
**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

DORINE BORRIELLO, individually and derivatively
on behalf of CATERINA REALTY, LLC,

Plaintiff,

- against -

MICHAEL LOCONTE, DIANE SCHMIDT and
MARIA PENNEY SELIGSON,

Defendants,

- and -

CATERINA REALTY, LLC,

Nominal Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW IN
SUPPORT OF CROSS-MOTION FOR SUMMARY
JUDGMENT AND PRELIMINARY INJUNCTION,
AND IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS THE COMPLAINT**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
DORINE BORRIELLO, individually and derivatively :
on behalf of CATERINA REALTY, LLC, :
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Plaintiff, :
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- against - :
 : Index No. 503180/2013
MICHAEL LOCONTE, DIANE SCHMIDT and :
MARIA PENNEY SELIGSON, : Demarest, J.
 :
Defendants, :
 :
- and - :
 :
CATERINA REALTY, LLC, :
 :
Nominal Defendant. :
-----X

**PLAINTIFF'S MEMORANDUM OF LAW IN
SUPPORT OF CROSS-MOTION FOR SUMMARY
JUDGMENT AND PRELIMINARY INJUNCTION,
AND IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS THE COMPLAINT**

Plaintiff respectfully submits this Memorandum of Law in support of her cross-motion for an order (a) pursuant to CPLR 3212 granting summary judgment dismissing the seventh affirmative defense of release and the counterclaim asserted in defendants' first amended answer dated September 17, 2013; and (b) pursuant to CPLR 6301 granting plaintiff a preliminary injunction enjoining nominal defendant Caterina Realty, LLC ("Caterina") from paying the legal fees and expenses of the individual defendants herein pending final determination of this matter.

Plaintiff also submits this Memorandum of Law in opposition to defendants' motion pursuant to CPLR 3211(a)(1) to dismiss the complaint based upon documentary evidence.

STATEMENT OF FACTS

The facts in support of plaintiff's cross-motion and in opposition to defendants' motion are set forth in detail in the Affidavit of Dorine Borriello, sworn to November 6, 2013 (the "Borriello Aff."), and the Affirmation of Thomas Torto, Esq., dated November 6, 2013 (the "Torto Aff."), and the exhibits annexed thereto.

Jersey Lynne Farms, Inc.

Briefly, Jersey Lynne Farms, Inc. ("Jersey Lynne") is a closely held, family corporation engaged in the wholesale and retail produce business at 8801 Foster Avenue in Brooklyn (the "Premises"). Vito Loconte, plaintiff's father, incorporated the business in 1969 and owned 100% of its stock until in or about 1991 when he transferred some of the stock to his children, plaintiff and the individual defendants. Vito Loconte continued to manage Jersey Lynne until in or about 1996 (Borriello Aff., ¶3).

After Vito Loconte died, the stock in Jersey Lynne was transferred to plaintiff and the individual defendants as follows: defendant Michael Loconte 35%; plaintiff Dorine Borriello 25%; defendant Diane Schmidt 20%; and defendant Maria Penney Seligson 20%. Plaintiff and defendants assumed management of Jersey Lynne (Borriello Aff., ¶4).

Plaintiff began working at Jersey Lynne at age 12, and worked there continuously until 2011. The individual defendants also worked at Jersey Lynne over the years in various capacities (Borriello Aff., ¶5).

Between 2005 through 2010, plaintiff was the president of Jersey Lynne. By 2008/2009, Jersey Lynne's business grew from \$22 million to approximately \$34 million in gross revenue (Borriello Aff., ¶6).

Plaintiff's husband, Raymond Borriello, was initially hired by Vito Loconte in or about 1990 to unload trucks for Jersey Lynne. Mr. Borriello worked his way up in the company and by 2005, was in charge of all buying (Borriello Aff., ¶7).

However, in March 2011, the individual defendants, in their capacity as shareholders and directors of Jersey Lynne, voted to terminate Mr. Borriello's employment with Jersey Lynne (Borriello Aff., ¶8).

In April 2011, the individual defendants, in their capacity as shareholders and directors of Jersey Lynne, held a meeting and voted to remove plaintiff as a director of Jersey Lynne. On October 5, 2011, the individual defendants, over objection, terminated plaintiff's employment with Jersey Lynne (Borriello Aff., ¶9).

Caterina Realty, LLC

In or about 1975, Vito Loconte purchased the Premises. The Premises consist of a large building which occupies the entire block (Borriello Aff., ¶10).

In 1999, plaintiff and defendants formed Caterina, a New York limited liability company, and transferred title to the Premises to Caterina. Plaintiff and the individual defendants are members of Caterina and each own 25% thereof (Borriello Aff., ¶11).

Jersey Lynne rents from Caterina the entire Premises in which it conducts its wholesale and retail produce business (Borriello Aff., ¶12).

In or about the summer of 2011, plaintiff and the individual defendants began discussing a new lease between Caterina and Jersey Lynne for the Premises. Prior to 2011, Jersey Lynne paid rent which was significantly below fair market value (Borriello Aff., ¶13).

During the lease discussions in 2011, plaintiff insisted that Jersey Lynne pay fair

market value rent to Caterina, triple net, with annual increases of 3%, and the other usual and customary terms of a commercial lease. Plaintiff obtained and provided the individual defendants with an appraisal by the NY Retail Group, LLC which showed that the fair market base rent would be in the range of \$1,100,000 per year (Borriello Aff., ¶14, Exhibit "A"). In order to resolve the dispute over fair market rent for the Premises, plaintiff agreed to accept base rent of \$600,000 per year payable by Jersey Lynne (Borriello Aff., ¶14).

Defendants insisted that Jersey Lynne pay rent that was substantially below fair market. They obtained an appraisal by M.C. O'Brien (the "O'Brien Appraisal") which grossly under-estimated the fair market rent at \$342,000 per year based on an inaccurate description of and omission of crucial facts regarding the Premises. The O'Brien Appraisal mischaracterized the Premises as an industrial/warehouse which would command only \$9.75 per square foot, when in fact it is a mixed-use building which includes office and retail space which would command \$35 per square foot. Additionally, the O'Brien Appraisal failed to account for substantial improvements to the Premises, such as a sprinkler system, refrigeration and other improvements, and failed to account for the location of the Premises directly across the street from the new Canarsie Plaza (Borriello Aff., ¶15, Exhibit "B").

Plaintiff vigorously objected to the O'Brien appraisal and to Caterina entering into a lease with Jersey Lynne based on that appraisal. During a meeting of Caterina's members held on December 13, 2011, plaintiff voted "No" to authorizing Michael Loconte to enter into the Lease between Caterina and Jersey Lynne dated December 1, 2011 based upon the O'Brien Appraisal (Borriello Aff., ¶16, Exhibit "C").

**Settlement of Plaintiff's Wrongful
Termination Claim Against Jersey Lynne**

In or about October 2011, plaintiff retained Thomas Torto, Esq. to represent her in connection with her claims for wrongful termination against Jersey Lynne and the dispute over the Lease between Caterina and Jersey Lynne. At that time, Mr. Torto also represented Raymond Borriello with respect to his wrongful termination claims against Jersey Lynne (Borriello Aff., ¶17; Torto Aff., ¶9).

