NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued March 9, 2010

Before Judges Wefing, Grall and LeWinn.

Defendants J.C. Morgan Realty, LLC ("JC Morgan"); M. Robert Lehrer ("Lehrer"); and 350 Warren, LP ("350 Warren") appeal from a judgment entered by the trial court. Brown-Hill Morgan, LLC ("Brown-Hill"); Morgan Jersey Development, LLC ("Morgan Jersey"); and Jeffrey M. Brown ("Brown") cross-appeal from that same judgment. After reviewing the record in light of the contentions advanced on appeal, we affirm in part.

I.

The dispute between the parties arises out of a failed real estate development venture in downtown Jersey City. Defendant Lehrer, through a limited partnership, 350 Warren, in which he was the sole general partner, owned an eight-story building located at 350 Warren Street. It had been built in 1906 for use as a warehouse and had been vacant for a number of years. Lehrer hoped to redevelop the property into a mixed-use structure, with underground parking, retail shops on the ground floor and luxury apartments on the upper floors. He approached Brown to solicit his participation in the project. Brown had extensive experience in construction and construction management and had been involved in the construction of several large projects in Jersey City but had not previously been involved in developing any projects in the city. Brown was interested in the concept, and the two men ultimately agreed to form a joint venture, Morgan Jersey, to pursue the project. They did not form this joint venture directly; rather, Brown formed Brown-Hill, and Lehrer formed JC Morgan, and Brown-Hill and JC Morgan, in turn, created the joint venture Morgan Jersey. Lehrer explained to Brown that for tax reasons, he would not have a direct ownership interest in JC Morgan; instead, it would be owned by his son Eric Lehrer and his nephew Kevin Lehrer. Because this arrangement had no direct impact upon him, it was satisfactory to Brown.

The building was located in a section of the city known as the Powerhouse Arts District, an area that had been designated both as a historic preservation district and to foster a growing arts community within the city. With respect to the latter, the city had adopted a redevelopment plan for the area that required ten percent of the apartments in a development to be "work/live" units for artists. Because of the historic preservation designation, approval of the Historic Preservation Commission was required before there could be any changes to the building's façade.

For the project to be viable in the modern real estate market, Lehrer and Brown both understood that it would be necessary to replace all the windows in the building, which were significantly smaller than current buyers would accept. Since the building had an estimated one thousand windows and the walls of the building were up to twenty-eight inches thick, planning and implementing their replacement was a complex endeavor. In addition, financial viability of the project necessitated relief from the requirement for a ten percent set aside for artists. Lehrer proposed seeking an exemption from this requirement through setting aside certain of the building's retail space as gallery and studio space. Brown said that Lehrer represented to him that getting these exemptions would not be a problem in light of the relationships Lehrer had developed with the individuals in charge of that process for the city. During their discussions and in the various documents they executed, the parties referred to the needed variances and approvals as "entitlements." We shall continue that terminology for the purposes of this opinion.

The parties executed a variety of documents to give form to their agreements. On March 24, 2005, Brown-Hill and JC Morgan executed the operating agreement for Morgan Realty. Certain provisions of that operating agreement are pertinent to the issues on this appeal. Under the operating agreement, Brown-Hill was responsible for designing the project and preparing a development and construction schedule. It was also responsible for preparing the final budget, subject to the approval of JC Morgan, and securing construction financing. If, within twelve months of the signing of the operating agreement, Brown-Hill had not located construction financing that was reasonably acceptable to JC Morgan, Brown-Hill had the right to extend the financing period for another six months. If the election had not been made, JC Morgan could terminate the agreement. If it elected that extension and had not secured such financing at the end of that six-month period, JC Morgan had the right to terminate the operating agreement. In addition, with the approval of JC Morgan, Brown-Hill would hire the architect, engineer and other professionals needed to complete the project.

The operating agreement provided for Brown-Hill to make capital contributions to the project of up to $500,000 through the date when Morgan Realty closed on purchase of the building. It also provided for Brown-Hill to inform JC Morgan of its capital contributions. Further, the operating agreement capped Brown-Hill's capital contribution at $500,000 until that closing occurred or one year had passed. If one year had passed and JC Morgan determined that additional capital contributions were required, Brown-Hill was obligated to make such additional contributions as JC Morgan reasonably determined were necessary. Paragraph 3.6 of the operating agreement provided:

Except (i) upon dissolution of the Company; or (ii) as may be expressly set forth in this Agreement, no Member shall have the right to demand or receive the return of any of its aggregate Capital Contributions or any part of its Capital Account or be entitled to receive any interest on its Capital Contributions or its outstanding Capital Account balance.

