SCAN

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BARBARA R. NIMKOFF AS EXECUTRIX OF THE ESTATE OF MARTIN B. NIMKOFF, DECEASED,

Plaintiff,

-against-

CENTRAL PARK PLAZA ASSOCIATES, LLC, DONALD MONTI, GERARD A. LEVI, ANNA ASSANTE AS EXECUTRIX OF THE ESTATE OF RALPH F. PARISI, BYRON H. TERK, MARIO FRACASSA, LAWRENCE J. PACERNICK, FREDERICK KAPLAN, WILLIAM CACCESE, JEFFREY GOODMAN, JEFFREY SHERWOOD, BERNARD POLATSCH, ILAN ISRAELI, STANLEY WEINREB, CHANCHAL SAHA, THOMAS SZULZ, RONALD C. RICHMAN, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4 and CONCORDE MANAGEMENT SERVICES, INC.,

Defendants.

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TRIAL/IAS PART: 11

NASSAU COUNTY

Index No: 5307/09
Motion Seq. No. 11
Submission Date: 4/13/18

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support, Affidavits in Support, Defendants' Rule 19-a Statement and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Pollet Affidavit and Exhibit.....x
Reply Affirmation in Support, Levi Affidavit in Support and Exhibit....x
Sur-Reply Affirmation.....x
Plaintiff's Counter-Statement Pursuant to Rule 19-a.....x

This matter is before the Court for decision on the motion filed by Defendants Central Park Plaza Associates LLC, Concorde Management Services, Inc., Donald Monti, Mario Fracassa, Frederick Kaplan, William Caccese, Ronald C. Richman, Jeffrey Goodman, Chanchal Saha and Anna Assante as Executrix of the Estate of Ralph F. Parisi ("Defendants") on

March 28, 2018 and submitted on April 13, 2018. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3212, dismissing Plaintiff's complaint in its entirety on the grounds that there are no material issues of fact that warrant trial, and that Defendants are entitled to judgment as a matter of law because there is no evidence that the failure to update the "Stated Value" of the "Building" was not in good faith, together with an award of attorney's fees.

Plaintiff Barbara R. Nimkoff as Executrix of the Estate of Martin B. Nimkoff, Deceased ("Plaintiff") opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in the prior decisions ("Prior Decisions") of the Court dated February 10, 2017 and August 15, 2017, and the Court incorporates the Prior Decisions by reference as if set forth in full herein. As noted in the Prior Decisions, the First Amended Complaint ("Amended Complaint") alleges as follows:

Plaintiff is legally authorized to bring this action on behalf of the estate ("Estate") of her deceased husband, Martin B. Nimkoff ("Nimkoff" or the "Deceased") pursuant to validly issued letters testamentary, and pursuant to New York Limited Liability Company Law ("LLCL") § 608. Defendant Central Park Plaza Associates LLC (the "LLC") is a New York limited liability company. Nimkoff was a member of the LLC, and had a 3.602% ownership interest until he passed away on April 15, 2004. The other individual defendants were at all relevant times members of the LLC with varying ownership interests in the LLC, which were as follows: Donald Monti ("Monti") (4.775%), Gerald A. Levi ("Levi") (6.551%); Ralph F. Parisi ("Parisi") (4.790%); Byron H. Terk ("Terk") (3.602%); Fracassa (11.546%); Pacernick (8.059%); Kaplan (4.400%); Caccese (3.439%); Jeffrey Goodman ("Goodman") (1.112%); Jeffrey Sherwood ("Sherwood") (4.690%); Bernard Polatsch ("Polatsch") (6.551%); Ilan Israeli ("Israeli") (7.113%); Stanley Weinreb ("Weinreb") (15.822%); Saha (3.696%); Thomas Szulz (" Szulz") (4.350%); and Richman (1.112%). Defendants John Does 1-4 represent those unknown members of the LLC that served on the LLC's management committee and managed the daily affairs of the LLC. Defendant Concorde Management Services, Inc. ("Concorde") is a New

York corporation.

A partnership known as Central Park Plaza Associates ("Partnership") was created by some or all of the members of the LLC in or about December 1982. The sole purpose of the Partnership was to own real property ("Property") known as 700-760 Old Country Road, Plainview, New York and to improve, manage, operate, lease, sell and mortgage or otherwise encumber the Property.

