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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HARRY MOHINANI, VIJAY MOHINANI,

Plaintiffs,

- v -

TZILI DORON CHARNEY as the personal representative of the Estate of Leon H. Charney, and LHC CLUB LLC,

Defendants.

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INDEX NO. 653229/2012

POST-TRIAL DECISION

In March 2007, plaintiffs invested $4.5 million in a Manhattan commercial real estate project. Their investment is governed by a letter agreement and operating agreements governing the LLCs that owned the real estate. If these written agreements exclusively govern plaintiffs' rights, their entire investment is lost because of foreclosures and sales of the real estate at a substantial loss. Plaintiffs, however, claim that there were oral terms that were part of their agreement, which provide them with additional rights, including, most critically, the right to be bought out of their investment on the same terms as all other investors. Plaintiffs contend that had such rights been honored they would have received their investment back, with interest. Plaintiffs further contend that they were fraudulently induced into investing.

After a bench trial, based on the evidence and an assessment of the witnesses' credibility having observed their demeanor, the court concludes that (1) plaintiffs failed to prove the existence of any alleged binding oral agreement, (2) they were not fraudulently induced to invest, and (3) they have no basis to recover anything in this action.

OTHER ORDER – NON-MOTION

Findings of Fact

The following findings are based on the credible evidence.

Plaintiffs, Harry and Vijay Mohinani (the Mohinanis), are brothers who live in Hong Kong and manage their family-apparel business. Gabriel Bitton, their close friend, also runs an apparel company with his brother. Bitton lives and primarily works in Canada but had an office in a Manhattan building owned by Leon H. Charney, who was a billionaire real estate investor with an office in that same building. Bitton became friendly with Charney and saw him as a highly successful real estate investor who could be trusted. Charney regaled Bitton with stories of his past investments. In 2004 or 2005, Bitton told Charney that he knew people in Asia who might be interested in investing if he ever had anything of interest.

In February 2007, while Bitton was at a trade show in Las Vegas, Charney called to ask if his Hong Kong contacts would be interested in investing in a real estate deal. The property would be purchased for $180 million, funded mostly by a $200 million bank loan, with investors to contribute an additional $30 million in equity. When Bitton returned to New York, he met with Charney to discuss the investment and was provided with a brochure depicting the real estate – two adjoining buildings near their offices, located at 119 West 40th Street (the Office Property) and 120 West 41st Street (the Hotel Property; collectively, the Properties). The Office Property was a 23-story building occupied by commercial tenants. The plan was to make improvements so the rent, and consequently the property value, could be increased. The Hotel Property, a much smaller building, would be demolished and a boutique hotel would be constructed using the $50 million of

cash obtained that was in excess of the purchase price ($20 million from the loan plus $30 million from the investors).

Bitton contacted Harry Mohinani about the investment. Harry indicated that he and his brother were interested and authorized Bitton to speak further with Charney on their behalf. At their next meeting, Bitton claims he was told that, of the $30 million investment, Charney's share would be $9 million and that the Mohinanis could have a $4.5 million stake. Charney also allegedly stated that he would not take any money out of the project for himself until the Mohinanis' investment was fully repaid with interest. Based on these alleged representations, Bitton claims to have believed that Charney was motivated to make the project successful.

At subsequent meetings, Bitton claims that he and Charney agreed that: (1) the Mohinanis would invest $4.5 million for a 15% stake in the project; (2) the Mohinanis would not be called for additional funds and could not be diluted until after their investment was repaid; (3) consistent with his past practice, which was, over time, to buy out his partners until he owned the entire building, Charney would offer to buy out the Mohinanis on the same terms as any other investors that were bought out; (4) the Mohinanis were in the deal for profits only and not for losses; (5) if and when the Mohinanis were paid back their $4.5 million with interest of 2% over prime, their interest would be diluted by 25% with the diluted amount given to Charney as a kicker; and (6) aside from attorneys' fees expended in connection with the sale, Charney would not take any money out of the project until the Mohinanis were paid back their $4.5 million with interest of 2% over prime. Bitton claims he relayed these terms to Harry, who agreed to them on behalf of both Mohinanis.