Paragraph 3.9 of the operating agreement provided in pertinent part:

Notwithstanding anything to the contrary contained in this Agreement, if the Entitlements for the Project are not obtained on or before the date which is the six month anniversary of the date hereof (the "Outside Date"), and this Agreement is consequently terminated pursuant to this Section 3.9, then the JB Member [Brown-Hill] shall be responsible for up to $100,000.00 of Project Costs. To the extent the JB Member has paid its Capital Contribution of up to $500,000.00 and any additional Capital Contributions, the excess of its Capital Contributions over $100,000.00 (the "Excess"), shall be reimbursed by the Lehrer Member [JC Morgan] within 120 days after this Agreement is terminated. This reimbursement shall be guaranteed by the Lehrer Member.

Although Brown-Hill was responsible for preparing the final budget for the project, JC Morgan had the right to approve that final budget, including any material modifications or deviations from the preliminary budget that was attached to the operating agreement.

JC Morgan was responsible for obtaining the necessary entitlements. The operating agreement provided a six-month window for JC Morgan to obtain these entitlements. If its efforts were not successful within six months, Brown-Hill could either waive that deadline or declare the agreement terminated. In the event of such termination for failure to obtain the necessary entitlements within that time frame, Brown-Hill would be responsible for up to $100,000 of the project costs, and JC Morgan would reimburse Brown-Hill for any excess capital contributions "[n]otwithstanding anything to the contrary contained" within the operating agreement.

The preliminary budget that was attached to this operating agreement estimated total project costs of $116,305,929. Of that amount, $60 million was allocated for construction costs. Brown testified that figure was just an estimate because at the time the preliminary budget was prepared, Brown-Hill had not determined the full scope of the project and had not conducted any structural assessment of the building or its systems.

Brown also testified that Lehrer had repeatedly assured him that the inherent value of the building stood behind the provision in the operating agreement to reimburse Brown-Hill. Lehrer denied ever making such a statement, and Brown admitted that nothing within any of the documents that were executed gave him the right to impose a lien on the building to secure his claim for reimbursement.

On that same date, March 24, 2005, 350 Warren, and Morgan Jersey executed a contract of sale for the building, the terms of which incorporated the operating agreement between Brown-Hill and JC Morgan governing their joint venture. The purchase price had three elements: a fixed sum of $7.238 million, plus an additional $100 per "Net Saleable Square Foot" plus 40% of the taxable income on the sale of residential units within the building. Closing was to occur on the date construction financing was in place.

Paragraph 12.3 of that contract provided the following:

Notwithstanding anything to the contrary, Purchaser [Morgan Jersey] agrees to pay from and after the date hereof, the costs of operating the Property, which costs include real estate taxes, insurance, water charges, sewer rents, assessments, employee salaries and utilities. Schedule 12.3 attached hereto and made a part hereof sets forth the current month's operating expenses for the Property. Seller [350 Warren] acknowledges that Purchaser is relying on Schedule 12.3 as a reasonable estimate of monthly operating expenses for the Property. If this Contract is terminated, Seller shall cause the Lehrer Member to reimburse Purchaser in accordance with the terms of the Operating Agreement. Nothing in this Paragraph 12.3 shall otherwise alter the obligations of the parties hereto. The provisions of this Paragraph 12.3 shall survive the Closing, or the sooner termination of this Contract.

Additionally, Morgan Jersey executed a construction management agreement with Jeffrey M. Brown Associates, Inc. ("Associates"). This agreement provided for Associates to receive a guaranteed maximum price and set forth the procedure for setting that figure. Both Brown and Lehrer agreed in their testimony that at some point that price was increased by one percent in return for Brown's agreement to hire Lehrer's son and nephew, the nominal principals of JC Morgan, during the project to help them learn real estate development. The construction management agreement also referred to certain "preconstruction phase" work to be performed but provided no breakdown for responsibility for those tasks between Associates and Brown-Hill.

The parties needed interim financing to carry the project until construction financing was in place, and in February 2005 JDI Loans, L.L.C. ("JDI") provided a construction loan in which $11.9 million was disbursed to Morgan Jersey, at an interest rate of 10.5%. Obtaining this loan required the payment of a loan origination fee of $117,000 to JDI; Brown-Hill advanced those funds. The loan agreement provided that in December 2005, the interest rate would be the greater of prime plus five percent or 10.5%; it also provided that in the event of default, the interest rate would increase to twenty percent. The loan could be extended at the end of the one-year period upon payment of one percent of the outstanding principle and deposit of six months future interest. Of the loan proceeds of $11.9 million, $2.65 million was used to satisfy the two outstanding mortgages on the property and $7.5 million was used to buy out a third-party's development rights to the property. This latter figure was greater than originally anticipated; the reasons for this increase are not entirely clear from the record.

Following the closing of this interim loan and execution of the relevant documents, the parties set about their respective tasks. The record before us contains minutes of the various design development meetings that were held, as well as e-mails that were exchanged among the various participants in the project. These minutes and e-mails chronicle the slowly deteriorating relationship between Lehrer and Brown as various delays were experienced, both in finalizing the project's design elements and in securing the requisite entitlements from the city.

