To Be Argued By:
Richard H. Dolan
Time Requested: 15 Minutes

New York County Clerk's Index No. 654177/2015

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case Nos.
2024-04525
2024-06869

KENNETH ROSENBLUM,

Plaintiff-Appellant-Respondent,

against

CRAIG TREITLER and STEVEN ROSENBLUM, Preliminary Executors of the Estate of BERNICE ROSENBLUM,

Defendants-Respondents-Appellants.

BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

SCHLAM STONE & DOLAN LLP
Attorneys for Plaintiff-Appellant-Respondent
26 Broadway
New York, New York 10004
212-344-5400
vrosenfeld@schlamstone.com

Of Counsel:
Richard H. Dolan
Vitali S. Rosenfeld

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Plaintiff-Appellant-Respondent Kenneth Rosenblum ("Kenneth") appeals from several aspects of (a) the Decision of the Supreme Court, New York County (Melissa Crane, J.S.C.) (the "Trial Court"), dated June 14, 2024, and entered on June 17, 2024 (JA7-14, the "Decision"), and (b) the Judgment based on the Decision, dated July 19, 2024, and entered on November 19, 2024 (JA20-22, the "Judgment").

This case was previously before this Court twice. *See Rosenblum v. Rosenblum*, 162 A.D.3d 608 (1st Dep't 2018) (*Rosenblum I*); *Rosenblum v. Rosenblum*, 214 A.D.3d 440 (1st Dep't 2023) (*Rosenblum II*).

PRELIMINARY STATEMENT

Six years ago, Kenneth withdrew, as of right, from two real estate holding LLCs. Under the applicable statute, he is entitled to receive the "fair value" of his 50% membership interest in the LLCs "within a reasonable time after withdrawal." LLCL §509. Having determined that "fair value" to be over $22 million, five years after the date of withdrawal, the Trial Court (a) reduced that value by a marketability discount of 15%; and (b) failed to award Kenneth any prejudgment interest to compensate him for the time value of his investment. The purpose of this appeal is to correct these errors.

The original parties to this litigation were Kenneth and his late mother, Bernice Rosenblum ("Bernice"), who died in July 2021 at the age of 101. The parties jointly owned (either as tenants in common or as partners or equal shareholders in

corporations and limited liability companies) a portfolio of buildings in Greenwich Village worth some $200 million.

Mother and son conducted the joint business amicably for over 40 years, beginning in 1972, despite the fact that there were never any written or oral agreements between the parties on any matter relating to the joint business. But disagreements arose between them in 2013.[1] When those disagreements persisted despite the settlement agreement signed by the parties in October 2013, Kenneth commenced this litigation in December 2015, seeking dissolution of the parties' joint ownership, a complete division of the parties' joint business, and a settlement of the accounts between them – *i.e.*, a business divorce.

This appeal concerns just two of the entities that the parties jointly owned, 132 Realty LLC ("132 Realty") and Village Realty LLC ("Village Realty" and, together with 132 Realty, the "LLCs"). On September 20, 2019, the Trial Court granted Kenneth summary judgment on his claim for withdrawal from the LLCs. In its post-trial decision of January 4, 2022, the Trial Court determined that September 20, 2019, should be deemed "the proper date" of Kenneth's withdrawal. *Rosenblum v. Rosenblum*, 2022 N.Y. Slip Op. 30237[U], at *4 (Sup. Ct. N.Y. Co. 2022). In April 2023, the Trial Court conducted a bench trial to determine the fair value of

[1] The repeated *dictum* in the Decision that the parties "have been fighting since 1996" (A7, A11) has no support in the record and is an apparent scrivener's error.

Kenneth's 50% interest in the LLCs as of the withdrawal date of September 20, 2019. In June 2024, the Trial Court rendered its Decision. In his appeal from that Decision and the resulting Judgment, Kenneth seeks review of several limited aspects of the Trial Court's rulings.

First, the Trial Court erred in applying a 15% discount for lack of marketability (DLOM) to Kenneth's 50% interest in the LLCs. Contrary to the Trial Court's reasoning, Kenneth's interest in these pre-1999 LLCs was a *liquid* interest, because under the pre-1999 Limited Liability Company Law ("LLCL"), his interest in both LLCs at issue could be liquidated for fair value at will at any time, as happened here when the Trial Court granted summary judgment on Kenneth's withdrawal claim. As such, Kenneth's liquid interest does not warrant a discount for *illiquidity* of corporate shares, which was a key rationale of the cases on which the Trial Court relied. Unlike those cases, here the LLC entities added no economic value and were merely the form in which Kenneth and Bernice chose to hold their real estate. Any exposure to market factors, which is the reason to apply a DLOM, is already taken into account by valuing the real estate directly, and is thus incorporated in the real property appraisals. The overwhelming weight of authority, both in this Court and in other Appellate Division departments, strongly counsels that where, as here, the interest is liquid in nature and the assets consist of real estate and cash only, the applicable marketability discount is zero.

Alternatively, assuming that a non-zero marketability discount were to be applied, the only rational basis for such a discount would be to account for the costs of sale of the underlying real estate, amounting to 3%-5% of the value. By contrast, there is no rational basis in the record for the 15% DLOM applied by the Trial Court.

Second, the Trial Court misinterpreted this Court's prior holding in *Rosenblum II*, erroneously stating that its "hands are . . . tied" and it "cannot award" Kenneth "any prejudgment interest on [his] withdrawal distribution." (JA14). In reality, as both parties noted at the trial, the Trial Court had never previously addressed the issue of prejudgment interest. This Court's decision in *Rosenblum II*, in the short *dictum* addressing the subject, recognized that, under CPLR 5001, the Trial Court *has discretion* with regard to awarding prejudgment interest, but did not affirm a refusal to award interest, because the Trial Court had never expressed such a refusal. The matter should be remanded to the Trial Court so that it may exercise its discretion and address the issue on the merits.