On April 16, 1991, the partners executed the Second Amended and Restated Partnership Agreement ("Partnership Agreement"). In or about June 1995, the partners, including Monti, Sherwood, Levi, Polatsch, Parisi, Terk, Nimkoff, Fracassa, Israeli, Pacernick, Weinreb, Kaplan, Saha, Caccese, Szulz,[1] Goodman, Polatsch and David Koretz ("Koretz" - now deceased) (collectively the "Members" and, when referred to without Nimkoff and Koretz, the "Defendant Members") 1) executed a conversion agreement to convert the interests of the partners in the Partnership into membership interests in a limited liability company, specifically the LLC; 2) caused a certificate of conversion of the partnership to the LLC to be filed with the New York Department of State; and 3) executed an Agreement governing the terms under which the LLC was to operate ("Operating Agreement"). Through the Operating Agreement, the Members expressly incorporated several provisions of the Partnership Agreement into the Operating Agreement. Under the Operating Agreement, a management committee ("Management Committee") that consisted of Monti and four other Members who were to be elected every three years, managed the daily business and affairs of the LLC.

The Operating Agreement contained a provision (Paragraph 10) concerning the death or expulsion of a member which reads as follows:

> The death, insanity, bankruptcy, retirement, resignation, or expulsion of any Member will cause a dissolution of the LLC unless, within 180 days after such event, the LLC is continued by the vote or written consent of a majority in interest of the Remaining Members. In the event the LLC is continued pursuant to vote or written consent of a majority in interest of the remaining Members in accordance with the previous sentence following the death or incompetence of a Member, then the terms and provisions of the Partnership Agreement relating to the death of incompetence of a Member shall be applicable to the LLC and its Members and are adopted herein as if fully set forth herein but made applicable to Members of

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[1] This defendant's name is spelled Thomas *Szulz* in the caption of the Amended Complaint but is spelled Thomas *Szulc* in the body of the Amended Complaint.

the LLC as opposed to Partners in the Partnership.

Plaintiff also cites Paragraph VIII of the Partnership Agreement which reads, in pertinent part, as follows:

> In the event of the death of any individual Partner...then and in any of those events, the Partnership shall purchase and the Estate of the Deceased Partner shall sell the interest of such Partner...to the Partnership on the following terms and conditions:
>
> The purchase price for such partner's interest...shall be equal to the greater of (i) the last Stated Value (as defined below) of the Partnership (to be agreed upon on an annual basis by the Partners) multiplied (a) in the case of an individual partner, by the deceased partner's percentage interest in the Partnership...The Stated Value shall be deemed to be the Partners' equity in the Property (and other assets if any owned by the Partnership) excluding all mortgages thereon and such amount shall be redetermined annually by the Partners on or about the anniversary date of the establishment of the then current Stated Value. In the event the Partnership shall fail to redetermine the Stated Value in any year, the Last stated value shall be controlling...
>
> Payment for such interest shall be made to the Estate of the Deceased Partners...as follows:...
>
> (iii) The balance of the Stated Value purchase price, if any, shall be paid in equal quarterly installments over a ten year period beginning at the end of the third full month after the six month period...together with interest at the lowest rate necessary to prevent an imputation of interest.

Plaintiff alleges that prior to June 1999, Sherwood filed for bankruptcy. The Defendant Members did not vote, or provide effective written consent of a majority in interest, to continue the LLC, within 180 days following Sherwood's bankruptcy. Accordingly, 180 days after Sherwood's bankruptcy, the LLC dissolved by the terms of the Operating Agreement. Plaintiff alleges that even if the Members voted to continue the LLC following Sherwood's bankruptcy, the LLC nonetheless dissolved.

On April 15, 2004, Nimkoff passed away. The Defendant Members did not vote, or provide written consent of a majority in interest, to continue the LLC, within 180 days following Nimkoff's death, or at all. Accordingly, 180 days after Nimkoff's death, the LLC dissolved by the terms of the Operating Agreement.

