time the Operating Agreement was executed, this included FCE Inc. but, upon the completion of the Brookfield Transaction, FCE Inc. (now FCE LP) stopped being a Ratner

affiliate and instead became owned by, and affiliated with, BAM, precluding application of Section 8.1(b)(iii)(i)'s consent exception.

The court concludes that the defendants have the better of this dispute. Contrary to the plaintiffs' contention, application of Section 8.1(b)(iii)(i)'s consent exception to the Brookfield Transaction does not require the court to "rewrite" the Operating Agreement. As discussed above, under both Ohio and Delaware law, FCE Inc. "[was] continued in" FCE LP (Ohio Rev. Code Ann. § 1701.821[A][1]), and the two entities are thus "deemed to be the same entity" (6 Del. C. § 17-217[g]). As such, and as correctly noted by the defendants, FCE LP automatically, by operation of law, retained all FCE Inc.'s contractual rights and obligations without any need to amend the latter's contracts to expressly refer to FCE LP instead of FCE Inc. In other words, because FCE Inc. and FCE LP are legally deemed to be one and the same entity, contractual references to the former are understood, post-conversion, to refer to the latter.

The parties herein cite no case law that directly addresses what effect, if any, such a conversion has on a contract, like the Operating Agreement, which references a converting entity that is not itself a party to the contract. The court, however, perceives no logical reason why the same conceptual framework, pursuant to which a converted entity is understood to substitute for a converting entity whenever the converting entity is referenced in a contract, should not also apply in such circumstances. Indeed, logic dictates that the same framework *should* apply. If FCE Inc. and FCE LP are legally deemed to be the same entity, having merely changed its corporate form, then references in the Operating Agreement to FCE Inc. should be understood, post-conversion, to refer to FCE LP because FCE LP *is* FCE Inc., even if there has been no express amendment of the contract to reflect such a substitution.

Interpreting the Operating Agreement in this way preserves the substance of the parties' original bargain. The parties chose to expressly include FCE Inc. in Section 8.1(b)(iii)(i). FCE Inc. did not cease to exist, but merely changed its corporate form and was continued in FCE LP. Accordingly, if Section 8.1(b)(iii)(i)'s reference to FCE Inc. is to be given effect, logic dictates that said reference must now, post-conversion, be understood to refer to FCE LP because, legally, it *is* FCE Inc. By contrast, the plaintiffs' preferred interpretation would effectively delete all references to FCE Inc. from the Operating Agreement. More than the implicit substitution of FCE LP for FCE Inc. urged by the defendants, which would give effect to the substance of the parties' agreement, such a deletion, based solely on a third-party's decision to change its corporate form, would seem to strongly implicate Section 10.15's proscription against amendment or modification of the contract without the consent of the parties. Indeed, given FCE Inc's continued existence in the form of FCE LP, it is notable that the plaintiffs offer no meaningful theory as to how or why interpreting and enforcing the contract in recognition of this reality would substantively impair or otherwise change the parties' rights and obligations under the Operating Agreement. The plaintiffs merely assert, in conclusory fashion, that a change in corporate form could, potentially, have tax or other consequences—for whom is left unsaid—but provide no further explanation, including how this entirely speculative concern is manifested here.

The plaintiffs further assert that, as the present situation purportedly demonstrates, adoption of the defendants' theory would allow a third-party's conversion to alter the agreement reached by separate parties and extend certain right to a changed entity without the consent of the contracting parties. This concern is misplaced. Insofar as any rights were extended to FCE Inc. under the Operating Agreement, this was indisputably done with the consent of the contracting

parties. And, as already discussed above, FCE LP, by virtue of the FC Enterprises Conversion, is automatically, pursuant to the Ohio and Delaware conversion statutes, vested with all the rights held by FCE Inc. prior to the conversion. Accordingly, insofar as the defendants' theory would extend rights under the Operating Agreement to FCE LP, it is only because the contracting parties already consented to extend those rights to FCE Inc., which is one and the same as FCE LP.

