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Date: 06/04/2021

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Return To:
Maureen P. Ware
99 Exchange Blvd
Rochester, NY 14614

Renfro, Pamela
Renfro-Herrald Hospitality, LLC

Herrald, Angela
Steitz, David
Herrald-Steitz Properties, LLC

Total Fees Paid: $0.00

Employee: CW

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

PAMELA RENFRO, individually and derivatively on behalf of

RENFRO-HERRALD HOSPITALITY, LLC,

Plaintiff, Index #: E2020010270

-vs-

ANGELA HERRALD, DAVID STEITZ and HERRALD-STEITZ PROPERTIES, LLC,

Defendants.

Special Term
April 6, 2021

APPEARANCES ON SUBMISSION

Kevin S. Cooman, Esq.
McCONVILLE CONSIDINE, COOMAN & MORIN, P.C.
Attorneys for Plaintiff

Jeffrey F. Allen, Esq.
BOND, SCHOENECK & KING, PLLC
Attorneys for Defendants

DECISION

Odorisi, J.

This action arises out of a joint venture to own and operate a historic property at 11 West Church Street, Fairport, New York, as an inn for lodging and events, known as The

Inn on Church. Pending before the Court is Defendants' motion to dismiss pursuant to CPLR 3211(a)(1) and (7) on the grounds that the Complaint fails to state a claim for which relief can be granted and dismissing Defendant David Steitz entirely as a party to this lawsuit. Defendants also submit a second motion for an order and judgment cancelling Plaintiff's Notice of Pendency pursuant to CPLR 6501 and 6514, and requiring Plaintiff to pay Defendants' costs and attorneys' fees pursuant to CPLR 6514(c) and 22 NYCRR §130-1.1.

Based upon a review of: Defendants' Notice of Motion to Dismiss dated February 5, 2021 (Doc. #7); the Affirmation of Jeffrey F. Allen, Esq. dated February 5, 2021, with exhibits (Docs. #8-11)- submitted in support of the motion to dismiss; Defendants' Notice of Motion to Cancel the Notice of Pendency dated February 5, 2021 (Doc. #16), the Affirmation of Jeffrey A. Allen, Esq. dated February 5, 2021, with exhibits (Docs. #17-19), the Affidavit of Angela Herrald dated February 4, 2021, with exhibits (Docs. #20-29)- submitted in support of the motion to cancel the notice of pendency; the Affidavit of Pamela Renfro dated February 28, 2021,with exhibits (Docs. #36-39)- submitted in opposition; as well as upon consideration of the parties' arguments without oral argument, this Court hereby **DENIES IN PART** and **GRANTS IN PART** the motion to dismiss, as set forth *infra*, and **DENIES** the relief sought with respect to the notice of pendency.

LAWSUIT FACTS

Renfro alleges that she and Herrald identified property listed for sale located at 11 West Church Street, Fairport, New York ('the Property") in the Fall of 2015. The Property is known as the Newman-Dean House and Barn, a historic residence and outlying structure

designated by the Fairport Historic Preservation Commission as a landmark property. According to Renfro, she and Herrald discussed the Property's potential and discussed acquiring and renovating the Property for operation as an inn. Thereafter, Renfro alleges that she, Herrald and Steitz entered into a joint venture to acquire the Property, renovate it, obtain necessary permits, and operate the space as an inn and event space.

Defendants Herrald and Steitz (as well as Steitz's mother who is not a party to this litigation) are married and took title to the Property on November 5, 2015, paying $285,000.

Renfro alleges that she, Herrald and Steitz memorialized the essential terms of their joint venture in a written business plan drafted primarily by Herrald, with the financial projections portion drafted primarily by Renfro ("the Business Plan"). Under the Business Plan, the name of the joint venture was "The Inn on Church in the Historic Newman-Dean House", and the joint venture participants were Renfro, Herrald, Steitz, Renfro-Herrald Hospitality, LLC ("Hospitality LLC"), and Herrald-Steitz Properties, LLC ("Properties LLC") (collectively, "the Joint Venture Participants"). Hospitality LLC was formed to operate the Inn, and Properties LLC was formed to hold title to the Property. Hospitality LLC's Operating Agreement provides that Renfro and Herrald each hold a 50% membership interest and allocated 100% of the profits and losses of Hospitality LLC to Renfro. Renfro was designated as the Tax Matters Partner for Hospitality LLC and was delegated to conduct its day-to-day operations.

