| **CP Jbam Holdings LLC v Shapiro** |
| --- |
| 2017 NY Slip Op 30274(U) |
| February 8, 2017 |
| Supreme Court, New York County |
| Docket Number: 651630/2016 |
| Judge: Shirley Werner Kornreich |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

CP JBAM HOLDINGS LLC, Index No.: 651630/2016

Plaintiff, **DECISION & ORDER**

-against-

IRA SHAPIRO, IRENE SHAPIRO, ONE WEST 96th STREET LLC, and HARTFORD CP MANAGEMENT LLC,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Defendants Ira Shapiro (Ira), Irene Shapiro (Irene), One West 96th Street LLC (One West), and Hartford CP Management LLC (Hartford) move, pursuant to CPLR 3211, for partial dismissal of the complaint. Plaintiff CP JBAM Holdings LLC (JBAM) opposes the motion. Defendants' motion is granted for the reasons that follow.

*I. Factual Background & Procedural History*

As this is a motion to dismiss, the facts recited are taken from the complaint (Dkt. 2)[1] and the documentary evidence submitted by the parties.

This action concerns real estate located at 361 Central Park West/One West 96th Street in Manhattan (the Property). "The Property is the site of the former First Church of Christ, Scientist in New York City, which received designation as an individual landmark in 1974." Complaint ¶ 1. The Property is owned by non-party 361 Central Park West LLC (Owner).[2] In

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

[2] Owner is a Delaware LLC. It "acquired the Property pursuant to a certain Agreement of Purchase and Sale Agreement, dated July 22, 2013, between [Owner's] predecessor-in-interest [Hartford], as purchaser, and Crenshaw Christian Center Church of Los Angeles County." Complaint ¶ 29.

April 2014, Irene, who owned 100% of Owner's membership interests, sold all of those membership interests to JBAM. This case concerns the parties' disputes over certain payments due under the agreement governing the sale of Owner to JBAM. The disputes arose from the failure to obtain all of the regulatory approvals JBAM needed to legally develop the Property into condominiums.[3] The chief point of disagreement is Irene's contractual responsibility for procuring such approvals.

The sale of Owner to JBAM is governed by an Agreement of Purchase and Sale dated April 10, 2014 (the Agreement). *See* Dkt. 20.[4] The Agreement defines Irene as the Seller and represents that she owns all of Owner's membership interests. *See id.* at 2. JBAM is defined as the Purchaser. *See id.* Ira, Irene's brother, is not a party to the Agreement. Nonetheless, as explained herein, JBAM seeks to hold him personally liable for Irene's obligations under the Agreement, because he was "solely responsible for all aspects of Seller's negotiation of, and performance under, the Agreement." Complaint ¶ 4. As discussed below, that Irene was the seller and sole contractual counterparty was fully disclosed,[5] and notwithstanding Ira acting as her agent and the various irrelevant accusations about Ira's checkered professional past (a fact

---

[3] The final denials were issued after both the complaint and the instant motion to dismiss were filed. *See* David W. Dunlap, *In a Rarity, New York Tells 2 Developers No*, N.Y. TIMES, June 8, 2016, http://www.nytimes.com/2016/06/09/nyregion/in-a-rarity-new-york-tells-2-developers-no.html?_r=0; *see also* Jackson Chen, *Residential Conversion of Central Park West Church Rejected After Months of Hearings*, MANHATTAN EXPRESS, June 2, 2016, http://www.manhattanexpressnews.nyc/residential-conversion-central-park-west-church-rejected-months-hearings/.

[4] The Agreement is governed by New York law. *See* Dkt. 20 at 13. It was drafted by the parties' extremely sophisticated counsel.

[5] In section 4.1.4, Irene represented that she owned all of the Owner's membership interests free of any encumbrances. *See* Dkt. 20 at 6.

about which JBAM apparently knew), the complaint does not explain how Ira's involvement satisfies the fraud prong of the applicable veil piecing standard.