Before making their $4.5 million investment, the Mohinanis did not meet or communicate with Charney. They exclusively relied on Bitton as their agent. Bitton never requested any financial information or a prospectus regarding the Properties or a detailed business plan from Charney, nor did he or the Mohinanis ask to consult a lawyer, including the in-house counsel of Bitton's company that later assisted them with their investment.

On March 20, 2007, while Bitton was in Charney's office, Charney dictated the following letter agreement to his secretary:

> Pursuant to our conversations of the past-few months, this letter confirms the fact that you wish to invest and will invest in a building project entitled 119 W. 40th street. You understand from our conversations and that you have physically seen the buildings and that it entails two buildings with the concept of tearing one down and creating a 22-story hotel probably not to operate, but to sell immediately upon completion. The market is large in New York for boutique hotels in this area. I explained to you that the total equity for the project was plus or minus [$30 million] and that because we took in partners who could help with the hotel situation, my personal equity was reduced to [$9 million] and you and I agreed that I would accept your right to subscribe to [$4.5 million] of the same.
>
> You have told me that you wish to participate in the equity only for profits and that you don't ever want to be called for additional funds. I have agreed to this concept. It is understood that once your [$4.5 million] is returned to you, with an interest rate of Prime plus 2, your percentage participation will be reduced by [a] 25% kicker to me and your remaining position will stay [the same] until the building is sold, refinanced or distributions are made. Thus, if we deduct 25% from 15% of the equity, your position after return of capital plus interest will be 11.25%. Other than legal costs, which your share could amount to approximately $40,000 - $50,000, there will be no other costs to you for this transaction.
>
> **If the above is a reflection of our conversation and understanding**,[1] please sign below where indicated and facilitate a transfer of [$4.5 million] per wire instructions attached hereto, no later than Monday March 26th, 2007.

[1] This language indicates that the very purpose of the Letter Agreement was to memorialize the oral terms the parties agreed on. Bitton signed the agreement the next day without any objection or any request that additional terms be included.

> This letter shall be a binding agreement between us and more formal documentation reflecting your membership in an LLC which will represent the equity will be facilitated in the very near future (Dkt. 414 [the Letter Agreement] [emphasis added]).

The secretary printed the Letter Agreement and Charney signed it and gave it to Bitton to review. After reviewing and discussing it with Harry, Harry authorized Bitton to sign the Letter Agreement on behalf of him and his brother. Bitton did so the next day, on March 21, 2007. Eight days later, on March 29, 2007, the Mohinanis wired $4.5 million to Charney. The sale of the Properties closed the following day.

Charney then drafted and provided to Bitton an "Interoffice Memorandum" dated April 5, 2007, which provides:

> A. The purchase of 119 W. 40th and 120 W. 41st street closed on Friday March 30th, 2007. The purchase price was $181,950,000.
>
> B. The deal received financing from Wachovia and Greenwich Capital in the amount of $202,250,000.
>
> C. The deal was originated by the undersigned.
>
> D. The equity of the deal was capitalized at $32,000,000.
>
> E. Charney brought in a group for 50% entitled Fortis Property Group.
>
> F. Thus, the original equity was Charney 50%, Fortis Property Group 50%.
>
> G. Charney sold 20% of his 50% to George Comfort and Sons an old line real estate company.
>
> H. Charney retained 30% of his equity in an entity entitled LHC Club LLC, herein after referred to as "Club".
>
> I. Thus, Charney's group equity participation was $9,600,000.
>
> J. Gaby Bitton's participation is as follows:

> 1. Bitton invested $4,500,000 which represents 14.0625% of the capitalization.
>
> 2. Passing that participation to Club gives Bitton 46.875% of Club's interest in the deal.
>
> 3. It was understood between Charney and Bitton that Bitton's participation would be for profits only and he would not [be] subject to any call or extra money if such money was deemed necessary. His position might have dilution if the same occurred.[2]
>
> 4. His investment was based upon the fact that he would receive Prime +2 upon his investment until all of his money is recouped and thereafter his participation would be diluted by a kicker of 25% to Leon Charney.
>
> 5. Pursuant to a letter dated, March 20th, 2007 between Bitton and Charney, Bitton's group would be responsible for certain legal fees which were referred to in said letter attached hereto.
>
> 6. Bitton has represented to the above that his participation may come in corporate form and could be inclusive of an investment of all of his brothers. He is to inform me in the near future who is to have title to his investment (Dkt. 416 [the April 5 Memo]).[3]

As contemplated, title to each of the Properties was held by separate LLCs, which were governed by operating agreements (*see* Dkts. 419, 420). LHC Club LLC (LHC) became a 30% member in each of the LLCs.[4] As set forth in the April 5 Memo, the other

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[2] Charney allegedly orally agreed with Bitton that dilution would not be permitted. The Letter Agreement, however, does not include that term. Absent such an agreement, it makes sense that if the Mohinanis exercised their right not to participate in a capital call, their equity would be diluted.