Based upon Lehrer's recommendation, Morgan Jersey retained an attorney to represent it in its efforts to obtain the needed variances and approvals from the city. As time went on, Brown became increasingly concerned that the attorney, who had done prior work for Lehrer, viewed Lehrer as his client on this project, rather than the joint venture, Morgan Jersey. The attorney informed Morgan Jersey that although the Historic Commission and the Planning Board apparently came to view the project favorably, both entities preferred to have the city revise its zoning ordinance to minimize the potential for challenges to any approvals they might grant the project. The attorney advised withholding formal submission for approvals until this question was clarified. These discussions, involving multiple parties, had the inevitable effect of delaying the project.

It was not until the end of July 2005 that a formal application was submitted to the Historic Commission for approval to enlarge the windows in the structure. The attorney was advised that the Commission might take up the application at its September meeting, but for reasons that are not clear from the record, it was not included on the Commission's September agenda; there is a reference to the application being misplaced. The developers were unwilling to proceed with replacing the windows on the basis that the application had been pending for more than forty-five days, N.J.S.A. 40A:12A-7(e), for fear of antagonizing city officials and jeopardizing any future applications before the Planning Board.

In addition, the project went through certain evolutions in design. The number of penthouses to be built increased and Lehrer, for instance, wished to enlarge certain aspects of the approximately 4,000 square foot penthouse unit that, under the operating agreement, would be conveyed to him. These changes, of necessity, required changes in design to the remaining elements.

While the parties waited for municipal approval and debated the various design questions, Brown-Hill did perform certain work at the site and advanced funds for expenses, including those for architectural and engineering services necessary to determine the structural integrity of the building and the soil composition of the site. The building, for instance, was built entirely with wooden beams; the condition of these beams had to be determined and whether they were capable of supporting the extra weight that would be engendered by the project. Brown-Hill provided Morgan Realty with periodic reports of the progress on these fronts and received no comments in response.

Brown-Hill also explored various possibilities for obtaining construction financing. Details of this financing, however, could not be completed until the designs were finalized and approvals were in place. Brown received, for instance, one proposal for construction financing based upon a proposed budget of approximately $176 million, including construction costs of $83 million. Brown testified that budget was merely conceptual in light of the many details which remained to be finalized and "costs that were unsubstantiated."

Brown testified that he met with Lehrer on September 22, 2005, and that Lehrer "told me we finally had a deal with the city and that the Mayor had approved," as did the heads of relevant departments.

Lehrer gave him a sheet outlining the concessions he had to make for approval. It contained a revised description of the project with gallery/studio space in the proposed building, together with six affordable rental units for artists in a building on one of Lehrer's nearby parcels, and community parking on a lot next to the project site that Lehrer had hoped to use for a high-rise. Brown was satisfied that the project could proceed. Lehrer testified that the meeting was the first time Brown told him that he was disinclined to keep paying bills for the project because he had already exceeded his required capital contribution.

The following day, September 23, 2005, Brown wrote to Lehrer to summarize their meeting. He noted that he and Lehrer had finally agreed on the atrium, floor plans, and apartment sizes, which the design team needed to finish its work. He also noted that the following day would be the outside date, and recommended "that we amend our agreement to allow for 6 additional months to obtain approvals and 6 additional months to obtain financing . . . ."

Brown further recommended that they "proceed with the financing as we have discussed[,]" which meant not waiting any longer for the entitlements, and instead performing all work that could be done "during this interim period" in order to avoid "miss[ing] the market" and to replace "the very expensive JDI loan" with construction financing. He stated his belief that Lehrer had agreed to that approach.

Brown testified that he simply wanted Lehrer to confirm everything in writing, as Lehrer was avoiding his phone calls. Lehrer still had not indicated to him that any of the entitlements was proving difficult to secure.

On September 26, 2005, the attorney advised the parties that "certain headway" was made on the "artist issue," and that it "may or may not be resolved over the next few days."

On September 28, 2005, Lehrer responded to Brown's e-mail by noting that the attorney's e-mail suggested that the City "may have had a change of heart" on artist units, and that it might require them to be on-site. He disagreed with Brown about having reached agreement on conceptual floor plans and unit layouts. Most important, he rejected Brown's recommended extension. He objected that he had never seen a construction financing proposal despite Brown's representations for three or four months that he "had financing lined up."

By the end of September 2005, with no approvals in sight and the approaching deadline for the JDI loan looming in the background, Brown, based upon his view that he had already expended significantly more upon the project than the $500,000 called for as his capital contribution, refused to advance any more funds. Lehrer took the position that this constituted a default on Brown's part, and in October 2005, he declared the contract terminated. Brown responded by filing a declaratory judgment action seeking a ruling that the operating agreement was not terminated and requesting specific performance of the contract for sale of 350 Warren Street. JC Morgan and 350 Warren responded by filing their own declaratory judgment action, seeking a declaration that the joint venture was at an end, that Brown-Hill had failed to meet its contractual obligations and thus was not entitled to reimbursement for its interim expenditures.