Plaintiff alleges that, under the LLC and the Operating Agreement, upon the dissolution, the Defendant Members were required to wind up the LLC by, *inter alia*, liquidating its assets, *i.e.*, selling the Property and paying to each Member, based on his ownership interest, his

proportionate share of the value of the Property, after paying creditors. In or about April 2008, the LLC sold the Property for $7 million. The Defendant Members received their proportionate share of the proceeds of the sale of the Property, but Nimkoff's Estate was never given its 3.602% proportionate share of the proceeds ("Proceeds") of the sale, amounting to $252,140. Instead of providing Plaintiff with Nimkoff's proportionate share of the Proceeds, the LLC took the position that the last Stated Value was calculated in early 2001 at $2,750,000 and that this allegedly "outdated" valuation (Am. Comp. at ¶ 40) was applicable in determining the purchase price at which the LLC should buy Plaintiff out under the Partnership Agreement. The Defendant Members and/or the Management Committee allegedly failed to update the Stated Value in 2002, 2003 or 2004 even though the LLC's attorney notified them, through a letter memorandum in February 2001, that they needed to update the Stated Value regularly for the purpose of properly compensating the estate of deceased members. The fair market value of the Property in 2001 was far less than its fair market value in 2004 but the Stated Value in the LLC's books did not reflect that fact.

The Amended Complaint contains nine (9) causes of action:

1) The Defendant Members and the LLC breached the Operating Agreement by refusing to provide the Nimkoff Estate with its proportionate 3.602% share of the Proceeds;

2) the Defendant Members, Management Committe and LLC breached their implied duty of good faith and fair dealing;

3) the Defendant Members and LLC breached their fiduciary duty of care and loyalty to Nimkoff and his Estate;

4) each Member of the Management Committee and the LLC breached their fiduciary duty of care and loyalty to Nimkoff and his Estate;

5) the Defendant Members, the LLC and the Management Committee breached their fiduciary duty to Plaintiff by failing to update the Stated Value annually;

6) the Defendant Members are liable for conversion of the Nimkoff Estate's right to possess 3.602% of the LLC;

7) the Defendant Members are liable for conversion of the difference between 3.602% of the 2001 Stated Value and the fair market value of the Property in 2004;

8) Concorde engaged in tortious interference by intentionally procuring the breach of the Operating Agreement; and

9) Concorde aided and assisted the Defendant Members and Management Committee's breach of their fiduciary duties to the Nimkoff Estate.

In support of the motion now before the Court, Defendants provide affidavits of Monti and Levy, as well as James T. Ashe ("Ashe"), a Certified Public Accountant. Monti submits that the allegations in the Amended Complaint are refuted by the controlling documents and deposition testimony, as they establish that Nimkoff was a party and signatory to all of the controlling documents which governed the amount and value of the buy-out of his membership interest upon his death, and contends further that his Estate is bound by the terms of those agreements.

Monti affirms that the terms of the original 1982 Partnership Agreement (Ex. 5 to Monti Aff. in Supp.) were superseded by various amendments, but the original and all amendments to the Partnership Agreement always anticipated that upon the death of a partner, the remaining partners would buy-out the decedent's partnership interest. A review of those agreements reveals that the purchase price of a deceased partner's interest was predicated on the last Stated Value multiplied by the individual deceased partner's percentage interest in the partnership..

As of the date of the Second Restated Partnership Agreement (Ex. 8 to Monti Aff. in Supp.), the Stated Value was $2.5 million (Ex. 8 at § VIII B). In connection with a refinance of the First Mortgage on the Building, the Partnership executed an Amendment to Second Amended and Restated Partnership Agreement in January 1994 ("Amendment to Second Restated Partnership Agreement") (Ex. 9 to Monti Aff. in Supp.). Monti affirms that this Amendment to Second Restated Partnership Agreement had no effect on the buy-out provisions contained in the Second Restated Partnership Agreement. On or about July 26, 1994, the New York Limited Liability Company Law ("LLCL") became effective, authorizing and empowering existing partnerships to convert to LLCs.

In light of the new law, on June 7, 1991, the partners executed a Conversion Agreement and Operating Agreement (Exs. 4 and 10 to Monti Aff. in Supp.) which converted the partnership into the LLC, with the partners becoming members. The LLC's Operating Agreement specifically incorporates by reference the terms of the Second Restated Partnership Agreement, including the death buy-out provisions. The partnership approved the conversion, and a Certificate of Conversion was filed with the New York Secretary of State on June 9, 1995 (Ex. 11 to Monti Aff. in Supp.).