In a letter dated December 12, 2011 (Borriello Aff., ¶18; Torto Aff., ¶10, Exhibit "D"), Mr. Torto set forth plaintiff's initial settlement position with respect to her claim for damages for wrongful termination from Jersey Lynne. Torto's letter also proposed settlement of plaintiff's claims respecting the below market rent in the lease between Caterina and Jersey Lynne, as follows:

- A. JLF will pay annual rent to Caterina on a triple net basis, based on the O'Brien estimate dated July 25, 2011, in the annual sum of \$342,000 for the first two years;
- B. At year 3, you and I will pick a neutral evaluator to determine the fair market rental going forward; and
- C. Caterina Realty will pay Dorine the sum of \$11,825 for the past eleven months at the rate of \$1,075 per month.

In emails dated January 3, 2012 and February 23, 2012 (Borriello Aff., ¶19; Torto Aff., ¶11, Exhibits "E" and "F"), defendants' attorney, Stephen J. Schwartz, Esq., of the firm Shatz, Schwartz and Fentin, P.C., in Springfield, Massachusetts, responded to Mr. Torto's claim

letter dated December 12, 2011.

In response, Mr. Torto revised plaintiff's settlement position in a letter dated February 24, 2012 (Borriello Aff., ¶20; Torto Aff., ¶12, Torto Aff., Exhibit "G"). As to Caterina, he proposed:

- A. If JLF pays Dorine \$50,000 per year for the next two years, Dorine will not challenge the annual rent which JLF pays to Caterina for the next two years;
- B. If JLF does not pay Dorine \$50,000 per year for the next two years, then JLF will pay annual rent to Caterina on a triple net basis, based on the O'Brien estimate dated July 25, 2011, in the annual sum of \$342,000 for the next two years; and
- C. At year 3, you and I will pick a neutral evaluator to determine fair market rent going forward.

Mr. Schwartz rejected plaintiff's proposals regarding Caterina (Borriello Aff., ¶21; Torto Aff., ¶13, Torto Aff., Exhibit "H").

**The Exclusion of Caterina from
The Jersey Lynne Settlement**

Following Mr. Schwartz's rejection of plaintiff's settlement proposal respecting Caterina, Mr. Torto spoke with Mr. Schwartz several times. On or about March 15, 2012, Torto and Schwartz agreed that the settlement of plaintiff's wrongful termination claim against Jersey Lynne would be without prejudice to her claims with respect to Caterina, in particular the lease.

Thus, by letter dated March 15, 2012, Mr. Torto confirmed that the settlement of plaintiff's claims against Jersey Lynne would be "without prejudice to any rights Dorine has a

member of Caterina Realty, LLC” (Borriello Aff., ¶¶ 22, 23; Torto Aff., ¶14, Exhibit “I”) .

Mr. Schwartz called Mr. Torto in response to Torto’s March 15, 2012 letter. He agreed that plaintiff “can sue” on her claims relating to the Caterina lease notwithstanding the settlement of her claims against Jersey Lynne. Mr. Torto contemporaneously set forth on his March 15, 2012 letter his handwritten notes of his telephone conversation with Mr. Schwartz and specifically recited Mr. Schwartz’s comment that plaintiff “can sue” as to Caterina (Torto Aff., ¶15, Exhibit “J”).

In his letter dated March 28, 2012, Mr. Torto reiterated and confirmed that the settlement of plaintiff’s claims against Jersey Lynne was “without prejudice” to her rights as to Caterina (Torto Aff., ¶ 16, Exhibit “K”). In an e-mail dated April 16, 2012, Mr. Schwartz, in responding seriatim to each item in Mr. Torto’s March 28, 2012 letter, did not object to the statement that the settlement as to Jersey Lynne was “without prejudice” to plaintiff’s rights as to Caterina (Torto Aff., ¶ 16, Exhibit “L”).

Thereafter, the parties proceeded based on their intention that the settlement resolved only plaintiff’s claims to recover damages from Jersey Lynne as a result of her alleged wrongful termination from Jersey Lynne. There was no intention whatsoever to resolve plaintiff’s claims against the other members of Caterina arising from the Caterina lease dated December 1, 2011 or any other claim arising out plaintiff’s ownership interest in Caterina (Borriello Aff., ¶24; Torto Aff., ¶17).

In accordance with the parties’ understanding, agreement and intention, the first

draft of the Separation Agreement and Release (Torto Aff., Exhibit “M”)¹ which were all initially drafted by Mr. Schwartz, did not mention plaintiff’s claims in regard to the Caterina Lease or anything else involving Caterina.

The Separation Agreement and Release

The clear and unambiguous terms of the final signed Separation Agreement and Release and related documents (Torto Aff., Exhibit “N” [in view of the confidentiality clause, the entire Separation Agreement will be handed up to the Court for an in camera inspection at the direction of the Court]), establish that entire Separation Agreement and Release relate only to plaintiff’s employment with Jersey Lynne, and has nothing to do with Caterina (Torto Aff., ¶18; Borriello Aff., ¶25). In this regard, the Separation Agreement and Release, inter alia, sets forth the termination date of plaintiff’s employment with Jersey Lynne, provides for plaintiff’s compensation and benefits, and contains a non-competition and non-disclosure agreement respecting Jersey Lynne’s business.

The Separation Agreement and Release and payments made thereunder dealt exclusively with the termination of plaintiff’s employment with Jersey Lynne. The Separation Agreement does not mention Caterina Realty. It is undisputed that plaintiff did not receive any payment on account of her Caterina claims (Borriello Aff., ¶25).

Plaintiff’s Breach of Fiduciary Duty Claims Against the Majority Member-Managers of Caterina

Since December of 2011, the individual defendants, as majority member-

¹In a transparent attempt to mislead, defendants use the confidentiality clause in the Separation Agreement and Release as a sword instead of the shield for which it was intended. However, plaintiff will, at the direction of the Court, hand up the entire first draft of and final, signed Separation Agreement and related documents for an in camera inspection.

managers of Caterina, have conducted Caterina's business to benefit themselves as employees and majority shareholders of Jersey Lynne, all at plaintiff's financial expense as a member of Caterina. In addition to depriving Caterina of fair rental income for the Premises by entering into a lease which is significantly below fair market value, the individual defendants have approved payment by Caterina of charges, expenses and liabilities which are the responsibility of Jersey Lynne to pay under the Lease. By virtue of the below market rent and other acts of self-dealing, the individual defendants have caused Caterina to lose significant money and become unprofitable, while simultaneously benefitting themselves as employees of Jersey Lynne, all at plaintiff's financial expense as a member of Caterina (Borriello Aff., ¶26).

Plaintiff objected to the actions taken by the individual defendants as majority member-managers of Caterina. Defendants have ignored plaintiff's objections (Borriello Aff., ¶27).

The Instant Action

By summons and complaint dated June 3, 2013 (Torto Aff., Exhibit "A"), plaintiff commenced the instant derivative action on behalf of Caterina to recover damages in the sum of not less than \$1,290,000, together with the expenses and carrying charges which Jersey Lynne should be paying under a proper lease for the Premises.

The complaint alleges that the conduct of defendants, as majority member-managers of Caterina, in entering into the December 1, 2011 Lease, approving payment by Caterina of charges, expenses and liabilities which are Jersey Lynne's responsibility to pay under the Lease, and reducing distributions to the members, constituted self-dealing and breach of fiduciary duties owed to Caterina and plaintiff.

