

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

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ROBERT SHAPIRO,	:	Index No. 653571/2014
	:	
Plaintiff-Counterclaim Defendant,	:	Part 61
	:	
- v -	:	
	:	Justice Anil C. Singh
GABRIEL ETTENSON and DAVID	:	
NEWMAN,	:	
	:	<u>ORAL ARGUMENT REQUESTED</u>
Defendants-Counterclaim	:	
Plaintiffs.	:	
	:	
-----X	:	

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN
FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

CARTER LEDYARD & MILBURN LLP
COUNSELORS AT LAW
2 WALL STREET
NEW YORK, N.Y. 10005

(212) 732 - 3200

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Defendants respectfully submit this memorandum of law in opposition to Plaintiff's motion for summary judgment, and in further support of Defendants' motion for summary judgment pursuant to CPLR 3212.¹

PRELIMINARY STATEMENT

Plaintiff's motion for summary judgment is built upon bald, conclusory assertions that are bereft of legal support. This is not, as Plaintiff contends, because "[t]his dispute raises an issue of first impression." *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, dated March 12, 2015 ("Pl. Br.") at p. 2. Rather, Plaintiff is unable to provide any legal or factual support for his claims because there is none. This case presents no novel issues, and merely requires the application of settled and unambiguous controlling law, including the provisions of LLC Law itself, to material facts that are not in dispute.

As demonstrated in Defendants' initial moving papers, the undisputed factual record and controlling law confirm that all of Defendants' actions at issue in this case were plainly authorized, and that Defendants are entitled to summary judgment on each of their Counterclaims. Plaintiff's motion, in contrast, relies upon sweeping factual assertions – in some cases, set forth in improper and inadmissible submissions – that are wholly lacking in evidentiary support, legal theories that are barren of any supporting law, and selective readings of the LLC Law that misinterpret its provisions.

In short, Plaintiff's motion for summary judgment fails to sustain his burden of showing that he is entitled to a judgment as a matter of law, and in fact actually confirms that he has no claim and that Defendants' motion should be granted.

¹ Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in Defendants' Memorandum of Law in Support of their Motion for Summary Judgment (NYSCEF Doc. No. 70) ("Defendants' Opening Brief" or "Def. Br.").

ARGUMENT

I. PLAINTIFF FAILS TO SUSTAIN HIS BURDENS IN SUPPORT OF HIS MOTION OR IN OPPOSITION TO DEFENDANTS' MOTION

It is axiomatic that the proponent of a summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the basis of evidentiary proofs. *Afco Credit Corp. v. Mohr*, 156 A.D.2d 287, 287-88 (1st Dept. 1989); *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 (1979) (“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form.”); *Smith v. Johnson Prods. Co.*, 95 A.D.2d 675, 676 (1st Dept. 1983) (on summary judgment, a party must “lay bare his proof and present evidentiary facts” sufficient to establish his cause of action or defense). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation.” *Smith*, 95 A.D.2d at 676.

Likewise, “conclusory assertions, devoid of evidentiary facts, are insufficient to defeat a well-supported summary judgment motion, as is reliance on surmise, conjecture, or speculation.” *Grullon v. City of New York*, 297 A.D.2d 261, 263-64 (1st Dept. 2002); *see also Brook Plaza Ophthalmology Assoc. v. Fink, Weinberger, Fredman, Berman & Lowell, P.C.*, 173 A.D.2d 170, 171 (1st Dept. 1991). In other words, “if the opponent is to succeed in defeating a summary judgment motion, he, too, must make his showing by producing evidentiary proof in admissible form.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals*, 46 N.Y.2d 1067-68. “Broad, conclusory assertions are inadequate to withstand a motion for summary judgment.” *Bernstein v. Freudman*, 102 A.D.2d 805, 806 (1st Dept. 1984); *see also Shapiro v. Health Ins. Plan of Greater N.Y.*, 7 N.Y. 2d 56, 63 (1959) (granting summary

judgment where opposition consisted of “conclusory allegations” and contained no “evidentiary facts”); *Pappalardo v. Meisel*, 112 A.D.2d 277, 278 (2nd Dept. 1985) (“[P]laintiff offers only conclusory allegations that defendants wants to ‘drive him out of business’, without offering any evidentiary facts to support his allegations. Suspicion, surmise and accusation are not enough to defeat a motion for summary judgment.”).

Here, Plaintiff’s entire motion is based on conclusory assertions and unsupported legal theories. In fact, as detailed below, Plaintiff fails altogether to come forward with any proofs or law sufficient to support his motion, or to withstand Defendants’ motion, for summary judgment.

II. PLAINTIFF’S ARGUMENTS REGARDING THE OPERATING AGREEMENT DO NOT WITHSTAND SCRUTINY

Plaintiff’s motion posits four theories in support of his claim that the Operating Agreement is invalid:

- First, relying on §417 of the LLC Law, Plaintiff argues that “by statute, an operating agreement is to be entered into by all but not less than all of the members, and certainly not just a majority.” Pl. Br. at 5-6.
- Second, Plaintiff theorizes, without any legal support, that “an operating agreement is a contract” and “must have been either signed by each and every [member] that was a member at the time of execution or in existence when new members acquire a membership interest in the particular limited liability company.” *Id.* at 6.
- Third, relying exclusively on the unsupported affidavit of his attorney, Plaintiff claims that “it is the practice in New York to have all members sign operating agreements.” *Id.*
- Fourth, Plaintiff contends that, under §417(c) of the LLC Law, the “[f]ailure of all the members to adopt a written operating agreement company [sic] before, at the time of, or within ninety days after the filing of the articles of organization prohibits two out of the three members of ENS from promulgating the Purported Operating Agreement over eleven (11) months after formation.” *Id.* at 7.

None of these arguments withstands scrutiny.

A. Only A Majority Is Required To Adopt An Operating Agreement

Plaintiff's first argument is sheer sophistry. Section 417 of the LLC Law refers only to the requirement of members to "adopt a written operating agreement," and says nothing whatsoever about there being any unanimity requirement. In fact, there is no provision anywhere in the LLC Law at all (and Plaintiff points to none) that requires an operating agreement to be "entered into by all but not less than all of the members, and certainly not just a majority." Pl. Br. at 5-6. To the contrary, as already detailed in Defendants' Opening Brief, the only provisions of the LLC Law that address the quorum required to adopt an operating agreement explicitly provide that only the approval of a majority is necessary. Def. Br. at 11-16. In particular, § 402(c)(3) of the LLC Law plainly states that "*a majority in interest of the members*" is all that is required to "*adopt, amend, restate or revoke the ... operating agreement.*" See LLC Law § 402(c)(3) (emphasis added). Likewise, § 402(f) of the LLC Law also states specifically that, "whenever *any action* is to be taken ... by the members ..., it shall, except as otherwise required or specified by this chapter or the articles of organization or the operating agreement as permitted by this chapter, be authorized by a *majority in interest of the members*' votes cast at a meeting of members by members ... entitled to vote thereon." LLC Law § 402(f) (emphasis added).²

² This majority-rules requirement makes sense, as it is founded upon the bedrock principle – which was clearly embraced by the drafters of the LLC Law – not to permit a minority member such as Plaintiff to stonewall any Company action merely by refusing to participate in the business. See, e.g., *Overhoff v. Scarp, Inc.*, 812 N.Y.S.2d 809, 816 (Sup. Ct. Erie Co. 2005) (upholding majority-rules provision because "[t]o rule otherwise would permit a minority member to stonewall any action by the members merely by refusing to attend meetings, as happened here."). The record is clear that this is precisely what Plaintiff has repeatedly attempted, and his misleading protests that the Operating Agreement "was not provided to Plaintiff for consideration" should fall on deaf ears. As his own affidavit makes clear, Plaintiff had been asked as far back as **July 2013** to move the operating agreement process along with the Company's attorney. See Shapiro SJ Aff., ¶ 8, Ex. F. Yet, noticeably absent from Shapiro's affidavit is any indication that he ever did anything to participate in that process. To the contrary, the record is clear and un rebutted that Plaintiff has been totally absent from the Company's business for years, and that he did

Plaintiff ignores these provisions altogether, and points to no provision anywhere that actually required the unanimous consent of the members of ENS to adopt the Operating Agreement. He also continues to concede, as he must, that each of the parties to this litigation is and always has been an equal one-third member of ENS³ – meaning that any two members acting together indisputably comprise a “majority in interest of the members” of the Company. LLC Law § 102(o) (“Majority in interest of the members means, unless otherwise provided in the operating agreement, the members whose aggregate share of the current profits of the limited liability company constitutes more than one-half of the aggregate of such shares of all members.”). And because Plaintiff cannot (and does not) dispute that the Operating Agreement was duly approved by a “majority in interest of the members” of ENS, his argument that the Operating Agreement is invalid fails as a matter of law.

B. The LLC Law Does Not Require Members To Sign An Operating Agreement

For Plaintiff’s second argument, he contends that because “an operating agreement is a contract” it must be signed by all members to be binding. Tellingly, Plaintiff does not cite a single case or provision of the LLC Law that supports his argument – because there is none.