The Agreement defines the Purchase Price in section 2.1, which, critically, also defines the two regulatory approvals at issue in this case:

> Purchaser shall pay to Seller for the Membership Interests the sum of [$42 million] (the "Purchase Price"), which is based on a 65,000 net sellable square foot design [containing at least 10 multifamily units][6] (the "Plans"). The Plans shall be based on the Schematic Designs, subject to modifications, and approved by the Landmarks Preservation Commission (the "LPC Approval"). In addition, the Plans shall be submitted to the New York City Department of Buildings [DOB] for a determination on the Plans[']compliance with the New York City Building Code, Zoning Resolution and New York State Multiple Dwelling Law standards for light and air (the "Light and Air Approval" [referred to herein as the LAA Approval]; together with the LPC [A]pproval, the "Approvals"). The Purchase Price will be reduced to the extent that the net sellable residential square feet obtained in the Approvals are less than 65,000 square feet at a rate of $1,000 per square foot, i.e. if the Approvals are for 60,000 net sellable square feet instead of 65,000, the purchase price will be [$37 million].

*See* Dkt. 20 at 2-3 (underline in original).[7]

Pursuant to sections 2.2.2 and 2.2.3, Seller paid $2 million of the Purchase Price when the Agreement was executed and another $30.22 million on the Closing Date (which was in June 2014). *See id.* at 3. Section 2.2.4 provides that payment of the balance of the purchase price, $10 million, was dependent on procurement of the Approvals:

> Within [10] business days of the date that **Seller obtains the Approvals**, [$10 million], or such amount as otherwise adjusted pursuant to Section 2.1 above or Section 3.2[8] below, (the "Approval Payment") by wire transfer of immediately

---

[6] The words in the brackets are handwritten on the Agreement.

[7] JBAM's payment obligations are secured by a Pledge Agreement between JBAM and One West dated July 1, 2014 (the Pledge), which designates some of the membership interests in Owner as collateral. *See* Dkt. 22.

[8] It is unclear if this is a typographical error (section 3.2 governs, among other things, development rights) and should instead refer to section 3.3.3, which provides:

> available federal funds to Seller. Notwithstanding the foregoing, Seller agrees to leave [$1 million] (the "DOB Payment") of the Approval Payment in escrow with Purchaser's attorney pending the final plan approval by the [DOB] plans ("DOB Approval"). Within three (3) business days of Purchaser receiving DOB Approval, Purchaser shall direct Purchaser's attorney to release the DOB Payment to Seller.

*See id.* (underline in original). While sections 2.1 and 2.2.4 define three approvals (the LPA, LAA, and DOB approvals), the definition of "Approvals" *only* encompasses the LPC Approval and LAA Approval. The DOB Approval is not one of the "Approvals", and was to (and could only) occur after the first two Approvals were procured. Moreover, while there was a total of $10 million contingent on regulatory approval, $9 million was due upon the LPA and LAA Approvals, and the final $1 million was due upon the DOB Approval. While the Agreement does not obligate Irene to help procure the DOB Approval, the final $1 million served as incentive for her to do so.[9]

JBAM alleges that Irene never obtained the Approvals. Its complaint sets forth the following account:

> To redevelop the Property for multifamily residential use in general accordance with the Plans, a coordinated process of review and approval of various alterations to the existing structure on the Property is necessary. Such approvals

---

> If Seller has not obtained the Approvals within 18 months of the Closing, (the "Approval Date") for every month from the Approval Date until Seller obtains the Approvals, the Approval Payment will be reduced by $2,500,000 per month.

*See* Dkt. 20 at 5. The import of section 3.3.3 is that if the court holds that the Approvals have not been obtained, the Approval Payment will be reduced to $0 since the 18-month period has elapsed.

[9] Sections 3.3.1 and 3.3.2 reinforce the notion that Irene was only obligated to help obtain the Approvals, but not the DOB Approval, since her cooperation and 50% carrying cost funding obligations under these sections only apply, and are solely dependent on, the Approvals – and not the DOB Approval. *See* Dkt. 20 at 5. As discussed herein, in addition to seeking a declaration that it does not have to pay Irene the Approval Payment, JBAM also seeks Irene's share of the Carrying Costs under section 3.3.2, which allegedly are owed by virtue of the Approvals not being procured.

are subject to determinations by multiple New York City agencies, including the LPC, DOB, and BSA. This coordinated review process culminates in the issuance of the LPC Approval by LPC and the [LAA] Approval by DOB as anticipated by Article 2.1 of the Agreement, and final DOB Approval, which would allow the Property's residential conversion to proceed as anticipated by Article 2.2.4 of the Agreement. Any proposed alterations to an LPC-designated site are subject to review and approval by the LPC. Thus, in the case of the Property, which is an LPC-designated Individual Landmark, the LPC Approvals are required for any proposed alterations, such as those shown in the Plans.