On April 16, 2016, Herrald, Steitz and Steitz's mother filed a deed transferring the Property into Properties LLC. The Business Plan provided that Hospitality LLC would rent the Property from Properties LLC on a long term basis. No written lease agreement was ever executed between Properties LLC and Hospitality LLC.

Renfro alleges that the Joint Venture Participants made financial and in-kind contributions to the Joint Venture to fund the renovations and start-up costs. Additionally, Renfro and Herrald engaged in a Kickstarter campaign to raise additional cash to fund the renovation and start-up costs. As part of that campaign, contributions were solicited from the general public. By October 2016, the Kickstarter campaign raised $46,409.00 from 131 contributors.

Between early 2016 and November 2016, Renfro alleges substantial renovations occurred at the Property. Then, from December 2016 through November 30, 2020, the Inn accommodated guests and events and revenues allegedly increased each year. Plaintiff contends that at the beginning of 2020, projected revenues were in excess of those attained in 2019.

In the Spring of 2020, after the pandemic began to take shape, it is alleged that Herrald and Steitz determined they wanted to move their family into the House on the Property and out of their home in the Village, which would necessitate that the House no longer be used as an Inn and that the Joint Venture be abandoned and liquidated. It is further alleged that Herrald and Steitz determined they no longer wanted the Barn used for events and wanted to use it for their business/hobby use. Renfro alleges that Herrald and Steitz undertook a plan to dissolve the Joint Venture, move their family into the House and exclusively use the Barn for their own purposes. It is alleged that in the Spring and Summer of 2020, Herrald and Steitz initiated conversations with Renfro about the profitability of the Joint Venture due to the pandemic and the lack of adequate revenue. On August 27, 2020, Herrald and Steitz told Renfro not to accept any additional reservations

after November 1, 2020. On September 28, 2020, Properties LLC issued a Notice of Termination of Monthly Tenancy to Hospitality LLC.

Renfro contends that she sought out consultants and investors about the Inn business and a potential sale of the Property, but Herrald, Steitz and Properties LLC refused to consider any offers presented.

On November 4, 2020, Properties LLC filed a Notice of Petition and Petition in Perinton Town Court seeking the forcible eviction of Hospitality LLC from the Property, and possession of the Property for Properties LLC. Renfro and Hospitality LLC vacated the Property on November 30, 2020.

PROCEDURAL HISTORY

Plaintiff commenced this action on December 30, 2020, alleging causes of action for breach of the joint venture agreement, breach of joint venture fiduciary duties, breach of contract by Herrald as to the Hospitality LLC Operating Agreement, unjust enrichment, defamation by Herrald, and a derivative claim on behalf of Hospitality LLC.

LEGAL DISCUSSION

Motion to Dismiss

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted if the documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s].'" Baumann Realtors, Inc. v First Columbia Century-30, LLC, 113 AD3d 1091, 1092 (4th Dept 2014) (citation omitted).

"On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d 137, 141 (2017) (citation omitted). "At the same time, however, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.'" Simkin v Blank, 19 NY3d 46, 52 (2012) (citation omitted). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." Connaughton, 29 NY3d at 142.

"'When ruling on a motion to dismiss pursuant to CPLR 3211(a)(7), it is well settled that 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.'" Wilczak v City of Niagara Falls, 174 AD3d 1446, 1447 (4th Dept 2019) (citation omitted). "'Thus, [a]ffidavits and other evidentiary material may be considered to establish conclusively that [the] plaintiff has no cause of action.'" Id. (citation omitted).

First Cause of Action

The First Cause of Action alleges breach of the Joint Venture Agreement, as reflected in the Business Plan, the parties' course of conduct, and the obligation of good faith and faith dealing.