Similarly unavailing is the plaintiffs' contention that Section 8.1(b)(iii)(i) is only applicable, with respect to the provision concerning FCE Inc., so long as FCE Inc./FCE LP is an affiliate of Ratner. Initially, the defendants' unrebutted submissions demonstrate that, at the time the Operating Agreement was executed, FCE Inc. was not an "Affiliate" of Ratner, as that term is defined in the Operating Agreement.[2] FCE Inc. was a publicly traded company controlled by its Board of Directors. Bruce Ratner did not own a controlling percentage of FCE Inc.'s stock, nor was he or any of his Family Members (as defined in the Operating Agreement)[3] on the company's Board of Directors, though the Board was admittedly controlled by certain extended members of the Ratner family. More importantly, however, the plaintiffs' preferred construction of the provision is at odds with the plain meaning of the contract language and well-established principles of contract interpretation.

[2] The Operating Agreement, as relevant here, defines an "Affiliate" of any Person (here, Ratner) as "any other Person controlled, controlling or under common control (directly or indirectly) by or with such Person. For purposes of this Agreement, the term "control," or any derivative thereof . . . when used with respect to any specified Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of voting securities or partnership or other ownership interests, or by contract[.]"

[3] The Operating Agreement defines "Family Member" with respect to an individual Person as "such Person's present spouse, brothers and sisters (whether by whole or half blood), lineal ascendents or descendants or the respective spouses of any of the foregoing, or a trustee or custodian for the benefit of any of them."

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'" MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009), quoting Greenfield v Philles Records, 98 NY2d 562, 569 (2002). This rule has special import "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled businesspeople negotiating at arm's length." Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 (2004) (internal quotation marks omitted). Additionally, a contract should not be read to render any portion of it meaningless (Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 39 [2018]), but should instead be construed "so as to give full meaning and effect to [its] material provisions" (Beal Sav. Bank v Sommer, 8 NY3d 318, 324 [2007]; see Isaacs v Westchester Wood Works, 278 AD2d 184, 185 [1st Dept. 2000] [contract should be construed "so as not to leave any provision without force and effect"]).

Section 8.1(b)(iii)(i)'s consent exception applies to Transfers that leave at least fifty-one percent (51%) of FC Foley directly or indirectly owned by "Ratner and/or one or more of his Family Members (or his heirs or trusts for the benefit of any one or more Family Members of Ratner), Forest City Enterprises, Inc. or any of his Affiliates[.]" This carveout, which was the subject of negotiation by sophisticated, counseled businesspeople, intentionally and expressly included FCE Inc. as a separate, standalone entity, and not, as plaintiffs' suggest, because it was an affiliate of Ratner. This is evident from the language and construction of the provision. There is no express statement in the provision that FCE Inc. was understood to be a Ratner affiliate. To the contrary, the provision clearly positions FCE Inc. as occupying a category

separate and distinct from "any of his [Ratner's] Affiliates."[4] The provision does not, for example, refer to "Forest City Enterprises, Inc. or any *other* of his Affiliates." Indeed, the plaintiffs' preferred interpretation would render the express inclusion of FCE Inc. in Section 8.1(b)(iii)(i) redundant because FCE Inc. would already be included among the entities encompassed by "any of his [Ratner's] Affiliates." The contract cannot be so construed, as such a construction would improperly and unnecessarily render the express inclusion of FCE Inc. as a standalone entity meaningless and without effect. See Cortlandt St. Recovery Corp. v Bonderman, supra; Beal Sav. Bank v Sommer, supra; Isaacs v Westchester Wood Works, supra.

Though they take the position that the language of Section 8.1(b)(iii)(i) is clear and unambiguously supports their position, the plaintiffs nevertheless attempt to introduce extrinsic and parol evidence, consisting of an earlier draft of the Operating Agreement and the affidavit of Joel Wiener, as further support for their construction of the agreement. "[E]xtrinsic and parol evidence," however, "is not admissible to create an ambiguity in a written agreement" and "may not be considered unless the document itself is ambiguous." South Rd. Assocs., LLC v IBM, 4 NY3d 272, 278 (2005). The court has determined that there is no ambiguity regarding whether FCE Inc./FCE LP must be a Ratner affiliate for Section 8.1(b)(iii)(i) to apply—it does not. Consequently, the plaintiffs' proffered extrinsic evidence is inadmissible and will not be considered by the court.