To begin with, Plaintiff’s contention that there is no case law in New York in which an operating agreement was promulgated and signed by any less than all members is wrong. *See Bobrow v. Liebman*, 839 N.Y.S.2d 431, 2007 N.Y. Slip Op. 50795(U) at *8 (Sup. Ct. N.Y. Co. 2007) (relying on provision of an operating agreement that was signed by only three of four

nothing except obstruct Defendants’ efforts to get an operating agreement in place, including by ignoring drafts that were circulated as far back as November 12, 2013, and by failing provide any feedback on Defendants’ comments to that draft. *See Plotnick Aff.*, Ex. 7 (Newman Aff., ¶¶ 18-30).

³ *See* Pl. Br. at pp. 1, 4; Affidavit of Robert Shapiro in Support of Plaintiff’s Motion for Summary Judgment, dated March 11, 2015 (“Shapiro SJ Aff.”), ¶¶ 2, 5, 6. (NYSCEF Doc. No. 53). The Shapiro SJ Aff. is substantively identical to Plaintiff’s original affidavit in support of his order to show cause, which is annexed as Exhibit 4 to the Affirmation of Stephen M. Plotnick in Support of Defendants’ Motion for Summary Judgment, dated March 12, 2015 (NYSCEF Doc. Nos. 72, 76).

members of New York limited liability company).⁴ But, more importantly in this case, there is no dispute that the parties voluntarily chose to form ENS under the LLC Law, and there can be no dispute that it is therefore the provisions of the LLC Law that govern the parties' rights. See LLC Law §§ 401(a), 408(a); *Ross v. Nelson*, 54 A.D.3d 258, 259 (1st Dept. 2008); *In re 1545 Ocean Avenue, LLC*, 72 A.D.3d 121, 129 (2nd Dept. 2010); *Manitaras v. Beusman*, 56 A.D.3d 735, 736 (2nd Dept. 2008); *Man Choi Chiu v. Chiu*, 71 A.D.3d 646, 647 (2nd Dept. 2010); *Spires v. Lighthouse Solutions, LLC*, 778 N.Y.S.2d 259, 266 (Sup. Ct. Monroe Co. 2004); *Overhoff*, 812 N.Y.S.2d at 816. Here, there is nothing in the LLC Law that makes *signing* a prerequisite to the validity or enforcement of an operating agreement. See, e.g., *Bobrow*, 839 N.Y.S.2d 431, 2007 N.Y. Slip Op. 50795(U) at *8. Rather, the LLC Law authorizes an operating agreement as long as it is "adopt[ed]" by a "majority in interest of the members." LLC Law §§ 402(c)(3), 402(f).

In other words, by the explicit provisions of the statute that the parties chose to govern their Company,⁵ the minority may be bound by the actions of the majority without any requirement that the minority "sign off" on those actions. To hold otherwise would effectively eviscerate the majority-rules provisions of the LLC Law, and permit a minority member like Plaintiff to stonewall any action by simply refusing to put pen to paper. See, e.g., *Overhoff*, 812 N.Y.S.2d at 816 (upholding majority-rules provision because "[t]o rule otherwise would permit a minority member to stonewall any action by the members merely by refusing to attend meetings, as happened here.")

C. Plaintiff's Counsel's Unsupported Affidavit Is Valueless And Irrelevant

Plaintiff's third argument relies exclusively on the unsupported affirmation of his attorney, and contends, based upon his attorney's "34 years of experience as a licensed attorney

⁴ A copy of *Bobrow v. Liebman* is annexed hereto.

⁵ Plaintiff, in fact, signed the Company's Articles of Organization. See Shapiro SJ Aff., Ex. E.

practicing mainly in the [sic] New York City”⁶ that “it is the practice in New York to have all members sign operating agreements.” Pl. Br. at 6; Affirmation of James M. Felix in Support of Plaintiff’s Motion for Summary Judgment, dated March 12, 1015, ¶¶6-7.⁷

Of course, it is settled law in New York that the submission of a conclusory, hearsay affirmation by counsel is probatively valueless, and insufficient to either support or defeat summary judgment. *See Zuckerman*, 49 N.Y.2d at 560 ; *Roche v. Hearst Corp.*, 53 N.Y.2d 767, 769 (1981); *Smith*, 95 A.D.2d at 676. Here, Plaintiff’s counsel’s unsupported affirmation is the very definition of conclusory speculation, bereft of evidentiary support in the record, and is therefore inconsequential.

Moreover, whatever counsel’s personal practice may be is irrelevant. It is the provisions of the LLC Law control – and as set forth above those provisions specifically authorize an operating agreement to be adopted by a majority and include no signature requirement.

D. Section 417(c) Of The LLC Law Did Not Bar Defendants From Adopting The Operating Agreement Effective As Of December 13, 2013

Plaintiff’s argument regarding §417(c) has already been addressed at length in Defendants’ Opening Brief.⁸ In short, Plaintiff’s argument is premised upon a misreading of that provision of the statute. Read in its entirety, it is clear that § 417(c) merely permits (but does not require) the members of an LLC to adopt an operating agreement “before, at the time of or within ninety days after the filing of the articles of organization,” and if done within that window of time allows for the operating agreement to be deemed effective retroactive to the formation date of the company. However, § 402(c)(3) separately and explicitly allows “a majority in interest of the

⁶ The LLC Law has only been in effect since 1994.

⁷ NYSCEF Doc. No. 52.

⁸ *See* Def. Br., pp. 14-15.

members” to “adopt” an operating agreement at a later date, but without retroactive effect. LLC Law § 402(c)(3); *see also, e.g., Spires*, 778 N.Y.S.2d at 262-265 (holding that “[t]here is no provision in the Limited Liability Company Law imposing any type of penalty or punishment for failing to adopt a written operating agreement” within the time frame set forth in § 417, and finding that the members of the limited liability company at issue had validly adopted operating agreements *more than two and a half years* after the company’s articles of organization were filed). That is precisely what occurred here.

III. DEFENDANTS’ ACTIONS WERE AUTHORIZED

Plaintiff next argues that there are no default provisions in the LLC Law that authorized Defendants to adopt the Operating Agreement without the unanimous consent of all members, to issue the Capital Call, to change the Company from member-managed to manager-managed, or to reduce Plaintiff’s salary.⁹

A. Defendants Were Authorized To Adopt The Operating Agreement

As set forth above and in Defendants’ Opening Brief, Defendants were explicitly authorized under § 402(c)(3) of the LLC Law to adopt the Operating Agreement. Although, under § 417(c), the Operating Agreement could not be deemed effective retroactive to the date of the Company’s formation,¹⁰ this fact is largely irrelevant because, (a) Defendants do not contend that it

⁹ Plaintiff refuses to concede, and only half-heartedly attempts to distinguish the great weight of authority in New York unanimously holding, that the default provisions of the LLC Law control in the absence of a written operating agreement. *See* Pl. Br. at 7-8. Yet Plaintiff addresses only two of these cases, *Ocean Ave.* and *Spires*, and merely argues that they “are not only not dispositive of the issues herein nor binding upon this Court.” *Id.* That argument ignores the First Department’s decision in *Ross v. Nelson*, which explicitly recognized the applicability of the default provisions of LLC Law in the absence of an operating agreement. 54 A.D.3d at 259 (“The operating agreement under which the parties worked was, by its terms, guided by the Limited Liability Company Law. ... Lacking a specific mechanism in the operating agreement for such expulsion, the parties relied on section 414 of the Limited Liability Company Law, which allows for removal of a manager by majority vote of the other members.”)

¹⁰ In addition to §417(c), Plaintiff inexplicably relies upon § 417(b) of the LLC Law, which by its terms applies only to the *amendment* of an operating agreement. Here, there has been no amendment to any

is retroactively effective, and (b) as explained in Defendants' Opening Brief, the Operating Agreement largely tracks the default provisions of the LLC Law with respect to majority approvals by members and managers, which default provisions applied prior to the effective date (December 13, 2013) of the Operating Agreement. *See* Def. Br., pp. 16-17.

B. The Capital Call Was Authorized

Plaintiff's arguments regarding the Capital Call are also mistaken. Defendants did not need separate authorization under a specific provision of the LLC Law to issue the Capital Call because, as Plaintiff does not dispute, the Capital Call was explicitly authorized by § 7.01 of the Operating Agreement and there is no prohibition in the LLC Law against the inclusion of such provisions. That the Operating Agreement was duly adopted by a majority of members, had been in place with Plaintiff's knowledge and acquiescence for nearly a year before the Capital Call, and was followed to the letter when the Capital Call was voted upon and issued, is not in dispute. This effectively ends the inquiry.

In any event, contrary to Plaintiff's argument, the Capital Call would not run afoul of §§ 502(a) or (b) of the LLC Law. Section 502(a) simply sets forth the requirement that "a member is obligated to the limited liability company *to perform any promise*" to make a "*required*" capital contribution, regardless of "death, disability or any other reason." LLC Law § 502(a) (emphasis added). Section 502(b), in turn, provides in relevant part as follows:

the obligation of a member to make a contribution or to return money or other property paid or distributed in violation of this chapter may be *compromised* only by consent of all the members. Notwithstanding the compromise, a creditor of a limited liability company who extends credit in reliance on the obligation of any member may enforce the original obligation to the extent he or she reasonably relied on such obligation after the member signed a

operating agreement of the Company; all parties agree that prior to the Operating Agreement the Company had no operating agreement at all. Thus, § 417(b) does not apply and is irrelevant.

writing which reflects the obligation and the creditor extended credit before the compromise. ...