The trial court conducted a bench trial, divided into segments. Initially, it considered and ultimately denied Brown-Hill's request for specific performance. It concluded, however, that Brown-Hill had incurred a variety of expenses that benefited Lehrer and that it would be unjust to permit Lehrer to retain those benefits without reimbursing Brown. After further hearings, the trial court ultimately entered a final judgment in favor of Brown-Hill for $508,167[1] against JC Morgan, 350 Warren, and Lehrer, individually. The judgment recites that personal liability for the judgment was imposed upon Lehrer despite the limited liability company he had utilized in the transaction. Further, the trial court imposed an equitable mortgage in favor of Brown-Hill upon the property located at 350 Warren Street to secure the judgment. Finally, it denied the requests of both parties for counsel fees. Both parties have appealed and cross-appealed from various aspects of that judgment.

Following institution of this litigation, JDI declared a default on its loan when Brown failed to make a required tax escrow deposit and cancelled a requisite insurance policy. While the litigation was pending, Brown-Hill and Morgan Jersey filed a lis pendens against 350 Warren, in furtherance of their claim for specific performance. Under the terms of Morgan Jersey's loan agreement with JDI, this constituted a default, which triggered the default rate of interest.

In November 2005, in unrelated litigation, the city's creation of the Powerhouse Arts District was set aside, together with its attendant zoning restrictions. In light of that development, Lehrer no longer wished to proceed with this project because preservation and restoration were far more expensive than new construction; with the historic district restrictions invalidated, Lehrer hoped to erect a modern high-rise on the site.[2]

II.

We take up first the arguments which JC Morgan, Lehrer and 350 Warren present on their appeal. They contend, in essence, that Brown-Hill was not entitled to any reimbursement for its expenses in light of its failure to meet its contractual obligations, that the amount of the reimbursement the trial court awarded Brown-Hill disregards the language of the operating agreement and that the trial court had no basis to impose personal liability upon Lehrer or to permit imposition of an equitable lien on the property at 350 Warren Street. They also contend that the trial court erred in dismissing 350 Warren's claim for malicious prosecution and in not awarding defendants reimbursement for their expenses and in denying them counsel fees.

We note the standard of review governing our consideration of the parties' arguments on appeal. An appellate court's review of a trial court's factfinding is limited. "Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice . . . .'"

Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (quoting Rova Farms Resort v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)). Findings that "may be regarded as mixed resolutions of law and fact" receive the same deference on appeal, with review "limited to determining whether there is sufficient credible evidence in the record to support these findings[.]" P.T. & L. Constr. Co. v. Dep't of Transp., 108 N.J. 539, 560 (1987).

An appellate court's review of a contract is not circumscribed by the lower court's reading of it, however, because the interpretation of a contract "is a matter of law for the court subject to de novo review." Fastenberg v. Prudential Ins. Co., 309 N.J. Super. 415, 420 (App. Div. 1998). Appellate courts decide such purely legal questions without deferring to a lower court's "'interpretations of the law and the legal consequences that flow from established facts. . . .'" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

That de novo review of contract interpretation is guided by certain fundamental principles. As a general rule, all writings that are part of the same transaction are interpreted together.

11 Williston on Contracts, § 30.25 (Lord ed. 1999). Thus instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be construed together. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997); Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 21 (App. Div. 1985). A writing should be interpreted as a whole and in a manner that is consistent with the dominant purpose of the contract. Krosnowski v. Krosnowski, 22 N.J. 376, 386-87 (1956). A court must keep in mind "the contractual scheme as whole," Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (quoting Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956)), and "the objects the parties were striving to attain." Celanese Ltd. v. Essex County Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). "[A] contract must be interpreted considering the surrounding circumstances and the relationships of the parties at the time [the contract] was entered into, in order to understand their intent and to give effect to the nature of the agreement as expressed by them." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

A.

The trial court posited two bases to support its conclusion that Brown-Hill was entitled to reimbursement for certain of its expenditures: that the contract did not require the approval of JC Morgan or Lehrer before Brown-Hill incurred these expenses and, additionally, that JC Morgan and Lehrer were fully aware of these expenses as they were being incurred and received no objection as its expenditures mounted. Both reasons find ample support within the record.

The operating agreement gave JC Morgan authority to approve or reject the final budget for the project; that final budget, however, could only be determined once the design elements were set and the question of approvals resolved. Because neither of those steps occurred, a final budget was never prepared and submitted to Lehrer or JC Morgan for approval. We have carefully reviewed the operating agreement in its entirety, noting particularly those sections to which defendants have pointed us; we find nothing within the operating agreement which made Brown-Hill's expenditures before that final budget subject to Lehrer's prior approval and authorization.