**Caterina's Improper Payment of
The Individual Defendants' Legal Fees**

Caterina's Operating Agreement (Borriello Aff., ¶28, Exhibit "D") provides for indemnification of members for expenses, including attorneys' fees, incurred "as a result of any act performed or omitted on behalf of [Caterina] or in furtherance of [Caterina's] interests without, however, relieving the Member of liability for failure to perform his or her duties in accordance with the standards set forth herein". The Operating Agreement does not authorize advancement of legal fees to a member during the course of and before a final judgment in the litigation.

Nevertheless, during a meeting of Caterina's managers-members held on August 20, 2013, the individual defendants voted to approve payment by Caterina of their legal fees and expenses incurred during the course of this action (Borriello Aff., ¶29, Exhibit "E"). Plaintiff expressly voted "No" to such payment.

**Defendants' First Amended
Verified Answer and Counterclaim**

In their first amended verified answer, dated September 17, 2013 (Torto Aff., Exhibit "B"), defendants admitted that Caterina is a New York limited liability company which owns the Premises; that Jersey Lynne is a New York corporation; and that plaintiff and defendants are owners of Jersey Lynne. The amended answer denies the other material allegations of the complaint and interposes seven affirmative defenses, including the seventh affirmative defense that "[p]laintiff's claims are barred by ¶ 7 of the Separation Agreement and General Release signed in June 2012".

The answer also interposes a counterclaim which alleges that, inter alia, plaintiff's claims are barred by the general release and that plaintiff's "filing of the Verified Complaint" breached the Separation Agreement and General Release.

In her reply to counterclaim, dated September 24, 2013 (Torto Aff., Exhibit "C"), plaintiff admitted entering into the Separation Agreement and General Release solely with respect to her employment with Jersey Lynne, denied the other allegations of the counterclaim, and respectfully referred the court to the Separation Agreement and General Release for its terms, conditions and legal effect. Plaintiff also alleged four separate affirmative defenses to the counterclaim, including the defense that the Separation Agreement and General Release was "intended to and limited to the defendants' acts and/or omissions as officers, directors, shareholder and managers of Jersey Lynne Farms Inc. and that plaintiff had no intention of releasing defendants from liability for their acts and/or omissions as members, managers and officers of Caterina Realty LLC."

Defendants' Instant Motion

By notice of motion dated September 19, 2013, defendants have moved pursuant to CPLR 3211(a)(1) to dismiss the complaint based upon documentary evidence. In support of the motion, defendants submit the affirmation of their attorney in this litigation, Howard Schwartz, Esq.; redacted portions of the Separation Agreement and Release contained in paragraph "7" thereof; excerpts from Caterina's Operating Agreement; minutes from the December 13, 2011 meeting of Jersey Lynne's members; and letters dated December 12, 2011 and February 24, 2012 of Mr. Torto.

Defendants have not submitted their own affidavits, based upon personal

knowledge, attesting to the facts and circumstances surrounding the execution of the Separation Agreement and Release, the underlying settlement negotiations, or a complete copy of Caterina's Operating Agreement. Nor have defendants submitted the affidavit of Steven J. Schwartz, Esq., who represented Jersey Lynne and them in the negotiations and execution of the Separation Agreement and Release.

POINT I

SINCE THE SEPARATION AGREEMENT AND RELEASE IS LIMITED TO PLAINTIFF'S CLAIMS FOR WRONGFUL TERMINATION AGAINST JERSEY LYNN, THE SEVENTH AFFIRMATIVE DEFENSE OF RELEASE AND THE COUNTERCLAIM THEREON SHOULD BE DISMISSED

It is well settled that the “meaning and scope of a release must be determined within the context of the controversy being settled”. Matter of Schaefer, 18 N.Y.2d 314, 274 N.Y.S.2d 869 (1966); accord: Eaton Elec., Inc. v. Dormitory Authority of New York, 48 A.D.3d 619, 852 N.Y.S.2d 363 (2d Dep’t 2008)(“[t]he meaning and scope of a release must be determined within the context of the controversy being settled”).

As the Court of Appeals explained in Cahill v. Regan, 5 N.Y.2d 292, 299, 184 N.Y.S.2d 348, 354 (1959):

... Although the effect of a general release, in the absence of fraud or mutual mistake, cannot be limited or curtailed (citations omitted), its meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not desire or intend to dispose of. . . . When the releases were executed, it is clear, the parties were solely concerned with settling the controversy then being litigated, the ownership of machinery in the employer's possession, a subject having no relation to the invention or the patent. . .

Thus, the Court will look to the intent of the parties in determining the scope of a release, even an “unconditional general release”. See, Schnee v. Schnee, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 5432080 (1st Dept 2013)(explaining that an “unconditional general release” drafted by defendant “does not reflect the parties’ intentions as there is no indication that

plaintiff intended to waive her interest in defendant's retirement accounts" and that the parties' stipulation was entered into to settle "only the issues of maintenance arrears, plaintiff's interest in the marital residence, and counsel fees").

In Morales v. Solomon Management Co., LLC, 38 A.D.3d 381, 382, 832 N.Y.S.2d 195 (1st Dep't 2007), the Appellate Division pointed out that "[i]t has long been the law that where a release contains a recital of a particular claim, obligation or controversy and there is nothing on the face of the instrument, other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby." Accord: Hallmark Synthetics Corp. v. Sumitomo Shoji New York, Inc., 26 A.D.2d 481, 484, 275 N.Y.S.2d 587, 590 (1st Dep't 1966); see also, Murray-Gardner Management, Inc. v. Iroquois Gas Transmission System, L.P., 229 A.D.2d 852, 854, 646 N.Y.S.2d 418 (3d Dep't 1996) (releases did not "evinced an intention to encompass the distinct contractual obligations defendant undertook upon which plaintiff's breach of contract causes of action are premised"); Niagara Frontier Transp. Authority v. Patterson-Stevens, Inc., 237 A.D.2d 965, 965, 654 N.Y.S.2d 526, 527 (4th Dep't 1997) (explaining that "[a] release may not be read to cover matters which the parties did not desire or intend to dispose of" and that there was "no clear language in the release indicating that the defendant agreed to waive future or continuing claims arising out of panel installation).

Here, plaintiff has met her initial burden of demonstrating prima facie that there are no questions of fact and that the seventh affirmative defense of release and the counterclaim thereon should be dismissed as a matter of law. See, Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790 (1979)(explaining that a movant

on a summary judgment motion makes a prima facie showing of entitlement to judgment as a matter of law by eliminating material issues of fact and showing that the movant is entitled to judgment as a matter of law); Andre v. Pomeroy, 35 N.Y.2d 361, 363, 362 N.Y.S.2d 131, 132 (1974) (“ . . . when there is no genuine issue to be resolved at trial, the cases should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus to deny to other litigants the right to have their claims promptly adjudicated”).