**Shortly after the Closing Date, Ira concluded that the Plans based on the Schematic Designs prepared by Sibertekture contained incorrect assumptions and would not cause Seller to obtain the Approvals**. Upon information and belief, the Plans incorrectly relied on the regulations of Article I, Chapter 5 (entitled "Residential Conversion within Existing Buildings") of the Zoning Resolution (the "Conversion Regulation"). The Property, however, is located within Manhattan Community District 7, where in this Conversion Regulation does not apply. Upon information and belief, as a result of the foregoing and in order to obtain the Approvals, Ira replaced Sibertekture as the project architect with the firm of Gerner Kronick + Valcarcel, Architects ("GKV"). In an effort to balance the programmatic need for bulk alterations that would serve interior residential uses with the preservation requirements necessary to support an LPC Approval, **GKV developed new plans knowing that they (i) would not be in full compliance with the New York City Building Code, Zoning Resolution and New York State Multiple Dwelling Law standards for light and air, and (ii) would necessitate an appeal to the BSA for waivers from the New York State Multiple Dwelling Law and variances from the Zoning Resolution to obtain the Approvals**. For example, there exists a universal requirement in the Zoning Resolution of a minimum-30-foot-deep rear yard for residential buildings, and the new plans prepared by GKV did not provide for a complying rear yard. In addition, the new plans prepared by GKV did not comply with Sections 30-2 and 30-8 of the New York State Multiple Dwelling Law relating to the size of windows needed for legal light and air.

As discussed below, Seller moved forward with this new strategy to obtain the Approvals by submitting the new plans by GKV, but has not yet obtained the Approvals and, as a result, the Approval Payment has been reduced by operation of Article 3.3.3. An application, dated November 13, 2014, for alterations relating to the Plans was prepared and submitted to the LPC. Following a series of public hearings from December 2014 through March 2015, the LPC issued a Certificate of Appropriateness, dated March 17, 2015. [*See* Dkt. 23].[10] The Certificate of Appropriateness states that the LPC-approved alterations are: 1) subject to review

[10] This is a four-page document. Each page is stamped: "DESIGN APPROVED No Work may proceed until DOB filing drawings are reviewed and approved." *See* Dkt. 23 at 2-5 (capitalization in original).

and approval by the BSA, and 2) contingent upon LPC review of final DOB Filing drawings. []

In addition, an application was filed with the DOB on September 10, 2014, for a scope of work including a range of exterior and interior alterations related to the proposed Plans. The DOB application showed proposed alterations contrary to various applicable regulations as established by the New York City Zoning Resolution and New York State Multiple Dwelling Law. As a result, the DOB issued a Notice of Comments, dated October 16, 2014, which included a list of objections relating to the Zoning Resolution and Multiple Dwelling Law and was stamped "DENIED For Appeal to Board of Standards and Appeals" ("October 16th DOB Denial"). [*See* Dkt. 24]. The October 16th DOB Denial specifically listed three objections based on applicable bulk regulations of the Zoning Resolution (citing Sections 23-40 relating to yards, 32-851 relating to courts, and 23-861 related to window location) and three objections based on standards established by the Multiple Dwelling Law (citing Sections 30-2 and 30-8 relating to windows proposed for light and air requirements, and 30-3 relating to depth of rooms in relation to a street or yard). []

In order to modify or waive the regulations cited in the October 16th DOB Denial and carryout the alterations as shown in the Plans, the BSA's approval was required—as the DOB states directly on the October 16th DOB Denial. Thus, the October 16th DOB Denial triggered the additionally-required BSA procedure, which if ultimately approved, would facilitate obtaining the [LAA] Approval together with the LPC approval—*i.e.*, the Approvals as defined in Article 2.1 of the Agreement. To ensure compliance with § 1-06.3 of the BSA Rules of Practice and Procedure, which requires that Appeal applications be filed within 30 days from the date of agency determination, Seller caused the DOB to reissue the October 16th DOB Denial, in a Notice of Comments dated March 16, 2015 (the reissued "DOB Denial"). This DOB Denial triggered the additionally-required BSA procedure, which if ultimately approved, would facilitate obtaining the [LAA] Approval together with the LPC Approval—i.e., the Approvals as defined in Article 2.1 of the Agreement. [*See* Dkt. 25].