A remand to determine that issue on the merits is particularly warranted in this case because the weight of judicial authority is overwhelming: prejudgment interest has been awarded virtually in every dissolution, withdrawal, or buyout case, whether under the LLCL (as here) or the Business Corporations Law ("BCL"). That is so for a simple and compelling equitable reason: where, as here, the investor in a joint business has to wait years to receive the "fair value" of his investment, while

the other parties are exploiting the value of his capital, the withdrawing party is entitled to be compensated for the time value of his money. Indeed, this is the quintessential purpose of prejudgment interest.

Furthermore, in all events, Kenneth is plainly entitled to prejudgment interest for the five-month period between the date the Decision was rendered and the date the Judgment was entered, as mandated by CPLR 5002.

For these reasons, which are explained in more detail below, on the law and the facts and in the exercise of discretion, this Court should modify the Trial Court's Decision to correct the errors set forth above, and as so modified, affirm that Decision; and direct the issuance of a corrected or supplemental Judgment in Kenneth's favor accordingly.

QUESTIONS PRESENTED

Question 1: Where a 50% member of a pre-1999 LLC, which in substance was a holding company for real estate, withdraws from the LLC as of right, should determination of the "fair value" of his interest under LLCL §509 include application of a 15% discount for lack of marketability?

Answer Below: Yes.

Question 2: Where a 50% member of a pre-1999 LLC, which in substance was a holding company for real estate, withdraws from the LLC as of

right, but does not receive the fair value of his interest under LLCL §509 for five years following the date of withdrawal,

(a) should he be awarded prejudgment interest under CPLR 5001 on that value?

Answer Below: No.

(b) if *not* awarded prejudgment interest under CPLR 5001 on that value, is he entitled instead to keep the distributions he had received from the LLC for this five-year period?

Answer Below: No.

(c) once the trial court renders a decision containing clear mathematical directions for calculating the amount of a judgment, but the judgment is entered only many months later, is plaintiff entitled to interest under CPLR 5002 from the date of the decision to the date the judgment was entered?

Answer Below: No.

STATEMENT OF FACTS AND OF THE CASE

A. Factual and Procedural Background

Bernice and Kenneth are mother and son, who were (a) equal partners in Standard Realty Associates (the "Partnership"); (b) the sole and equal shareholders of two real estate holding corporations; (c) the sole and equal members of the two LLCs at issue here; and (d) equal tenants in common in several other properties. For

forty years from 1972 until 2013, Bernice and Kenneth conducted their joint business in successful cooperation. Since 2013, however, disputes arose between them, because Bernice (who was then in her 90s) fell under the influence of others having an agenda of their own. There was no practical way, short of partition and dissolution, to end the quarreling that then characterized Kenneth's relationship with his mother and her advisors. Kenneth therefore commenced this litigation to divide the joint business so that the two 50% owners could each go their separate way.

In 2018, this case first came before this Court, which reversed the Trial Court's denial of Kenneth's pre-trial motion and enforced the October 2013 settlement agreement between the parties. *Rosenblum I,* 162 A.D.3d 608.

On September 20, 2019, as relevant here, the Trial Court granted Kenneth summary judgment on his claim for withdrawal from the LLCs. In March 2020, the Trial Court held a 9-day bench trial, which involved, *inter alia*, extensive expert reports and testimony concerning valuation of the LLCs, and extensive arguments as to the appropriate valuation date. On January 4, 2022, the Trial Court issued a post-trial decision, in which it determined that September 20, 2019 should be deemed "the proper date" of Kenneth's withdrawal from the LLCs, even though Kenneth had initially noticed his withdrawal in June of 2016. In that decision, the Trial Court did not address either the fair value of Kenneth's interest or the issue of prejudgment interest on that value. *Rosenblum v. Rosenblum*, 2022 N.Y. Slip Op.

30237[U], at *4 (Sup. Ct. N.Y. Co. 2022). On appeal from that decision, this Court affirmed the Trial Court's ruling fixing September 20, 2019 as the date of Kenneth's withdrawal from the LLCs. *Rosenblum II*, 214 A.D. 3d at 440.

B. The Valuation Trial, the Decision, and the Judgment Below

In April 2023, the Trial Court conducted a three-day bench trial to determine the fair value of Kenneth's 50% interest in the LLCs as of the withdrawal date of September 20, 2019. At the outset of that valuation trial, the Estate's counsel asked for an "opportunity to brief" "a potential issue with respect to prejudgment interest" – "an issue that hadn't been raised previously" before the Trial Court: "Your Honor has never heard that issue because it hadn't been raised and it was raised to the Appellate Division" in *Rosenblum II*. (JA41:23-42:19). The Trial Court agreed. (JA42:24).

At the valuation trial, each of the parties presented two expert witnesses: (a) an expert testifying as to appraisals of the real estate owned by the LLCs; and (b) an expert testifying as to the business valuations of the LLCs. Each of the business valuations was based on the respective real estate appraisals, but also addressed the financial assets and liabilities of the LLCs, as well as the issue of an appropriate discount for lack of marketability (DLOM): Kenneth's expert, Christopher Mercer, advocated for a 0% DLOM, while the Estate's expert Hubert Klein insisted on a 15% DLOM. After the trial, the parties submitted extensive post-trial briefing. In June

2024, the Trial Court rendered its Decision. (JA7-14).

In the Decision, the Trial Court did not entirely accept or reject either party's expert appraisals, but instead came up with its own formula for calculation of value, mixing and matching various elements of both parties' appraisals. In particular, the Trial Court "direct[ed] the parties to recalculate the valuation for the real property underlying the LLCs" by using "plaintiff's comps and cap rate, but defendant's NOI." (JA10-11). The Trial Court also provided specific instructions on how to treat the cash and loans on the LLCs' books. (JA11). On the DLOM issue, the Trial Court endorsed the conclusion of the Estate's expert and imposed a DLOM of 15% on the value of Kenneth's interest. (JA11-13). Finally, the Trial Court declared that it "cannot award [Kenneth] any prejudgment interest on [his] withdrawal distribution" because its "hands are now tied" as a result of this Court's decision in *Rosenblum II*. (JA13-14). Both parties filed timely Notices of Appeal from the Decision. (JA2-5).