LLC Law § 502(b). Plaintiff offers no support for his reading of these provisions which, as New York commentators have recognized, largely exist to protect (a) lenders of a limited liability company who extend credit in reliance upon members' existing obligations to make contributions to the company, and (b) the other members of a limited liability company who frequently may be held personally liable to creditors under loan agreements. *See* 1 N.Y. Prac., New York Ltd. Liab. Cos. and Partnerships, §16:4 (Liability of members – Liability for distributions and contributions). Under these circumstances, a member may be compelled under §502(a) to make a contribution of capital that he has already promised to make, and that promise may not under §502(b) be compromised without the consent of the other members or a creditor that has relied on that obligation.

Contrary to Plaintiff's argument, §§ 502(a) and (b) plainly would not even apply in the absence of the Operating Agreement to the Capital Call, because the Capital Call by its terms is *voluntary*, and does not *require* or impose any *obligation* on any member of ENS to make the requested \$10,000 contribution of capital. *See* SOUMF, ¶ 43; Shapiro SJ Aff., Ex. K (Operating Agreement, § 7.01) ("Each Member may, ***but shall not be required*** to, provide additional Capital Contributions to the Company in proportion to his Participation Interest.") (emphasis added). Here, as Defendants do not contend that Plaintiff has made any promise or has any obligation to make any contribution of capital pursuant to the Capital Call, §§ 502(a) and (b) have no application.

C. The Amendment To The Company's Articles Of Organization Was Authorized

Plaintiff's assertion that "[t]here is no default provision which would allow for a member managed limited liability company to be changed to a manager managed LLC" is clearly wrong

and requires little discussion. Indeed, his entire argument is premised upon the unremarkable point that the Company's original Articles of Organization provided for ENS to be member-managed by default. *See* Pl. Br. at 10. However, as already detailed in Defendants' Opening Brief, the LLC Law specifically authorizes a member-managed limited liability company to be changed into a manager-managed limited liability upon the approval of "a majority in interest of the members." LLC Law §§ 211, 213, 402(c)(3). Plaintiff addresses none of these provisions of the LLC Law in his argument.

D. Salary Determinations Are Authorized By Majority Vote

Plaintiff also argues that there is no provision of the LLC Law which authorizes salary determination to be made by majority vote. Again, Plaintiff is incorrect.

As stated, under the LLC Law, unless otherwise provided in the LLC Law itself, the articles of organization, or a written operating agreement, whenever any action is to be taken by members or managers it is authorized to be taken by a determination of a majority in interest of the members or managers. *See* LLC Law §§ 402(f), 408(a). Here, as Plaintiff concedes, there is no provision in the LLC Law, the Company's Articles of Organization, the Amendment, or the Operating Agreement concerning the payment of salaries – meaning that the determination of a majority is all that is required as a matter of law.

IV. PLAINTIFF HAS NO RIGHT TO RECEIVE A SALARY

Plaintiff contends that Defendants were not authorized to reduce Plaintiff's salary at the October 2014 Meeting, while at the same time continuing their existing salaries, because "no unequal salary or other payments are permitted." Pl. Br. at 11. Plaintiff's arguments are premised upon § 411 of the LLC Law, a supposed oral agreement reached by the members at the

September 2013 Meeting, and § 9.01 of the Operating Agreement. Each of Plaintiff's arguments is unavailing.

A. There Is No Interested Manager Issue

Relying upon the interested-manager provision of the LLC Law (§ 411), Plaintiff contends that “the LLC Law specifically prohibits a manager from benefitting from transactions which favor a manager or group of managers over other managers or members.” Pl. Br. at 11. Even assuming that § 411 applies to salary decisions (and Plaintiff provides no legal support for his argument that it does),¹¹ there is simply no interested-manager issue here.

Plaintiff specifically concedes that the members' salaries were *unanimously* approved at the September 2013 Meeting. See Shapiro SJ Aff., ¶¶ 41-42. Thus, as to the approval of the members' salaries, there is certainly no issue with respect § 411. And Defendants' votes over a year later, at the October 2014 Meeting, to reduce Plaintiff's salary due to his continual and ongoing dereliction of his duties was plainly not an interested manager transaction under § 411 because it was not a “contract or other transaction between a limited liability company and one or more of its managers” in which those managers “have a substantial financial interest.” LLC Law § 411(a). Indeed, Defendants did not vote to increase (nor is there any allegation that Defendants have increased) their own salary at Plaintiff's expense; Defendants merely voted to reduce Plaintiff's salary. In other words, as Defendants derived no personal financial benefit

¹¹ Plaintiff's argument that § 411 of the LLC Law applies to salary decisions is actually contrary to the statutory scheme of the LLC Law. For example, § 414 of the LLC Law authorizes members to remove or replace “any or all managers of a limited liability company ... with or without cause by a vote of a majority in interest of the members entitled to vote thereon.” LLC Law § 414. If Defendants had simply voted at the October 2014 to remove Plaintiff as a manager of ENS for non-performance, he clearly would not have been entitled to continue to receive a salary for any management services. In other words, if Plaintiff's argument that § 411 were to be accepted, it would mean that Defendants could easily do under § 414 that which they could not do under § 411.

from the decision, which concerned only the elimination of Plaintiff's salary, there is no § 411 issue at all.

B. There Is No Agreement Requiring Payment Of Salary To Plaintiff Or Prohibiting The Continued Payment of Defendants' Salaries

Finally, Plaintiff contends that the elimination of Plaintiff's salary and continued payment of Defendants' salaries is contrary to (a) the supposed oral agreements reached by the members "in connection with the formation of ENS" and at the September 2013 Meeting, and (b) § 9.01 of the Operating Agreement.

Plaintiff's continued reliance upon the supposed oral agreements he claims to have been reached by the members is ineffective. As already detailed in Defendants' Opening Brief, any such agreements are required under the LLC Law to be in writing to have any force or effect. *See* Df. Br. at 9-11, 20. Moreover, it was incumbent upon Plaintiff on summary judgment to "lay bare his proof and present evidentiary facts" sufficient to establish his contentions. *Smith*, 95 A.D.2d at 676. Plaintiff's "conclusory assertions" regarding these supposed oral agreement, which are "devoid of evidentiary facts, are insufficient for this purpose." *Id.*; *see also Clarke v. 6485 & 6495 Broadway Apt. Inc.*, 122 A.D.3d 494, 495 (1st Dept. 2014) ("Associates failed to make a prima facie showing of entitlement to summary judgment since it submitted only a conclusory affidavit stating that it was not responsible for its tenant's conduct, without submitting a copy of any lease or even identifying the tenant."); *Afco Credit*, 156 A.D.2d at 288 ("In this instance, the plaintiff's failure to submit documentary proof of the defendant's purported guilty plea ... undermined the attempt at such a summary resolution of this action.")

Plaintiff not only fails to offer any evidentiary proofs to support his conclusory assertions that these supposed oral agreements even exist,¹² but the actual evidence in the record belies his claims entirely – including (a) the documentary proof that Defendants refused to agree to the Proposed Consent circulated by the Company’s attorney following the September 2013 Meeting, and (b) Plaintiff’s admission that salaries were actually paid by the Company to, and accepted by, all members, including in months following the expiration of the suggested ninety (90) day period set forth in the Proposed Consent. *Id.* at ¶¶ 21-22. Accordingly, Plaintiff’s reliance on these supposed oral agreements fails as a matter of law.

Plaintiff also attempts to play on both sides of the net in arguing that § 9.01 of the Operating Agreement precludes “salaries or other compensation” from being “provided to defendants and not to plaintiff” without “the unanimous consent of the members.” Indeed, Plaintiff contends earlier in his brief that the Operating Agreement is invalid, and that ENS is member-managed because Defendants were not authorized to approve the Amendment. Yet § 9.01 of the Operating Agreement concerns only the payment of “Management Fees,” and it is in any event undisputed that the members’ salaries were approved unanimously at the September 2013 Meeting – which was three months before the Company had any managers or an Operating Agreement. Moreover, Plaintiff admits that salaries were actually paid to all members in months following the approval of the Operating Agreement,¹³ and does not contend that there was any

¹² Plaintiff’s fundamental contention that there was some supposed “express agreement” reached by members of the Company “in connection with the formation of ENS” that “ENS would be member managed, that all material decisions would be by unanimous vote, of all the members and that in the event of a capital call, that no members inability or decision not to make any payment on account of a capital call, would result in any diminution of that member’s membership interest” also strains credibility. Indeed, stripped to its essence, Plaintiff’s central allegation is that the parties coincidentally had the prescience to specifically discuss, but not reduce to writing despite having counsel available to advise them, each of the specific issues that developed among them in the years following the formation of ENS.

¹³ SOUMF at ¶¶ 21-22.