At the time that the Operating Agreement was executed, in order for the LLC to continue to be taxed as a partnership pursuant to Federal and State law, the LLC was required to include language necessitating the dissolution of the LLC following, *inter alia*, the death or bankruptcy of a member of the LLC, unless within 180 days of such event, the members voted to continue the LLC. Thus, § 10 of the Operating Agreement provided that the death of a member will cause a dissolution of the LLC "unless, within 180 days after such event, the LLC is continued by the vote or written consent of a majority in interest of the remaining Members." § 10 of the Operating Agreement also provided that in the event that the LLC is continued, then the terms of the Partnership Agreement relating to death shall be applicable to the LLC and its Members.

On or about June 22, 1999, following a change in the tax laws, the Members executed a document titled "Letter Agreement Continuing the LLC and Amending Section 10 of the Operating Agreement of Central Park Plaza Associates, LLC" ("Letter Agreement") (Ex. 12 to Monti Aff. in Supp.). Monti affirms that the Letter Agreement effectively amended the Operating Agreement, specifically to reflect current tax laws at the time. A new § 10 was enacted to supersede and replace § 10 of the Operating Agreement which provided that the LLC would continue notwithstanding the occurrence of certain events, including the death of a Member, and that the terms and provisions of the Partnership Agreement relating to death would be applicable to the LLC and its Members.

On or about March 7, 2001, the Members, including Nimkoff, executed a Certificate of Stated Value setting the value at $2,750,000 (Ex. 14 to Monti Aff. in Supp.). This Certificate of Stated Value was prepared based on a Limited Summary Appraisal Report (Ex. 15 to Monti Aff. in Supp.) which was prepared by Goodman-Marks Associates, Inc. ("Goodman"), a leading appraisal firm in the New York metropolitan area.

Subsequent to Nimkoff's death, on or about March 31, 2005, the Members agreed to further amend § 10 of the Operating Agreement. Monti affirms that this March 2005 Amendment (Ex. 16 to Monti Aff. in Supp.) did not, and could not, affect the rights of Nimkoff or his Estate because his rights were determined as of the date of his death, April 15, 2004, and there are no other relevant amendments to any of the LLC documents. Upon Nimkoff's death, pursuant to the Letter Agreement, Nimkoff's 3.602% interest was to be bought by the LLC predicated on his membership interest relative to the Stated Value then in effect, specifically that set forth in the 2001 Certificate of Stated Value, calculated to be $99,055. Monti affirms that the

LLC tendered payment to the Estate, plus interest. Monti notes that another member of the LLC, David O. Koretz, died shortly after Nimkoff and Koretz' estates each received payment for his membership interest according to this same method, without objection or litigation.

In or about April 2008, the LLC sold the Building to a third party, as reflected by the Closing Statement provided (Ex. 21 to Monti Aff. in Supp.). In light of the fact that the Building represented the LLC's primary asset, the Members decided to make a final distribution to its Members and wind up its affairs. Notwithstanding the fact that the payout to the Estate could have, and should have, extended over a 10-year period, as per the Operating Agreement, the LLC chose to act "honorably" (Monti Aff. in Supp. at ¶ 40) and accelerate the payments due to the Estate. To that end, the LLC issued a bank check payable to the Estate in the amount of $111,107.14 (Ex. 19 to Monti Aff. in Supp.), representing payment for Nimkoff's ownership interest in the LLC, plus interest. Monti affirms that this check replaced all prior checks sent to the Estate in connection with the buy-out, which were not cashed. By letter to Plaintiff's Counsel dated April 6, 2009 (Ex. 18 to Monti Aff. in Supp.), counsel for Defendants ("Defendants' Counsel") advised counsel for Plaintiff ("Plaintiff's Counsel") that 1) the LLC was in the process of closing its accounts; 2) a stop payment order had been issued against two outstanding LLC checks totaling $111,107.14 payable to the Estate, and Plaintiff should not attempt to cash those checks; and 3) the LLC was instead enclosing a bank check payable to the Estate in the total amount of $111,107.14 to replace the previously issued checks.