In a project of this size and scope, if Lehrer had wished to retain the ultimate authority to approve all expenditures, that should have been clearly stated. Such an additional step, of course, would have had the clear capacity to generate additional delays in a project that was all too burdened by them. We decline to read into the contract an implied requirement that Brown-Hill obtain approval for all these preliminary expenses; doing so would run counter to the overall purpose of the agreement. Thus, we agree with the trial court that the lack of a formal authorization from Lehrer is not a bar to Brown-Hill's claim for reimbursement.

The minutes of the design development meetings, to which we referred earlier, demonstrate that Lehrer was kept fully apprised of the engagement of such professionals as the architects and engineers and reviewed and commented upon their work and, in some instances, sought revisions. Various e-mails that were exchanged and marked into evidence support the trial court's finding that Lehrer and JC Morgan were kept fully apprised of the nature of Brown-Hill's expenditures and raised no objection to any of them. The trial court, in addition, following the hearing on damages, carefully delineated in its oral opinion between those charges which provided a benefit to Lehrer, for which it considered reimbursement appropriate, and those which it did not, for which it denied reimbursement. We perceive no basis to overturn any of the trial court's findings in that regard.

Nor do we agree with defendants' assertion that Brown's failure to secure construction financing for the project defeats his claim for reimbursement. The operating agreement provided a six-month time frame for JC Morgan to obtain the needed entitlements and gave Brown-Hill the right to terminate the agreement if those entitlements were not issued within that period. It also provided Brown-Hill twelve months to secure the necessary construction financing. Brown-Hill thus had the right to terminate the agreement well in advance of the time it was called upon to produce the construction financing. We see no contractual link between the construction financing and Brown-Hill's right to reimbursement.

B.

Defendants also argue that even if Brown-Hill is entitled to some reimbursement, the trial court erred when it directed that Lehrer, individually, as well as the partnership 350 Warren, share responsibility for the reimbursement. There are two aspects to their argument. Defendants initially stress that neither Lehrer individually nor 350 Warren were participants in JC Morgan or Morgan Jersey and were not parties to the operating agreement and thus could not be held liable to reimburse Brown-Hill.

Defendants cite Nat'l Amusements, Inc. v. N.J. Tpk. Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd, 275 N.J. Super. 134 (App. Div.), certif. denied, 138 N.J. 269 (1994), and Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108-09 (App. Div. 1966), as authority for their assertion that a party to a contract cannot obtain a relief from one who is not a party to the contract. In our judgment, these cases do not provide support for defendants' position in this litigation.

Nat'l Amusements, Inc., supra, 261 N.J. Super. at 476-78, was an eminent domain case, in which the owner of unimproved property claimed unjust enrichment against the Turnpike Authority for notice of the possibility of a partial taking, which ultimately did not occur. Once the owner received the notice of a possible partial taking, it developed its property in a manner smaller than it otherwise would have done. Id. at 472. When the possibility of a partial taking was finally eliminated, the owner sued the Turnpike Authority for the loss it said it incurred because of this smaller development. Id. at 470, 472. We rejected this claim because the Turnpike Authority had not received a benefit, and because the legal remedy of inverse condemnation would have been adequate in the event of a taking. Id. at 478.

In Callano, supra, 91 N.J. Super. at 107, the decedent had contracted with a developer for construction of a new house. In a separate transaction, he ordered shrubbery from a nursery, which delivered and planted it. Ibid. The decedent died before paying the nursery, and his estate and the developer agreed to cancel his contract of sale. Ibid. This court reversed the grant of the nursery's quasi-contract claim against the developer, ruling that the nursery had an adequate remedy against the decedent's estate. Id. at 109-10. Callano thus, rather than supporting defendants' position, recognized the legitimacy on appropriate facts of pursuing the real party in interest that retained the unpaid benefit.

Defendants' second contention with respect to this issue is that, in any event, Lehrer, individually, and 350 Warren received no benefit, and that the theory of unjust enrichment is thus inapplicable. They point to the subsequent invalidation of the zoning requirements for the historic district, which had the practical effect of rendering unnecessary certain of the work performed by Brown-Hill. Defendants provide no authority for the proposition that the viability of Brown-Hill's reimbursement claim should be measured in light of this subsequent, unrelated and unanticipated development.

Contract damages are "designed 'to put the injured [party] in as good a position as he would have had if performance had been rendered as promised.'" In re Liquidation of Integrity Ins. Co., 147 N.J. 128, 136 (1996) (quoting Donovan v. Bachstadt, 91 N.J. 434, 444 (1982) (citation omitted)). Recoverable damages are the amount that "will put that party in the same position it would have been in if the breaching party had performed the contract in accordance with its terms, no better position and no worse." Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 293 (App. Div. 1998). To accept defendants' position in this regard is, in our judgment, inherently in conflict with that settled principle.