“unanimous agreement” to approve the payment of those salaries as “Management Fees” after the Operating Agreement was approved. *Id.* Accordingly, any objection that Plaintiff might have had has clearly been waived. *See Hadden v. Consolidated Edison Co. of New York, Inc.*, 45 N.Y.2d 466, 469 (1978) (“A waiver may be ... accomplished ... by such conduct or failure to act as to evince an intent not to claim the purported advantage.”)

CONCLUSION

Accordingly, Plaintiff’s motion for summary judgment should be denied, and Defendants are entitled to a judgment, pursuant to CPLR 3212, dismissing in its entirety and with prejudice Plaintiff’s Complaint, and in Defendants’ favor on each of their Counterclaims.

Dated: March 26, 2015
New York, NY

CARTER LEDYARD & MILBURN LLP

By: /s/ Stephen M. Plotnick
Stephen M. Plotnick
Alexander G. Malyshev

2 Wall Street
New York, NY 10005-2072
(212) 732-3200
plotnick@clm.com

*Attorneys for Defendants-Counterclaim
Plaintiffs Gabriel Ettenson and David
Newman*

15 Misc.3d 1121(A)

Unreported Disposition

(The decision of the Court is referenced
in a table in the New York Supplement.)

Supreme Court, New York County, New York.

Betty BOBROW, Plaintiff,

v.

Sam LIEBMAN, Neil Tepper, 235 East
4th Street, LLC, Daniel Perla and Daniel

Perla Associates, LP, Defendants.

235 East 4th Street Management, LLC, Plaintiff,

Betty Bobrow, Defendant.

No. 601132/04. | April 16, 2007.

Attorneys and Law Firms

Heller Horowitz & Feit, P.C., by Alan A. Heller, New York,
for Plaintiff (Betty Bobrow).

Trachtenberg Rodes & Friedberg LLP, by Barry J. Friedberg,
New York, for Defendants (Sam Liebman, Neil Tepper,
235 East 4th Street LLC, Daniel Perla and Daniel Perla
Associates, LP,) and 235 East 4th Street Management, LLC.

Opinion

BERNARD J. FRIED, J.

*1 This action involves a dispute between real estate investors based on an oral agreement pursuant to which Plaintiff invested \$400,000 in defendant 235 East 4th Street, LLC (235), shortly before 235's acquisition of a building and property located on the lower eastside of Manhattan (the Property or the Project). In the Amended Complaint (Complaint), Plaintiff alleges that she has not received the equity interest, distributions, and other consideration she was promised in exchange for her investment, and seeks a declaration that she has a 25.80% direct equity interest in 235, that her distributions should be recalculated to reflect that interest, and other damages.

In the counterclaims to the first action, 235 seeks a declaration that Plaintiff is not, and has never been, a member of 235, and money damages for her alleged refusal to execute and comply with the obligations of 235's operating agreement. In the second action (Index No. 601199/05), 235 East 4th Street Management LLC (Management), the Managing Member of

235, also seeks a declaration that Plaintiff is not a member, the return from Plaintiff of all distributions she has received from it to date, and damages due to Plaintiff's refusal to execute documents necessary to its efforts to refinance the Property on behalf of 235.

Here, Defendants¹ move for partial summary judgment for the previously-described declaration. They also move for the alternative relief of dismissal of Plaintiff's first and fourth causes of action, for a greater equity interest in 235, so that The LLCs² can continue to carry Plaintiff at the respective 10% and 21.43% interests which they have, to date, recorded in their books and records. Defendants also seek dismissal of the seventh, eighth, ninth, and twelfth causes of action of the Complaint. Plaintiff cross-moves for partial summary judgment in her favor on the third, eleventh, thirteenth, and fourteenth causes of action of the Complaint.

In the Complaint, Plaintiff alleges that in or about 1998, she was approached by defendants Sam Liebman and Neil Tepper about an investment in the Property and told that, in addition to available mortgage financing, Liebman and Tepper would raise, through the sale of units in 235 to "outside" investors (Outside Investors), \$1.2 million necessary to purchase the Property. In exchange for the \$1.2 million, the Outside Investors were to receive a total of 30% of the equity of the Property through their ownership of units of 235, with Management owning the remaining 70% of the equity of the Property.

Plaintiff claims that she was told, and relied on the representation, that because she was contributing \$400,000, representing one-third of the total monies to be raised from the sale of the 235's units, she would receive:

"a pro rata portion of the total 30% equity interest in the Property to be allocated to the Units (based on the actual aggregate monies raised in the Offering and used for the purchase of the Property) and an additional 21.43% equity interest in [Management]....

*2 (Complaint, at 7, ¶ 15).

Plaintiff further alleges that she was advised by the Defendants that if the full \$1.2 million was not raised from the sale of the units, Liebman and Tepper would either purchase

the unsold units, or lend 235 the balance of the proceeds needed to complete the \$1.2 million offering. Thus, Plaintiff alleges that, whether as an investment or a loan, Liebman and Tepper were supposed to, at the time of closing on the Property, fund any shortfall in raising the \$1.2 million with their own funds, even if they had to personally borrow from others to do so. In reliance on these representations, Plaintiff asserts that she invested in 235.

Plaintiff contends that the total amount raised in the offering at or prior to January 11, 1999 closing on the Property was not \$1.2 million. Instead of funding the shortfall in raising the \$1.2 million with their own funds, however, Plaintiff alleges that Liebman and Tepper borrowed \$499,000 from defendant Daniel Perla Associates, LP (Perla), at an interest rate of 14% per annum, mortgaged the Property, and thereafter used 235's funds to service the loan (the Perla Loan).

Plaintiff alleges that in December 1999, Liebman and Tepper prepared a "Confidential Private Placement Memorandum" (Private Placement Memorandum) with respect to the terms and conditions of the \$1.2 million offering to Outside Investors, which together with Defendants' representations to her, constitute a binding and enforceable contract between Plaintiff and 235, entitling her to 25.80% of the equity of 235 (Complaint, at 12). Plaintiff further alleges that 235 has breached that contract by treating her as a 10% equity holder, and that she is entitled to judicial declaration that she holds 25.80%, not 10%, of the equity of 235. In the fourth cause of action, Plaintiff seeks the same declaration based on a misrepresentation theory.

In the third cause of action of the Complaint, Plaintiff alleges that Defendants later sold certain units in 235, owned by Management, at a \$50,000 premium. Plaintiff alleges that notwithstanding that she holds a 21.43% membership interest in Management, Defendants took the \$50,000 premium for themselves and did not share it with her, and that she has thus incurred damages of \$10,715 (\$50,000 x .2143).

In the seventh and eighth causes of action of the Complaint, Plaintiff alleges that Liebman and Tepper did not give to 235, or distribute to its owners, \$150,000 that was held in escrow, and later returned to them by the Property's first mortgagee. Instead, Plaintiff alleges that Defendants kept the money, and/or used it for the benefit of other persons or entities unrelated to 235. Plaintiff seeks an accounting and damages.

In the ninth cause of action of the Complaint, Plaintiff alleges that when Liebman and Tepper raised money from her, they promised that they would make up any shortfall in the \$1.2 million to be raised through the offering with their own funds knowing that they did not intend to do so. Plaintiff contends that Liebman, Tepper and Perla intentionally concealed from her, and the other 235 unitholders, that they would not use their own funds to cover the shortfall, but would instead use 235 to service the Perla Loan, and the Property to secure it. Plaintiff alleges that these representations and omissions were material, and made by Defendants to deceive Plaintiff, and that she and the other 235 unitholders were deceived and injured by them. Plaintiff seeks \$250,000 in compensation for damages.

*3 In the eleventh cause of action of the Complaint, Plaintiff claims that Defendants did not pay to her a portion of funds from a refinancing on the Property, effected in December 2003, that she was promised pursuant to a memorandum dated January 4, 1999 (the January 4, 1999 Memorandum).

In the twelfth cause of action, Plaintiff claims that she is entitled to dissolution of 235 and Management pursuant to New York Limited Liability Company Law (LLCL) § 702.

In the thirteenth cause of action of the Complaint, Plaintiff claims that she is entitled to an annual minimum distribution from 235 of \$40,000, that Liebman and Tepper have wrongfully withheld these distributions, and that she is thus entitled to damages of \$40,000, plus interest, from the date that each distribution should have been made.

In the fourteenth cause of action, plaintiff alleges that at the time of the closing on the Property, Liebman, Tepper and non-party Kinsey did not give Plaintiff her 21.43% share of a \$75,000 distribution made by Management.

It is undisputed that on December 8, 1998, Liebman, Tepper and Kinsey formed 235 and executed an operating agreement (The First 235 Operating Agreement), which provides that each of the three has a one-third membership interest in 235. On December 29, 1998, Liebman, Tepper and Kinsey formed Management to serve as the managing member of 235. At that time, Liebman, Tepper and Kinsey also prepared and signed an operating agreement for Management (The Management Operating Agreement). The Management Operating Agreement provides that Plaintiff has a 21.43% membership interest in Management, with the remaining

aggregate interest in the LLC divided equally among Liebman, Tepper, and Kinsey (26.19% each).³

Liebman gave Plaintiff the January 4, 1999 Memorandum, mentioned in the eleventh cause of action of the Complaint. On January 11, 1999, 235 closed on the Property and at about that time, Plaintiff transferred \$400,000 into an account controlled by 235. Thereafter, over time, over 20 others, whose interests have been recorded in 235's books, invested \$800,000 for the remaining equity units in 235.