On March 20, 2015, an Appeal application was submitted to the BSA (the "BSA Appeal"). The BSA began conducting a series of public hearings in September 2015, and the BSA Appeal remains on going as of the date hereof. On March 8, 2016, at a public hearing, the BSA calendared a continued public hearing for the BSA Appeal on June 2, 2016. Without obtaining the BSA approval necessitated by the DOB Denial, the [LAA] Approval remains outstanding. As a result, Seller has not yet obtained the Approvals. Further, it is no longer possible for seller to obtain the Approvals on or before April 25, 2016 because the BSA has calendared a continued public hearing in connection with the BSA Appeal on June 2, 2016.[11]

[11] As noted earlier, that appeal was ultimately rejected and, therefore, the condominium development project at the Property appears to be dead. It also should be noted that this action

Complaint ¶¶ 72-96 (emphasis added; original paragraph breaks and numbering omitted; paragraph breaks inserted for clarity).

Prior to the appeal process concluding, by letter dated January 20, 2016, Ira demanded that JBAM pay Irene the Approval Payment. *See* Dkt. 26. JBAM refused; it argues that the lack of DOB approval defeats any claim Irene had to the Approval Payment under section 3.3.3. By letter dated March 2, 2016, One West claimed that JBAM was in breach of the Pledge. *See* Dkt. 27. JBAM principally disputes this for the same reasons it disputes Irene's entitlement to the Approval Payment.

On March 28, 2016, JBAM commenced this action by filing a complaint with seven causes of action: (1) a declaratory judgment against all of the defendants that they have not obtained the Approvals, that the Approval Payment has not become due, the Approval Payment has been reduced by $2.5 million per month after December 24, 2015, that JBAM's obligation to pay the Approval Payment has been extinguished, or alternatively, the purchase price must be reduced by $65 million in accordance with Article 2.1;[12] (2) a declaratory judgment against One West that the Pledge Agreement was not breached for failure to make the Approval Payment; (3) breach of contract against Ira as Irene's alter ego, alleging that he is responsible under section 3.3.2 of the Agreement for 50% of JBAM's carrying costs; (4) breach of section 3.3.2 of the Agreement, asserted against Irene; (5) a preliminary and permanent injunction (no motion seeking the former has been filed) prohibiting One West from obtaining the collateral under the Pledge by virtue of Irene's right to the Approval Payment having been extinguished due to the

---

does not touch on the wisdom of the parties' proposed development plan or its regulatory denial, nor will the court opine on either. This is strictly a contractual dispute between the parties.

[12] As explained herein, this cause of action is asserted against Ira under various legal theories (e.g., alter ego).

18-month time period under section 3.3.3 of the Agreement having elapsed; (6) an accounting, asserted against Ira, Irene, and Hartford, regarding the Carrying Costs that have accrued; and (7) conversion, asserted against Ira, Irene, and Hartford, of the Carrying Costs owed under section 3.3.2 of the Agreement, i.e., that such funds were not paid to JBAM in violation of the Agreement.

Defendants filed the instant motion to dismiss on May 31, 2016. They seek dismissal of the first, second, third, fifth, and seventh causes of action, and also all claims asserted against Ira. After a June 23, 2016 preliminary conference, discovery was stayed pending a decision on the motion. The court reserved on the motion after oral argument. *See* Dkt. 39 (11/3/16 Tr.).

*II. Discussion*

*A. Legal Standard*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1

AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

*B. Breach of Irene's Contractual Obligation to Obtain the Approvals*

It is well settled under New York law that a "contractual provision that is clear on its face must be enforced according to the plain meaning of its terms." *Bank of N.Y. Mellon v WMC Mortg., LLC*, 136 AD3d 1, 6 (1st Dept 2015) (citation omitted). "This rule applies with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople. In addition, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Id.* (citations omitted). Thus, "if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002). The court, moreover, must "avoid an interpretation that would leave contractual clauses meaningless." *TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 204 (1st Dept 2015), citing *Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 (1984); *see Kolbe v Tibbetts*, 22 NY3d 344, 354 (2013) (rejecting interpretation that "both conflicts with the most natural reading of the sentence and renders meaningless the [subject contractual] provision"); *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007) ("a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if

possible it will be so interpreted as to give effect to its general purpose.'"), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003).