**The Language of the Separation Agreement and Release
Is Limited to Plaintiff's Employment with Jersey Lynne**

The language of the Separation Agreement and Release unequivocally establishes that plaintiff released only her wrongful termination claim against Jersey Lynne arising out of her employment with Jersey Lynne. Paragraph “7” of the Separation Agreement (Schwartz Aff., Exhibit “C”) provides as follows:

7. General Release. Except with respect to any rights, obligations or duties arising out of this Agreement, and in consideration and exchange for the Non-Competition Pay and Loan and Employment Agreement set forth in this Agreement, Employee, on behalf of herself, her heirs, executors, administrators, agents, representatives, attorneys and assigns, knowingly and voluntarily forever releases and discharges the Company and its past and present affiliates, subsidiaries, parent companies, predecessors, insurers, successors and assigns and its and their current and former partners, members, owners, shareholders, officers, directors, employees, employee benefit plans, attorneys, fiduciaries, representatives and agents both individually and in their business capacities (collectively, the “Releasees”), of and from any and all claims, complaints, demands, lawsuits, causes of action or expense of any kind (including attorneys’ fees and costs), excluding only claims and or rights that the law does not permit Employee to waive (collectively, “Claims”), whether known or unknown, that Employee now has or ever had against the Releasees as of

the signing of this Agreement, including but not limited to Claims related to or arising from Employee's employment with the Company and/or the termination thereof; Claims arising under common law; Claims for breach of contract and in tort; Claims for unpaid compensation, unpaid bonuses or any employee benefits; Claims for attorney's fees and costs; and Claims arising under federal, state or local labor law, employment law and laws prohibiting employment discrimination, including but not limited to: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Americans with Disabilities Act of 1990, the Employee Retirement Income Security Act of 1974, the Equal Pay Act of 1963, the Fair Labor Standards Act of 1938, the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), the Family and Medical Leave Act, Employee Retirement Income Security Act of 1974 ("ERISA") (except as stated below), the Human Rights Law of the City of New York, the New York Human Rights Law, the New York Wage Theft Prevention Act, New York Labor Law §§160, 162, 191, 191-c, 193, 194, 201-a, 201-c, 201-d, 202-a, 218, 663, 736, 740 (each as amended). It is further expressly agreed and understood by Employee that the release herein is a GENERAL RELEASE.

This release does not apply to (a) the Employee's rights to vested benefits under an employee pension or welfare benefit plan as defined under ERISA, (b) enforcement of the terms of this Agreement, or (c) any rights the Employee may have to file, cooperate or participate in any proceeding before the Equal Employment Opportunity Commission ("EEOC") or the New York City Commission on Human Rights, New York State Division of Human Rights, except, however, the Employee waives any right to recover monetary damages in connection with any proceeding before the EEOC, New York City Commission on Human Rights, or the New York State Division of Human Rights, or (d) the rights of the Employee as a Stockholder of the Company.

Since there is nothing on the face of the above-quoted Separation Agreement and Release other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby. Morales v. Solomon Management Co., LLC, *supra*; Hallmark Synthetics Corp. v. Sumitomo Shoji New York, Inc., *supra*; Schnee v. Schnee, *supra*; Cahill v. Regan, *supra*.

The Separation Agreement and Release does not mention plaintiff's Caterina claims and certainly does not mention her objections to the below-market Lease dated December 1, 2011 between Caterina and Jersey Lynne. There is no language in the Separation Agreement and Release which establishes in clear and unequivocal language that plaintiff waived her Caterina claims. Niagra Frontier Transp. Authority v. Patterson-Stevens, Inc., *supra*; Schnee v. Schnee, *supra*; Morales v. Solomon Management Co., LLC, *supra*; Cahill v. Regan, *supra*.

The Separation Agreement and Release is solely between Dorine Borriello as "Employee", and Jersey Lynne as "Company". The language of the General Release itself releases only those claims arising out plaintiff's termination of employment with Jersey Lynne. There is no mention of Caterina Realty, LLC anywhere in the Separation Agreement and Release or in any of the related settlement documents (Torto Aff., Exhibit "N"). See, Art Finance Partners, LLC v. Christie's Inc., 58 A.D.3d 469, 470, 870 N.Y.S.2d 331, 333(1st Dep't 2009) ("The mutual releases were not "clear and unambiguous as to the intention of the parties to cover the amount in dispute"). Thus, the plain language of the Separation Agreement and Release, standing alone, refutes defendants' self-serving contention that plaintiff's Caterina claims are barred and waived.

As set forth in the Borriello Affidavit, Caterina is a single purpose entity which owns and operates the Premises. Caterina is not “an affiliate, subsidiary, parent company, predecessor, insurer, successor or assign” of Jersey Lynne, which is engaged solely in the wholesale food business. Moreover, the release discharges only Jersey Lynne’s “current and former partners, members, owners, shareholders, officers, directors, employees, employee benefit plans, attorneys, fiduciaries, representatives and agents, both individually and in their business capacities”. The release describes plaintiff as “Employee” of Jersey Lynne.

In order to conclude that the Separation Agreement and Release constitutes “a general release of all claims against defendants” which bars plaintiff’s claims regarding the December 1, 2011 Lease, the Court would have to rewrite the Settlement Agreement and Release by adding Caterina as a party and the individual defendants in their capacities as members and managers of Caterina. Since the release expressly “does not apply to . . . the rights of the Employee [plaintiff] as a Stockholder of the Company [Jersey Lynne]”, a fortiori it does not apply to plaintiff’s rights as a member of Caterina. In order to accept defendants’ position, the Court would have to improperly rewrite the Separation Agreement and Release by adding terms which were not agreed upon by the parties, and construe the existing language “in such a way as would distort the apparent meaning”. Korosh v. Korosh, 99 A.D.3d 909, 911, 953 N.Y.S.2d 72 (2d Dep’t 2012); see also, Cohen-Davidson v. Davidson, 291 A.D.2d 474, 475, 740 N.Y.S.2d 68 (2d Dep’t 2002) (pointing out that “a court cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation”). As written, the Separation Agreement and Release (and the other settlement documents) (Torto Aff., Exhibit “N”), does not evince an intention to encompass plaintiff’s claims respecting the December 1,

2011 Lease or Caterina. Murray-Gardner Management, Inc. v. Iroquois Gas Transmission System, L.P., supra.

Since the language of the Separation Agreement and Release clearly relates to claims arising out of plaintiff's employment with Jersey Lynne, effect must be given to the intent of the parties to release only such claims as indicated by the language employed. Matter of Schaefer, supra; Cahill v. Regan, supra; Schnee v. Schnee, supra. Therefore, the general words of release in Paragraph "7" are limited to plaintiff's claims arising out of her employment with Jersey Lynne. Morales v. Solomon Management Co., LLC, supra.

Consequently, defendants' assertion (Defendants' Memorandum, at 5, 8, 9) that the general release contains "broad" language which encompasses plaintiff's claims regarding Caterina is totally without merit.

**The Parties Did Not Intend to Settle
and Release Plaintiff's Caterina Claims**

Based upon uncontroverted documentary evidence, the Borriello Affidavit and Torto Affirmation establish the parties' intention that the settlement of plaintiff's claims against Jersey Lynne was without prejudice to plaintiff's Caterina claims. See, Matter of Schaefer, supra; Cahill v. Regan, supra; Schnee v. Schnee, supra.