"To establish the existence of a joint venture agreement, 'it is not enough that two parties have agreed together to act in concert to achieve some stated objective.'" Anderson

v Kernan, 133 AD3d 1234, 1235 (4th Dept 2015) (citation omitted). "A joint venture 'is in a sense a partnership for a limited purpose, and it has been long recognized that the legal consequences of a joint venture are equivalent to those of a partnership.'" Schultz v Sayada, 133 AD3d 1015, 1016 (3rd Dept 2015) (citation omitted). "'The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of Property, financial resources, effort, skill or knowledge), some degree to joint proprietorship and control over the enterprise; and a provision for the sharing of profits and losses.'" Id. (citation omitted). "Significantly, the intent of the parties to form a joint venture may be implied from the totality of their conduct." Id. "Parties can evince their intent to be joined as joint venturers expressly through language in an agreement or impliedly through actions and conduct." Cosy Goose Hellas v Cosy Goose USA, Ltd., 581 FSupp2d 606, 620 (SDNY 2008).

Here, Plaintiff alleges the essential elements and satisfies her pleading requirements. Plaintiff alleges that she, Herrald and Steitz entered into the Agreement to own and operate the Inn as a Joint Venture. The Business Plan allegedly memorialized the essential contract terms of the Joint Venture, and specifically names Plaintiff, Herrald, Steitz, Hospitality LLC and Properties, LLC on the cover page. Plaintiff alleges it was the intent of the parties to associate as coventurers and create the Inn. See Complaint, ¶14. In the Complaint, Plaintiff alleges that the parties memorialized the essential terms of the Joint Venture in the Business Plan and then acted in accordance with that Plan during the ensuing four and a half years.

Plaintiff further alleges that the parties contributed a combination of "property, financial resources, effort, skill or knowledge" to the Joint Venture. Schultz, 133 AD3d at 1016. Herald and Steitz are alleged to have conveyed the Property into Properties LLC and devoted it to the Joint Venture, supervised the Property renovation, supplied many furnishings, and paid the carrying costs for the Property during the renovation. As to Plaintiff, she allegedly contributed payment for the architect's costs, cash investments, drafts of financial projections, fundraising efforts, and day-to-day marketing, hospitality and financial operation of the Inn.

The Complaint alleges joint proprietorship and joint control over the enterprise. Plaintiff alleges that they each participated in the hands-on renovation efforts, hired and supervised contractors, ran the Kickstarter drive, applied for permits, publicized the Inn, maintained the Property, and ran the Inn operation. See Complaint, ¶¶31-50, 64-66. While not attached to the Complaint, Defendants submit the Business Plan in opposition.[1] The Business Plan provides:

> Pam Renfro and Angela Herrald are partnering in this start-up business venture (with support from our husbands Mark Renfro and David Steitz). We will be working as equal partners in the creative and envisioning process, each creating an LLC. Angela Herrald and David Steitz recently purchased the Newman-Dean House for the purpose of turning it into a local Fairport inn. They will oversee the renovations and maintenance of the property and grounds. Angela will also run a small-scale upcycled furniture business where guests will be offered the opportunity to purchase small pieces from the inn. Pam will be the owner of the business aspects of The Inn and

[1] "When a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true facts as alleged in the complaint and submission in opposition to the motion, accord Plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.'" Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc., 20 NY3d 59, 63 (2012) (citation omitted).

> will lease the Property from Angela. She will also oversee initial renovations. Primarily, she will run day-to-day operations and marketing. All partners will play an active role in the grand-scheme visions and creative aspects in transforming the Newman-Dean house into a community showpiece and gathering place.

Affidavit of Angela Herrald, Exhibit E.

Plaintiff alleges that the parties operated in this manner for over four years. Additionally, Plaintiff alleges that the parties made provisions for the sharing of profits and losses in the Joint Venture. See Complaint, ¶¶32, 54-60, 79, 88-90, 129-133. Plaintiff's Complaint alleges that Defendants breached this Joint Venture agreement by evicting Hospitality LLC, terminating the Inn's operation and appropriating the enhancements in the value of the Property to themselves.

On this motion to dismiss, Plaintiff has made sufficient allegations, and the motion on the first cause of action must be **DENIED**.

