

SCANNED ON 1/25/2013  
SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
Justice

PART 8

115224/10

Index Number : 115224/2010  
POKOIK, LEE  
vs.  
POKOIK, GARY  
SEQUENCE NUMBER : 006  
SUMMARY JUDGMENT

INDEX NO.                     

MOTION DATE                     

MOTION SEQ. NO. 006

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**

JAN 25 2013

NEW YORK  
COUNTY CLERK'S OFFICE



J.S.C.

**JOAN M. KENNEY**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1/21/13

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 8

-----X  
Lee Pokoik a/k/a Leon Pokoik,

Plaintiff,

-against-

Gary Pokoik, Jonathan Pokoik  
and J. Pokoik Realty, LLC,

Defendants  
-----X  
NEW YORK  
COUNTY CLERK'S OFFICE

**FILED**

JAN 25 2013

Index Number:

115224/2010

**DECISION &  
ORDER**

**Joan M. Kenney, J.:**

Gary Pokoik (Gary) and Jonathan Pokoik (Jonathan) move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's (Leon) complaint and Leon cross-moves for summary judgment, pursuant to CPLR 3212, and for leave to add 242-44 East 77th Street, LLC and 234 East 82nd Street, LLC as defendants. The complaint against J. Pokoik Realty, LLC (Realty) was dismissed by the court's order dated July 2, 2011 (the July 2011 Order).

**Factual Background and Procedural History**

Leon alleges that he and Gary are managing members of Realty (complaint, ¶ 4), and that they were involved in owning and managing various real estate properties, together with other family members (*id.*, ¶ 5). He contends that he had the actual management of these businesses until April 2006, when he yielded management control to Gary (*id.*, ¶ 8). He further states that Realty was formed thereafter in 2006 by Gary and Jonathan to manage the properties (*id.*)

The complaint concerns Leon's claims regarding property

located at 221 East 76th Street (the East 76th Street Property), property located at 234 East 82nd Street, New York, N.Y. (the East 82nd Street Property), property located at 242-244 East 77th Street, New York, N.Y. (the East 77th Street Property) and property located at 521 East 83rd Street, New York, N.Y. (the East 83rd Street Property (collectively, the Properties) (*id.*, ¶ 11).

Leon asserts that the Properties' ownership and management rights and obligations are embodied in operating agreements or similar documents, which provide for distribution payments (*id.*, ¶ 6). He further contends that he has a 20% ownership interest in the East 76th Street Property, pursuant to a co-tenancy agreement dated December 31, 1985 (the East 76th Street Agreement); a one-third ownership interest in 234 East 82nd Street LLC (the East 82nd Street LLC), which owns the East 82nd Street Property, pursuant to an operating agreement dated July 28, 1997 (the East 82nd Street Operating Agreement); a one-quarter ownership interest in 242-244 East 77th Street, LLC (the East 77th Street LLC), which owns the East 77th Street Property, pursuant to an operating agreement dated July 28, 1997 (the East 77th Street Operating Agreement); and a one-sixth ownership interest in the East 83rd Street Property, under a tenancy-in-common agreement (the East 83rd Street Agreement) (*id.*, ¶¶ 11-12).

Leon contends that Defendants breached their obligation to make "appropriate distributions" to him (*id.*, ¶ 15), instead,

making "a lesser or no" distribution to him (*id.*, ¶ 16), and that this constituted a breach of their fiduciary duty to him (first cause of action). Leon's remaining causes of action are only against Gary for breach of contract for failure to make "appropriate distributions" regarding the East 76th Street Property (second cause of action), the East 82nd Street Property (third cause of action), the East 77th Street Property (fourth cause of action) and the East 83rd Street Property (fifth cause of action). This action was commenced on November 24, 2010.

The underlying facts are set forth in detail in the July 2011 Order and, therefore, need not be repeated. In the July 2011 Order, the court dismissed the complaint against Realty, stayed proceedings related to the East 76th Street Property and directed the parties to proceed to arbitration on that claim and dismissed the third and fourth causes of action (July 2011 Order, at 11-13). The court denied plaintiff's motion to add additional parties by order dated October 24, 2011 (the October 2011 Order). Since plaintiff never appealed the October 2011 Order, it is the law of the case and the portion of Leon's cross motion that seeks to add the East 77th Street LLC and the East 82nd Street LLC as defendants is denied. Moreover, Leon has failed to submit a proposed amended complaint, also warranting denial of this aspect of his cross motion.

Leon contends that "a dispute arose" between he and Gary

regarding the management of the Properties. They arranged for Eisner & Lubin to perform a forensic accounting (the Agreement). Eisner & Lubin ultimately issued a report in June 2006 (the Report). He and Gary executed a settlement agreement in July 2006 (the Settlement), that resolved the dispute (Leon affidavit, ¶¶ 5-11). Leon further asserts that he made the required payments under the Settlement, but that defendants wrote down his capital accounts in the Properties improperly and failed to make required payments due to him based upon these allegedly improper write downs (*id.*, ¶¶ 12-14, 18, 21-28). He states that this conduct establishes Gary's bad faith and that because Jonathan signed distribution checks he too is liable (*id.*, ¶¶ 34-39).