As directed in the Decision, both parties filed proposed judgments along with letters explaining their respective calculations. (JA27-36). On July 19, 2024, the Trial Court signed Defendants' proposed Judgment, which was subsequently entered by the clerk on November 19, 2024. (JA20-23). Both parties filed timely Notices of Appeal from the Judgment. (JA15-18).

ARGUMENT

I. THE TRIAL COURT ERRED BY APPLYING A 15% DLOM TO THE VALUE OF KENNETH'S 50% INTEREST IN THE LLCS

A. No Marketability Discount Is Applicable to Kenneth's Interest

Having made a determination of how to calculate the value of Kenneth's interest in the LLCs, the Trial Court accepted the conclusion of the Estate's expert, Hubert Klein, that Kenneth's interest should be subject to a 15% discount for lack of marketability. (JA11-13). That finding was clear error: under consistent New York authorities, there is no legal basis for applying any marketability discount on the facts of this case. None of the Trial Court's explanations to the contrary is convincing.

First, as the Trial Court itself emphasized with reference to the applicable authorities, "[a] lack of marketability discount reflects 'the *illiquidity* of petitioner's shares, i.e. that a potential investor would pay less for shares in a close *corporation* because they *could not be readily liquidated for cash*.'" (JA12, quoting *Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 165 (1995) ("*Beway*") (emphasis added)).[2] The Trial Court likewise quoted this Court's holding in *Giaimo v. Vitale*, 101 A.D.3d

[2] The holding and principles of *Beway*, the Court of Appeal's seminal case on business valuation, are discussed at length in the valuation report of Z. Christopher Mercer, Kenneth's expert. (JA1159-69).

523, 524 (1st Dep't 2012)[3] that a DLOM reflects "any risk associated with the *illiquidity* of the shares." (JA11, emphasis added). Here, however, no such "illiquidity" exists, because Kenneth's interest in the LLCs is not an interest in shares of a *corporation*. Instead, it is a 50% interest in *pre-1999 LLCs*, whose assets consist of *freely marketable* real estate and cash – and is therefore an entirely *liquid* interest.

In particular, because both LLCs are governed by the pre-1999 LLCL, under §606 of that statute Kenneth had the absolute right to withdraw from them on six months' notice. Indeed, that was the basis on which the Trial Court granted Kenneth summary judgment on his withdrawal claim in 2019. (NYSCEF #423 at 3).[4] Given that he was legally entitled to receive "fair value" upon withdrawal, Kenneth's 50% interest in the LLCs is as liquid as a 50% tenant-in-common interest in real properties, which is subject to liquidation by means of a partition action. This liquid interest stands in sharp contrast to the illiquid ownership interest of a corporate shareholder, who does not have a statutory right to dissolve the corporation or to demand "fair value" from the other shareholders for his stock.[5]

---

[3] *Giaimo* is also discussed in detail in Mr. Mercer's report. (JA1174-75).

[4] Citations to NYSCEF refer to the Trial Court's electronic docket, of which this Court can take judicial notice.

[5] This very case perfectly illustrates that distinction: unlike Kenneth's 50% tenant-in-common interest in multiple properties, which was successfully liquidated at a public auction as a result of the Trial Court's decision granting partition, Kenneth's claim for dissolution of the corporations he owned jointly with Bernice was denied

In contrast to the fact patterns of *Beway*, *Giaimo*, and the other cases the Trial Court cited, all of which involved a *corporate* and therefore *illiquid* form of ownership interest, Kenneth's absolute right to withdraw from the LLCs and receive fair value for his interest rendered his interest *liquid* for discount purposes. The Trial Court ignored the directly applicable holding in *Man Choi Chiu v. Chiu*, 125 A.D.3d 824, 825 (2d Dep't 2015) – the only appellate case dealing with withdrawal from a pre-1999 LLC under §606 of the former LLCL – which affirmed the trial court's refusal to apply any "discount for lack of marketability" in the same context as presented here. The Trial Court also disregarded this Court's holding in *Vick v. Albert*, 47 A.D.3d 482 (1st Dep't 2008), involving a real estate general partnership from which any partner could withdraw at will – thus presenting facts closely analogous to this case, since both turned on a party's withdrawal as of right and entitlement to "fair value" payable upon withdrawal. In *Vick*, this Court rejected any marketability discount, explaining: "The unavailability of the discounts is particularly apt here, where the business consists of nothing more than ownership of real estate." *Id.* at 484. The same is true here.

Second, as the Trial Court noted, "Mr. Klein, the [E]state's expert[,] applied

---

by the Trial Court (NYSCEF #526), and that ruling was affirmed by this Court in *Rosenblum II*. The reason was that, unlike the LLCs at issue here, Kenneth did not have a statutory right to demand "fair value" for his 50% shareholding interest in those corporations.

a 15% marketability discount primarily due to the protracted litigation between the parties . . . and the lack of an operating agreement that has contributed to the protracted litigation." (JA11). In its Decision, the Trial Court cited those reasons for applying a DLOM here, emphasizing the parties' "inability to work together," "an unwillingness to compromise," the "litigation [that] is nearly ten years old," and, again, "the lack of an operating agreement." (JA12). In the Trial Court's view, "a third-party investor . . . would be unlikely to risk buying into this business," which warrants a discount. (*Id*.).

Of course, the same concern about "protracted litigation" can be present when a partner withdraws from a partnership, as in *Vick, supra;* or in partition action between tenants in common, but in neither case is a marketability discount applicable.