Monti affirms that Nimkoff died several years prior to the sale of the Building and submits, therefore, that his Estate does not have a claim to the net proceeds from the sale of the Building. Monti submits that this litigation, in which Plaintiff claims damages based on a percentage of the gross value of the Building as reached by her expert, demonstrates a fundamental lack of understanding of real estate assets and a refusal by Plaintiff to acknowledge the controlling documents. Monti contends, further, that there is no evidence that Defendants' failure to update the stated value was not in good faith. Monti affirms that the issue of the Property's stated value was a matter that he handled as the Managing Member of the Company, and he took a "very sound and practical approach" in determining the Property's stated value (Monti Aff. in Supp. at ¶ 42). He affirms that none of the doctors that Plaintiff deposed had any issue with the Property's stated value, and submits that this is because it was clear that, absent any justification for change, the stated value would remain the same unless the accountant and

Monti felt that there was a substantial reason to recommend a change.

In further support of the motion, Ashe affirms that Defendants' Counsel retained him in this action as an expert in the area of dispute resolution. Ashe affirms that he submitted his expert report ("Report") in connection with his possible testimony at trial (Ex. 22 to Ashe Aff.), and he was deposed by Plaintiff's Counsel (transcript at Ex. 23 to Ashe Aff.). Ashe addresses Plaintiff's allegation in the Amended Complaint that the members of the LLC failed to update the Certificate of Stated Value ("Certificate") for a period of three (3) years prior to Nimkoff's death, and that the breach of this obligation resulted in a reduction to Decedent's 3.602% interest in the LLC, as the Certificate did not reflect the true value of the LLC. Ashe provides his expert opinion that Defendants' actions were not in bad faith, and submits that the Court should now grant summary judgment dismissing the Amended Complaint.

Ashe affirms that on January 11, 2001, Goodman prepared a limited summary appraisal of the LLC and valued the leased fee estate at $4.5 million and the value, net of mortgage, at $2,658,337 as of December 31, 2000. On or about March 7, 2011, the LLC executed a Certificate setting the value of the Building at $2,750,000, net of the outstanding mortgage on the Property. On April 14, 2004, Nimkoff passed away. By letter from Defendants' Counsel to Monti dated January 13, 2005 (Ex. 33 to Ashe Aff.), Defendants' Counsel responded to Monti's request for an analysis of the procedures to be followed under the terms of the LLC's Operating Agreement following Nimkoff's death, and provided Monti with a description of those procedures. That included Defendants' Counsel statement that:

> The purchase price for the interest of the deceased Member is equal to the greater of the last Stated Value of the deceased Member's interest in the LLC or the net proceeds of life insurance, if any, owned by the surviving Members on the life of the deceased Member...According to our records, the last Stated Value was executed in or around the end of March, 2001 and reflected an aggregate Stated Value of $2,750,000. Furthermore, according to our records the percentage interest of Dr. Nimkoff in the LLC was 3.602%. Applying the percentage interest to the Stated Value, the Stated Value of the interest of the Estate of Nimkoff in the LLC would be $99,055. Assuming no insurance (or insurance of less than $99,055) was maintained by the LLC or its member on the life of Dr. Nimkoff, the purchase price to be paid to the Estate is $99,055." [2]

On January 21, 2005, the LLC provided Barbara Nimkoff with the January 13, 2005 letter from Defendants' Counsel, as well as a check representing a 10% down payment for the purchase

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[2] Nimkoff did not have life insurance (Monti Aff. at n. 6).

price to be paid to the Estate, and advised her that quarterly payments for the balance would commence in February 2005. Ashe affirms that, given the market dynamics and other relevant factors, neither the managing member nor the accountant deemed it necessary to make any changes to the stated value from 2001 to 2004.

On April 10, 2008, the LLC sold the building to Reservoir Associates, LLC for $7 million before consideration of the outstanding mortgage. On April 28 and October 23, 2008, the LLC issued checks to the Estate in the amounts of $64,857.54 and $46,249.60, for total payments of $111,107.14, based on the March 7, 2001 stated value of $2,740,000. The Estate did not cash these checks. On April 6, 2009, the LLC tendered a bank check in the amount of $111,107.14 to the Estate to replace the checks that were not cashed.