[3] The Mohinanis do not claim the April 5 Memo is a binding agreement despite the attorney working on their behalf later writing that she considered it part of the "Bitton Agreement" (*see* Dkt. 341 at 1). The April 5 Memo and Bitton's reaction to it is evidence of what they understood their agreement to be.

[4] LHC is a New York LLC and is <u>not</u> governed by an operating agreement (there were drafts and a version signed by Charney [Dkt. 418] but the Mohinanis never signed). Regardless, the Mohinanis do not argue that the drafts contain any provision that would be more beneficial to them than the applicable default fiduciary duties. As will be addressed, it is law of the case that Charney

members were Fortis Property Group, LLC (Fortis), which owned 50%, and George Comfort & Sons, Inc. (GCS), which owned 20%. The Mohinanis, in turn, were each provided with a 23.4375% membership interest in LHC, which is reflected in K-1s they began receiving in 2007 to which they never objected (*see* Dkt. 487).

In March 2008, Charney told Bitton that it made sense to acquire air rights to increase the size of the Hotel Property. The Mohinanis agreed, and provided $74,539.64, which they later claimed was to be treated as a loan based on the parties' agreement. Charney, however, contemporaneously wrote a letter indicating it was a capital contribution (*see* Dkt. 325 at 2).

By letter dated June 23, 2008, Charney explained why the project needed more money and made a capital call on the Mohinanis of $509,190.16 (*see* Dkt. 451 at 3-4). The Mohinanis also paid this amount but claim they did not agree it was a capital contribution, again insisting it was a loan. At this point, the Mohinanis contributed an additional $583,729.80 on top of their original $4.5 million investment.

Charney also asked the Mohinanis to further contribute to a buy-out of Fortis' interest in the Hotel Property that had occurred in June 2008 (*see* Dkt. 330). The Mohinanis refused. The buy-out nonetheless resulted in LHC's and GCS' interests in the Hotel Property respectively increasing to 60% and 40%, and the operating agreement of the LLC that owned the Hotel Property was amended accordingly.

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has default fiduciary duties to LHC and the Mohinanis by virtue of his status as LHC's managing member and the manager of the project. However, the Mohinanis have never asserted derivative claims, so their claim for breach of fiduciary duty is necessarily limited to harm suffered uniquely by the Mohinanis, and as will be explained, no such harm occurred.

In November 2008, Geneviève Maranda, an attorney who worked for Bitton's company, began corresponding with Charney at Bitton's direction. She was tasked with ascertaining the corporate structure of the project and the Mohinanis' investment. By letter dated November 13, 2008, she requested organizational and financial information related to the Properties (Dkt. 455). She understood that $4.9 million was required at that point on the Hotel Property mortgage and that her clients' share would be $2.3 million. In response to her inquiries, she and the Mohinanis were provided with the operating agreements for the LLCs that owned the properties.

After reviewing the documents, Maranda wrote a letter to Charney, dated December 18, 2008, stating:

> As you both know, Leon Charney on behalf of LHC Club LLC has entered into a special agreement regarding the contribution of our clients in the acquisition of the Property. This special agreement provides that our clients will "participate in the equity only for profits" and that they will not be called for additional funds. This agreement has been confirmed by a letter dated March 20, 2007, and has been reiterated in [an] Interoffice Memorandum dated April 5, 2007, both signed by Leon Charney (the "Bitton Agreement"). Based on these conditions, the amount of $4,500,000 has been transferred to your care.
>
> Following your demand, our clients have transferred an additional amount of $583,784, for a total of $5,083,784. Thereafter, based on the Bitton Agreement, our clients have reiterated that they did not want to be called for additional capital contributions. Moreover, section 2.2 of the Operating Agreement dated May 1st, 2007, that deals with member's capital contribution, provides that each member may, with the consent of the manager, but no member shall be required to, make loans to the company.
>
> On July 17, 2008, Leon Charney on behalf of the LHC Club LLC sent a letter to the members asking the signature of an addendum that would have replaced section 2.2 of the Operating Agreement. According to our records, our clients have not signed this addendum and in consequence, they would not be bound by this addendum.