On a date not specified, but after Plaintiff's investment and the purchase of the Property, Liebman swears that an operating agreement for 235, dated October 20, 1999 (The Second 235 Operating Agreement), was circulated to all members of 235 who, except for Plaintiff, executed it by signing a signature page entitled "Adoption of Limited Liability Company Agreement for 235" (the Adoption Form). The Adoption Form states a specific membership interest in units, and by signing it, the signer confirms that he or she has acquired that number of units. Despite Defendants' requests that she do so and, Liebman swears, their inquiries as to whether Plaintiff was in or out of the deal, Plaintiff declined to sign the Second 235 Operating Agreement.⁴ At her examination before trial (EBT), Plaintiff testified that she has refused to sign The LLC's operating agreements because they do not reflect the terms upon which she agreed to invest. Since 1999, the books and records of 235 and Management reflect that Plaintiff has had 10% and 21.43% ownership interests, respectively, in The LLCs. As Management is the 70% owner of 235, a 21.43% interest in Management is a 15% interest in 235 (.70 x .2143). Also undisputed is Liebman's sworn statement that Plaintiff has received and filed tax returns using IRS K-1 schedules (K-1s) issued by The LLCs that reflect the membership interests described above, and that she has received and cashed distribution checks from 235 calculated on that basis.

*4 To meet their burden on summary judgment, Liebman swears that he discussed the investment project with Plaintiff prior to her investment and provided to her a memorandum outlining potential terms, were she to make a \$350,000 investment. Liebman further swears that because Plaintiff requested more equity in consideration of a larger investment, he gave her the January 4, 1999 Memorandum, which reflects the terms of her \$400,000 investment. Liebman swears that Plaintiff invested \$400,000 in 235 on or about January 11, 1999.⁵

According to Liebman, the January 4, 1999 Memorandum confirms that Plaintiff was promised 25% of the deal. This 25% interest, Liebman states, is represented by Bobrow's 10% interest as a unitholder of 235, and her 15% interest in 235 through Management. Liebman submits copies of excerpts from The LLCs' books and records, which he states have recorded these interests since 1999.

Liebman also swears that when it was completed, although he does not provide the date it was completed, but only the date the financial projections therein were finalized, December 11, 1998, he gave Plaintiff a copy of a prospectus, which he states was prepared to solicit investor interest (the Prospectus). The Prospectus is briefly mentioned in the January 11, 1999 Memorandum.

Liebman further swears that because Plaintiff later refused to sign the operating agreements for The LLCs, notwithstanding that they made repeated requests for her to do so, Defendants did not know whether Plaintiff was or was not "in the deal" and, in what he characterizes as "the absence of any ... subscription" for her interest, whether to treat her as a member or a lender (Liebman Aff., 19). Liebman does not specify when these refusals or requests were made, but submits a March 4, 2002 letter to Plaintiff's counsel requesting that she sign The LLCs' respective operating agreements.

In opposition to the Defendants' motion, and in support of her own, Plaintiff swears that in and around December 1998, Liebman and Tepper told her that they were raising \$1.2 million for the purchase of the Property, which they led her to believe would represent one-third of the monies Defendants were actually raising from Outside Investors for the purchase of the Property. Plaintiff also swears that she was "led to believe" that, in return for her investment of one-third of the total \$1.2 million Offering, she would receive one-third of the underlying equity in the Property (33%), not one-third of the 30% of the equity offered to Outside Investors (10%).

Plaintiff states that she was informed by the individual Defendants that, to the extent that there would be any "shortfall" in raising the \$1.2 million from Outside Investors for the purchase of the Property at closing, Liebman and Tepper would fund it themselves through either investing in or, at their own expense, lending money to 235. Plaintiff contends that unbeknownst to her at the time of the closing on the Property, only \$35,000 was raised from other investors, and her \$400,000 investment was approximately 92% of the

total \$435,000 raised, and virtually all of the money “at risk” at closing.

*5 Plaintiff states that, instead of investing their own funds in 235, or loaning the company the money to cover the shortfall in raising the \$1.2 million dollars at the time of closing, Defendants borrowed \$499,000 from Daniel Perla Associates, LP, encumbered the Property with a Mortgage, and used 235's funds to service the Perla Loan. Thus, Plaintiff swears, because Tepper and Liebman did not live up to their word, 235's funds were used to fund their personal obligations, causing the company to waste tens of thousands of dollars.

Plaintiff states that she received the January 4, 1999 Memorandum from Defendants at or around the time that she invested the \$400,000 with them, and that it outlines what the Defendants concede was allotted to her for her investment. Plaintiff further states that “[a]s it turned out (and presumably to appease me since I told them that I should receive one-third of the entire deal since my investment was, by far, the largest single investment in the Syndication and was the first monies in’), I was allotted an additional 21.43% of Management” (Pl.Aff., ¶ 7). According to Plaintiff, the 21.43% interest in Management demonstrates that she received, at minimum, a 15% indirect ownership interest in the Property, and a total of 25% of the total equity of the deal. Plaintiff states that the January 4, 1999 Memorandum also confirms that Liebman and Tepper agreed that she would receive the eight, nine, and ten percent returns indicated therein and, based on the 25% equity interest in the Property allotted to her, 25% of the proceeds from the refinancing of a loan on the Property. Plaintiff states that the terms of her agreement are, to some extent, supported by the Prospectus, which provides that the total offering to Outside Investors was \$1.2 million, and recites the terms of her “priority return,” but which she first saw only years after making her investment.

Plaintiff swears that months after both the closing on the Property and the solicitation of her funds, Liebman and Tepper apparently prepared drafts of, but never completed, the Private Placement Memorandum setting forth the terms of the Project. Plaintiff states that neither she nor the other investors received a copy of the Private Placement Memorandum, but that its contents support the eight, nine and ten percent annual returns to which she claims entitlement. Plaintiff states that the Private Placement Memorandum also supports her contention that Defendants promised that they would themselves make up any shortfall in obtaining the \$1.2

million outside funding because it states that if all of the 35 units were not sold to Outside Investors, and the full \$1.2 million not raised, the Managing Member would “purchase the balance of the units” or “lend to the Company the balance of the proceeds to complete the Offering” (Pl. Aff., at 15). Although Plaintiff quotes from this document, and despite that it appears to have been produced at Liebman's EBT, she has not submitted a copy of it, or a reason for not submitting it.

*6 Plaintiff states that while she has not signed The LLCs' operating agreements, because they do not reflect what she believed to be her percentage ownership in The LLCs, she has never indicated that she was not a member of the two companies. Prior to her commencement of this action, Plaintiff maintains, Defendants did not seriously take the position that she was not a member of, or holder of an equity interest in, the Property.

The Defendants' Motion

The Defendants move for summary judgment on their claim for a declaration that Plaintiff is not a member of The LLCs. In order to obtain summary judgment, the movant must establish its claim sufficiently to warrant a court's directing judgment in its favor, as a matter of law, through the tender of admissible evidentiary proof (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Where the movant meets its burden, the party opposing the motion must set forth admissible evidentiary proof in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 N.Y.2d at 562).

Defendants state that they “expanded” membership in 235 by preparing and circulating to its members the Second 235 Operating Agreement, which provides that

“the Members other than the Managing Member shall contribute to the capital of the Company a total of \$1,200,000 which shall be subscribed for in units of \$34,285.71, or such other amounts as the Managing Member may elect to accept. Each \$34,285.71 unit (or proportionate part thereof with respect to units of a lesser amount (hereinafter, “Units”)) shall be subscribed for and contributed by each Member in cash or by check upon execution of this Limited Liability Company Agreement.”

(Liebman Aff., Exh. E, ¶ 6). With the agreement, Defendants state that they also annexed a copy of the Adoption Form (*supra*, at 6).

Defendants argue that New York's Limited Liability Company Law (the LLCL) §§ 417 and 602 require execution of and compliance with a limited liability company's (LLC) operating agreement as a prerequisite to membership. They further argue that they are entitled to a declaration that Plaintiff did not become a member of 235 or Management under the LLCL because after their preparation and circulation of The LLCs' respective operating agreements to her, their requests that she sign, and their inquiries to her as to whether she was in or out of the deal, Plaintiff has not signed the Adoption Form or the Management Operating Agreement. Defendants thus advocate characterizing the \$400,000 Plaintiff tendered to 235 as a loan, the unwinding of what they label as her "purported investment," and the return to her of \$400,000, with interest, and minus prior distributions, and the dismissal of her claims for lack of standing. Plaintiff argues that there is nothing in the LLCL that makes status as a member in an LLC dependent upon the execution of the operating agreement, and that numerous documents, including tax forms and schedules, prepared by Defendants and transmitted to Plaintiff confirm her 25% equity interest in The LLCs, and demonstrate her status as a member of both of them. Consequently, Plaintiff argues, Defendants have acknowledged her membership status through their conduct, and should not now be permitted to cash out, at cost, her valuable equity interest in the Property.