[4] The defendants argue that pursuant to Section 10.6 of the Operating Agreement, "his Affiliates" should be understood as referring to both Ratner's affiliates and FCE Inc.'s affiliates. Section 10.6 concerns the use of pronouns in the Operating Agreement and provides that "references to the masculine gender shall include the feminine and neuter genders (and vice versa), except where the same shall not be appropriate." The defendants thus contend that "his Affiliates," as used in Section 8.1(b)(iii)(i), should also be read as "its Affiliates," in reference to FCE Inc. The court need not reach this sub-argument because, even assuming, *arguendo*, as the court does in the body of this decision above, that "his Affiliates" refers only to Ratner's affiliates, it is nevertheless clear that application of Section 8.1(b)(iii)(i) with respect to the provision concerning FCE Inc. does not depend on FCE Inc.'s status as a Ratner affiliate.

Accordingly, the branch of the defendants' motion seeking summary judgment on their second counterclaim for a declaration that the Brookfield Transaction was an excepted Transfer under Section 8.1(b)(iii)(i) of the Operating Agreement and, consequently, did not require Federal's prior approval, is granted; and the branch of the plaintiffs' cross-motion seeking summary judgment dismissing the second counterclaim is denied.

C. Plaintiffs' First Cause of Action

The plaintiffs contend that, even if Section 8.1(b)(iii)(i)'s consent exception applies to the Brookfield Transaction, they are nevertheless entitled to summary judgment on their first cause of action, which seeks a declaration that the Brookfield Transaction is null and void and of no force and effect, based on the defendants' purported violations of Sections 8.5 and 8.1 of the Operating Agreement.

1. Section 8.5—The Regulatory & Reimbursement Agreements

The plaintiffs contend that the Brookfield Transaction must be declared null and void pursuant to Section 8.5 of the Operating Agreement. Section 8.5 imposes additional restrictions on FC Foley's ability to transfer its interest in the Property Owner, or to cause or permit the transfer of any interest in itself or any entity which directly or indirectly holds an interest in FC Foley. Specifically, Section 8.5.1.1 provides, in relevant part, that:

> No Transfer of all or any portion of such Interest shall be effective unless (i) such Transfer complies with the Transfer restrictions in . . . all agreements to which the [Property Owner] or [FC Foley] is a party; and (ii) such Transfer would not cause or result in a violation or breach of any of the then applicable rules and regulations of any governmental authority having jurisdiction over such Transfer[.]

Similarly, Section 8.5.1.5 provides that:

> No Transfer of an Interest, or any portion thereof, shall be effective to convey the subject matter thereof until the assignee or transferee thereof executes all necessary certificates or other documents and

> performs all acts required in accordance with the laws of the State of New York and any other states in which the Company is then doing business and executes any and all documents as shall be required from time to time by the rules and regulations of any regulatory body or commission having jurisdiction over the Company or any of the Project[.]

And Section 8.5.2 provides that, "[a]ny purported Transfer or any other action taken in violation of this Section 8.5 shall be void ab initio."

The plaintiffs argue that the Brookfield Transaction breached the above provisions of Section 8.5 because it violated the terms of a pair of collateral agreements executed by the Property Owner—the 2001 Regulatory Agreement with the HFA, and the 2003 Reimbursement Agreement with Fannie Mae. Provisions in each of these collateral agreements impose certain transfer restrictions without the prior consent of the HFA or Fannie Mae, respectively. According to the plaintiffs, who raise the issue of these collateral agreements—which are never mentioned anywhere in the complaint—for the first time in their moving papers, the Brookfield Transaction was subject to the transfer restrictions in the Regulatory Agreement and Reimbursement Agreement, but no consent was sought or received from either the HFA or Fannie Mae, rendering the Brookfield Transaction null and void pursuant to Section 8.5 of the Operating Agreement.