More fundamentally, the Trial Court's error lies in ignoring the import of the *Beway* principle that "a marketability discount" has to be considered "at the holding company level." (*Id*.). In *Beway*, the Court of Appeals directed that the marketability inquiry for the purposes of "fixing fair value" should consist of determining "what a willing purchaser, in an arm's length transaction, would offer" for "the corporation *as a whole* . . . as an operating business" – and then applying it to the "proportionate interest" at issue. 87 N.Y.2d at 168 (emphasis added). Considering marketability at the entity level makes it crystal clear why the

"protracted litigation" between Kenneth and Bernice (and later her Estate) is completely irrelevant to valuation of the LLC Entities as of the valuation date of September 2019. Because the "prospective purchaser" as of that valuation date would *not* be buying Kenneth's interest in the LLCs but would instead be buying the LLCs *as a whole*, it would not need to be concerned about any actual or potential litigation between the *former* owners. Simply put, the hypothetical buyer would no longer be dealing with any parties to this litigation or their ongoing disputes; instead, it would have complete control of the LLC entities.

It follows that the prospective purchaser's due diligence would *not* include any factors regarding how the LLCs were run or whether they had any operating agreements. None of that would interest the prospective buyer, who would be in complete control of the LLCs as a result of the purchase and would be able to establish its own operating agreements or other applicable management rules. Instead, the prospective purchaser's due diligence would focus on the market value of the underlying real estate, which constitutes the core of its business investment. As Mr. Mercer put it, "[t]he absence of an operating agreement has really no bearing if we're selling the entire company . . . because the buyer couldn't care less about what operating agreement exists at a point in time" – which makes it "improper to use the lack of an operating agreement effectively as a restriction on transfer." (JA 450:4-10).

Third, the Trial Court erred in rejecting Mr. Mercer's explanation that the marketability discount is "baked in at the property level" – in other words, exposure to the market is already embedded in the underlying real estate appraisals. (JA453:16-22). Contrary to the Trial Court's reasoning, the case law supports Mr. Mercer's interpretation. *See, e.g.*, *Vick, supra* (this Court rejecting imposition of a marketability discount at the partnership level where the partnership was a real estate holding company); *Cinque v. Largo Enterprises of Suffolk County, Inc.*, 212 A.D.2d 608, 609-10 (2d Dep't 1995) (affirming refusal "to discount the value of the petitioner's shares of the corporation due to their lack of marketability" where "the value of the corporation is attributable solely to real property and cash"); *Kassab v. Kasab*, 56 Misc. 3d 1213(A), at *8-9 (Sup. Ct. Queens Co. 2017) (crediting Mr. Mercer's valuation which "did not apply any marketability discount, since the companies were real-estate holding companies, whose valuation *already relies upon market exposure*") (emphasis added), *aff'd as modified*, 195 A.D.3d 832 (2d Dep't 2021).

Based on the same authorities, the Trial Court was wrong to reject the view that the LLCs here were "mere 'wrappers'" for the underlying real estate. (JA12). The only thing about the LLC "wrappers" that would interest the purchaser is the companies' monetary assets and liabilities – which may be directly addressed by adjusting the purchase price and do not require any assessment of uncertain future

risks related to the market, making any marketability discount unwarranted.

Fourth, according to the Trial Court, Kenneth "overstate[d] the holdings of the cases [he] cite[d]" that refuse "to apply marketability discounts to real estate holding companies." (JA13). But it hardly qualifies as "overstating" to point to the impressive statistics collected in Mr. Mercer's report, summarizing decades of case law in each of the Appellate Departments and showing that, in cases concerning valuation of an interest in real estate holding companies, the *mean*, *median*, and *mode* marketability discount are *all zero*. (JA1181, JA1239-40; JA406:19-407:24). These cases include many of those cited above: *Vick*, 47 A.D.3d at 484 (finding 0% marketability discount appropriate in determining fair value of interest in partnership holding a single property); *Chiu*, 125 A.D.3d at 825 (affirming trial court's refusal to apply any "discount for lack of marketability" in a case concerning withdrawal from a real estate holding LLC); *Cohen v. Cohen*, 279 A.D.2d 599, 600 (2d Dep't 2001) (where "the subject real estate holdings consist solely of real property . . . the Supreme Court properly determined not to apply a discount for lack of marketability"); *Kassab*, 56 Misc. 3d 1213(A) at *8-9 (recognizing Mr. Mercer as "an expert on marketability discounts" and crediting his valuation which "did not apply any marketability discount, since the companies were real-estate holding companies").

Accordingly, contrary to the Trial Court's view, the facts of this case and the overwhelming weight of legal authority counsel in favor of applying a zero marketability discount here.

The same result is strongly warranted by equity. The inequity is especially obvious when one considers that the protracted litigation, which the Trial Court cited as one of the main grounds for the discount, arises from Bernice's failure to pay Kenneth the "fair value" of his 50% interest "within a reasonable time" after withdrawal, as she was required to do under LLCL §509, and otherwise holding up the division of the parties' joint business. As the Trial Court recognized in granting Kenneth summary judgment on his withdrawal claim, Kenneth's right to withdraw from the pre-1999 LLCs was absolute – but having no genuine defense did not stop the Estate from resisting Kenneth's withdrawal and refusing to pay him the "fair value" of his interest. As a result, the Estate was able to delay the time of payment for 5 years from Kenneth's 2019 withdrawal, despite the statutory command to make that payment "within a reasonable time." The Trial Court's refusal to award interest rewards the Estate for Bernice's dilatory litigation tactics. As Mr. Mercer put it in his trial testimony, "to discount for the litigation would be effectively to transfer value from Mr. Rosenblum to Bernice Rosenblum." (JA405:10-15). Rewarding that conduct is not only fundamentally unfair, but also wrong from the public policy perspective. This is yet another reason why the only appropriate marketability

discount in this case should be zero. The Trial Court has erred in holding otherwise.