Certain of the work for which the trial court directed reimbursement, such as the environmental audit and the soil testing, retained value for Lehrer regardless of this subsequent development. Other work, such as exploring the various design alternatives, may have provided value to Lehrer for increasing his understanding of the developing market for new residential units in the area. We find no abuse of discretion in the trial court's conclusion that Lehrer received a benefit as a consequence of Brown-Hill's development work. Finally, as a matter of policy, we can see no justification for relieving Lehrer of this obligation because of the intervening actions of an unrelated third party.

Defendants contend that the theory of unjust enrichment is inapplicable to 350 Warren because the parties' agreement provided that in the event of the termination of the operating agreement, all permits, approvals and work product would be assigned to the partnership. They argue that 350 Warren cannot be considered to be unjustly enriched if it received what it was contractually entitled to. That provision is found in the contract of sale between 350 Warren and Morgan Jersey. It is conditioned, moreover, on the purchaser, Morgan Jersey, defaulting on the contract to purchase. That is not what occurred, however. The joint venture, the trial court correctly found, was lawfully terminated when Brown-Hill exercised its right not to proceed further when the needed entitlements had not been obtained within the six-month window. There was thus no default on the part of the purchaser, Morgan Jersey, to trigger this clause.

C.

Defendants also contend the trial court erred when it employed the doctrine of piercing the corporate veil to impose personal liability upon Lehrer, individually. JC Morgan was a limited liability company and thus subject to N.J.S.A. 42:2B-1 to -70. N.J.S.A. 42:2B-23 provides:

Except as otherwise provided by this act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company, or for any debt, obligation or liability of any other member, manager, employee or agent of the limited liability company, by reason of being a member, or acting as a manager, employee or agent of the limited liability company.

Defendants note that their research has not uncovered a reported case in New Jersey which has utilized the doctrine of piercing the corporate veil, developed under the principles of corporate law, to limited liability companies. We can perceive no reason in logic or policy why the principle should not be fully applicable in the context of a limited liability company, and defendants have proffered none.

"[P]iercing the corporate veil is not technically a mechanism for imposing legal liability, but for remedying the fundamental unfairness that will result from a failure to disregard the corporate form." Verni ex rel. Burstein v. Stevens, 387 N.J. Super. 160, 199 (App. Div. 2006) (quotations omitted), certif. denied, 189 N.J. 429 (2007). Defendants' arguments against employing the remedy of piercing the corporate veil in this matter can be divided into two general contentions: first, the doctrine is inappropriate in this matter because M. Robert Lehrer was not a member of JC Morgan, and it was the veil of that entity which the trial court pierced, and secondly, that the threshold elements were not established to warrant piercing in any event.

As to the first, defendants are technically correct; the members of JC Morgan were Lehrer's son and nephew, Eric Lehrer and Kevin Lehrer. The assertion, however, disregards the underlying reality. Lehrer was the moving force in JC Morgan; he, through 350 Warren had the property to be developed, and he had the initial concept to develop this abandoned warehouse into a modern, multi-use structure. He was intimately involved in all aspects of the project, and he took on the responsibility to see to the critical first step, obtaining the necessary entitlements. His son and nephew had no experience in real estate development, at least nothing on this scale. He assured Brown that he was making the two young men the nominal members of JC Morgan for reasons of his own tax planning and to secure the greatest return for himself. Lehrer was entitled to structure the transaction in a manner to maximize his own return, but he cannot, in a court of equity, be permitted to walk away from the reality of the transaction. "[E]quity [regards] substance[,] rather than form." Assocs. Home Equity Servs. Inc. v. Troup, 343 N.J. Super. 254, 276 (App. Div. 2001); Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 500-01 (App. Div. 1958); Ardito v. Bd. of Trs., Our Lady of Fatima Chapel, 281 N.J. Super. 459, 468 (Ch. Div. 1995).

We also reject defendants' second argument against the trial court's piercing of the limited liability structure. New Jersey courts will pierce the corporate veil when necessary "to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate a fraud, to accomplish a crime, or otherwise to evade the law." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 239-40 (App. Div. 1996). A corporate subsidiary's veil may be pierced "on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent[,]" and that the piercing is necessary to avoid an injustice. State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 501 (1983).

A party seeking to pierce the corporate veil bears the burden of establishing that the corporate form should be disregarded. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008). A court will look to various factors, including "whether the subsidiary was grossly undercapitalized, the day-to-day involvement of the parent's directors, officers and personnel, and whether the subsidiary fails to observe corporate formalities, pays no dividends, is insolvent, lacks corporate records, or is merely a facade." Verni, supra, 387 N.J. Super. at 200. The inquiry is fact-specific. Ibid.

Here, the entire history of this joint venture demonstrates that for all practical purposes, Lehrer was the sole principal working on behalf of JC Morgan. The reality is that JC Morgan had no underlying substance; it was capitalized with $100. Absent a piercing of the corporate veil, Brown-Hill lacked an adequate remedy at law. The trial court correctly recognized that it was necessary to pierce the corporate veil to prevent an injustice to Brown-Hill.

D.