*7 In support of their motion, Defendants rely on LLCL §§ 417(a), 602(a)(2) and 602(b)(1). LLCL § 417(a) provides that members "shall adopt a written operating agreement," but it does not require that they adopt one that does not accurately reflect their ownership interest.⁶ In fact, there is no penalty in the LLCL for a member's failure to adopt an operating agreement (*see Villi v. O'Caining-Villi*, 10 Misc.3d 1060(A) [Sup Ct, Westchester County 2005]; *Matter of Spires v. Lighthouse Solutions, LLC*, 4 Misc.3d 428, 431 [Sup Ct, Monroe County 2004]; *see also Merrell-Benco Agency, LLC v. HSBC Bank USA*, 20 AD3d 605,607 [3d Dept 2005]). In addition, because LLCL § 417(a)'s plain language speaks of a "member's" adoption of the LLC's operating agreement, the statute merely provides that those that are members shall adopt an agreement, not that its fulfillment is a prerequisite for membership.

Defendants' reliance on LLCL § 602(a)(2) is also unpersuasive. That provision concerns no more than the date upon which a member becomes a member.⁷

LLCL § 602(b) provides that a person may become a member of an LLC on the effective date of the initial articles of organization, in the case of initial members (White, 5 N.Y. Business Entities ¶ L602.01 [14 ed]).⁸ After such filing, others may be admitted to the LLC as members; such admission, however, requires compliance with the LLC's operating agreement (LLCL § 402 [c]; LLCL § 602; White, 5 N.Y. Business Entities ¶ L602.01]). Where the operating agreement makes no provision for the admission of new members, however, a member may be admitted on receiving the vote or written consent of a majority in interest of the members (LLCL § 402[c]; LLCL § 602; White, 5 N.Y. Business Entities ¶ L602.01). In other words:

"The operating agreement may set forth the requirements for membership. A person becomes a member of an LLC (i) upon formation of the LLC, [or] (ii) after formation either by acquiring the membership interest directly from the LLC or by assignment or transfer from an existing member.... The operating agreement may specify what percentage of membership interests must approve the issuance of an interest to a non-member, and absent such specification, a majority in interest of the members is required to approve the issuance."

Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, § 6(A), 2007 Pamph, at 19–20). Thus, Defendants' argument that the preparation and circulation for signing of an operating agreement is dispositive as to whether or not a person is a member under the LLCL is not supported by the statute. That Defendants executed the agreements or their own adoption forms does not change this.⁹

In addition, Liebman swears, and Defendants' position is, that the terms of the parties' agreement are contained in the January 4, 1999 Memorandum. Defendants also advance this position in their Rule 19–a Statement.¹⁰ The Second 235 Operating Agreement states that it is "made as of October __, 1999," approximately 10 months after Defendants claim that the parties made their agreement. As Defendants' position is that the January 4, 1999 Memorandum states the terms pursuant to which Plaintiff made her investment and they accepted her money, their attempt to make the Second 235 Operating Agreement a required subscription agreement,

where the January 4, 1999 Memorandum does not mention that document is unpersuasive.

*8 Furthermore, the First 235 Operating Agreement permits the three initial members of the company to take actions without a meeting. Defendants' position is that the January 11, 1999 Memorandum states the terms of Plaintiff's investment, and Defendant Liebman swears that the true and correct copies of excerpts that Defendants submit from The LLCs' books and records, which they are required to keep pursuant to law (LLCL § 1102),¹¹ record Plaintiff as holding a 10% unitholder interest in 235 and a 21.43% interest in Management since 1999. Moreover, according to Defendants, Plaintiff received and filed tax returns using K-1s, issued by The LLCs, which reflect the interests described above, as well as distribution checks, from The LLCs, calculated on the basis of 10% unitholder interest in 235 and the 21.43% interest in Management. The Prospectus, upon which Defendants rely, describes the investment interests made by those who contributed the \$1.2 million dollars in outside funds to 235 as membership interests. Defendants' submissions thus support Plaintiff's claim of a 10% and 21.43% membership interest in The LLCs. In fact, based on the Defendants' provision to her of the K-1s, Plaintiff argues for an estoppel against Defendants' assertion that she is not a member.

As to Management, the factual position taken by the Defendants is that the parties agreed that Plaintiff was to have an ownership interest in that LLC, and, according to the documentation they have submitted, she was an initial member.¹² Defendants point to nothing in the LLCL that would support the unwinding or effective forfeiture of Plaintiff's interest in Management.

Thus, the only evidence that Defendants have submitted demonstrates that Plaintiff is an owner, and the file of the New York County Clerk in this matter (*Bobrow v. Liebman*, Index No. 601132/04) reveals that Defendants admitted in a previous Rule 19-a response that Plaintiff "is the owner (directly or indirectly) of a 25% economic interest in the total equity of 235," indicating that the position that Defendant have taken in this action is that Plaintiff is an owner.¹³ The owners of an LLC are its members (*see Willoughby Rehabilitation and Health Care Center, LLC v Webster*, 13 Misc.3d 1230(A) [Sup Ct, Nassau County 2006] ["A limited liability company is hybrid business entity having attributes of both a corporation and a partnership. Its owners are its members"]; *Landa v. Herman*, 9 Misc.3d 1125(A) [Sup

Ct, N.Y. County 2005] ["An LLC combines the corporate limitation on personal liability of the owners (who are called 'members') with the partnership's operating and management flexibility by its members ..."] (internal quotation marks omitted); *cf Exchange Point LLC v. United States Securities and Exchange Commission*, NYLJ, June 17, 1999, at 36, col 6 [SD NY, Schwartz, J.] ["[r]ather than having general partners and limited partners as a limited partnership does ... the owners of a Delaware LLC are designated as members"].¹⁴ On this record, Defendants have not demonstrated entitlement to a declaration that, pursuant to the LLCL, Plaintiff is not now and has never been a member (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]).

*9 In their alternative argument, to dismiss the first and fourth causes of action of the Complaint, Defendants argue that the record, including the Prospectus, the January 4, 1999 Memorandum, and The LLCs undisputed books and records, establish that Plaintiff received precisely the interests to which she is entitled, and that there is no evidence to support Plaintiff's assertion that she did not receive what she was promised, or that Liebman and Tepper took an interest in 235 or Management improperly (Def. Moving Memo. of Law, at 10).¹⁵ Furthermore, as previously discussed, there is no dispute that Defendants have recorded Plaintiff's interest as a membership interest in 235's books and records, and that prior to the commencement of this suit, Plaintiff received the economic benefits of those interests.¹⁶ Consequently, Defendants argue that the evidence conclusively establishes that Plaintiff has received all the percentage interest in 235 to which she is entitled, and that the books and records of The LLCs further establish that Plaintiff received those interests.¹⁷

In opposition, Plaintiff argues that there is a material issue of fact concerning the terms of her agreement and her understanding with Defendants Liebman and Tepper under which she invested \$400,000. Plaintiff swears that she was "led to believe" that she would receive one-third of the underlying equity in the Property, and not one-third of the 30% share of the entity that was sold to the Outside Investors, that is, a 10% in the underlying equity (Pl.Aff., ¶ 7). She further swears that Defendants "led [her] to believe" that her \$400,000 investment would represent one-third of the monies defendants were actually raising from Outsider Investors for the purchase of the Property (*id.*, ¶ 6).

At summary judgment, the non-moving party must lay bare her proofs (*Corcoran Group, Inc. v. Morris*, 107 A.D.2d 622 [1st Dept], *aff'd* 64 N.Y.2d 1034 [1985]). Although Plaintiff swears that Defendants led her to believe that she could be getting a one-third of the underlying equity in 235 East 4th Street, purchased by 235, in exchange for \$400,000, she does not so much as state a specific representation made to her by any defendant prior to her investment. Instead, Plaintiff argues that documents she never saw before tendering the \$400,000, for example, the Private Placement Memorandum, which she has not provided, and the Prospectus, confirm a representation she never actually states was made by the Defendants.¹⁸

At this juncture, plaintiff may no longer merely conclude or allege that she was led to believe something, as unsubstantiated or bald conclusory allegations or assertions, even where believable, and shadowy semblances of an issue will not suffice to defeat summary judgment (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 [1974]; *Zuckerman v. New York*, 49 N.Y.2d at 562). In other words, Plaintiff needs to have stated here the representations which she claims were misleading, and upon which she relied. She does not do so.¹⁹ Thus, her assertions are devoid of evidentiary facts and insufficient to defeat summary judgment (*Grullon v. City of New York*, 297 A.D.2d 261, 263–264 [1st Dept 2002]).

*10 As Plaintiff has not submitted any admissible evidence that any defendant made a representation to her that she would receive one-third of the equity in the Property, reliance cannot follow. In addition, she cannot claim justifiable reliance where, through the exercise of ordinary diligence, she could have obtained information about potential “cash” contributions made by other investors or members before the closing.