B. If Any DLOM Is Applied, It Should Be No Higher Than 5%

Assuming that a marketability discount should be applied at all in this case, the Trial Court's Decision offers no basis for setting that number at 15%, other than simply referring to the Estate's expert reports. Yet, neither Mr. Klein's reports nor his trial testimony contains any coherent explanation as to how that number was reached. Simply put, there is nothing in the record to support 15% as the appropriate marketability discount.

The Trial Court concluded its discussion of the subject with the following note: "Finally, as plaintiff does not argue that the discount was too high, but merely sticks to his guns that no discount should apply at all, there is nothing to contravene defendant's expert's application of a 15% discount, as opposed to a smaller percentage." (JA13). The latter statement, however, is a mistake: the Trial Court overlooked a critical aspect of the testimony of Kenneth's expert, Mr. Mercer, providing a basis for an alternative DLOM of 3% to 5% – the costs of sale.

In particular, Mr. Mercer's report discussed "expected costs of sale" as a basis for imposition of a DLOM that "could make sense," and concluded his analysis as follows: "If the Court decides against my conclusion that the appropriate marketability discount is 0%, then I would proffer an alternative marketability discount of 3% to 5% based on this discussion." (JA1190).

Indeed, given that the LLCs had only two members and became solely owned by Bernice as of Kenneth's withdrawal, nothing prevented Bernice from selling the entire real properties owned by the LLCs at that point, with or without the LLC wrapper, recovering the full market value as of the valuation date, less only the costs of the sale. Therefore, the only justifiable discount from the market value of the properties (or the LLCs) would amount to the costs of such sale, *i.e.* 3% to 5% of the value, which represent the marketing and brokerage commission.

As a result, the record does contain sufficient grounds not only to reject Mr. Klein's proffered DLOM of 15%, but also to adopt and apply the alternative DLOM of 3% to 5% proffered by Mr. Mercer. Therefore, to the extent that this Court may hold that the DLOM should be higher than zero, it should be modified to a number between 3% and 5%.

C. If Any DLOM Is Applied, Loan Deductions Should Be Prorated

One aspect of the LLCs' valuation addressed by the Trial Court in the Decision related to the significant loans receivable by the LLCs from Standard Realty Associates, the Partnership in which Kenneth and Bernice were equal partners. The Trial Court correctly concluded that, regardless of Standard Realty's possible insolvency, "the loans [we]re still fully collectible" because "partners are personally liable for the debts of the partnership" – and therefore properly included these loans receivable into valuation of the LLCs. (JA11).

Later, in calculating the amount of the Judgment, the Trial Court deducted the amounts of $1,036,168.00 and $1,348,293.50, representing Kenneth's 50% share in each of the respective loans, "to be credited against the fair value amount owed to Plaintiff by Defendants." (JA21). In endorsing this calculation proffered by the Estate, the Trial Court erroneously failed to adjust the respective amounts taking into consideration the 15% DLOM that it had applied.

Notably, the Trial Court's discussion of the loans in the Decision concluded as follows: "[I]t is difficult to understand how, as a practical matter, with each side owing 50% of these loans, the amounts do not cancel out at the individual level once payment occurs." (JA11). Thus, the Trial Court's clear (and logical) intent was that the loans "cancel out at the individual level." In the Judgment, however, a full 50% of the loans was "credited against the fair value amount owed" to Kenneth, while that "fair value amount" itself did not include the full 50% of the loans, but was reduced by 15% by application of the DLOM (which was applied to the entire value of Kenneth's interest in the LLCs, including the loans receivable). As a result of this miscalculation, the loans did not "cancel out at the individual level": instead, Kenneth was unjustifiably deprived of the amount constituting 15% of his 50% share of the loans – specifically, $357,669.22.

Accordingly, to the extent that this Court may find that application of any DLOM to the fair value of Kenneth's interest is appropriate, it should have the loans

amount prorated by the same percentage as the DLOM applied and direct a corrected or supplemental judgment in Kenneth's favor to account for the difference.

II. THE TRIAL COURT ERRED IN FAILING TO AWARD KENNETH PREJUDGMENT INTEREST ON HIS WITHDRAWAL VALUE

A. The Trial Court Misinterpreted This Court's Prior Holding

Under LLCL §509, Kenneth is entitled to receive the "fair value" of his interest in the LLC "within a reasonable time after withdrawal." As a result, he is entitled to prejudgment interest on that value at the statutory rate of 9% since the date of withdrawal (here, September 20, 2019, as the Trial Court had previously determined and this Court affirmed). *See, e.g.*, *Man Choi Chiu v. Chiu*, 4 N.Y.S.3d 279, 280 (2d Dep't 2015) ("The Supreme Court providently exercised its discretion in awarding prejudgment interest from the date of Winston Chiu's withdrawal [from the LLC] . . . at the statutory rate of 9%") (citing CPLR 5001(a) and other authorities); *In re Superior Vending, LLC*, 71 A.D.3d 1153, 1154 (2d Dep't 2010) (purchasing member to pay 9% interest since the date when business relationship terminated); CPLR §5004 ("Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute").

Here, in its Decision, the Trial Court did not address the issue of prejudgment interest on the merits. Instead, it found that its consideration of the issue on the merits was precluded by *Rosenblum II*: "Plaintiff, having raised the issue of his right to prejudgment interest with the Appellate Division and *having lost*, *this court's*

hands are now tied. The Appellate Division's decision is not only law of the case, it also binds this court. Accordingly, the court *cannot* award plaintiff any prejudgment interest. . ." (JA14, emphasis added).

In reality, however, Kenneth had not "lost" the issue of prejudgment interest in *Rosenblum II*, nor did this Court's holding in that prior appeal contain anything that would preclude the Trial Court from awarding Kenneth prejudgment interest. Rather, *all* this Court stated in *Rosenblum II* on this issue was: "The trial court also did not improvidently exercise its discretion in declining to award prejudgment interest on plaintiff's withdrawal distribution." *Rosenblum II*, 214 A.D.3d at 440-41 (citing CPLR 5001(a), *PFT Tech., LLC v. Wieser*, 181 A.D.3d 836, 839 (2d Dep't 2020), and *Man Choi Chiu v. Chiu*, 125 A.D.3d 824, 826 (2d Dep't 2015)).