> Your assertion that Leon Charney has advanced $2,601,594 on behalf of our clients to fulfill their funding obligations has no ground, as there are no funding obligations for our clients. Said assertion seems to be based upon section 3.2 of the Limited Liability Company Agreements of L.H. Charney 40th Street LLC and of 41st Street Holdings LLC ("LLC Agreements"). The LLC Agreements have been entered into between LHC Club LLC and the other partners. Our clients are not a party to the LLC Agreements. Notwithstanding the foregoing, the specific conditions of the Bitton Agreement confirmed on March 20, 2007, and April 5, 2007, supersede the provisions of the other agreements regarding member's additional capital contributions.
>
> Accordingly, you are unfunded to consider the additional contribution of Leon Charney as a loan to our clients, as there are no funding obligations and in consequence, there is no loan to our clients. Moreover, the claimed interest rate of 18% is exorbitant and the Operating Agreement provides rather that loans bear interest at an agreed upon rate.
>
> We also take the opportunity of this letter to ask you how you will deal with that additional contribution of $583,784 of our clients.
>
> Finally, and in order to clarify the question of the membership of our clients, please note that Gabriel Bitton represents the Mohinanis who are members in LHC Club LLC. To that effect, and as requested recently, the Mohinanis would like to receive a "share certificate" of said membership (Dkt. 34).

The Mohinanis did not provide any additional funds.

After the market crash in 2008, the LLC that owned the Office Property defaulted on its mortgage. Pursuant to an agreement dated October 16, 2009, Fortis' interest in the Office Property was amended from a management role to one of a passive investor in consideration for an option to put its equity to Charney after five years for 75% of the capital it invested (*see* Dkt. 388 at 3 [the Fortis Agreement]). In January 2010, in a mortgage foreclosure action, the court appointed a receiver to take control of the Office Property.

By late 2009, the mortgage on the Hotel Property went into default a second time and Charney acquired the mortgage note from the lender and passed it to the investors.[5]

In early February 2010, Charney became ill and went into a coma that lasted several months. Guardians were appointed to manage his affairs. Shortly thereafter, Bruce Block, who was the President of Charney's company, notified Bitton and the other investors of Charney's condition. In March 2010, Bitton attended a meeting of LHC's members, at which time Bitton claims to have become aware for the first time that Charney had sold $2 million of his stake in LHC to other investors.

In November 2011, the Hotel Property was sold, at a loss, for $20.5 million. By letter dated November 17, 2011, Block notified the Mohinanis of the sale, which resulted in net proceeds of $8.7 million, so LHC's share was $5.2 million (Dkt. 380). After agreeing to treat the Mohinanis' contributions of $583,729.80 as loan, each Mohinani was issued a check for $291,864.90 as complete repayment of the loan. Block notified the Mohinanis that LHC had no further funds to repay the members, resulting in a loss of their original equity investment. The Mohinanis have not submitted any persuasive evidence to the contrary. Instead, they claim that certain funds paid to Charney violated their alleged oral agreement and that, had Charney not been paid these amounts, there would have been

[5] Bitton's involvement in the negotiations with the lender is ultimately irrelevant to the claims here. Bitton's contention that money Charney loaned to the project should have been subordinated to the Mohinanis' investment is not credible. Bitton testified that he objected to the interest rate and sought to convince Block to refinance with a bank loan at a lower rate. However, if Bitton truly believed that Charney's loan was subordinated to the Mohinanis' equity, it is hard to imagine why he would have insisted on refinancing with a bank because, unlike a bank loan that would not have been subordinated, Charney would not be repaid the allegedly-inflated interest before the Mohinanis were made whole. Thus, the court finds that Bitton did not truly believe that the parties had an agreement to prioritize the Mohinanis' equity over Charney's loan.

enough money to repay their $4.5 million. Because plaintiffs did not prove any such oral agreement, discussion of these payments is unnecessary.[6]

Finally, in May 2012, Fortis sued Charney and LHC for breach of the Fortis Agreement, and they settled in December 2012 with Charney's guardians purchasing Fortis' interest in the Office Property for approximately $9.6 million.[7]

Procedural History

Plaintiffs commenced this action in September 2012.[8] After a court-ordered accounting, plaintiffs filed their operative amended complaint and the claims that remain to be resolved are: (1) breach of contract, (2) fraudulent inducement and (3) breach of fiduciary duty (Dkt. 101).[9] A bench trial was held between February 3-5, 2020 (*see* Dkts.