The relevant provision in the Regulatory Agreement is Section 5.5. Section 5.5(a), as relevant here, sets forth the ownership structure of the Property Owner, stating that:

> All of the membership interests in [Property] Owner are, as of the date hereof, owned by FC Foley . . . as the managing member of [Property] Owner ("Managing Member") and Federal . . . (the "Non-Managing Member"). The membership interests of the Managing Member are held by FC/RRG Foley Square Associates, LLC, an affiliate of Forest City Ratner, as managing member, and S/K Foley Square L.L.C. The membership interest of the Non-Managing Member is held by Joel Wiener.

Section 5.5(b) of the Regulatory Agreement then provides that the Property Owner shall not permit, without the HFA's prior consent:

> (1) the substitution of, or admission of additional managing members of the [Property] Owner, the Managing Member or the Non-Managing Member; [and]
>
> (2) the admission of additional non-managing members of the [Property] Owner or the Managing Member if such additional non-managing members will hold a 10% or greater interest in [Property] Owner or the Managing Member[.]

The plaintiffs contend that the Brookfield Transaction required the HFA's prior consent because the references in Section 5.5(b)(1) and (b)(2) to additional "managing members" and "non-managing members" encompass both those that acquire a direct ownership interest in the Property Owner or the "Managing Member" (*i.e.*, FC Foley), *and* those, like BAM, that acquire only an indirect interest in these entities via a transaction further up the chain of ownership. The defendants take the opposite position, arguing that "managing members" and "non-managing members" should be understood to encompass only those that acquire a direct ownership interest in the Property Owner or FC Foley, but not those, like BAM, that acquire an indirect interest in these entities via a transaction further up the chain of ownership.

With regard to the Reimbursement Agreement, the relevant provision is Section 3.1(A)(1), which provides that, subject to certain exceptions set forth is Section 3.1(A)(2), "Fannie Mae may, at Fannie Mae's option, declare an Event of Default" and invoke any of its specified contractual remedies, if, without Fannie Mae's prior written consent, there occurs any of a number of specified transfers affecting the direct or indirect ownership and/or control of the Property Owner. These include:

> (b) a Transfer which results in (i) [FC Foley] not Controlling the [Property Owner] or (ii) [FC Foley] not being the sole managing member of the [Property Owner];

> (c)(i) a Transfer of any of [FCRRG Member's] Ownership Interests in [FC Foley] or (ii) a Transfer which results in [FCRRG Member] not being the sole managing member of [FC Foley]; or
>
> (d)(i) a Transfer of any of RRG Residential Properties, LLC's Ownership Interests in [FCRRG Member] or (ii) a Transfer which results in RRG Residential Properties, LLC not being the sole managing member of [FCRRG Member]; or
>
> (e)(i) a Transfer of any of Bruce Ratner's Ownership Interests in RRG Residential Properties, LLC or (ii) a Transfer which results in Bruce Ratner not being the sole managing member of RRG Residential Properties, LLC[.]

(internal parentheticals omitted). According to the plaintiffs, these subsections demonstrate that the Reimbursement Agreement was designed to ensure that there would be no change in control, whether direct or indirect, over FC Foley without Fannie Mae's prior approval, which allegedly was not sought or received in connection with the Brookfield Transaction. The defendants respond that the cited subsections of Section 3.1(A)(1) are inapplicable because the Brookfield Transaction did not involve a Transfer of any interests in FC Foley, FCRRG Member, or RRG Residential Properties, LLC, and that in any event the Brookfield Transaction would be subject to one of the exceptions to the consent requirement set forth in Section 3.1(A)(2) of the Reimbursement Agreement.