In fact, neither in its first post-trial decision, *Rosenblum v. Rosenblum*, 2022 N.Y. Slip Op. 30237[U], at *4 (Sup. Ct. N.Y. Co. 2022), nor in any other decisions preceding *Rosenblum II*, did the Trial Court ever "exercise its discretion" in awarding or "declining to award" prejudgment interest on Kenneth's withdrawal value, given that that value itself had not yet been determined. As Defendants' counsel admitted on the record at the outset of the valuation trial, prejudgment interest on the withdrawal value "was an issue that hadn't been raised previously. . . . This was an issue that was raised by plaintiff for the first time on [the *Rosenblum II*] appeal . . . So, Your Honor has never heard that issue because it hadn't been

raised and it was raised to the Appellate Division." (JA42).

Indeed, in the Decision, the Trial Court itself expressly confirmed that it "may have overlooked the issue of Plaintiff's prejudgment interest in its trial decision dated January 4, 2022 [EDOC 526]" – likely because it "did not [yet] award plaintiff any 'withdrawal distribution' at that time." (JA13-14). Given that it is undisputed and unequivocal that, prior to *Rosenblum II*, the Trial Court *had never ruled*, one way or another, on the issue of prejudgment interest, *Rosenblum II* cannot be understood as affirming any particular outcome on that issue.

Instead, *Rosenblum II* established that the Trial Court *has discretion* to "award prejudgment interest on plaintiff's withdrawal distribution." This conclusion is fully supported by the authorities this Court cited in *Rosenblum II* as a basis for its only statement concerning prejudgment interest: CPLR 5001(a), which provides *for judicial discretion to award* prejudgment interest "in an action of an equitable nature," and two Second Department cases, both of which *did award* such interest: *PFT Tech.,* 181 A.D.3d at 839, and *Chiu*, 125 A.D.3d at 826. All three of these authorities stand for the principle that prejudgment interest on a withdrawal or buyout value *is awardable at the trial court's discretion*; none of them stands for a proposition that such interest should not be awarded. Thus, this Court's citation to these authorities emphasizes that it did not itself resolve the prejudgment interest issue, and instead left it to the Trial Court's discretion.

It follows that the Trial Court's understanding that its "hands" were "tied" by this Court's *Rosenblum II* holding (JA14) was erroneous. Indeed, even assuming *arguendo* that *Rosenblum II* could be understood as affirming the Trial Court's prior negative exercise of discretion (which, as discussed above, is *not* the case), it would still not be "law of the case" that would "bind" the Trial Court (*id*.) in a *future exercise of discretion* – because, by definition, discretion is exercised anew each time it is afforded. As a result, no matter how this Court's holding in *Rosenblum II* may be viewed, the Trial Court did have full discretion in the Decision to award Kenneth prejudgment interest, and has erroneously declined to exercise it.

"It is well settled that a court's failure to exercise the discretion it possesses is, in itself, an abuse of discretion." *Montgomery v. List*, 173 A.D.3d 1657, 1658 (4th Dep't 2019) (citing *Cardinal Chemical Co. v. Morton Intl., Inc.*, 508 U.S. 83, 103 (1993)). That error warrants this Court's remand.

B. Law and Equity Require Statutory Interest To Be Awarded Here

Following the two authorities this Court cited in *Rosenblum II*, and countless others, prejudgment interest on his withdrawal value should be awarded to Kenneth. *See Chiu*, 125 A.D.3d at 826 ("The Supreme Court providently exercised its discretion in awarding prejudgment interest from the date of Winston Chiu's withdrawal" from the LLC "at the statutory rate of 9%") (citing authorities)); *PFT Tech.*, 181 A.D.3d at 839 ("The Supreme Court providently exercised its discretion

in imposing prejudgment interest" on the value of LLC membership in dissolution proceeding). Indeed, there is no authority declining to award interest in an LLC withdrawal, buyout, or dissolution case. To the contrary, courts have uniformly awarded interest in LLC dissolution and buyout cases, just as they have done in corporate dissolution and buyout cases. *See*, *e.g.*, *In re Superior Vending*, 71 A.D.3d at 1154 (2d Dep't 2010) (purchasing member of LLC to pay 9% interest since the date when business relationship terminated); *cf. Blake v. Blake Agency, Inc.*, 107 A.D.2d 139, 150 (2d Dep't 1985) (reversing trial court and awarding interest at 9% per annum in a corporate dissolution case); *Giaimo*, 101 A.D.3d at 526 (affirming award of interest on fair value in corporate dissolution case resulting in buyout).

In prior submissions before the Trial Court, the Estate attempted to distinguish, but could not offer a principled distinction, between the equitable reasons for an award of interest here and the many corporate dissolution and buyout cases decided under the BCL. Just as in those BCL cases, interest has been *awarded as a matter of course* in the numerous LLC dissolution, withdrawal, and buyout cases decided under the LLCL. Even though, unlike LLC §509 or §702, BCL §1118(b) expressly mentions the court's "discretion" to "award interest," in practice the courts have concluded that such discretion is a necessary element of the Court's equitable powers in a liquidation proceeding, and have routinely awarded interest in all buyout situations regardless of the type of entity at issue or the applicable statute.

This Court's *Rosenblum II* holding, with its citation to *PFT Tech*, plainly supports that conclusion: "the equities" involved in LLC membership cases point in the same direction as the corporate equities addressed by the express language of BCL §1118(b), and thus require the same result. *PFT Tech*, 181 A.D.3d at 838 (holding that "the equities" of the LLC membership buyout case pointed to the same valuation date – "the day before the action was commenced" – as the one specified in BCL §1118).