In urging that the Separation Agreement and Release bars plaintiff's claims against defendants related to Caterina, defendants submit the letters of plaintiff's attorney dated December 12, 2011 (Schwartz Aff., Exhibit "D") and February 24, 2012 (Ibid, Exhibit "G"). However, defendants conveniently fail to bring to the Court's attention the March 15, 2012 and March 28, 2012 letters of plaintiff's attorney (Torto Aff., Exhibits "I" and "K"), each of which

expressly state that the Jersey Lynne settlement is “without prejudice to any rights Dorine has as a member of Caterina Realty, LLC”. Moreover, defendants fail to bring to the Court’s attention their attorney’s settlement memo (Torto Aff., Exhibit “L”) in which he indicates his consent to exclude from the Jersey Lynne settlement of plaintiff’s Caterina claims.

Thus, defendants’ contention (Defendants’ Memorandum at 5-6, Fn 2) that the Jersey Lynne release released them from all claims arising against them prior to June 2012 because they are “officers, directors and employees” of Caterina, is specious.

The Borriello affidavit and Torto affirmation unequivocally establish the clear intent of the parties that the Jersey Lynne settlement was “without prejudice to any rights Dorine has as a member of Caterina Realty, LLC”. Schnee v. Schnee, supra; Ayers v. Ayers, 92 A.D.3d 623, 938 N.Y.S.2d 572 (2d Dep’t 2012); Cahill v. Regan, supra (general release did not extinguish employer’s right in an invention since at the time of the release the parties were concerned solely with settling the ownership of certain machinery). It is factually undisputed that defendants agreed that the Jersey Lynne settlement was “without prejudice” to plaintiff’s claims relating to Caterina. The attorney who represented defendants in the settlement negotiations agreed that plaintiff “can sue” on her claims relating to the December 1, 2011 Caterina lease (Torto Aff., Exhibit “J”), and never once changed or revised the statement – contained in each draft of the principle terms of the settlement (Torto Aff., Exhibits “I”, “K” and “L”) – that the Settlement was “without prejudice to any rights Dorine has as a member of Caterina Realty, LLC”.

The cases relied on by defendants to support their argument that the release contains broad language which discharges defendants from all claims arising prior to June 2012,

are distinguishable on their own specific facts. These cases involve (a) lawsuits where the plaintiff sought to recover for the same claim previously released, see, Matter of Schaefer, 18 N.Y.2d 314, 274 N.Y.S.2d 869 (1966)(release in Surrogate's Decree pursuant to which bank released estate from all liability arising out of an unpaid note precluded bank from subsequently seeking to recover on unpaid note against after-acquired assets); Sparacio v. Sparacio, 283 A.D.2d 481, 724 N.Y.S.2d 204 (2d Dep't 2001)(broad language in release between parties relating to their divorce judgment barred husband's claims relating to his child support obligation); Delaney v. County of Westchester, 90 A.D.2d 819, 455 N.Y.S.2d 839 (2d Dep't 1982)(comprehensive release resolving all of plaintiff's employment compensation and benefits claims barred plaintiff's lawsuit for additional salary and benefits); Krumme v. Westpoint Stevens, Inc., 238 F.3d 133 (2d Cir. 2000)(plaintiffs claims barred by "unambiguous release" of precise claims sued upon); LeMay v. H.W. Keeney, Inc., 124 A.D.2d 1026, 508 N.Y.S.2d 769 (4th Dep't 1986)(plaintiff who accepted settlement on his claims for personal injuries, and was aware of his injuries at the time he of the settlement, was barred from suing to recover for those injuries); In Re Worldcom, Inc., 296 B.R. 115 (SDNY 2003)(release which specifically referenced agreements barred plaintiffs' subsequent lawsuits to recover under those same agreements); or (b) contentions by the plaintiffs that the releases were procured by undue duress, illegality, fraud or mutual mistake. See, Rocanova v. Equitable Life Assur. Socy. of U.S., 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994)(plaintiff failed to establish any of the traditional bases for setting aside a release); Booth v. 3669 Delaware, Inc., 92 N.Y.2d 934, 680 N.Y.S.2d 899 (1998)(in an action brought subsequent to the execution of the release to recover damages for the very liability released, plaintiff failed to show that the release was procured by fraud); Davis &

Associates, Inc. v. Health Management Services, 168 F.Supp2d 109 (SDNY 2001)(plaintiff barred from recovering on claims specifically released and did not show that the release was procured by economic duress and in fact ratified the release); Calvano v. New York City Health & Hosps. Corp., 246 A.D.2d 317, 667 N.Y.S.2d 351 (1st Dep't 1998)(plaintiff failed to show mutual mistake in entering into release of claims to recover for personal injuries).

Here, plaintiff does not seek to recover on a claim which she previously released or to vacate the release upon the ground of fraud, mistake, illegality or duress. The undisputed proof shows that the parties' expressly agreed that the Settlement was "without prejudice" to plaintiff's claims related to Caterina, including her objections to the December 1, 2011 Lease. Thus, defendants' reliance on Rubycz-Boyar v. Mondragon, 15 A.D.3d 811, 790 N.Y.S.2d 266 (3rd Dep't 2004) is misplaced, since the release in that case encompassed "any matter, cause or thing whatsoever from the beginning of the world to the day of the release" and did not qualify or limit the claims released.

In view of (i) the language of the Separation Agreement and Release; and (ii) the intent of the parties as established by their written settlement negotiations, plaintiff has established that there are no factual questions and that as a matter of law her Caterina claims have not been discharged or released by the Settlement Agreement and Release. Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., *supra*. Accordingly, the seventh affirmative defense of release should be dismissed as a matter of law.

The counterclaim based on the release should be dismissed for the same reasons. Since plaintiff's instant action seeks to recover for breaches related solely to Caterina, plaintiff's complaint does not constitute a breach of the Separation Agreement and Release as alleged in

defendants' counterclaim.

Accordingly, plaintiff's cross-motion for summary judgment dismissing defendants' seventh affirmative defense of release and the counterclaim, should be granted.

POINT II

CATERINA SHOULD BE PRELIMINARILY ENJOINED FROM PAYING THE INDIVIDUAL DEFENDANTS' LEGAL FEES AND EXPENSES INCURRED IN THIS ACTION PENDING FINAL DETERMINATION OF THIS ACTION

A preliminary injunction will generally be granted upon a showing of a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in the movant's favor. See, Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49 (2005); CPLR 6301. "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." Doe v. Axelrod, 73 N.Y.2d 748, 536 N.Y.S.2d 44 (1988).

Pursuant to Limited Liability Company Law §420, an LLC may in its Operating Agreement:

. . . indemnify and hold harmless, and advance expenses to, any member, manager. . . from and against any and all claims and demands whatsoever; provided, however, that no indemnification may be made to or on behalf of any member, manager . . . if a judgment or other final adjudication adverse to such member, manager. . . establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled.

The statutory language of section 420 is permissive and "does not per se create a legal duty to indemnify." 546-552 West 146th Street LLC v. Arfa, 99 A.D.3d 117, 121-122, 950 N.Y.S.2d 24 (1st Dep't 2012)(Section 420 "empowers a limited liability company to tailor an indemnity clause in accordance with its own 'standards and restrictions,' subject to the

limitations specified in the statute”).

Additionally, indemnification provisions are “strictly construed”. 546-552 West 146th Street LLC v. Arfa, supra (“When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed”). As explained by the Court of Appeals in Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 -492, 549 N.Y.S.2d 365 (1989):

. . . Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might “seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view” (citation omitted). This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed (citations omitted). The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances [citations omitted]. . .