In a May 24, 2010 decision by the Honorable Stephen A. Bucaria in this action (Ex. 3 to Monti Aff.), [3] Judge Bucaria denied Defendants' prior motion for summary judgment based on his conclusion that, in light of Plaintiff's submission of a February 6, 2001 memorandum from Defendants' Counsel to the LLC ("Ziegler Memorandum"). The Ziegler Memorandum stated that it had been several years since a Certificate of Stated Value had been executed and that it was important that the Stated Value be current so that the estate of a member is properly compensated in the event of a buy-out after a member's death. Accordingly, Judge Bucaria concluded that Plaintiff had demonstrated a triable issue as to whether the failure to update the stated value was not in good faith.

Ashe affirms that on April 20, 2017, Pollet Associates, Ltd. issued an appraisal report and valued the lease fee estate at $6.7 million as of April 15, 2004. Ashe provides his professional opinion that the LLC did not act in bad faith in calculating the Estate's buy-out by using a December 31, 2000 appraisal report prepared by Goodman rather than an appraisal closer in time to Nimkoff's death. Ashe affirms that the LLC followed best practices by reviewing the LLC's value annually with its accountant. Ashe affirms his understanding that the Certificate was not modified due to the "flat" performance of the Building (Ashe Aff. at ¶ 24), as well as other factors. Ashe makes reference to Monti's deposition testimony that Monti met with Tim Mulcahy ("Mulcahy"), the LLC's accountant, at least once annually to discuss the property's

[3] Judge Bucaria handled this matter until May 2015, at which time he exercised recusal. This matter was then reassigned to the Court.

performance, that the accountant would make a recommendation as to whether the stated value should be increased, decreased or remain the same, and that Mulcahy based his recommendations on information discussed at these meetings, including an analysis of the financial and operating results of the Property. Ashe affirms that, in his experience in dealing with real estate rental activities, Certificates of Stated Value are typically not prepared on an annual basis, and that it would be unusual to do so. Ashe notes, further, that the Operating Agreement at issue did not require the LLC to execute a Certificate of Stated Value annually, and provided that in the event that the LLC failed to determine the stated value in any year, the last stated calculation would be controlling.

Ashe provides his opinion that, based on Monti's communication and annual review with Mulcahy, as well as his discussions with certain LLC members, the decision to maintain the 2001 Certificate of Stated Value was not made in bad faith. Ashe affirms that, in his experience in dealing with real estate, Certificates of Stated Value are not typically prepared on an annual basis, and are often not prescribed by operating agreements. As the LLC's Operating Agreement did not require a Certificate of Stated Value to be issued every year, and because the LLC's financial performance was relatively flat between 2001 and 2004, there was no reason for the LLC to issue a new Certificate of Stated Value, and Defendants' actions were not in bad faith.

In further support of the motion, Levi submits that Plaintiff's claim is based on a fundamental misunderstanding of the requirements of the partnership/LLC on the death of a partner/member. Levi affirms that, as detailed by Ashe, Certificates of Stated Value are not typically prepared on an annual basis, and are often not prescribed by operating agreements. Levi submits that this action is without merit because the overwhelming evidence demonstrates that Defendants' actions were not in bad faith.

Levi affirms that the LLC's managing member handled the issue of the Property's stated value, and took a sound and practical approach in determining the Property's stated value. Monti worked closely with the LLC's accountant annually, and the recommendation to maintain the stated value was based on extensive review and discussion. The LLC's Operating Agreement did not require a new Certificate of Stated Value to be issued each year and, because the LLC's financial performance was relatively flat between 2001 and 2004, there was no reason for the LLC to issue a new Certificate of Stated Value. Moreover, a partner/member had no incentive to harm the valuation or payout of a member's interest because the procedures agreed

upon by the members applied equally to all members. Levi affirms that Plaintiff and Plaintiff's Counsel, who is Plaintiff's son, were aware of the controlling Letter Agreement. Under these circumstances, Levi submits, Defendants are entitled to summary judgment because there has been no showing that the LLC acted in bad faith by failing to update its Certificate of Stated Value on an annual basis.

In opposition, Leigh Pollet ("Pollet"), the principal of Pollet Associates, a real estate appraisal and consulting company, affirms that he was retained by Plaintiff to conduct an appraisal of the Property as of April 15, 2004 and to prepare an appraisal report reflecting his findings. Pollett provides a copy of the Expert Appraisal Report prepared by Pollet and his colleague William A. White III (Ex. A to Pollet Aff.). Pollet also provides details regarding his experience which includes thirty (30) years of professional real estate appraisal experience.