Finally, Plaintiff argues that her percentage ownership interest in the property should be adjusted to give her the full benefit of her bargain. Fraud damages, however, are not intended to provide a victim with “benefit of the bargain damages,” and are limited to indemnifying the injured party for the actual losses sustained, that is, “out-of-pocket” damages (*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 [1996]; *164 Mulberry Street Corp. v. Columbia University*, 4 AD3d 49, 60 [1st Dept 2004] [“compensatory damages are limited to provable pecuniary losses correlating with out-of-pocket losses” (internal citations omitted)]), and a victim of fraud may not recover the benefit of an

alternative agreement overlooked in favor of the fraudulent one (*Kensington Publishing Corp. v. Kable News Co.*, 100 A.D.2d 802, 802 [1st Dept 1984] [stating that victim of fraud may not recover the benefit of an alternative agreement overlooked in favor of the fraudulent one]).

Plaintiff's contract claim for a larger equity interest fares no better. Defendant Liebman swears that plaintiff tendered the \$400,000 based on the terms contained in the January 4, 1999 Memorandum. In opposition, plaintiff does not provide admissible evidence of a promise made to her by any of the Defendants that she would receive one-third of the equity in the Property in exchange for \$400,000. Plaintiff's subjective beliefs about the interest she should have received are not a substitute for specific terms of an agreement.

In addition, in her opposition papers and at oral argument, Plaintiff explains that her claim is that having taken virtually all of the economic risk of the deal, her ownership percentage in the deal should be adjusted. The agreement the parties have, however, is the one they made, and not one that a party, or a court, believes they would have made with better knowledge of the facts, as it is hornbook law that a court cannot fashion an agreement for parties into which they did not themselves enter.²⁰ Accordingly, crediting Plaintiff's statement that she incurred additional risk (*S.J. Capelin Associates*, 34 N.Y.2d at 342), to the extent that she could prove the value of such damages at trial, her remedy would be for money damages only.

On reply, Defendants raise a statute of frauds argument based on the alleged oral agreement. The Complaint makes clear that Plaintiff asserts an oral agreement concerning her interests in the LLC. Defendants did not advance a statute of frauds defense in their moving papers, and the amended answer does not contain a statute of frauds defense. On a summary judgment motion, arguments advanced for the first time in reply papers are entitled to no consideration (*Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 [1st Dept 1998]). Moreover, the statute of frauds must be pled as an affirmative defense. Defendants have not sought to amend their answer, and the failure to plead the statute of frauds as an affirmative defense is deemed a waiver of the affirmative defense (CPLR 3211(e); *23/23 Communications Corp. v. General Motors Corp.*, 257 A.D.2d 367, 367 [1st Dept 1999]; *Gottlieb v. Gurrieri*, 5 Misc.3d 1004(A) [Sup Ct, Nassau County 2004]).²¹

*11 So at this juncture, Plaintiff maintains that she has at least the 10% and 21.43% membership interests in 235 and Management respectively, but her claim for a greater interest in those entities fails, while Defendants, unpersuasive in their efforts to “unwind” Plaintiff’s interests pursuant to the LLCL or in light of their conduct over the years on behalf of The LLCs, seek to limit Plaintiff to precisely the same interests. In the first and fourth causes of action, Plaintiff requested a declaration. Where no question of fact is raised, but only a question of law or statutory interpretation is presented on a motion to dismiss a declaratory judgment action, the court may render a determination and declare the rights of the parties (*Spilka v. Town of Inlet*, 8 AD3d 812, 813 [3d Dept 2004]). In addition, where a party is unsuccessful in a declaratory judgment action, the determination should not be a judgment of dismissal, but rather the appropriate declaration of the rights of the parties (*Lanza v. Wagner*, 11 N.Y.2d 317, 222 [1962]). Defendants’ request for dismissal of the first and fourth causes of action of the Complaint is thus granted, and Defendants are entitled to a declaration that Plaintiff is a member of The LLCs, at the respective 10% and 21.43% ownership interests described above.²²

Defendants move to dismiss the seventh, eighth and ninth causes of action of the Complaint. As previously discussed, in the seventh and eighth causes of action, Plaintiff seeks an accounting and the return of certain mortgage escrow proceeds in the amount of \$150,000, which Plaintiff alleges Liebman and Tepper took for themselves or others, that should have gone to 235, or been distributed to 235’s owners. In the ninth cause of action, Plaintiff alleges that, as part of their scheme to obtain a larger equity interest in the property, prior to making her investment, Liebman and Tepper knowingly misrepresented to her that they would make up the shortfall in the offering with their own funds, knowing that they would instead use 235 to service the Perla Loan.

In their moving papers, neither Liebman nor Tepper’s affidavits address the Perla Loan, or the \$150,000 discussed in the seventh and eighth causes of action in their respective affidavits. In fact, the Defendants merely address the seventh and eighth causes of action by referring to my earlier decision on the motion to dismiss, and otherwise do not address the Complaint, or tender sufficient evidence to eliminate any material issues of fact from the case (*Winegrad*, 64 N.Y.2d at 853). Regardless of the sufficiency of the opposition papers, failure to make a prima facie showing requires denial of the motion (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324

[1986]). Accordingly, Defendants’ motion to dismiss the seventh and eighth causes of action of the Complaint is denied.

As to the ninth cause of action, in support of their motion, Defendants point to the Prospectus and a memorandum from Liebman to Kinsey and Tepper, and argue that their documents conclusively establish that the Perla Loan had been contemplated and confirmed as early as November 1998 (Def. Memo. of Law, at 11). They also state that the Prospectus supports their position that the Defendants only received the “sweat equity” interests to which they were entitled. Where Plaintiff alleges that, knowing it was untrue, Defendants represented to her that they intended to use their own funds to cover any shortfall in raising the \$1.2 million dollars for closing on the property, in order to obtain her investment funds, a demonstration that Defendants did not intend to use their own funds, does not dispose of factual issues.²³ In addition, that the Prospectus may support Defendants’ position is not dispositive.

*12 A different result is found where Defendants submit Plaintiff’s EBT testimony that she could not, in hindsight, determine whether or not she would have invested in the project had she known about the Perla Loan and mortgage, and indicates that she merely would not have “acquiesced” to its terms. To prevail on a misrepresentation claim, a party must demonstrate that she relied on a false representation made by the Defendants (*see Lama Holding Co.*, 88 N.Y.2d at 421). Plaintiff’s EBT testimony demonstrates that she cannot establish a requisite element of her claim. Plaintiff does not contend otherwise, but instead asserts that Defendants Liebman and Tepper, as managers of 235, have violated LLCL § 409, in that they have breached a fiduciary duty to 235 by using its assets for their own purposes.

The claim plaintiff asserts here, which speaks to an injury to the company, is a derivative action; recovery would belong to 235, not Plaintiff. Plaintiff has not brought her claim as a derivative action, and may not, on summary judgment, transform a fraudulent misrepresentation claim into a breach of fiduciary duty claim, and a direct claim into a derivative one. As Plaintiff raises no other argument in opposition, the ninth cause of action of the Complaint is dismissed.

Defendants move for summary judgment on the twelfth cause of action for dissolution of the company. LLCL § 702 provides that:

“On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”

In support of their motion, Defendants point to Plaintiff's EBT testimony that she does not seek dissolution of 235, and knew of no reason to believe that the company is either failing financially, or cannot function as intended. As Plaintiff is not the movant, and does not run 235, her knowledge about its financial or operational state is irrelevant. As Plaintiff also testified that she does not seek dissolution of 235, however, and does not oppose Defendants' motion, the motion is granted, and the twelfth cause of action of the Complaint is dismissed.

The Plaintiff's Motion

Plaintiff moves for summary judgment on the third, eleventh, thirteenth and fourteenth causes of action of the Complaint. Plaintiff states that Defendants concede that the January 4, 1999 Memorandum contains the terms of her investment, and seeks certain distributions and payments outlined in her Complaint. Defendants contend that Plaintiff must establish that she is a member before she is entitled to any distributions. They also claim that there are triable issues of fact relating to Plaintiff's alleged failure to cooperate with the Property's refinancing and that Plaintiff has already made a summary judgment motion, which I determined was premature. Without explanation, Defendants argue that the motion is still premature, but do not point to or even assert that there is outstanding discovery.

*13 While “[m]ultiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause” (*Flomenhaft v. Fine Arts Museum of Long Is.*, 255 A.D.2d 290 [2d Dept 1998] [internal quotation marks and citations omitted]; see *Giganti v. Town of Hempstead*, 186 A.D.2d 627, 628 [2d Dept 1992]), a subsequent summary judgment motion may be properly entertained when “it is substantively valid and [when] the granting of the motion will further the ends of justice while eliminating an unnecessary

burden on the resources of the courts” (*Detko v. McDonald's Rests. of NY*, 198 A.D.2d 208, 209 [2d Dept 1993]).

Early on in this action, Plaintiff moved for summary judgment on the eleventh cause of action of the Complaint, in response to Defendants' pre-answer motion to dismiss. I denied the motion at that early juncture because the parties had not had an opportunity to conduct discovery concerning Defendants' contentions regarding possible offset to Plaintiff concerning the refinancing proceeds. There is now no dispute that discovery is complete, and determining Plaintiff's motion will aid judicial economy.

Regarding her motion for summary judgment on the eleventh and thirteenth causes of action, Plaintiff argues that her affidavit demonstrates that there is no genuine issue of fact with respect to her right to receive a pro rata share of the mortgage refinance proceeds of \$152,816 and her preferred “priority return” of 10% per annum, and that her motion should be granted because Defendants have not seriously disputed her right to these monies.

