

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED & RECORDED

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

JUN 18 2019

**COUNTY CLERK
QUEENS COUNTY**

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**VINCENT CORTAZAR, Individually and
Derivatively on behalf of 47th Road LLC**

Index No.:705029/16

Petitioner,

-against-

**BENCH TRIAL ORDER
AND JUDGMENT**

**JAMES CORTAZAR, a/k/a JIM E. CORTAZAR
a/ka JAMES EDWIN CORTAZAR and
47th ROAD LLC, a New York Limited Liability
Company,**

Defendants.

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OPINION OF THE COURT

A trial was held in this matter, on October 17, 2018, October 18, 2018, October 19, 2018, November 5, 2018, November 8, 2018, November 16, 2018 and November 19, 2018, following a dissolution hearing, in which the Court held that 47th Road LLC (the Company) was to be dissolved, pursuant to § 702 LLCL. As this was a bench trial, the Court was both the finder of facts and the determiner of questions of law. The Court considered the testimony of the witnesses, gave weight to that testimony, and generally determined the reliability of the witnesses' testimony (*see Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006].) The Court also considered the interest or lack of interest in the case and the bias or prejudice of the witnesses (*see People v Ferguson*, 178 AD2d 149 [1st Dept 1991].) The Court declined to apply the maxim of *falsus in uno, falsus in omnibus*. Accordingly, the Court made credibility determinations on a case-by-case basis, wherever necessary and appropriate to do so (*see Noryb Ventures, Inc. v Mankovsky*, 47 Misc 3d 1220A [Sup. Ct NY Co. 2015].)

At trial, this Court heard testimony regarding the claims of Vincent Cortazar and James Cortazar, each party claiming a breach of fiduciary duty and other related damage claims against each other, as 50% members of the Company.

PROCEDURAL HISTORY

Petitioner Vincent Cortazar filed a Summons and Complaint, on April 28, 2016, alleging, *inter alia*, damages, individually and derivatively, on behalf of the Company for breach of fiduciary duty, fraud, waste, conversion, unjust enrichment and negligence.

Respondent James Cortazar filed his Answer with Counterclaims, on June 10, 2016, seeking declaratory relief that the Company was "100%" owned by James Cortazar, breach of fiduciary duty, the imposition of a constructive trust, conversion, equitable and promissory estoppel, unjust enrichment, restitution, an accounting and injunctive relief.

Petitioner denied the allegations set forth Affirmative Defenses of Statute of Frauds and Statute of Limitations.

A Dissolution Hearing was held. In its Judgment/Order, the Court found that Vincent Cortazar and James Cortazar were each 50% members of the Company. The Court ordered the Company's dissolution, pursuant to § 702 LLCL, finding that due to a foreclosure in an action pending in this Court, entitled *47th Road Funding Inc v Cojam Realty Inc. et al*, that this single asset Company could not reasonably carry on its business. The Court further ordered that Joseph J. Risi, Esq., be appointed Receiver of the property of the Company, located at 5-19 47th Road, Queens, New York, and set forth the duties and obligations of the Receiver. After the appointment of Joseph J. Risi, Jr., as a Court of Claims Judge, this Court Order by, dated August 3, 2017, Joseph J. Risi, Jr. was relieved and discharged, and Joseph Mattone, Jr., Esq., was appointed as the substitute Receiver. Mr. Risi filed an affirmation, dated July 7, 2017, setting forth his accounting through June 2017. By Decision and Order of this Court, dated June 4, 2018, the Court approved the Purchase and Sale Agreement, dated May 4, 2018, for the sale of the property, located at 5-19 47th Road, Long Island City, New York, by Receiver Mattone, for the gross sales price of \$2,500,000.00, with the purchaser taking the premises subject to the violations and fines placed on the property as a lien by the various agencies of the City of New York totaling in excess of \$500,000.

By Decree and Order, dated June 13, 2018, this Court, on motion by Receiver Mattone, consolidated the dissolution proceeding and the instant action, as captioned above. The sale of the premises took place on June 29, 2018. Thereafter, on September 1, 2018, Receiver Mattone filed his interim accounting.