Pollet affirms that, in appraising the Property, he used two different approaches: a sales comparison approach, also known as a market approach, and an income approach. With respect to the sales comparison approach, Pollet identified sales of local properties similar in functional utility to the Property, and compared those properties to the Property. Pollet determined that, as of April 15, 2004, the Property had a fair market value of $6,624,000.

Pollet explains that the income approach, unlike the market approach, does not take market forces into account and is based solely on an analysis of the financial performance of the Property, specifically its revenue and expenses, without regard to how that revenue and those expenses came to be. Thus, it does not take into account whether the revenue that the Property generated was maximized through arms-length dealings or, as Plaintiff alleges, was not maximized due to the alleged self-dealing of the individuals who served as both members of the LLC-landlord, and tenants of the Building. Pursuant to the income approach, based on the LLC's actual revenue and expenses, Pollet determined that, as of April 15, 2004, the Property had a fair market value of $6.8 million. As reflected in his Report, Pollet reconciled the values obtained by the two approaches and determined that the fair market value of the Property as of April 15, 2004 was $6.7 million.

Pollet disputes Defendants' contention that they acted in good faith. Pollet provides his opinion that the sales comparison/market approach is the more reliable approach, and that Defendants erred in valuing the Property based only on whether the financial performance of the Property had increased, decreased or remained constant. Pollet submits that the valuation of the

Property as of the year 2000 could not be a proper valuation of the Property for subsequent years, given the tremendous appreciation in the real estate market between the end of 2000 and April 2008, when the Property was sold.

In further opposition to the motion, Plaintiff's Counsel provides a copy of the Ziegler Memorandum (Ex. 13 to Ds' motion). Plaintiff's Counsel submits that the Ziegler Memorandum, as well as other evidence, refutes Defendants' arguments and compels denial of the motion. Plaintiff's Counsel notes, *inter alia*, that 1) despite the admonition in the Ziegler Memorandum, the LLC did not arrange for an appraisal of the Property's fair market value at any time after Goodman prepared its 2001 appraisal report; and 2) during discovery, the LLC has not produced any document generated after the Certificate of Stated Value at issue was signed that reflects an analysis of whether the Certificate of Stated Value should be updated.

Plaintiff's Counsel also disputes Defendants' assertion that Plaintiff is claiming entitlement to a share of the proceeds from the 2008 closing on the sale of the Property, rather than a share of the fair market value of the Property as of the time of Nimkoff's passing in 2004. Plaintiff's Counsel affirms that Plaintiff seeks the Estate's 3.602% share of the fair market value of the Property as of the time of Nimkoff's passing in 2004, net of any mortgage debt. Plaintiff's Counsel submits that Judge Bucaria's decision denying Defendants' prior motion for summary judgment refutes Defendants' argument, which they advanced in support of their prior motion and advance again now, that the Letter Agreement bars this action.

Plaintiff's Counsel submits, further, that Monti conceded the self-dealing nature of the relationship between the LLC, as landlord, and a majority of the LLC's members, who occupied the Property as tenants, testifying that a majority of the members were occupants of the Property owned by the LLC. Plaintiff's Counsel affirms that, according to the rent roll set forth on page 19 of the 2001 Appraisal Report (Ex. 15 to Ds' motion), at least 9 of the 18 members of the LLC were also tenants. In addition, minutes of a 2003 LLC meeting (Ex. D to Nimkoff Aff. in Opp.), reflect an intent to discuss whether a rent increase should not apply to an LLC member who occupied an office on the Property. Under these circumstances, Plaintiff's Counsel submits, Defendants' reliance on the cash flow performance of the Property as the sole determinant of fair market value is "disingenuous" (Nimkoff Aff. in Opp. at ¶ 17) because the members who were also tenants were not motivated to maximize the Property's financial performance and cash flow by maximizing their own rent. Moreover, Plaintiff's Counsel submits, even if the financial

performance of the Property was not the result of self-dealing, Defendants' failure to take market forces into account in valuing the Property was not done in good faith. Plaintiff also submits that the Court should reject Defendants' argument, which they also advanced in support of their prior motion, that the language in the Second Amended Partnership Agreement stating that the stated value shall be redetermined annually is of no effect in light of the subsequent language in that Agreement stating that in the event that the stated value is not redetermined in a particular year the last stated value shall be controlling.