Defendants next contend that the trial court erred in awarding reimbursement to Brown-Hill because Brown-Hill acted in bad faith and had unclean hands. They base this position on Brown-Hill's admitted failure to notify JC Morgan and Lehrer that its budget projections showed a significant increase in the project's cost. We agree with the trial court that this is an insufficient basis to deny recompense to Brown-Hill.

During the course of its several opinions, the trial court commented at various junctures that neither Lehrer nor Brown acted with the candor one would expect from a partner. Lehrer did not keep Brown fully advised with respect to the difficulties and delays in securing the entitlements, and Brown did not share with Lehrer the figures he had developed internally with respect to potential cost. He did not, he said, because they were not real figures at that juncture; there was no way to develop realistic estimates until the entitlements and design questions were finally settled. Defendants counter that assertion by contending that if Brown had advised them of the escalating projections, they would have halted the project early on, and thus Brown-Hill would not have incurred all the expenses that it did.

The trial court did not find one party more at fault than the other and viewed both as having unreasonable expectations: Lehrer, from his experience and background, should have understood that cost estimates were only guesses during the preliminary stages, and Brown, from his experience and background, should have understood that no one could guarantee either that the entitlements that were critical to the project going forward would be issued or when they would be issued.

The relationship of joint venturers, like that of partners, is "one of trust and confidence," requiring the highest standard of good faith; one joint venturer may not take advantage of the other. Muscarelle v. Castano, 302 N.J. Super. 276, 283 (App. Div. 1997); Silverstein v. Last, 156 N.J. Super. 145, 152 (App. Div. 1978).

"The doctrine of unclean hands embraces the principle that a court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit." Pellitteri v. Pellitteri, 266 N.J. Super. 56, 65 (App. Div. 1993). The decision whether it is appropriate to invoke this principle, and thus deny relief, requires a careful consideration of the totality of the circumstances. Ibid. The decision whether it is appropriate to invoke the doctrine of unclean hands rests within the trial court's sound discretion and its decision in that regard is reviewed to determine whether there was an abuse of that discretion. Ibid. We can find no abuse of the trial court's discretion in this regard.

E.

Defendants also contend that even if Brown-Hill were entitled to some reimbursement, the amount could not, under the language of the operating agreement, exceed $400,000. They point to the provision in the operating agreement limiting Brown-Hill's allowable capital contribution to $500,000 and combine that with the provision that in the event of termination, the first $100,000 of capital contribution would not be recoverable.

We reject this reading, as did the trial court. As we have already noted, the operating agreement did not require prior approval by defendants of an expenditure as a condition on reimbursement. Courts should read a contract "as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. AbdulMatin, 198 N.J. 95, 103 (2009). "Individual clauses and particular words [within a contract] must be considered in connection with the rest of the agreement, and all parts of the writing and every word of it, will, if possible, be given effect." AXA Assurance, Inc. v. Chase Manhattan Bank, 339 N.J. Super. 22, 26 (App. Div. 2001). In construing a contract, "[l]iteralism must give way to context." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer County Improvement Auth., 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd and remanded, 169 N.J. 135 (2001). Further, specific clauses will, as a rule, control more general terms. Isko v. Engelhard Corp., 367 F. Supp. 2d 702, 710 (D.N.J. 2005).

In the event the joint venture failed because Brown-Hill was unwilling to proceed further with the entitlements issue which was unresolved on the outside date, the operating agreement called for JC Morgan to reimburse Brown-Hill for all but its first $100,000 in contributions. It did so by explicitly defining the remainder of the first $500,000 "and any additional Capital Contributions" as the excess that was to be reimbursed.

Furthermore, while the operating agreement generally limited Brown-Hill's capital contribution to $500,000 before closing on the purchase of 350 Warren Street, the termination provision specifically acknowledged that Brown-Hill might have made further contributions. It explicitly stated that all contributions beyond $100,000, including "additional Capital Contributions" beyond $500,000 would be reimbursed "[n]otwithstanding anything to the contrary contained in this Agreement . . . ." This more specific provision took precedence over the more general language upon which defendants rely.

F.

Defendants also contend that the trial court erred when it imposed an equitable mortgage on the property located at 350 Warren Street to secure the judgment it had granted Brown-Hill. They point to the testimony of Jeffrey Brown in which he admitted that there was no written agreement pledging this property as security for his expenditures. They overlook, however, that he also testified that Lehrer continually assured him that the property stood behind the project.

"An equitable lien is 'a right of special nature in a fund and constitutes a charge or encumbrance upon the fund.'" VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546 (1994) (quoting In re Hoffman, 63 N.J. 69, 77 (1973)). The concept of an equitable lien rests upon the equitable maxim that equity regards as done that which ought to be done. VRG, supra, 135 N.J. at 546. Contrary to defendants' argument, there need not be an express agreement to warrant imposition of an equitable lien; an equitable lien is an appropriate device to avoid unjust enrichment. Id. at 548. There was no abuse of discretion on the part of the trial court.