Upon motion by the petitioner's attorney, this Court granted the application to hold respondent James Cortazar in contempt for failure to obey this Court's Order, dated February 16, 2017, by failing to provide documents and other materials to the petitioner. Respondent James Cortazar was ordered to provide said materials, by July 30, 2018, to purge the contempt or he would be fined \$250 per day until they are delivered to the petitioner. If he failed to comply, the petitioner could enter judgment against him for the sums due and owing.

CONTENTIONS OF THE PARTIES

Petitioner contends that respondent James Cortazar and his agents used obstructionist tactics to block Receiver Mattone from receiving an accounting, security deposits, turning over rent receipts, insurance information, tax records and relevant records and therefore should be held in contempt of court in addition: the petitioner claims he is seeking six different forms of damages, namely:

1) The principal amount of money (approximately one million dollars) that was received from a mortgage taken from the property by respondent James Cortazar and invested in a property in California wholly owned by James Cortazar.

2) The default amount of interest when the mortgage was not paid by respondent due to his failure to pay the mortgage and subsequent foreclosure (approximately seven hundred thousand dollars.)

3) Rents and profits of the Company pocketed into his own name since respondent failed to pay any taxes nor did he pay the mortgage or bills.

4) Building Violations that the petitioner contends that he took all reasonable steps to correct, but once he was removed from control the violations mushroomed to an astronomical amount (approximately one half million dollars.)

5) Legal fees for the breach of respondents fiduciary duties to be determined by the Court by attorney's affidavit.

6) Contempt for failure to comply with the Court's Order to turn over rents, records and security deposits to the Receiver.

Respondent contends that: he complied with the Contempt Order; he returned security deposits; turned over leases; paid the insurance out of his pocket; and did not obstruct the Court Order. He turned over documents in his possession. Respondent

claims that: the violations were the fault of the petitioner; the money from the mortgage was for other properties; and the petitioner wasted \$250,000 on a Ponzi scheme. Respondent is seeking attorneys' fees blaming the petitioner for failure to cooperate in refinancing the building and that he is blameless for the default, foreclosure and resulting damages.

FINDINGS OF FACT

The Court's prior Findings of Fact, in its Order of Dissolution, dated February 16, 2017, is the law of the case. Such findings are specifically incorporated herein and made a part hereof. Counsel for the petitioner put into evidence the minutes of the Dissolution Hearing and the exhibits introduced as part of the record in this proceeding (*see* Exhibit 20 and Exhibit 1 through 29 Diss. Proc.)

The Court finds, as it did in the consolidated Dissolution Proceeding at the time of that hearing, that 47th Road, LLC is a New York limited liability Company, that was established, on August 18, 2009, by Vincent Cortazar and James Cortazar.

The brothers each own a 50% interest in the Company. The sole asset of the Company is real property, located at 5-19 47th Road, Long Island City, New York, designated as Block 29, Lot 17, in Queens County. The brothers purchased the property in their individual names as joint tenants by deed, dated August 29, 1996. The property transferred from the brothers, as joint tenants, to 47th Road LLC. The property consists of a residential, four story walk-up apartment unit, with eight separate apartment units occupied by tenants, which have a fair market rental value of approximately \$160,000.00 per year rent. On August 25, 2009, the Company borrowed the sum of \$800,000.00 from Hypothecator Realty Corp. On October 4, 2010, the Company took an additional mortgage from the same entity, in the sum of \$250,000.00. On February 14, 2011, the brothers borrowed the sum of \$1,200,000.00 from Hudson Valley Bank, which is now known as Santander Bank. This loan was secured by a \$1,200,000.00 mortgage on the subject premises. The funds from the mortgage loans, in the approximate amount of \$1,000,000.00, were used to purchase approximately one hundred acres in Rio Del, California. This California property was titled only in the name of James Cortazar. When Vincent Cortazar found out, there was a physically violent confrontation between the brothers. Vincent Cortazar was locked out of the Company's day-to-day operations,

claiming the property was mismanaged. James Cortazar was collecting the rents from these apartments, while not paying down any of the indebtedness of the mortgage. The Santander mortgage loan matured on March 1, 2016. As a result, all amounts due under the note became due and payable. James Cortazar refused to pay the mortgage. As a result the property is in foreclosure. He refuses to work with his brother Vincent, to resolve the mortgage. There are numerous outstanding violations on the property and James Cortazar has collected the rents without making repairs, paying the violations, or the mortgage. He apparently does not care that the only asset of the Company will be lost to foreclosure. An entity known as 47th Road Funding, Inc. acquired the defaulted loan from Santander Bank for \$1,000,000.00. Vincent Cortazar has attempted to renegotiate a loan extension with 47th Road Funding. However, without his brother's cooperation, which has not been forthcoming and since he is a 50% member of the Company, this has been impossible.