In her affidavit, Plaintiff swears that Defendants' obligation to pay these monies to her are set forth in the documents which formed the basis for her initial investment,²⁴ and that the January 4, 1999 Memorandum, which Defendants gave to her, confirms that she was entitled to a proportionate share of the proceeds in the amount of \$152,816. Regarding the refinancing, the January 4, 1999 Memorandum states that “[a]ny refinance proceeds will be split equally, 50% to the limited partners and 50% to the general partners.” In paragraph 30 of her Rule 19—a statement, Plaintiff states that the refinance generated \$152,816 that belongs to her pursuant to the terms of the parties' agreement.

Defendants do not dispute Plaintiff's contentions (see Def. Rule 19—a Resp.), but merely assert that Plaintiff is not entitled to distribution of these funds to her where she had not demonstrated that she is a member. As the issue of Plaintiff's membership interest has been resolved,²⁵ and where Defendants rely on the January 11, 1999 Memorandum as a statement of the terms of the parties' agreement, and Plaintiff does the same, there is no issue of fact and Plaintiff's motion is granted.

The situation concerning the thirteenth cause of action of the Complaint is similar. The January 4, 1999 Memorandum also provides for the distributions, and Defendants provide no admissible evidence to demonstrate that Plaintiff is

not entitled to them. Accordingly, Plaintiff is also granted summary judgment on the thirteenth cause of action.

*14 Concerning the third cause of action, Plaintiff points to her affidavit, in which she swears that she is the holder of a 21.43% membership interest in Management and states that there is no dispute that following the closing, Liebman and Tepper caused the transfer of approximately \$75,000 from 235 to Management, and also caused Management to sell certain of the units at a premium and split the \$50,000 profit between them. To support her contentions concerning these transactions, Plaintiff cites to spreadsheets entitled "Recap of Fees Owed," appended as exhibits to her affidavit. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Finkelstein v Cornell University Medical College*, 269 A.D.2d 114, 117

[1st Dept 2000] [citation omitted]) and "failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 N.Y.2d at 853 [citation omitted]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324). Plaintiff's statement that Liebman and Tepper caused the transfer of \$75,000 to Management, and her citation to documents for which she has neither provided foundation nor explanation are insufficient to meet her summary judgment burden. Accordingly, Plaintiff's motion for summary judgment on the third and fourteenth causes of action of the Complaint is denied. The parties are directed to settle an order and judgment in accordance with the foregoing opinion.

Parallel Citations

15 Misc.3d 1121(A), 839 N.Y.S.2d 431 (Table), 2007 WL 1139417 (N.Y.Sup.), 2007 N.Y. Slip Op. 50795(U)

Footnotes

- 1 Notwithstanding that Management is the plaintiff in the second action, for convenience, "Defendants," refers to 235, Liebman, Tepper, Perla, Daniel Perla Associates, LP, and Management collectively.
- 2 "The LLCs" refers to 235 and Management together.
- 3 Liebman and Tepper later bought out Kinsey's interest in Management.
- 4 Liebman swears that "inasmuch as 235 Management contemplated that Ms. Bobrow would become a 21.43% member of it, Tepper, Kinsey and I also sent her an [Adoption Form] for her to confirm her membership in ... Management" (Liebman Aff., ¶ 15).
- 5 The January 4, 1999 Memorandum states that in exchange for the \$400,000 investment, Plaintiff would receive "a limited partnership interest which will represent 10% ownership in the total deal" and that such interest would entitle her to "receive your share of the greater of 30% of the net cash flow or an annual preferred return on investment" of eight percent in the first year, nine percent in the second year, and 10% thereafter. The January 4, 1999 Memorandum also provides that Plaintiff would receive, as a bonus, "a general partnership interest which will represent an additional equity interest of 15%. Therefore, your total equally [*sic*] interest will be 25.00% ..." (*id.*). In addition, the January 4, 1999 Memorandum provides that any refinance proceeds were to be split equally, 50% to the limited partners and 50% to the general partners. (*id.*).
- 6 As Plaintiff's counsel pointed out at oral argument, employing Defendants' reasoning, they could have drafted an agreement stating that Plaintiff has a 2% interest, and Plaintiff would not have recourse for refusal to sign (Tr., at 33).
- 7 LLCL § 602(a)(2) provides that:

"[a] person becomes a member of a limited liability company on the later of: (1) the effective date of the initial articles of organization; or (2) the date as of which the person becomes a member pursuant to this section or the operating agreement; provided, however, that if such date is not ascertainable, the date stated in the records of the limited liability company.

11LLCL § 602(b)(1) provides that:

"[a]fter the effective date of a limited liability company's initial articles of organization, a person may be admitted as a member: (1) in the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the vote or written consent of a majority in interest of the members....
- 8 An LLC must have at least one member at the time of its formation (LLCL § 203).
- 9 Perhaps as part of their attempt to characterize the parties' transaction as a demand loan, Defendants state that because, at some unspecified time after she transferred the \$400,000, they asked her whether or not she was in the deal. Nothing in the LLCL or contract law supports the contention that asking a party to sign a written agreement after a deal is struck changes the position of the contracting parties. As Defendants state that their agreement with Plaintiff was that she would have the interest specified in the

- January 4, 1999 Memorandum, implicit in such an agreement is that any later written agreement drafted reflect the bargain struck. Thus, this dispute is properly framed as one over the terms under which Plaintiff agreed to invest \$400,000 in 235.
- 10 Plaintiff, while stating that her "PLAINTIFF'S RULE 19-A STATEMENT" is "with respect to defendants' motion for partial summary judgment," disregards Rule 19-a (c) which states that "each numbered paragraph in the statement of material facts ... will be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party." While sufficient as her own Rule 19-a statement, this document is not acceptable as a response to the Defendants' Rule 19-a statement.
- 11 Section 1102 of the LLCL requires that an LLC maintain a current list of the full names and addresses of the members, together with the contribution and the share of profits and losses of each member or information from which such share can be derived.
- 12 The Management Operating Agreement, drafted by Defendants, specifies that "Additional Members may be admitted as provided by the Act" and it defines "Member" as including Plaintiff (*see Liebman Aff.*, Exh. D, at 1-2), which is evidence that Plaintiff is a member.
- 13 The LLCL also provides for the assignment of economic interests by members.
- 14 Using the vocabulary of partnership law, the various documents submitted by the parties describe the members' interests in Management as general partnership interests, and that of those who own units in 235 as limited partnership interests. The parties do not, however, dispute the meaning of these terms as they relate to the respective membership interests in The LLCs.
- 15 The memorandum to which plaintiff refers in the first cause of action of the Complaint is the Private Placement Memorandum which she has not submitted.
- 16 There is no dispute that since the commencement of this suit Defendants have placed distributions and other funds in an escrow account pending the outcome of this suit.
- 17 The Memorandum that Plaintiff describes in the Complaint as constituting part of the parties' binding agreement is not the January 4, Memorandum, but the Private Placement Memorandum.
- 18 Plaintiff provides only a letter from Liebman to Tepper, dated November of 1999 stating that a private placement memorandum would need to be drafted.
- 19 In addition, the statements in the Prospectus to which Plaintiff points are mere statements of future intent (*see Lanzi v. Brooks*, 43 N.Y.2d 778 [1977]).
- 20 In addition, in her papers, as discussed, and at oral argument, Plaintiff argued that because the entire \$1.2 million was not raised at or before the time of closing, almost all of the cash at the time of the closing, and thus the risk of loss of the deal, was hers and that had she known that she would have negotiated for a better deal (*see Transcript*, at 22, 25-28). Assuming the truth of the Plaintiff's assertion that, although Defendants led her to believe that her \$400,000 would be one-third of the outside funds raised through the sale of units prior to the closing on the Property, her investment was a greater percentage interest, providing the declaration Plaintiff seeks, for a larger interest in 235, would require determination of what the agreement between the parties *might* have been had Plaintiff been made aware of the true circumstances.
- 21 No opinion as to the merits of this defense is reached. On another note, Defendants assert that the factual situation here is analogous to that described in *Pearlree Associates, LLC v. Naclerio* (303 A.D.2d 210 [1st Dept 2003]), which concerns an option agreement to purchase real property, but have not provided evidence to demonstrate that the agreement into which the parties entered was an option, as opposed to what Plaintiff appears to state was an executed agreement whereby she tendered cash in exchange for a specific interest in 235. Consistent with Plaintiff's position, is Defendants' position that the January 4, 1999 Memorandum states the terms of the deal.
- 22 Defendants request in their notice of motion "any such other and further relief as the Court deems just and proper" (Def. Not. of Motion, at 2).
- 23 Although Defendants request that I compare certain documents, it is not the role of a court on summary judgment to make such comparisons and/or to search through documents to postulate how and why they may support a party's arguments.
- 24 Plaintiff may not rely on the Private Placement Memorandum which she has not produced here.
- 25 In their Rule 19-a response, Defendants admit that if plaintiff is a member of 235, the refinance would have generated proceeds for her in the amount of \$152,816, and that those funds have been placed in an escrow account pending adjudication of their claims.