Second Cause of Acton

The Second Cause of Action alleges breach of joint venture fiduciary duties. Defendants' motion alleges that Plaintiff's Complaint fails to sufficiently plead facts in detail to demonstrate a fiduciary relationship between the parties and that the misconduct constitutes a breach of that alleged fiduciary relationship. The Court notes that Plaintiff has incorporated by reference all of the allegations contained in the Complaint into each cause of action, including the Second Cause of Action.

Plaintiff's Complaint provides sufficient particularity to show the existence of a fiduciary relationship between the parties and the misconduct allegedly constituting breach of that fiduciary relationship. See CPLR 3016(b).

Moreover, a joint venture can be the basis of a fiduciary relationship. See Rhodes v Little Falls Dairy Co., Inc., 230 AD 571, 573 (4th Dept 1930). To ascertain whether a relationship constitutes a joint venture, "'[t]he ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit. . . .'" Mendelson v Feinman, 143 AD2d 76, 77 (2nd Dept 1988) (citation omitted). It is a relationship of "trust" that "creates a fiduciary duty." Id.

Defendants cite to Weisman v Awnair Corp. of Am., 3 NY2d 444, 449 (1957), wherein the Court of Appeals cited the "well settled" rule "that a joint venture may not be carried on by individuals *through* a corporate form." In Weisman, plaintiffs sued for an injunction and an accounting based on the defendants alleged breach of a joint venture agreement with plaintiff for his distribution of their products through a corporation to be organized by him; 40% of the stock was to be issued to the defendants and 60% to plaintiff. After the corporation was formed and he expended large sums to market the defendants' products, defendants refused to permit plaintiff to continue distributing the products. The Weisman Court found the alleged agreement to be vague, did not entitle plaintiff to receive anything, and amounted to an agreement between them to conduct a business as joint venturers through a corporation. In that context, the Court of Appeals held that a joint venture cannot be carried on by individuals through a corporate form, because upon the formation of the corporation the individuals were shielded from personal

liability and ceased to be partners. The Court of Appeals held: "They cannot be partners *inter sese* and a corporation as to the rest of the world." Id.

However, the Court of Appeals restricted the scope of Weisman shortly thereafter. In Macklem v Marine Park Homes, Inc., 17 Misc2d 439 (Sup Ct Nassau Co 1955), a trial court (making a determination prior to the Court of Appeals' decision in Weisman) enforced a joint venture agreement between individuals for the purchase and sale of realty despite the parties' formation of a corporation as a conduit to hold title to the realty and receive the proceeds from its sale. The plaintiff sued the other parties to the venture for his share of the proceeds. The Second Department affirmed, 8 AD2d 824 (2nd Dept 1959), and the Court of Appeals, despite Weisman, dismissed defendants' appeal, affirming the Second Department. See Macklem v Marine Park Homes, Inc., 8 NY2d 1076 (1960).

Other cases since Macklem have further confirmed that the rule pronounced by the Court of Appeals in Weisman was shortly thereafter qualified. While a joint venture agreement that merges into a corporation will not be enforced as a joint venture, see e.g., Migletta v Kennecott Copper Corp., 25 AD2d 57 (1st Dept 1966), a joint venture agreement involving the formation of a corporation to carry out an objective that intends to reserve certain rights *inter sese* under the agreement and does not interfere with or restrict the management of the corporate affairs, can be enforced. See Shapolsky v Shapolsky, 53 Misc2d 830 (Sup Ct NY Co 1966), *aff'd* 28 AD2d 513 (1st Dept 1967). "There is little logical reason why individuals cannot be 'partners inter sese and a corporation as to the rest of the world,' so long as the rights of the third parties such as creditors are not involved." Arditi v Dubitzky, 354 F2d 483, 486 (2nd Cir 1965) (citation omitted). If it can be shown that the corporate form was "merely an instrumentality of the joint venture," then suit upon joint

venture obligations can exist. Id. See also, Sagamore Corp. v Diamond West Energy Corp., 806 F2d 373 (2nd Cir 1986). Since then, the First Department has suggested requiring a reservation of rights *inter sese* is unduly restrictive, and that it is more "reasonable . . . to make the governing concern whether the parties' rights as joint venturers are in conflict with the corporation's functioning, rather than whether they expressly provided for a reservation of rights in the corporate governance documents." Richbell Information Services, Inc. v Jupiter Partners, L.P., 309 AD2d 288, 300 (1st Dept 2003).