Moreover, there is a “clear distinction” between a member’s right to indemnification and a member’s entitlement to advancement of legal expenses during the course of litigation. See, Ficus Investments, Inc. v. Private Capital Management, LLC, 61 A.D.3d 1, 872 N.Y.S.2d 93 (1st Dep’t 2009)(“ . . . whether an officer is entitled to advancement is determined in a summary proceeding, while the right to indemnification is delayed until the conclusion of the matter”); In re Adelphia Communications Corp., 323 B.R. 345, 375 (Bkrcty.S.D.N.Y. 2005)(“Advancement and indemnification, in the context of the payment of defense costs, are not the same thing. Indeed, they are ‘legally quite distinct types of legal rights’”).

Generally, a member is not entitled to indemnification until there has been a final adjudication which relieves the member from fault. See, TIC Holdings, LLC v. HR Software, Acquisition Group, Inc., 194 Misc.2d 106, 115, 750 N.Y.S.2d 425, 433 (Sup. Ct. New York Co. 2002) (concluding that the defendant former members and managers of an LLC were not entitled to indemnification under an operating agreement since plaintiff's claims "may result in an adjudication adverse to [defendant], which establishes that his acts were committed in bad faith, or were the result of active and deliberate dishonesty"); In re Adelphia Communications Corp., supra ("successful outcome" is required for obligatory indemnification).

Here, while the operating agreement provides only for indemnification of Caterina's members provided they are not in breach of their duties and standard of care set forth in the operating agreement, the operating agreement does not provide for advancement of legal fees to a member during the course of litigation against that member. In pertinent part, the operating agreement provides:

- 6.6 **Member's Standard of Care.** Each Member shall discharge the Member's duties to the Company and the other Members in good faith and with that degree of care that an ordinary prudent person in a similar position would use under similar circumstances. . . . The Company shall indemnify and hold harmless each Member against any loss, damage or expense (including attorney's fees) incurred by the Member as a result of any act performed or omitted on behalf of the Company or in furtherance of the Company's interests, without, however, relieving the Member of liability for failure to perform his or her duties in accordance with the standards set forth herein. The satisfaction of any indemnification and any holding harmless shall be from and limited to Company Property and the other Members shall not have any personal liability on account thereof.

The Operating Agreement also provides in Section 6.2 that a member “shall indemnify the Company for any costs or damages incurred by the Company as a result of any unauthorized action by such Member.”

In strictly construing the indemnification provision of the Operating Agreement, as the Court must, 546-552 West 146th Street LLC v. Arfa, supra; Hooper Associates, Ltd. v. AGS Computers, Inc., supra, it follows that defendants’ right to indemnification for their attorneys fees incurred herein is not triggered until the Court makes a final determination that they acted in accordance with their duties and standard of care. TIC Holdings, LLC v. HR Software, Acquisition Group, Inc., supra; Ficus Investments, Inc. v. Private Capital Management, supra.

The Operating Agreement contains no provision for advancement of legal fees. There is also no provision that the right to indemnification vests upon the mere assertion of a claim against a Member. Moreover, the Operating Agreement specifically requires a Member to indemnify Caterina “for any costs or damages” it incurs “as a result of any unauthorized action by such Member.”

Under these circumstances, defendants are not entitled to indemnification for their attorneys fees herein unless and until the Court makes a final determination that they discharged their duties in “good faith”, did not breach their fiduciary duties to plaintiff as the minority member-manager, and were free from self-dealing. Ficus Investments, Inc. v. Private Capital Management, LLC, supra (an LCC Members’ entitlement to indemnification for legal fees “is delayed until the conclusion of the matter”); TIC Holdings, LLC v. HR Software, Acquisition Group, Inc., supra; In re Adelphia Communications Corp., supra. Plaintiff objected to Caterina’s

payment of defendants' attorneys fees herein (Borriello Aff., Exhibit "E"). Defendants are not entitled to indemnification for their attorneys until there is a final determination that they are free from fault. Ficus Investments, Inc. v. Private Capital Management, LLC, supra; TIC Holdings, LLC v. HR Software, Acquisition Group, Inc., supra; In re Adelphia Communications Corp., supra.

Consequently, a preliminary injunction enjoining Caterina from paying the legal fees incurred by the individual defendants during the pendency of this matter should be granted.

Additionally, as demonstrated in POINT I, supra, and below, plaintiff will likely succeed on her claims to recover damages caused by defendants' breach of fiduciary duties and self-dealing. The December 1, 2011 lease, approved by defendants' majority vote, is substantially below market rent and patently contrary to Caterina's interests. Moreover, defendants, acting in concert as majority member-managers of Caterina, have engaged in self-dealing and breached their fiduciary duties to plaintiff as minority member-manager in authorizing such lease.

Next, plaintiff will suffer irreparable injury in the absence of an injunction. Caterina's assets will continue to be dissipated by Caterina's payment of defendants' attorneys fees to which it may well be determined that they not entitled.

Third, the equities balance in favor of plaintiff, the minority member-manager of Caterina, who has suffered financial hardship as a result of defendants' conduct.

Accordingly, plaintiff is entitled to a preliminary injunction enjoining Caterina from paying the legal fees incurred by the individual defendants during the pendency of this matter, and directing that any such legal fees and expenses already paid be returned to Caterina forthwith. See, Nobu Next Door, LLC v. Fine Arts Housing, Inc., supra.

POINT III

DEFENDANTS' 3211(a)(1) MOTION IS UNTIMELY

Since defendants' instant motion to dismiss pursuant to CPLR 3211(a)(1) has been made after service of their answer, it is untimely and should be denied. Siegel, Practice Commentaries, CPLR 3211, C3211:8, at 19 (explaining that a motion to dismiss a complaint pursuant to CPLR 3211(a)(1) "must be made before service of a responsive pleading – i.e., before answering"); CPLR 3211(e) ("[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted").

POINT IV

**ALTERNATIVELY, DEFENDANTS HAVE FAILED TO MEET
THEIR INITIAL BURDEN OF ESTABLISHING THAT THERE
ARE NO QUESTIONS OF FACT AND THAT THE COMPLAINT
IS CONCLUSIVELY BARRED BY THE RELEASE AND
OPERATING AGREEMENT**

It is well settled that “[u]nder CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”. Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 974 (1994); accord: Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., ___ A.D.3d ___, ___ N.Y.S.2d ___ (1st Dep’t 2013) (2013 WL 5708699)(“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”); Summer v. Severance, 85 A.D.3d 1011, 1012, 925 N.Y.S.2d 627, 628 (2d Dep’t 2011)(“To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim. . . . “the evidence must be unambiguous, authentic, and undeniable”).

Here, even if defendants’ pre-answer motion to dismiss is timely (and/or is converted to a motion for summary judgment after notice to plaintiff), it should still be denied upon the ground that defendants have failed to meet their initial burden of conclusively establishing, in the first instance, that the complaint is barred by (i) the Jersey Lynne release and (ii) Caterina’s operating agreement. See, Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985)(It is well settled that the moving party on a summary

judgment motion bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law, and that failure to meet such initial burden will result in denial of the motion "regardless of the insufficiency of the opposing papers").

The Schwartz Affirmation is of No Probative Value.