Plaintiff's Counsel notes, further, that although Monti asserts that he received recommendations from Mulcahy regarding whether a stated value should be increased, decreased or remain the same, Mulcahy's deposition testimony was inconsistent with that assertion. At his deposition (transcript at Ex. E to Nimkoff Aff. in Opp.), Mulcahy denied being engaged to calculate or determine the stated value of the LLC. Thus, Plaintiff submits, in light of the fact that Defendants' contention that they acted in good faith is based in large part on the fact that they received advice from Mulcahy on which they relied, and in further consideration of Mulcahy's testimony denying that assertion, summary judgment is not warranted. Plaintiff's Counsel also questions the reliability of Ashe's opinion, in light of his concession that the only documents that he reviewed in formulating his opinion were those provided by Defendants' Counsel and that he did not review other materials, including the deposition testimony of Mulcahy.

In reply, Defendants' Counsel submits that the affidavit and report of Pollet provide no useful analysis regarding the central issue in this action which is whether the failure to update the stated value of the Building was in good faith. Defendant's Counsel submits that the 2017 appraisal provided by Pollet is merely an opinion or estimate of value, and has no probative worth in light of the fact that the sale of the Property had already occurred. Moreover, Defendants' Counsel submits, there is nothing in the record to suggest that there was any self-dealing by the members of the LLC who were also tenants, specifically no evidence that the rents paid by the tenants were below market rates for comparable space. Defendants' Counsel submits that Pollet overlooked the fact that whatever actions the landlord took affected each tenant individually. Defendants' Counsel also submits that Pollet's assertion that a proper valuation of the Property in 2000 could not have been the same for subsequent years in light of the appreciation in the real estate market between 2000 and 2008 is "sheer speculation"

(Cummings Reply Aff. at ¶ 14). Defendants submit that Plaintiff has not identified any evidence demonstrating that Defendants engaged in bad faith when making decisions regarding the Building and its Stated Value and, therefore, Defendants are entitled to summary judgment dismissing the Amended Complaint.

In response, Plaintiff's Counsel affirms that Nimkoff, the father of Plaintiff's Counsel, was, at the time of his death, a member of the LLC, but had ceased being a tenant of the Property during the 1980s when he retired from his medical practice, as confirmed by the rent roll that appears on a report submitted as an exhibit to Defendants' motion. Thus, Plaintiff's Counsel submits, while the LLC members who were also tenants may have benefitted from the allegedly self-dealing terms under which the LLC leased offices to them, Nimkoff did not so benefit. Plaintiff's Counsel submits that Defendants seek to take advantage of those self-dealing terms to deny the Estate its rightful share of the value of the Property based on a proper valuation.

C. The Parties' Positions

Defendants submit that they have established their right to summary judgment dismissing the Amended Complaint because there has been no showing that the LLC acted in bad faith by failing to update its Certificate of Stated Value on an annual basis. Plaintiff opposes the motion submitting that, in light of Judge Bucaria's prior decision as well as evidence submitted in opposition to the instant motion which disputes Defendants' assertions, including Mulcahy's testimony denying that he provided the LLC with an opinion or advice regarding the stated value, there are issues of fact making summary judgment in appropriate.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d at 49, citing *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Viewing the evidence in the light most favorable to the non-moving

party, if the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate. *Nomura Asset Capital Corp.*, 26 N.Y.3d at 49, quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011).

B. Law of the Case

The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned. *Clark v. Clark*, 117 A.D.3d 668, 669 (2d Dept. 2014) quoting *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

C. Application of these Principles to the Instant Action

The Court denies the motion. The motion papers before the Court demonstrate that there are issues of fact regarding the reasonableness and good faith of Defendants' determination regarding the stated value of the Property. Because the stated value was an integral component of the payment made to Nimkoff's Estate upon his death, summary judgment is inappropriate. The Court's decision is further informed by Judge Bucaria's prior decision denying Defendants' previous motion for summary judgment, in which Judge Bucaria concluded that Plaintiff had demonstrated a triable issue as to whether the failure to update the stated value was in good faith.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance at a pre-trial conference before the Court on May 3, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY
April 17, 2018

HON. TIMOTHY S. DRISCOLL
J.S.C.