That being said, "[i]f the court concludes that a contract is ambiguous, it cannot be construed as a matter of law." *Telerep, LLC v U.S. Int'l Media, LLC*, 74 AD3d 401, 402 (1st Dept 2010). "Ambiguity exists when, looking within the four corners of the document, the terms are reasonably susceptible of more than one interpretation." *Ellington v EMI Music, Inc.*, 24 NY3d 239, 250 (2014). "A contract is unambiguous if 'on its face [it] is reasonably susceptible of only one meaning.'" *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 (1st Dept 2015), quoting *Greenfield*, 98 NY2d at 570. The "parties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret them differently.'" *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015), quoting *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 (1996).

"Whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990). "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *Id.* at 163. In other words, if, on its face, a contract has an unambiguous meaning, the court may not consider "extrinsic evidence ... in order to create an ambiguity in the agreement." *Id.* This rule is especially applicable where, as here, the parties are commercially sophisticated and their contract contains a merger clause. *Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 (2013) ("where a contract contains a merger clause, a court is obliged to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.") (citation and quotation marks

omitted); *see* Dkt. 20 at 14 ["This Agreement (including all Exhibits annexed hereto) contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior understandings with respect thereto."].

The primary issue in this case is whether Irene "obtain[ed] the Approvals", which section 2.2.4 requires her to do before being entitled to the first $9 million of the Approval Payment. While the verb used to describe her obligation under section 2.2.4 is "obtain", what it means to "obtain" the Approvals turns on what the Approvals, a defined term, actually encompass. The first of the Approvals, the LPC Approval, is expressly defined to include actual approval of the Plans by LPC. *See* Dkt. 20 at 2 ("The Plans shall be based on the Schematic Designs, subject to modifications, **and approved by** the Landmarks Preservation Commission.") (emphasis added). Thus, the parties do not dispute that actual LPC approval (in the colloquial sense) is required for Irene to "obtain" the LPC Approval.

That being said, the parties disagree about whether DOB had to actually approve the Plans as compliant with the myriad applicable regulatory requirements (e.g., zoning) for Irene to be said to have obtained the LAA Approval. That is because, unlike the LPC approval, which explicitly requires actual approval by the LPC, the LAA Approval is defined as follows:

> the Plans **shall be submitted** to the New York City Department of Buildings [DOB] **for a determination** on the Plans[']compliance with the New York City Building Code, Zoning Resolution and New York State Multiple Dwelling Law standards for light and air.

*See* Dkt. 20 at 3 (emphasis added).

Irene takes the position that since the definition of LAA Approval does not include the word "approve", but only states that Irene must cause the Plans to "be submitted ... for a determination," DOB actually approving the Plans is not part of "obtaining" the LAA Approval.

Irene avers that the parties knew how to define an approval to include actual regulatory agency approval – and they did just that with the LPC Approval. That they omitted the requirement that DOB approve the plans from the definition of the LAA Approval indicates that they clearly intended DOB approval not to be Irene's responsibility. Rather, she argues, all she needed to do to "obtain" the LAA Approval and receive the $9 million was (in good faith)[13] to submit the Plans to DOB so that DOB could make a "determination." Unlike the LCP Approval, the definition of LAA Approval does not require a particular determination (i.e., that it be "approved by" DOB) to be made.

In fact, the parties specifically carved out actual DOB Approval as being the predicate for Irene receiving the final $1 million. The definition of DOB Approval – like the definition of LPC Approval, and unlike the definition of LAA Approval – explicitly includes actual regulatory approval. *See* Dkt. 20 at 3 ("Seller agrees to leave [$1 million] … of the Approval Payment in escrow with Purchaser's attorney **pending the final plan approval by the [DOB]**.") (emphasis added). According to Irene, the only way to harmonize sections 2.1 and 2.2.4 is to hold that approval by DOB is only a prerequisite to Irene receiving the final $1 million, but not a prerequisite to her receiving the $9 million. To hold otherwise, Irene contends, would ignore the lack of an actual DOB approval requirement in section 2.1 and would ignore the parties' express agreement about the limited implications of DOB approval – that is, only the final $1 million, and not the $9 million, turns on DOB Approval.