As the case cited by Defendants, Weisman, has been qualified in the ensuing years by New York courts and Plaintiff's Complaint otherwise provides sufficient detail as required by CPLR 3016 and to withstand a motion to dismiss, the motion to dismiss the Second Cause of Action is **DENIED**.

Third Cause of Action

The Third Cause of Action alleges that Defendant Herrald violated the Hospitality LLC Operating Agreement. Defendants seek dismissal of this cause of action, alleging that Plaintiff's Complaint fails to allege that she performed in accordance with the contract, a required element of a breach of contract claim. See Niagara Foods, Inc. v Ferguson Elec. Service Co., Inc., 111 AD3d 1374, 1376 (4th Dept 2013).

The preceding allegations in the Complaint are incorporated by reference into the Third Cause of Action, as expressly permitted by the CPLR. See CPLR §3014. Plaintiff makes allegations relative to her performance in the Complaint. See, e.g., Complaint, ¶¶86-88. The motion to dismiss is **DENIED** on this issue.

Defendants also take aim at Plaintiff's allegation in the third cause of action that Herrald's action also breached the implied covenant of good faith and fair dealing. "'Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included . . . This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Howard v Pooler, 184 AD3d 1160, 1164 (4th Dept 2020) (citation omitted). As an example, Plaintiff in opposition notes that while the Operating Agreement does not expressly forbid Herrald from evicting Hospitality LLC and closing the Inn, if the actions alleged do not constitute a breach of an express provision of the Agreement, it could nevertheless constitute a breach of the implied obligation in every contract.

"'Allegations that defendant violated 'the implicit contractual duties of good faith and fair dealing' are not sufficient to state a 'violation of a duty independent of the contract.'" Val Tech Holdings, Inc. v Wilson Manifolds, Inc., 119 AD3d 1327, 1331 (4th Dept 2014). As such, Plaintiff's inclusion of the claim of a breach of the implied covenant in the Third Cause of Action, which explicitly is premised on the same facts and seeks the same damages, is duplicative.

To that limited extent, the motion to dismiss the Third Cause of Action is **GRANTED**. Otherwise, the motion to dismiss the Third Cause of Action is **DENIED**.

Fourth Cause of Action

The Fourth Cause of Action alleges unjust enrichment. Plaintiff alleges that this cause of action is duplicative of the breach of contract claims.

"'[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.'" Zuley v Elizabeth Wende Breast Care, LLC, 126 AD3d 1460, 1462 (4th Dept 2015). A claim of unjust enrichment "must show that (1) the other party was enriched, (2) at that party's expenses, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 (2011) (citations omitted). Plaintiff alleges that Defendants have been enriched at her expense: they have possession of the Mansion that was renovated and improved using funds Renfro provided in cash or loan proceeds (or that came from Hospitality LLC's guest revenue), and also have appropriated the furnishings, foods and inventory owned by the Joint Venture Participants in the Mansion. Plaintiff alleges she has received no accounting for payment for the enrichment received by Defendants.

At this early stage in the litigation, Plaintiff sufficiently pleads the claim for unjust enrichment, which the Court acknowledges could allow for recovery in the alternative if Defendants are ultimately successful on other claims. The motion to dismiss the unjust enrichment claim is **DENIED**.

Fifth Cause of Action

The Fifth Cause of Action is stated against Herrald for defamation, alleging that Herrald's communicaiton described in the Complaint constituted a published libel of Renfro with respect to her business interests and reputation in the community. Defendants contend that Plaintiff has failed to allege that Herrald lacked authority to make the statement at issue, failed to allege that she suffered economic loss, cannot show that the

statement refers to her, and fails to identify the recipients of the communications (other than alleging that it went to some guests of the Inn).

"The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." D'Amico v Correctional Med. Care, Inc., 120 AD3d 956, 962 (4th Dept 2014). "A plaintiff in a defamation action must allege that he or she suffered special damages- the loss of something having economic or pecuniary value. . . , unless the defamatory statement falls within one of the four per se exceptions, which consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." Spring v County of Monroe, 151 AD3d 1694, 1696-97 (4th Dept 2017).