G.

When this litigation commenced, Brown-Hill, as we have noted, filed a lis pendens against 350 Warren Street. Defendants included a claim for malicious prosecution based upon that filing, contending that plaintiffs used the lis pendens "in a bad faith and malicious attempt to coerce [defendants] into acquiescing" to their demands.

Malicious prosecution is the institution of a lawsuit to seek a remedy without "reasonable or probable cause" to support it. Ash v. Cohn, 119 N.J.L. 54, 58 (E. & A. 1937). The party claiming malicious prosecution must also establish the existence of a "[s]pecial grievance," which "consists of interference with one's liberty or property." Penwag Prop. Co. v. Landau, 76 N.J. 595, 598 (1978). Malicious prosecution is not a favored cause of action. Id. at 597-98 (citing Lind v. Schmid, 67 N.J. 225 262 (1975)); Baglini v. Lauletta, 338 N.J. Super. 282, 299 (App. Div.), certif. denied, 169 N.J. 607, appeal dismissed, 169 N.J. 608 (2001). An essential element of the tort of malicious prosecution is actual malice. Vickey v. Nessler, 230 N.J.

Super. 141, 150 (App. Div.), certif. denied, 117 N.J. 74 (1989). The trial court correctly concluded that there was a failure of proof with respect to this element; dismissal of the claim was clearly correct.

H.

Defendants also asserted their own claim for reimbursement from Brown-Hill for expenses they incurred. The trial court denied recovery, and defendants contend that was error. We disagree.

Defendants sought reimbursement for two categories of expenses: clean-up and related charges incurred by 350 Warren of approximately $46,000 and utility charges totaling approximately $43,000. As to the first, the clean-up work was of direct benefit to 350 Warren and was not an ordinary operating cost properly chargeable to the joint venture. As to the second, defendants supported their claim by presentation of certain checks and receipts, but not the invoices showing when the charges were incurred. The trial court properly disallowed both items.

III.

Defendants' final claim of error is that the trial court improperly denied their request for counsel fees. They base this assertion on that section of the operating agreement which provided for counsel fees to the prevailing party in an action brought to enforce the agreement or seek recovery for a breach. Defendants argue that since they prevailed on their assertion that the operating agreement terminated by its own terms, and successfully defeated the claim for specific performance, they were entitled to counsel fees.

In reality, both parties prevailed in part and were unsuccessful in part. In such a context, the trial court correctly perceived that the fairest result was to deny counsel fees to both parties.

IV.

We turn now to plaintiffs' cross-appeal, in which their first contention is that the trial court, in calculating the amount to be reimbursed to Brown-Hill, incorrectly disallowed its $500,000 capital contribution. It points to paragraph 3.9 of the operating agreement which provided that if the agreement terminated as a result of Lehrer not getting the necessary entitlements within the six-month window, "[t]o the extent [Brown-Hill] has paid its Capital Contribution of up to $500,000.00 and any additional Capital Contributions, the excess of its Capital Contributions over $100,000.00 (the 'Excess'), shall be reimbursed by [Lehrer]. . . ."

Read literally, this language would support plaintiffs' position. As we noted earlier, however, literalism must give way to context. Princeton, supra, 333 N.J. Super. at 325. "There is no surer way to misread any document than to read it literally[.]" Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring), aff'd sub nom. Gemsco, Inc. v. Walling, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). A writing must be given a reasonable construction, in accordance with justice and common sense. GNOC, Corp. v. Director, Div. of Taxation, 328 N.J. Super. 467, 477 (App. Div. 2000) (quotations omitted), aff'd as modified on other grounds, 167 N.J. 62 (2001).

We reject the construction put forth by plaintiffs; it is, in our judgment, unreasonable. Adopting that position would have had the effect of limiting Brown's overall risk to $100,000, no matter the nature of the expenses Brown-Hill incurred. Such a position would provide little or no motivation from Brown-Hill to monitor and limit its expenditures. At various points in the trial court's opinion, it referred to the colloquialism the parties had used throughout the proceedings, about "having skin in the game." If Brown-Hill could recover everything above $100,000 even if the project did not go forward due to no fault on the part of defendants, it would have had very little "skin in the game."

In our opinion, the most reasonable interpretation of this language is that Brown-Hill, if it advanced more than $500,000, and the project terminated for failure to get the entitlements within that six-month period, could seek reimbursement for its advances in excess of $500,000. We thus affirm the determination of the trial court in this regard.

Plaintiffs' final argument on their cross-appeal is that the trial court erred when it denied their application for counsel fees. We reject this argument for the same reasons we rejected defendants' argument in this regard.

V.

The judgment under review is affirmed, on both defendants' appeal and plaintiffs' cross-appeal.

1. The third page of the judgment refers to $508,157. We conclude this was an inadvertent typographical error.

2. We were informed at oral argument that that did not take place, and the building remains in the condition it was in when the parties abandoned the project.