The Estate also argued below that there is no statutory basis for an award of interest in a case governed by the LLCL, thus implying that *Chiu*, *PFT Tech*, *In re Superior Vending*, and similar cases were all wrongly decided. This Court has already rejected that view by its express reference to the Trial Court's "discretion to award prejudgment interest" and its express reliance on *Chiu* and *PFT Tech. Rosenblum II, supra*. This Court also cited CPLR §5001(a), which constitutes the statutory basis for an award of interest in an LLC withdrawal case (as well as an LLC dissolution or buyout case), as it provides for recovery of interest in an action based on "an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property," as well as "in an action of an equitable nature." A claim for withdrawal from an LLC under LLCL §606 (just as a claim for dissolution of an LLC under LLCL §702) is "an action of an equitable nature" and also involves "possession or enjoyment of property" – to wit, an LLC membership

with all the attendant property rights. The Court of Appeals has definitively held that "a determination of the fair value of [plaintiff's] shares and an order directing defendants to pay that value for them . . . is equitable in nature," *Loengard v. Santa Fe Indus., Inc.*, 70 N.Y.2d 262, 266 (1987), thus resolving any issue of whether a court can award interest in such a case under CPLR §5001(a). For both reasons, an award of interest in LLC dissolution, withdrawal, and buyout cases is authorized by CPLR §5001(a), as the above cases confirm.

Indeed, numerous judicial holdings emphasize that an award of interest in cases involving "fair value" determinations is driven by equity. The Second Department explicitly held that, in making a "fair value" award, "the court is not precluded from making such orders as justice requires," and that, even where the applicable BCL sections "do not specifically provide for the payment of interest on the fair value of the shares, *justice requires* that . . . interest be paid." *Blake, supra* (emphasis added); *accord Matter of Digeser v. Flach*, 54 Misc. 3d 1217[A], 2017 N.Y. Slip Op. 50220[U], *7 (Sup. Ct. Albany Co. 2017); *accord Ferolito v. Arizona Beverages USA LLC,* 2014 N.Y. Slip Op. 32830[U] (Sup. Ct. Nassau Co. 2014) ("The principle that prejudgment interest is to be awarded absent some showing of bad faith has since [*Blake*] been repeated numerous times, without exception, in cases at both the trial and appellate level") (quoting *Giaimo, supra*, noting that interest is "a cost imposed for having the use of another party's money over a period

of time."). "While [CPLR 5001] makes an award of interest a matter of discretion in equity cases . . . such an award [i]s virtually mandated [where, as here,] defendants were fiduciaries and failed to properly account to plaintiff for [many] years, during which time they enjoyed the benefit of plaintiff's money. . ." *Aurnou v. Greenspan*, 161 A.D.2d 438, 439-440 (1st Dep't 1990) (holding that failure to award prejudgment interest in a partner withdrawal case "constituted an abuse of discretion under CPLR 5001").

The equities in this case point distinctly in favor of Kenneth. It is undisputed that the LLCs' properties were income-producing and debt-free at all times following Kenneth's withdrawal. In this situation, mortgaging the properties would have been the obvious way to finance Kenneth's buyout, but the Estate in fact used its control over the LLCs – in flagrant disregard of its fiduciary responsibilities to Kenneth as a withdrawing member – to *prevent* the LLCs from mortgaging their properties or otherwise raising the funds to pay him the statutorily required "fair value" within a "reasonable" period. LLCL §509.

Notably, both the Trial Court and this Court have awarded prejudgment interest to the Estate throughout this same action, in the context of the claims on which Kenneth was found to owe money to the Estate. As just one example, in *Rosenblum II*, this Court held that "statutory prejudgment interest should be awarded on the [Estate's] breach of contract counterclaim." 214 A.D.3d at 442 (citing CPLR

5001(a)). It would be inconsistent – and therefore inequitable – to treat Kenneth differently and deny prejudgment interest to him.

For all of these reasons, this Court should remand the matter to the Trial Court with a direction to address, on the merits, whether in its discretion and on this record, an award of prejudgment interest from the date of withdrawal must be added to the principal amount of the "fair value" of Kenneth's interest in the LLCs that he should have received years ago, as a matter of statutory law, judicial precedent, and equity.

C. In the Absence of Statutory Interest, Kenneth Should Be Entitled to Keep His Post-Withdrawal Distributions from the LLCs

In calculating the amount of the Judgment, the Trial Court deducted the distributions Kenneth had received from each of the LLCs since his withdrawal date of September 20, 2019 – to wit, $514,942.97 from 132 Realty and $222,971.87 from Village Realty – and "credited" these amounts "against the fair value" due to Kenneth. (JA21). Had Kenneth been awarded the statutory prejudgment interest at 9% since his withdrawal date pursuant to CPLR 5001 as discussed above, such a deduction of post-withdrawal distributions would have been proper and logical: Kenneth would not have been entitled to keep his post-withdrawal distributions *on top of* the statutory interest on his "fair value." In the absence of statutory interest, however, depriving Kenneth *also* of his post-withdrawal distributions is utterly inequitable.

Once again, the Trial Court ruled, and this Court affirmed, that Kenneth

withdrew from the LLCs as of September 20, 2019. He did not receive the "fair value" of his interest "within a reasonable time" of that date, as required by LLCL §509. Instead, Bernice, and later her Estate, have had complete control and use of Kenneth's capital investment in the LLCs (some $22.6 million, as the Decision and the Judgment reflect) for over 5 years, until the Estate paid the Judgment in December 2024. The Trial Court's Decision failed to award Kenneth any prejudgment interest to compensate him for the time value of this capital. In these circumstances, equity requires that Kenneth is at least allowed to keep his 50% of distributions from the LLCs for the time period between his withdrawal and the entry of Judgment.