The statement at issue is Herrald's email communication to some of the Inn guests: "The Pandemic unfortunately is greatly affecting the hospitality industry as well as small business. We are unable to survive it." Here, Plaintiff alleges that statement was libelous per se. Plaintiff alleges that the portion of the statement that they could not survive the pandemic is false as they were still attracting guests, and the Inn cash flow was positive. As the Inn was actually still successful, Plaintiff alleges that Herrald's statement implied that the reason for the closure was Plaintiff's incompetence and ineffectiveness as an innkeeper. Plaintiff alleges this impugned her profession as an innkeeper, which was known to the Inn guests and to the wider business community.

""Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation.'" Bisimwa v St. John Fisher College, __AD3d __, 2021 WL 1826812, *3 (4th Dept May 7, 2021) (citation omitted). "'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." Id. at *4. "Under that standard, '[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference.'" Id. This "heightened standard" "achiev[es] balance between 'a Plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements'"... but "the rationale is not limited to First Amendment considerations and instead also includes fairness to a declarant who intended or endorsed only the true meaning of the subject statement." Id.

"A statement imputing incompetence or dishonesty to the plaintiff is defamatory per se if there is some reference, direct or indirect, in the words or in the circumstances attending their utterance, which connects the charge of incompetence or dishonesty to the particular professional or trade engaged in by plaintiff." Van Lengen v Parr, 136 AD2d 964, 964 (4th Dept 1988). A plaintiff is given the benefit of every possible inference in assessing whether the statements at issue constitute defamation and injure a plaintiff's professional standing. See Spring v County of Monroe, 151 AD3d 1694, 1697 (4th Dept 2017).

Here, Plaintiff contends that Herrald's use of "we" in the statement implies Plaintiff is to blame, as she was the innkeeper and the individual the guests dealt with when securing reservations and in their pre-stay interactions. Even granting Plaintiff every possible inference, as the Court must do on a motion to dismiss, Plaintiff does not sufficiently allege a claim for defamation because the statement does not include any inference that could injure Plaintiff in her professional standing. The statement complained of, especially in light of the COVID pandemic, is not "'reasonably susceptible of a defamatory connotation.'" Elibol v Berkshire-Hathaway, Inc., 298 AD2d 944 (4th Dept 2002) (citation omitted). The motion to dismiss the fifth cause of action is **GRANTED**.

Sixth Cause of Action

Finally, the Sixth Cause of Action is a derivative claim made on behalf of Hospitality LLC, alleging that Herrald breached her contractual and fiduciary duties to Hospitality LLC, resulting in lost revenue and profits for the LLC. The action described in the Complaint, including the eviction of Hospitality LLC and seizure of Hospitality LLC's inventory, constitute unjust enrichment of Defendants to the detriment of Hospitality LLC. Defendants allege that the Sixth Cause of Action is duplicative of Plaintiff's individual claims and is asserted to secure relief for her individually. According to Defendants, there is no allegation that Hospitality LLC suffered any harm different or separate than Plaintiff; the profits and losses of Hospitality LLC are allocated 100% to Plaintiff in the Operating Agreement.

Plaintiff opposes and notes that in the dissolution and liquidation of the joint venture, both Plaintiff and Herrald are affected, as both are 50% owners of Hospitality LLC. Plaintiff sets forth several examples of the non-duplicative nature of the claim. For example, the

forced closure of the Inn left guests holding advance deposits and outstanding gift certificates for future stays. These obligations to creditors are Hospitality LLC's responsibility and should be satisfied in an orderly dissolution. Likewise, it is alleged that Hospitality LLC prepaid $3,540.02 in taxes on the property, more than it was obligated to pay. The prepayment now accrues only to the benefit of Properties, LLC and its members. Plaintiff contends Hospitality LLC is entitled to pursue the prepaying as part of the winding down of operations.

Plaintiff sufficiently alleges a derivative claim on behalf of Hospitality LLC to withstand a motion to dismiss. The motion to dismiss the Sixth Cause of Action is **DENIED**.