Since the Schwartz Affirmation, which is the only affirmation submitted in support of defendants' motion, is not based on personal knowledge, it lacks probative value and is insufficient to sustain defendants' initial burden. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598 (1980) (affirmation of attorney who demonstrated "no personal knowledge of the manner in which the accident occurred . . . is without evidentiary value and thus unavailing"); Batista v. Santiago, 25 A.D.3d 326, 807 N.Y.S.2d 340 (1st Dep't 2006); Werdein v. Johnson, 221 A.D.2d 899, 900, 633 N.Y.S.2d 908, 910 (4th Dep't 1995) (pointing out that "conclusory allegations of counsel" and an affirmation by an attorney "without personal knowledge of essential facts" are insufficient to support an award of summary judgment).

Mr. Schwartz' affirmation is devoid of critical factual averments regarding the pertinent facts and circumstances which led up to the execution of the Separation Agreement and Release. He was not involved in the Agreement's negotiation and ultimate execution. His affirmation does not and can not set forth the facts and circumstances of the Jersey Lynne settlement within its proper context. Mr. Schwartz did not represent defendants in the settlement of plaintiff's claim for wrongful termination from Jersey Lynne. He did not participate in the preparation of the Separation Agreement and Release and lacks personal knowledge of the intent and scope of the Settlement.

Similarly, Mr. Schwartz lacks personal knowledge of Caterina's operating agreement as well as the facts and circumstances related to the complained of actions taken by defendants on behalf of Caterina from December 2011 through the commencement of this action, as factually alleged in the complaint. Nor did he represent Jersey Lynne or Caterina prior to the instant action.

Consequently, the assertions contained in defendants' memorandum of law – that the Separation Agreement and Release released “all claims against the defendants in June 2012”, that plaintiff can not file a claim against defendants “for acts which took place in 2011”, that the release in the Separation Agreement encompassed plaintiff's claims respecting the December 1, 2011 Lease (Defendants' Memorandum at 5, 8), and that defendants' self-dealing is protected as “majority rule” (Defendants' Memorandum at 10) – constitute conclusory assertions by counsel without personal knowledge which are patently insufficient to meet defendants' initial burden. See, e.g., Werdein v. Johnson, *supra*; Zuckerman v. City of New York, *supra*; Batista v. Santiago, *supra*.

For this reason alone, defendants' motion should be denied outright. Zuckerman v. City of New York, *supra*; Batista v. Santiago, *supra*; Werdein v. Johnson, *supra*.

The Language of the Separation Agreement and Release

As demonstrated in POINT I, *supra*, defendants' reliance on a limited excerpt of the Separation Agreement and Release, which is taken out of context, fails to conclusively demonstrate a defense to plaintiff's Caterina claims. To the contrary, as demonstrated in POINT I, *supra*, the very language of the Separation Agreement and Release shows that as a matter of law, plaintiff's Caterina claims are not encompassed therein. See, Matter of Schaefer, *supra*;

Cahill v. Regan, supra; Morales v. Solomon Management Co., LLC, supra; Schnee v. Schnee, supra; Ayers v. Ayers, supra; Jochowitz v. Russell Sage College, supra. Defendants have not met their initial burden of showing otherwise.

The Operating Agreement

Nor does the operating agreement, standing alone, bar plaintiff's claims for, inter alia, breach of fiduciary duty and self-dealing. While the operating agreement gives the majority operational control, the majority still owes a fiduciary duty to treat plaintiff fairly and in good faith and to refrain from self-dealing which wrongfully gives themselves business advantages at plaintiff's financial expense. Defendants fail to submit the entire Operating Agreement and, at the least, the provisions which specifically require that "[e]ach Member shall discharge the Member's duties to the Company and the other Members in good faith and with that degree of care that an ordinary prudent person in a similar position would use under similar circumstances" (Borriello Aff., Exhibit "D").

Defendants have not submitted their own affidavits in which they affirmatively establish that they have not engaged in self-dealing, that their actions on behalf of Caterina since 2011 do not constitute a breach of fiduciary duty to Caterina and plaintiff, as minority member-manager, and that they have affirmatively complied with their duties under the operating agreement. Thus, the assertion by defendants' attorney that defendants' actions "simply constituted the majority of voting members" (Defendants' Memorandum at 10) is conclusory and self-serving and substantively insufficient to meet defendants' initial burden.

As noted, since defendants' position is supported solely by the affirmation of their attorney who lacks personal knowledge, it is of no probative value. Werdein v. Johnson, supra;

Zuckerman v. City of New York, *supra*; Batista v. Santiago, *supra*. Defendants have failed to submit their own affidavits in which they attest to the facts and circumstances of the challenged actions taken on behalf of Caterina and affirmatively demonstrate that they did not engage in self-dealing and breach of their fiduciary duties as majority member-managers by entering into a lease which is substantially below market value.

Second, defendants fail to cite legal authority to support their unprecedented argument that majority rule in and of itself insulates them from liability for damage to Caterina and/or plaintiff and for their disregard of the clear mandate of the operating agreement to act in good faith towards plaintiff and Caterina. To the contrary, as explained by the Court of Appeals in Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008), which held that LLC members may sue derivatively, “. . . the Legislature obviously did not intend to give corporate fiduciaries license to steal.” Taken to its logical conclusion, defendants basic argument is that they are entitled to steal from Caterina so long as there is a majority vote to do so.

Closely on point is 21st Century Diamond, LLC v. Allfield Trading, LLC 88, A.D.3d 558, 559, 931 N.Y.S.2d 50, 51-52 (1st Dep’t 2011):

. . . Accepting the factual allegations of the third-party complaint as true, and drawing all reasonable inferences in the pleader's favor, Allfield has made out a claim that Exelco breached its fiduciary duty as majority member of 21st Century and the covenant of good faith and fair dealing implied in 21st Century's operating agreement. Specifically, the third-party complaint alleges that Exelco usurped for itself a prospective supply deal with a major diamond retailer (Sterling Jewelers, Inc.) that Allen and Cornfield were in the process of negotiating on 21st Century's behalf when they were removed from management. While 21st Century's operating agreement permits each member to engage in outside activities “compet[ing] with the business of the Company,” that provision did not entitle Exelco to use 21st Century's proprietary

information to appropriate for itself a business opportunity that 21st Century had been pursuing (*cf. Kahn v. Icahn*, 1998 WL 832629, 4, 1998 Del. Ch. LEXIS 223, [Del. Ch.1998], *affd.* 746 A.2d 276, 2000 WL 140018 [Del.2000] [in dismissing a usurpation claim where the partnership agreement permitted competition with the entity, the court noted that the plaintiffs did not “plead specific facts by which [the court] might reasonably infer that there was misappropriation of information, unlawful redirection or personal use of partnership resources or some sort of misappropriation of proprietary investment research”]). In addition, the third-party complaint, construed liberally, states a cognizable claim against Exelco, as majority member of 21st Century, for oppression of Allfield, as minority member, by freezing the latter out of the business and depriving it of the benefit of its interest. Determining whether these claims have merit must await the development of a factual record.