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[6] In short, the Mohinanis complain about fees Charney received at the closing in March 2007 that were authorized by written agreement with other investors (*see* Dkt. 318 at 4). The only grounds to challenge these fees would be based on the alleged oral agreement, which the court finds never occurred, or on the grounds of corporate waste. While the Mohinanis have asserted direct breach of fiduciary duty claims, they never asserted claims derivatively on behalf of LHC or double derivatively on behalf of the LLCs that owned the Properties. As any improper fees (which might be subject to entire-fairness scrutiny) would have harmed the LLCs and not the Mohinanis uniquely, there is no basis to challenge them with direct claims at this juncture.

[7] That Fortis had given up its management rights in connection with its buy-out agreement is yet another reason why it makes no sense for Charney to have offered to buy out the Mohinanis on the same terms as Fortis. Thus, even if there was an oral agreement (and the court is not convinced there was), there would not necessarily have been any breach. Fortis, moreover, had to fight to enforce this agreement, which suggests this was not a contrived attempt to favor Fortis over the Mohinanis.

[8] Charney passed away in March 2016 and the personal representative of his estate was substituted as the defendant.

[9] Plaintiffs have been provided with a full accounting of the project. The accounting claim has therefore been resolved. Plaintiffs have not submitted any credible evidence that Block's accounting of the net proceeds, which resulted in repayment of the Mohinanis' loans but not their equity, is erroneous. There is no basis to conclude that any payment made to Charney or to other investors should have been subordinated to the Mohinanis, and thus, no basis to compel repayment of their $4.5 million equity investment, which was entirely lost.

312-314). The Mohinanis, Bitton, Block, and Robert Essex each provided direct testimony by affidavit and all of them except for Block were subject to live cross-examination (*see* Dkts. 302-305, 308).[10]

The parties filed post-trial briefs on June 8 and June 24, 2020 (Dkts. 315-317, 413).

Conclusions of Law

Breach of Contract

"To form a binding contract there must be a 'meeting of the minds,' such that there is 'a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms'" (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). Plaintiffs did not prove that there was mutual assent over the alleged oral terms. Based primarily on Bitton's testimony and an assessment of his credibility, considered along with the documents and the course of the parties' dealings, the evidence established that Charney informed Bitton that it was his general practice to buy out investors until he eventually owned the entire building but not that he ever committed to doing so. Indeed, Bitton testified:

> I don't think I went and called Harry [Mohinani] and told him this document doesn't represent everything we did. This is the basis of our agreement and Mr. Charney had knowledge not only once, but many times along the way that his way of buying properties with many partners and he would buy out one partner at a time until he owned everything. And that he was probably going to do the same thing as this with this venture as he did with all the other buildings that he now owns 100 percent. Because from my understanding, none of the buildings that he owns today did he ever own alone. He always owned them with many partners and he bought them out along the way and he was going to use the same way of dealing on this one property (Dkt. 312 at 157-158).

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[10] The parties rested on May 18, 2020, after stipulating to submit Block's cross-examination and redirect by affidavit due to his medical condition (Dkt. 311).

Bitton's testimony of an amorphous, one-sided understanding, at most, indicates potential future intent and is not an express agreement to buy out the Mohinanis. Bitton's testimony to the contrary is not credible.[11] Even if Bitton subjectively believed that the parties had reached an agreement, there is no credible proof that Charney ever agreed to be bound or that there was any meeting of the minds.

The same is true of all the alleged oral terms not contained in the Letter Agreement, including the alleged promise that Charney would not take fees of any kind until the Mohinanis were paid back. Plaintiffs have not asserted any derivative claims, so the fairness of the fees is not at issue. All that matters on the breach of contract claim is whether there was ever an express agreement prohibiting fees, which were authorized by written agreements with the other investors. There was no convincing proof that such an agreement was made.