Steitz

Defendants seek dismissal as to Steitz, alleging he is an improper party and that there is no theory whereby he could be held individually liable. Steitz is a member of Properties LLC. The Complaint makes allegations as to Steitz on the First, Second, Fourth and Sixth Causes of Action.

For the reasons stated *supra*, the motion to dismiss as to Steitz is **DENIED**.

Motion to Cancel Notice of Pendency

Defendants move to cancel the notice of pendency, alleging that the judgment demanded in the Complaint does not affect the title, possession, use or enjoyment of real property. It is alleged that Plaintiff has acknowledged that Herrald, Steitz and Steitz's mother took title to the property, which was thereafter transferred to Properties LLC, which is owned and managed by Herrald and Steitz.

CPLR §6501 provides that "[a] notice of pendency may be filed in any action. . . in which the judgment demanded would affect the title to, or the possession, use or

enjoyment of, real property. . . ." "In determining the merits of a motion to cancel a notice of pendency, a court is limited to examining the face of the pleadings." Jolley v Lando, 99 AD3d 1256, 1256 (4th Dept 2012). "[A] court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501." 5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313, 321 (1984). The court's inquiry "is to be limited to the pleading's face"; whether there is a "likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency." Id. at 320-21.

"The courts have been frequently confronted by attempts to file a notice of pendency in controversies that more or less referred to real property, but which did not necessarily seek to directly affect title to or possession of the land. In the absence of this direct relationship, the remedy was denied." 5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313, 321 (1984). "For example, an action brought under a will for an accounting and for a determination of rights to and sale of real property supported filing a notice of pendency... In contrast, a trespass action seeking money damages did not justify a notice of pendency as the judgment would not affect title to or possession of the realty." Id. "'The usual object of filing a notice of *lis pendens* is to protect some right, title or interest claimed by a Plaintiff in the hands of a Defendant which might be lost under the recording acts in event of a transfer of the subject property by the Defendant to a purchaser for value and without notice of the claim.'" Id. at 322 (citation omitted). Filing a notice of pendency ensures that if the Plaintiff wins a judgment in her favor, it will be enforceable against the property free of any competing claims by persons who's interest was not recorded until after the notice of pendency was filed. See Novastar Mortgage, Inc. v Mendoza, 26 AD3d 479 (2nd Dept 2006).

A notice of pendency has been held to be properly placed in a shareholder derivative action where it is alleged that the property is a corporate asset or is allegedly purchased with fraudulently removed funds from the corporation. See Keen v Keen, 140 AD2d 311 (2nd Dept 1988).

Plaintiff's Complaint expressly requests "an order directing liquidation and sale of all the assets of the Joint Venture, including the Property. . . ." Complaint, at 25. Additionally, the Complaint alleges:

> The Joint Venture structure adopted by the Joint Venture Participants in order to create and operate the Inn was the formation of two separate LLCs- one to hold title to the Property (i.e., Properties LLC) and a separate LLC (i.e., Hospitality LLC) to operate the Inn at the Property.

Id. at ¶25.

The Complaint further alleges:

> Under the Business Plan, the Joint Venture was owned in equal shares: 50% by Renfro, and 50% by Herrald and Steitz, irrespective of the amount and character of their Start-Up Contributions.

Id. at ¶32.

The Complaint also alleges the investments made in the property by the Joint Venture Participants. Id. at ¶¶62-75.

The Court's review of the Complaint reveals that the judgment demanded would affect title to, or the possession, use or enjoyment of, real property. Plaintiff's Complaint alleges that the Joint Venture was owned equally by Renfro, on the one side, and Herrald and Steitz, on the other. It is further alleged that the Joint Venture set up the LLCs to hold title and to operate the Inn. As an alleged Joint Venture Participant, Plaintiff properly filed

a notice of pendency on the property she claims is owned by the joint venture.

The motion to cancel the notice of pendency is **DENIED**.

Plaintiff is directed to submit a Proposed Order within thirty days.

Signed at Rochester, New York on June 5, 2021.

HONORABLE J. SCOTT ODORISI
Supreme Court Justice