Notably, neither Bernice nor later the Estate ever objected to Kenneth's post-withdrawal distributions as they were made, or petitioned the Trial Court to stop them. Moreover, the distributions Kenneth received in that time period were recorded on his tax returns as his income, on which he paid taxes. Depriving Kenneth of those funds now and handing them over to the Estate (which did *not* pay taxes on them and for which it becomes a windfall) is inequitable on its face.

D. In Any Event, Kenneth Is Entitled to Interest Under CPLR 5002

Regardless of any other matter pertaining to prejudgment interest, at the very least, Kenneth is entitled to such interest as of the date the Decision was made (June 14, 2024) to the date the Judgment was entered (November 18, 2024).

CPLR 5002 provides: "Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, *from the date the* verdict was rendered or the report or *decision was made to the date of entry of final judgment*. The amount of interest shall be computed by the clerk of the court and included in the judgment." (Emphasis added).

Here the Trial Court's Decision was made on June 14, 2024. (JA14). While not listing the "total sum awarded," the Decision gave the parties precise mathematical instructions to calculate it (JA10-14), as best demonstrated by the parties' shown ability to do so and agree on it in their respective proposed judgments. *See* JA30 (Plaintiff' proposed judgment for the amount of $22,622,149); JA34-35 (Defendants' proposed judgment, listing the values of Kenneth's interest in the two LLCs as $11,831,569 and $10,790,580 respectively, which add up to $22,622,149). As apparent from these proposed judgments, based on the Trial Court's instructions in the Decision, the parties agreed on the basic amount of $22,622,149 – even though they had disputes about the various offsets and deductions from that amount. (JA27-36). As such, the "total sum" of $22,622,149 was effectively "awarded" in the Decision that was "made" on June 14, 2024 – which means that Kenneth should be entitled to interest on that amount from that date until the entry of judgment. CPLR 5002. Such interest amounts to $875,756.07.

Alternatively, at the latest, when the Judgment was signed by Justice Crane

on July 19, 2024, that signed Judgment unquestionably constituted the Trial Court's "decision" that "awarded" Kenneth the "total sum" of $19,253,095.51, after all the deductions and setoffs set forth in the Judgment. (JA22). CPLR 5002 mandates that the "amount of interest [as of that date] shall be computed by the clerk of the court and included in the judgment." But the clerk, when finally entering the Judgment several months later, on November 18, 2024, failed to do so. The interest on $19,253,095.51 between July 19, 2024 and November 18, 2024 amounts to $579,175.31.

This Court should correct that error and award Kenneth a corrected or supplemental judgment including the interest to which he is entitled under CPLR 5002 – or so direct the Trial Court.

CONCLUSION

For the foregoing reasons, this Court should, on the law and the facts and in the exercise of discretion, modify the Trial Court's Decision, and direct issuance of a corrected or supplemental judgment in Kenneth's favor as follows:

(a) eliminating the application of any DLOM to the fair value of Kenneth's interest in the LLCs, or alternatively reducing the DLOM to 3%, or another number no higher than 5%;

(b) to the extent that the application of any DLOM remains, reducing the credit to the Estate on account of the loans receivable by the LLCs from

the Partnership by prorating the amount thereof by the same percentage as the DLOM applied;

(c) awarding, or directing the Trial Court to award, pursuant to CPLR 5001 and 5002, prejudgment interest at the statutory rate of 9% per annum on the entire fair value of Kenneth's interest in the LLCs, as of the valuation date of September 20, 2019 until the November 18, 2024 date of entry of the Judgment;

(d) to the extent and for the period that prejudgment interest is not awarded, directing the Estate to return to Kenneth the amounts of his post-withdrawal distributions received from the LLCs, which were deducted in the Judgment as a credit to the Estate; and

(e) granting such other and further relief to Plaintiff-Appellant-Respondent Kenneth Rosenblum as this Court deems just and equitable.

Dated: New York, New York
March 20, 2025

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: _____
Richard H. Dolan
Vitali S. Rosenfeld

26 Broadway, 19th Floor
New York, New York 10004
(212) 344-5400

Attorneys for Plaintiff-Appellant-Respondent Kenneth Rosenblum

PRINTING SPECIFICATION STATEMENT

I hereby certify that the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

Word Count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 8,011.

Dated: New York, New York
March 20, 2025

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: _____

Richard H. Dolan
Vitali S. Rosenfeld
26 Broadway, 19th Floor
New York, New York 10004
(212) 344-5400

Attorneys for Plaintiff-Appellant-Respondent Kenneth Rosenblum

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

KENNETH ROSENBLUM,

Plaintiff-Appellant-Respondent,

against

CRAIG TREITLER and STEVEN ROSENBLUM, Preliminary Executors of the Estate of BERNICE ROSENBLUM,

Defendants-Respondents-Appellants.

---

1. The index number of the case in the Court below is 654177/2015.
2. The full names of the original parties were: Plaintiff Kenneth Rosenblum (no change) and Defendant Bernice Rosenblum (after her death in 2021, substituted by Craig Treitler and Steven Rosenblum, Preliminary Executors of the Estate of Bernice Rosenblum). In addition, this proceeding originates from two separate proceedings (each with its own caption) that were later consolidated: Index No. 654191/2015 and Index No. 654177/2015.
3. The action was commenced in the Supreme Court, New York County.
4. This action was commenced on or about December 2025, by the filing of a Complaint and a Petition. An Amended Verified Complaint was filed on or about June 10, 2016. Issue was joined by service of a Verified Answer on or about July 21, 2016.
5. The nature and object of the action: division of the parties' joint business, including dissolution of certain corporations, withdrawal from certain LLCs, and partition of joint tenancy in certain properties.
6. These appeals are from the Decision and Order of the Honorable Melissa A. Crane, dated June 14, 2024 and entered June 17, 2024, and the Judgment of the Supreme Court of the State of New York, County of New York, dated July 19, 2024 and entered November 18, 2024.
7. These appeals are being perfected on the Joint Appendix method.