The Letter Agreement--"a reflection of [the parties'] understanding" (Dkt. 414)--did not include the alleged material oral terms and Bitton did not object to their omission before signing or even thereafter when he would have been expected to. Had the alleged additional oral terms really been agreed upon, Bitton would have insisted that they be incorporated. He did not. He knew how to voice his objection when he believed an

[11] While Bitton does not have a direct financial interest, he surely wants to see the Mohinanis--his close friends whom he represented in this transaction--prevail. He clearly feels some responsibility because he recommended the investment and vouched for Charney. Overall, the Mohinanis' testimony was not particularly significant because the terms of the alleged oral agreement were the product of meetings between Charney and Bitton. The Mohinanis did not meet or communicate with Charney until after they made their investment. Only Bitton knows what was actually said in his March 2007 meetings with Charney. Thus, Bitton's credibility is paramount. Likewise, Block and Essex were not privy to those meetings and clearly were left to pick up the pieces after Charney's incapacitation. They had no way to know what was orally agreed since those alleged oral agreements were not memorialized in writing. Thus, their credibility is not probative of whether there was an alleged oral agreement.

agreement was wrongly described (Dkt. 301 ¶ 43). Yet, he nonetheless testified that it was not his practice to communicate in writing, either by email or letter, and that he instead prefers to speak in person or over the phone. That ultimately was his perilous prerogative (though the court is convinced that none of the alleged oral understandings were actually agreed-upon obligations and that is why they were not memorialized). Bitton's after-the-crash testimony is inconsistent with the parties' writings and how they behaved. Maranda, who was tasked with clarifying the terms of the Mohinanis' investment and set forth her understanding in writing, never mentioned or even suggested in her letters that the parties had orally agreed to terms not contained in the Letter Agreement, the April 5 Memo, or the operating agreements. It strains credulity to believe that Bitton would not have told her of the alleged oral terms if they truly were essential to the parties' agreement and, had he done so, she surely would have included those terms in her writings. Instead, the evidence bears out that these alleged oral terms were asserted for the first time in this litigation and evolved over time (*see, e.g.*, Dkt. 409).

Because Charney is deceased, this case turns on whether the court believes Bitton's testimony that he and Charney expressly orally agreed to certain terms that were not memorialized in the written agreement and were not even asserted until this lawsuit. The court does not. It is incredible that Bitton would have signed the written agreement, which was missing these alleged critical terms, if the parties truly reached a binding consensus on them. It is also doubtful, under the circumstances, that Charney would have attempted to trick Bitton by leaving the terms out because Bitton could easily have called him out and the deal could have been scuttled.

Consequently, the Mohinanis failed to prove that defendants breached their agreement and there is no credible evidence to dispute the proper allocation set forth by Block. The Mohinanis' equity was ultimately lost due to failure of the investment. They, like many others, invested in Manhattan commercial property just before the financial crisis and suffered significant losses.

Fraud

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Fraud must be proven with "clear and convincing evidence" (*Simcuski v Saeli*, 44 NY2d 442, 452 [1978]).

Plaintiffs have not proven by clear and convincing evidence that they were fraudulently induced to invest $4.5 million in the project. There was no credible proof that Charney made any material misrepresentations about his intentions since, as with the alleged oral agreement, the court does not find that Charney made any of the promises or commitments alleged. Plaintiffs, moreover, have not proven that when Charney made any statements he did not believe them or that he had any intent to defraud. The evidence did not establish, for example, that Charney committed to investing or maintaining any minimum amount of equity. In fact, the evidence established that Bitton was unclear about the amount Charney was putting in. The evidence did not support, moreover, that Charney represented that he would definitively buy the Mohinanis out while having no intention of doing so. To the extent a buyout was discussed, Charney was making a bona fide expression of future intent to potentially purchase the Mohinanis interests as he had done

in the past with successful endeavors. There was no credible evidence that Charney did not sincerely intend to do so here if the circumstances made sense for him as they did in the past (*see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]). What most likely occurred was that understandably Charney changed his mind after the financial crisis. In the end, it is unbelievable that Charney essentially was guaranteeing the success of the investment, which was obviously subject to risk of loss if the market went down.[12]

The Mohinanis failed to prove their fraud claim.