The plaintiffs' contentions regarding the Regulatory Agreement and Reimbursement Agreement are, like their other arguments, unavailing. Initially, although the parties have not briefed the issue, the court is skeptical as to whether the plaintiffs may properly seek to adjudicate any purported breaches of the Regulatory Agreement and/or Reimbursement Agreement given that they are not parties to either contract. Similarly concerning is that the plaintiffs seek to adjudicate these purported breaches in an action to which neither the HFA nor Fannie Mae is a party. Indeed, these concerns are only heightened by the fact that both the

Regulatory Agreement and the Reimbursement Agreement appear to the court to reserve to the HFA and Fannie Mae, respectively, the right to enforce their respective agreements. Section 7.2 of the Regulatory Agreement states that "[t]he [HFA] shall enforce the Regulatory Agreement." And Section 5.3 of the Reimbursement Agreement provides that "[t]he rights and remedies of Fannie Mae specified in this Reimbursement Agreement are for the sole and exclusive benefit, use and protection of Fannie Mae," which "is entitled, but has no duty or obligation . . . to exercise or to refrain from exercising any right or remedy reserved to [it] under this Reimbursement Agreement[.]" Indeed, Section 5.3 not only reserves to Fannie Mae the right to enforcement of the Reimbursement Agreement, but also the discretion not to exercise that right. In light of these provisions, and especially given the defendants' credible arguments that the Brookfield Transaction was not subject to the consent requirements of the Regulatory Agreement and Reimbursement Agreement in the first instance, the court declines to opine on the merits of the purported violations alleged by the plaintiffs without there being any opportunity for the HFA and Fannie Mae, who arguably have a greater interest in the enforcement of these agreements than the plaintiffs, to weigh in on the issue.

In any event, it is unnecessary for the court to reach these issues because the plaintiffs submit no evidence to establish, prima facie, a breach of either the Regulatory Agreement or the Reimbursement Agreement. See Winegrad v New York Univ. Med. Ctr., supra; Zuckerman v City of New York, supra. Specifically, even assuming, *arguendo*, that the Brookfield Transaction was subject to the prior consent requirements of the Regulatory Agreement and Reimbursement Agreement, the assertion that consent for the transaction was not sought or received from either the HFA or Fannie Mae is entirely conclusory, as it is unsupported by any of the plaintiffs' evidentiary submissions. For example, there is no evidence submitted that

either the HFA or Fannie Mae has ever determined that the Brookfield Transaction required its prior consent, let alone that either agency has pursued its contractual remedies for a failure to obtain such consent. Indeed, given that, as shown by the defendants' submissions, the Brookfield Transaction was subject to fairly extensive news coverage, even if it is assumed that consent for the transaction was never sought, the fact that neither the HFA nor Fannie Mae has declared a default and pursued its contractual remedies may well suggest that they, like the defendants, believe that their prior consent was not required.

To be sure, there is also no evidence submitted demonstrating that either the HFA or Fannie Mae *did* consent to the Brookfield Transaction. Unfortunately for the plaintiffs, however, they cannot rely on an absence of, or gap in, the evidence to demonstrate their prima facie entitlement to summary judgment or the existence of a triable issue of fact. See Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra; O'Halloran v City of New York, supra; see also Blackwell v Mikevin Mgmt. III, LLC, 88 AD3d 836, 837 (2nd Dept. 2011) ("A movant fails to satisfy its prima facie burden by merely pointing out gaps in [its opponent's] case."); cf. Clyde v Franciscan Sisters of Allegany, N.Y., Inc., 217 AD3d 1353, 1355 (4th Dept. 2023) ("A party seeking summary judgment based on an alleged failure to procure insurance . . . must demonstrate that a contract provision required that such insurance be procured *and that the provision was not complied with*.") (emphasis added). In effect, the plaintiffs have merely pointed out the existence of the consent requirements in the Regulatory Agreement and Reimbursement Agreement, assumed that those requirements were applicable to the Brookfield Transaction, and speculated, without any evidentiary support, that the defendants may not have complied with them. Whether offered in support of the plaintiffs' cross-motion or in opposition

to the branch of the defendants' motion seeking the dismissal of the complaint's first cause of action, such unsupported speculation is simply insufficient to satisfy the plaintiffs' burden.