---

[13] Obviously, the submission obligation is subject to the implied covenant of good faith and fair dealing, which is a part of every contract. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). The complaint, however, does not plead a cause of action for breach of the implied covenant, despite taking issue with how Ira dealt with the Plans (*see* Complaint ¶¶ 75-78). The only claim pleaded concerns whether DOB approving the Plans is a predicate to Irene's entitlement to the $9 million. It should be noted that at oral argument, defendants contended that all of the parties always knew about the problems with the Plans and that variances would be needed.

While Irene's interpretation of the Agreement is compelling, JBAM avers that she is not entitled to a ruling in her favor on this motion to dismiss. JBAM claims that Irene was obligated to obtain actual DOB approval of the LAA issues because "the entire framework of and consideration for the Agreement turns on successfully obtaining the necessary authorizations from New York City agencies to proceed with the residential conversion in accordance with the Plans." *See* Dkt. 36 at 16. In its opposition brief, JBAM proffers its version of the parties' intentions based on its gloss of how the various approval processes were supposed to play out. This account and these supposed intentions, however, cannot be gleaned from the Agreement itself. *See W.W.W. Assocs.*, 77 NY2d at 163 (court may not rely on extrinsic evidence to determine if contract is ambiguous.).

To be sure, an agreement in which Irene was actually obligated to obtain DOB approval prior to being entitled to the $9 million would have been commercially reasonable. But that is not something that may inform the court's analysis. *See Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC*, 20 NY3d 438, 445 (2013) ("an inquiry into commercial reasonableness is only warranted where a contract is ambiguous"). Nor is the fairness of the deal actually stuck by these sophisticated parties an issue.[14] *See Greenfield*, 98 NY2d at 569-70. Instead, as Irene correctly contends, the Agreement very clearly delineates when actual regulatory approval is required and when it is not. To hold that the LAA Approval includes actual DOB approval would be to redefine the term LAA Approval. The court is not permitted to rewrite the Agreement in this manner. *See Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004) ("courts may not by construction add or excise terms, nor

[14] JBAM's principals, non-parties Joseph Brunner and Abraham Mandel, have extensive experience investing in lucrative real estate ventures and have been represented by extremely capable transactional and litigation counsel.

distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing"), quoting *Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 (2001).

There is no question that the parties and their counsel understand how the relevant regulatory approval processes work and the interplay between the various agencies that were required to bless the proposed condominium development. With this understanding, they only premised one payment – the final $1 million – on actual DOB approval. Their decision to omit DOB approval from the definition of LAA approval must be given effect. For this reason, JBAM's claims premised on Irene's failure to procure DOB approval are dismissed.[15]

*C. Claims Against Ira*

Moreover, there is no basis to hold Ira liable for Irene's obligations under the Agreement. Ira is not a party to the Agreement. *See Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463 (1st Dept 2012) ("There can be no breach of contract claim against a non-signatory to the contract."). Rather, he was an agent for a disclosed principal. *See Polo Elec. Corp. v N.Y. Law Sch.*, 114 AD3d 419, 420 (1st Dept 2014) (agent of disclosed principal not personally bound by contract); *see also JDF Realty, Inc. v Sartiano*, 93 AD3d 410 (1st Dept 2012) ("there was no clear and explicit evidence that Sartiano intended to be personally bound despite acting as an agent for a disclosed principal"). JBAM not only admits that it knew that Ira did not own Owner's membership interests, but that fact is expressly disclosed in the Agreement. If JBAM was only willing to purchase Owner on condition that Ira be personally responsible and bear individual financial liability, JBAM could have negotiated for such terms to be included in the Agreement. By making the decision to contract with Irene, JBAM has no right to enforce the Agreement against Ira.

[15] Irene has indicated that, after this motion is decided, she intends to file a counterclaim for failure to pay her the Approval Payment.