Breach of Fiduciary Duty

There is no question that Charney owed fiduciary duties to the Mohinanis (156 AD3d 443, 444 [1st Dept 2017]). The Mohinanis, however, did not prove that Charney breached them. The only possible fiduciary violation is the taking of fees that are not entirely fair to LHC or the LLCs that own the Properties. The Mohinanis, however, have never asserted derivative or double derivative claims seeking redress for harms done to these LLCs, and these fees were expressly authorized by contract with the other investors, who paid the bulk of them since they had a much bigger equity stake than the Mohinanis. Because there is no credible proof that Charney otherwise did anything wrong in connection with his management of the project and, in any event, the credible evidence

[12] That he bought out other investors does not permit a reasonable inference that he intended to defraud the Mohinanis at the outset. Many of the other investors had other business dealings with him (e.g., tenants in his buildings) or unique management rights (e.g., Fortis). It makes sense for Charney to prioritize buying out investors where failing to do so would have collateral adverse business consequences. Regardless, as discussed, Charney had no contractual or fiduciary obligation to buy out the Mohinanis.

shows that the project failed, not due to Charney, but due to the market downturn, there is no basis to hold his estate liable for any fiduciary violation.[13]

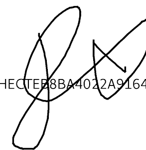
The Mohinanis' contention that Charney had a direct fiduciary duty to buy them out on the same terms as the other investors is rejected. They cite no authority actually supporting this unpersuasive proposition; instead, they rely on cases involving operation, management or disposition of an entity's property in a manner unfair to the entity and damaging the entity.

In fact, the law is to the contrary (*Hauben v Morris*, 255 AD 35, 46 [1st Dept 1938] ["Ordinarily a director may deal in securities of his corporation without subjecting himself to any liability to account for profits, for the corporation as such has no interest in its outstanding stock or in dealings in its shares among its stockholders"], *affd* 281 NY 652 [1939]; *see Varveris v Zacharakos*, 110 AD3d 1059, 1059-60 [2d Dept 2013] ["Contrary to the plaintiff's contention, Zacharakos's status as an officer, director, or shareholder of a close corporation does not, by itself, create a fiduciary relationship as to his individual purchase of another shareholders stock"]; *see also Zetlin v Hanson Holdings, Inc.*, 48 NY2d 684, 685 [1979] [rejecting minority investors right to share in control premium]; *see*

[13] Rather than meaningfully address these issues, the Mohinanis vociferously accuse defendants of ignoring the law of the case that Charney owed them fiduciary duties. They miss the point. They conflate the general question of whether Charney, in his capacity as manager of LHC, owed them fiduciary duties (which of course he did) and whether his conduct was in violation of such duties. They also conflate the direct duties owed to minority members with those owed to LHC itself, the latter of which may only be redressed through derivative claims (which have never been asserted) and for which recovery would go to LHC and not the Mohinanis. The Mohinanis have always sought damages on their own behalf and not on behalf of LHC (*see* Dkt. 101 at 22; *see also id.* at 19 ¶ 76). To the extent the Mohinanis contend that fees earmarked for LHC were instead diverted to Charney personally, that is also a derivative claim because it seeks redress for harm to LHC--the Mohinanis' loss is only suffered by virtue of their interest in LHC (*see Serino v Lipper*, 123 AD3d 34, 41 [1st Dept 2014]). Consequently, there is no reason to address whether the alleged fees were entirely fair to LHC or whether the Mohinanis waived their objections to them.

also Cohen v LeNoble, 50 AD3d 321 [1st Dept 2008] ["As there are no restrictions on the disposition of shares in the subject close corporation's corporate documents, the LeNobles have the right to sell to Clarett or to whomever they wish"]). Indeed, if that were the law, there would have been no need for the alleged oral buyout agreement as a managing member could never buy out one minority member without offering to buy out all of the others. Many operating agreements have bespoke provisions governing member buy-outs, rights of first refusal, and most-favored-nation clauses. These are matters of contract, not default obligations. The default right to be treated on a pari passu basis with respect to distributions does not include the right to be bought out along with all other members.

Accordingly, it is ORDERED that the Clerk is directed to enter judgment dismissing plaintiffs' claims with prejudice.



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DATE: 11/16/2020 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**