See also, Gjuraj v. Uplift Elevator Corp., ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 5712554, 1 (1st Dep’t 2013)(explaining that a “majority” shareholder “had a fiduciary duty to plaintiff, a minority shareholder”); see generally, Wolff v. Wolff, 67 N.Y.2d 638, 641, 499 N.Y.S.2d 665, 667 (1986)(“Where, as here, an officer has been found to have diverted corporate assets and opportunities, he may be held accountable for the fruits of his wrongdoing”); accord: Armentano v. Paraco Gas Corp., 90 A.D.3d 683, 685, 935 N.Y.S.2d 304, 307 (2d Dep’t 2011) (complaint by minority shareholder sufficiently alleged that majority shareholders breached a fiduciary duty owed to the plaintiff by issuing to themselves treasury shares without a legitimate business purpose and for the sole reason of diluting the equity interest held by the plaintiff and the other shareholders).

Accordingly, defendants’ motion to dismiss should be denied.

POINT V

ALTERNATIVELY, THERE ARE QUESTIONS OF FACT AS TO THE SCOPE OF THE SEPARATION AGREEMENT AND RELEASE, AND DEFENDANTS' SELF-DEALING AND BREACH OF FIDUCIARY DUTIES TO CATERINA AND PLAINTIFF, WHICH REQUIRE A TRIAL

When deciding a motion for summary judgment, the Court's function is issue finding rather than issue determination. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). If an issue is arguable or the Court has any doubt as to whether a triable issue of fact exists, a trial is needed and the case may not be disposed of summarily. Barrett v. Jacobs, 255 N.Y. 520, 175 N.E. 275 (1931); Daliendo v. Johnson, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dep't 1989); see generally, Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974) (since summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues").

Here, assuming as true the factual averments in plaintiff's complaint (Torto Aff., Exhibit "A") and reply to counterclaim (Ibid, Exhibit "C"), the Borriello Affidavit, the Torto Affirmation and the documentary evidence annexed thereto, and giving plaintiff the benefit of all favorable inferences which can be reasonably drawn from the facts, see, Byrnes v. Scott, 175 A.D.2d 786, 573 N.Y.S.2d 679, 680 (1st Dep't 1991)(explaining that "on a defendant's motion for summary judgment, opposed by plaintiff, we are required to accept the plaintiff's pleadings, as true, and our decision must be made on the version of the facts most favorable to plaintiff"); Ptasznik v. Schultz, 223 A.D.2d 695, 637 N.Y.S.2d 469 (2d Dep't 1996) ("papers must be

scrutinized carefully in a light most favorable to the non-moving party”), it follows that there are questions of fact as to whether (i) plaintiff’s Caterina claims are barred by the Separation Agreement and Release; and (ii) defendants, as majority member-managers, have engaged in self-dealing and breached their fiduciary duties owed to Caterina and plaintiff, as minority member-manager, by entering into the substantially below market lease. See, 21st Century Diamond, LLC v. Allfield Trading, LLC 88, supra.

The Borriello Affidavit and Torto Affirmation are based upon personal knowledge and constitute evidentiary proof in admissible form which demonstrates the existence of material questions of fact requiring a trial which precludes, at this early stage of the litigation, the drastic remedy of summary judgment which would deprive plaintiff of her day in court. See, Andre v. Pomeroy, supra; Zuckerman v. City of New York, supra, 49 N.Y.2d at 562. The affidavit and affirmation, the settlement negotiation documents attached thereto, and the Separation Agreement and Release and the Operating Agreement, refute defendants’ contention that the Separation Agreement and Release encompasses plaintiff’s Caterina claims.

These documents also raise questions of fact as to defendants’ wrongful conduct as majority member-managers of Caterina, precluding summary judgment. 21st Century Diamond, LLC v. Allfield Trading, LLC 88, supra; Gjuraj v. Uplift Elevator Corp., supra; Wolff v. Wolff, supra; Armentano v. Paraco Gas Corp., supra.

Accordingly, defendants’ motion should be denied upon the ground that there are questions of fact.

POINT VI

ALTERNATIVELY, DEFENDANTS' MOTION TO DISMISS IS PREMATURE IN THE ABSENCE OF DISCOVERY

Defendants' motion to dismiss should be denied as premature in the absence of a reasonable opportunity to conduct and complete pre-trial discovery. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993); Firesearch Corp. v. Micro Computer Controls Corp., 240 A.D.2d 365, 658 N.Y.S.2d 110 (2d Dep't 1997); Efdey Electrical Contractors, Inc. v. Melita, 167 A.D.2d 501, 562 N.Y.S.2d 172 (2d Dep't 1990); CPLR 3212(f).

A preliminary conference has not been held, pre-trial depositions have not been conducted, and there has been no document or other discovery. This case should proceed in the usual course with a summary judgment motion made after discovery is completed.

As demonstrated in the Borriello affidavit and Torto affirmation, pre-trial discovery, particularly depositions of the individual defendants and exchange of documents, will disclose material and relevant evidence which will defeat defendants' reliance on the majority provision of the operating agreement and the Jersey Lynne Separation Agreement and Release. Plaintiff needs the opportunity to depose defendants, as majority member-managers of Caterina, with respect to her claims that they have breached their fiduciary duties to Caterina and her, as minority member-manager, and that the Jersey Lynne release does not apply to plaintiff's Caterina claims. In particular, plaintiff needs to depose attorney Steven J. Schwartz, Esq., which would disclose evidence confirming that the Jersey Lynne release was without prejudice to plaintiff's Caterina claims. Significantly, none of the individual defendants have submitted their

own affidavit in support of their motion, and have instead relied on the affirmation of their attorney who lacks personal knowledge.

Under these compelling circumstances, plaintiff should not be summarily deprived of her day court without having had an opportunity to conduct and complete critical pre-trial discovery. Accordingly, defendants' motion to dismiss should be denied as premature and the parties directed to conduct discovery.

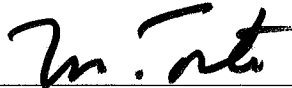
CONCLUSION

FOR THE FOREGOING REASONS:

- (1) THAT BRANCH OF PLAINTIFF'S CROSS-MOTION AS SEEKS SUMMARY JUDGMENT DISMISSING THE SEVENTH AFFIRMATIVE DEFENSE OF RELEASE AND THE COUNTERCLAIM, SHOULD BE GRANTED;**
- (2) THAT BRANCH OF PLAINTIFF'S CROSS-MOTION AS SEEKS A PRELIMINARY INJUNCTION ENJOINING NOMINAL DEFENDANT CATERINA FROM PAYING THE INDIVIDUAL DEFENDANTS LEGAL FEES INCURRED HEREIN PENDING FINAL DETERMINATION OF THIS MATTER, SHOULD BE GRANTED; AND**
- (3) DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3211(A)(1) SHOULD BE DENIED**

Dated: New York, New York
November 6, 2013

Respectfully submitted,



THOMAS TORTO, ESQ.
Attorney for Plaintiff
419 Park Avenue South, Suite 406
New York, New York 10016
(212) 532-5881

AFFIRMATION OF SERVICE

THOMAS TORTO affirms under penalty of perjury:

1. I am an attorney admitted to practice in the Courts of New York State; am not a party to this action; and reside at 524 East 20th Street, New York, New York 10009.

2. On November 6, 2013, I served a copy of the attached Memorandum of Law upon each party or party listed below, by depositing a copy of the said document, enclosed in a sealed, postpaid envelope addressed to the party as given below, in an official depository under the exclusive care and control of the United States Postal Service within the State of New York, and also by email to the respective email addresses set forth below.

3. The party or parties served were as follows:

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Dated: New York, New York
November 6, 2013



THOMAS TORTO