These facts also prelude Ira from being held liable as Irene's alter ego. Under New York law, alter ego liability (usually based on piercing the corporate veil) not only requires a showing that the parties or entities were effectively the same, but also that such an alter ego structure was specifically perpetrated for the purpose of defrauding or committing a wrong against the plaintiff. *See Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 141 (1993); *Fantazia Int'l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009). Consequently, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." *TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335, 339 (1998); *see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012) ("cases following *TNS Holdings* have dismissed complaints seeking to hold a parent liable for the contractual obligations of its subsidiary or affiliate 'unaccompanied by allegations of consequent wrongs'") (citations omitted); *see also Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 (1st Dept 2006) ("The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil").

In this case, Ira did not conceal the fact that he was acting on his sister's behalf or that she would be the sole source of recourse under the Agreement. Nor does JBAM proffer anything other than conclusory allegations about Irene's financial capacity to satisfy a possible judgment against her (and if that is indeed the case, there is always CPLR Article 52). Simply put, if JBAM was unwilling to contract with Irene, for instance, due counterparty credit risk, it should not have signed the Agreement. Contrary to JBAM's suggestion and its myriad inapposite case law citations, no authority stands for the proposition that a more business savvy family member is legally prohibited from acting as an agent for another family member on a complex business

deal without incurring personal contractual liability. There simply is nothing wrongful (let alone fraudulent) about Ira's involvement based on the facts pleaded in the complaint. Importantly, Ira is not alleged to have committed any act which, in of itself, is unlawful. Nonetheless, despite merely serving as Irene's agent, JBAM seeks to hold Ira personally liable for Irene's contractual breaches. This is precisely the scenario in which New York law precludes personal liability.

Likewise, there is no basis to seek an accounting from Ira. Under New York law, "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 (1st Dept 1997) (citation omitted). An equitable accounting may not be sought from a defendant in the absence of a fiduciary relationship. *Castellotti v Free*, 138 AD3d 198, 210 (1st Dept 2016); *see Saunders v AOL Time Warner, Inc.*, 18 AD3d 216, 217 (1st Dept 2005) ("in the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for an accounting."). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). "While a contractual relationship is not required for a fiduciary relationship, 'if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.'" *Oddo Asset Mgmt. v Barclays Bank PLC*, 19 NY3d 584, 593 (2012), quoting *N.E. Gen. Corp. v Wellington Advertising, Inc.*, 82 NY2d 158, 162 (1993) (ordinary commercial transactions do not give rise to fiduciary duties). Ira and JBAM were not and are not in such a fiduciary relationship. Ira was Irene's agent. While Ira may have been

Irene's fiduciary, he had no such relationship with JBAM. The accounting claims against Ira are dismissed.[16]

*D. Conversion*

Finally, the conversion claim is dismissed. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). "In order to establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession **to a specific identifiable thing** and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights." *Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 (2d Dept 2010) (emphasis added; citations and quotation marks omitted). "Where the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." *Republic of Haiti v Duvalier*, 211 AD2d 379, 384 (1st Dept 1995), citing *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 (1st Dept 1990). Moreover, a conversion claim "cannot be predicated on a mere breach of contract." *Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 (1st Dept 2008); *see Markov v Spectrum Group Int'l Inc.*, 136 AD3d 413, 414 (1st Dept 2016) ("the conversion claim was predicated on a mere breach of contract, which is insufficient")

JBAM's conversion claim is yet another iteration of its claim that Irene breached the Agreement by failing to pay her share of the Carrying Costs. JBAM, effectively, seeks to recast this claim as one for conversion by claiming the cash not paid to JBAM for these costs was

[16] The court will not opine on whether JBAM may seek an accounting from Irene since Irene does not move to dismiss the accounting claim as pleaded against her.

converted by the defendants. This is not a viable claim. Cash is fungible. JBAM does not proffer any allegation that there was specific cash earmarked by the parties which was diverted to Ira. Without such an allegation, a conversion claim does not lie. *See Fesseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268, 269 (1st Dept 2003). Accordingly, it is

ORDERED that the motion by defendants Ira Shapiro, Irene Shapiro, One West 96th Street LLC, and Hartford CP Management LLC to dismiss the first, second, third, fifth, and seventh causes of action in the complaint, along with all claims asserted against Ira Shapiro, is granted, and said causes of action are hereby dismissed; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a status conference on March 2, 2017, at 11:30 am, at which time a discovery schedule will be set.

Dated: February 8, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.