Gary and Jonathan allege that Gary was the managing member of the East 82nd Street LLC and the East 77th Street LLC, and that Gary and Leon each have a one-sixth interest in the East 83rd Street Property (Gary affidavit, ¶ 5). They assert that in February 2006, Gary discovered that Leon had misappropriated more than \$2 million from the Properties to fund his own personal business ventures and that as a result, management of the Properties was transferred from Leon to Gary and the Agreement was entered into in order to determine the exact amount Leon had taken (*id.*, ¶¶ 7-10). They state that the Settlement required that Leon pay back certain amounts and that any discrepancies between the amounts paid and the amounts shown on the books of the Properties

be written off by the respective entities (Settlement, ¶ 5) and that the write down of Leon's capital accounts was done for that reason (Gary affidavit, 12, 14-15).

Jonathan contends that Leon's complaint should be dismissed against him, since Gary was the managing partner of the Properties and that Jonathan had no discretionary authority over the amount of the distributions, but merely signed the checks (Jonathan affidavit, ¶¶ 3, 6).

Gary and Jonathan state that Gary acted in good faith, based upon Eisner & Lubin's advice that it was appropriate to write down Leon's capital accounts (Erdmann EBT, at 74, 85-87). However, Eisner & Lubin stated that the Agreement was not a general reconciliation (*id.* at 69).

#### **Summary Judgment**

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of

the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

#### **Breach of Fiduciary Duty**

“ “[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011] [internal citation omitted]). “A majority shareholder in a close corporation is in a fiduciary relationship with the minority [shareholder]” (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 300 [1st Dept 2003]). Similarly, “the managing member of the company ... [owes] ... a fiduciary duty [to the other members]” (*Salm v Feldstein*, 20 AD3d 469, 470 [2d Dept 2005]; see also *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1039 [2d Dept 2009]).

The business judgment rule “bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes” (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). However, it “does not foreclose judicial inquiry into the decision

of a board of directors where the board acted in bad faith, e.g., by deliberately singled out an individual for harmful treatment" (*Owen v Hamilton*, 44 AD3d 452, 456 [1st Dept 2007], lv dismissed 10 NY3d 757 [2008]; *Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002])).

#### **Contract Interpretation**

Generally, "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

#### **Analysis**

Applying the aforementioned principles to this case, Jonathan's motion for summary judgment dismissing the complaint against him must be granted. He has presented evidence that he had no authority to determine the amount of the distributions to Leon and only wrote the checks, moreover, Leon has failed to rebut this showing. Since Jonathan was neither the majority stakeholder, nor the managing member, therefore he was not in a fiduciary relationship with Leon (*Cottone*, 68 AD3d at 1039; *Salm*, 20 AD3d at 470). Further, Leon has not shown any "misconduct" by on

Jonathan's behalf (*Palmetto Partners*, 83 AD3d at 807). Accordingly, Leon's complaint is dismissed against Jonathan.

There is no dispute that Leon's capital account was written down and that, therefore, he was treated differently from the other shareholders. He contends that the Settlement limited his responsibility for his alleged misappropriation of funds to partial repayment and that, consequently, the write down of his capital account was improper and due to bad faith. Gary contends that the write down of Leon's capital account was proper, because the decision was made based upon Eisner & Lubin's determination, which was embodied in the Settlement, and was necessary to comply with the relevant Treasury regulations and proper accounting practices. Gary therefore, argues that the write down of Leon's capital account was not "misconduct" and Leon's claim of breach of fiduciary duty must fail (*Palmetto Partners*, 83 AD3d at 807).

The reasons for the write down cannot be determined as a matter of law, particularly since the Eisner & Lubin review was not a general reconciliation (*Erdmann EBT*, at 69). The Settlement is ambiguous in reference to the write down. The reasons for, and the appropriateness of the write down, the purported bad faith of Gary in determining to write down Leon's capital accounts and the degree to which Gary relied upon Eisner & Lubin's advice are factual issues that are more properly resolved by a finder of fact at trial. Accordingly, Gary's motion and Leon's cross motion for

summary judgment are both denied. Consequently, it is

ORDERED that the motion of Jonathan Pokoik for summary judgment dismissing the complaint and any cross claims against him is granted, and said complaint and any cross claim against said party are dismissed in their entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said party; and it is further

ORDERED that the action is severed and continued against the remaining party; and it is further

ORDERED that the motion of Gary Pokoik for summary judgment dismissing the complaint against him is denied; and it is further

ORDERED that the cross motion of Lee Pokoik a/k/a Leon Pokoik for summary judgment and for leave to add 242-44 East 77th Street, LLC and 234 East 82nd Street, LLC as defendants is denied.

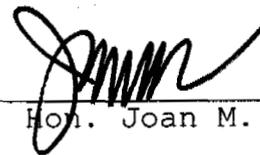
Dated: January 21, 2013

**FILED**

ENTER:

JAN 25 2013

NEW YORK  
COUNTY CLERK'S OFFICE



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Hon. Joan M. Kenney