2. Operating Agreement Section 8.1

Finally, the plaintiffs contend that the Brookfield Transaction should be declared null and void because the defendants failed to comply with the final paragraph of Section 8.1 of the Operating Agreement, which sets forth additional "conditions" to a Transfer of any interest in the Property Owner. These include, as relevant here, the transferee's provision to the Property Owner of instruments of assumption and security, approved by both FC Foley and Federal, for the payment and performance of all obligations attendant to the Interest so transferred and assumed. The plaintiffs contend that such documentation has never been delivered to Federal for its approval. Even if this is true, however, which the defendants dispute, such a failure would not require that the Brookfield Transaction be declared null and void. Other portions of the Operating Agreement governing transfer restrictions, such as Sections 8.1(a) and 8.5.2, explicitly state that a Transfer in violation thereof will be "void ab initio." The final, standalone paragraph of Section 8.1, by contrast, contains no similar language. Under the well-accepted cannons of contract construction, the omission of such language, when it is expressly included elsewhere in the Operating Agreement, must be assumed to be intentional. See Sterling Inv. Servs., Inc. v 1155 Nobo Assoc., LLC, 30 AD3d 579, 581 (2nd Dept. 2006). Consequently, even if the documentary notice requirements of Section 8.1's final paragraph were not met, the Operating Agreement would not require that the Brookfield Transaction be declared null and void as a result. Rather, the proper remedy would be to order specific performance—*i.e.*, the delivery to Federal of the necessary documents for its approval.

Accordingly, for all the reasons discussed above, the branch of the defendants' motion seeking summary judgment dismissing the plaintiffs' first cause of action is granted; and the branch of the plaintiffs' cross-motion for summary judgment in their favor on their first cause of action is denied.

D. Plaintiffs' Remaining Causes of Action

The plaintiffs' remaining two causes of action seek monetary damages for FC Foley's breach of the transfer restrictions in the Operating Agreement by failing to obtain Federal's prior consent to the Brookfield Transaction (second cause of action), and monetary and punitive damages against BAM and Brookfield Properties for tortiously inducing FC Foley to breach the transfer restrictions in the Operating Agreement (third cause of action). For all the reasons discussed above, the defendants have established that the Brookfield Transaction was an exempted Transfer that did not require Federal's prior approval. Accordingly, the branch of the defendants' motion seeking summary judgment dismissing the plaintiffs' remaining two causes of action is granted.

V. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion pursuant to CPLR 3212(e) for partial summary judgment dismissing the complaint and awarding judgment on the first and second counterclaims (MOT SEQ 001) is granted; and it is further

ORDERED that the plaintiffs' cross-motion pursuant to CPLR 3212(e) for partial summary judgment dismissing the first and second counterclaims and awarding judgment on their first cause of action is denied; and it is further

ORDERED that the complaint is dismissed in its entirety; and it is further

ORDERED that the remaining counterclaims are severed and shall continue as against the plaintiffs; and it is further

ADJUDGED and DECLARED that the December 31, 2015, conversion of Forest City Enterprises, Inc. to Forest City Enterprises, L.P., was not a Transfer under the terms of the Operating Agreement executed on August 29, 2000, by and between defendant FC Foley, LLC and plaintiff Federal Realty NY, LLC and, consequently, the conversion did not require the prior approval of plaintiff Federal Realty NY, LLC; and it is further

ADJUDGED and DECLARED that the December 10, 2018, acquisition by defendant Brookfield Asset Management, Inc. of 100% of the publicly traded shares of Forest City Realty Trust, Inc. was an excepted Transfer under Section 8.1(b)(iii)(i) of the Operating Agreement executed on August 29, 2000 by and between defendant FC Foley, LLC and plaintiff Federal Realty NY, LLC and, consequently, the transaction did not require the prior approval of plaintiff Federal Realty NY, LLC; and it is further

ORDERED that counsel shall appear for a status conference on January 18, 2024, at 11:30 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision, Order and Judgment of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/17/2023
DATE

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