These incorporated facts are relevant to the findings made herein upon the consideration of all of the evidence adduced at both the dissolution hearing and the trial in the derivative action.

Following the dissolution hearing, the Court finds, after witnessing the testimony and demeanor of both James Cortazar and Vincent Cortazar and the respective witnesses called on their behalf, that the testimony of Vincent Cortazar was credible, as was the testimony of Receiver Joseph Mattone, Esq. The Court also finds that the testimony of James Cortazar was not generally credible, as well as that of the testimony of his only witness, Jose Guadalupe Escudero. James Cortazar's lack of credibility was compounded by his lack of cooperation given by James Cortzar and his agents to Receiver Mattone. James Cortazar's systematic failure, even in the face of the Contempt Order, to transfer and transmit to Receiver Mattone the Company's, books, records, bank accounts, securities and collected rent (*see* pgs. 17-92.)

Defendant James Cortzar attempted to call as a witness at trial his employee and bookkeeper, Christine Gavino, but she refused to testify or appear on the defendant's behalf (pg. 319). Christine Gavino had testified in the prior dissolution proceeding that she was employed by defendant James Cortazar, since 2015. She collected and deposited rents, allocated tenants, paid bills and had an active full time role in the management of the Company for the past three (3) years (*see* pages 85-86 Diss. Proc. Exhibit 20)

TESTIMONY OF THE RECEIVER JAMES MATTONE

Receiver Joseph Mattone, Jr., Esq., testified that he was appointed receiver, on August 3, 2017, in place of Referee Joseph Risi, Esq., who was later appointed as a Court of Claims Judge. Mr. Mattone testified that when he took over as substitute receiver he had reviewed Mr. Risi's interim account report, which revealed that rent was never collected for apartments 1L or 1R, and that these apartments were rented to defendant James Cortazar's employees, Christine Gavino and Georgio Christodolou, respectively. The Christodolou apartment (1R) was apparently being utilized as an Airbnb, and the listed contact for that daily rental was "Christine," James Cortazar's employee (See pgs. 18-20). On December 5, 2017, Mr. Mattone served a Notice to Attorn on the property to all the tenants. He received no contact from any of the tenants who resided at the premises. An investigation by Mr. Mattone revealed that the notices had been sent to a common mailbox and that only defendant James Cortazar and "someone from the basement apartment" had the key (*see* pg. 21.) The subject premises is an eight story apartment building and no basement tenancy would be legal.

Upon Mr. Mattone's discovery that there was a tenant in the basement, he left a note on the basement door indicating that the dwelling was not legal and its continued occupancy would result in the commencement of a civil proceeding (*see* pg. 22.)

Shortly thereafter, Mr. Mattone was contacted by an attorney, Alfredo Tapia, Esq. He informed Mr. Mattone that he represented the basement tenant, who had an "arrangement" with James Cortazar in exchange for living and/or working in the basement. Mr. Mattone visited that basement unit; It was apparent to him that the basement was being used as a dwelling unit. Mr. Mattone then received an email from Mr. Tapia which confirmed "that Mr. Jose Guadalupe Escudero, lives in the basement apartment . . . as part of a [sic] employment arrangement with Mr. James Cortazar . . ." (*see* Exhibit 24.)

Mr. Mattone testified that, despite his numerous requests of respondent's James Cortazar's attorney, James Costo and Christine (from the defendant James Cortazar's office), he was never provided with any bank records or rents from James Cortazar or his agents (*see* pgs. 26-34 and Exhibit 4 & Exhibit 5.) The Receiver's emails with Christine and James Costo were admitted into evidence and support, which established beyond question, that James Cortazar was receiving rents from the premises and failed and

refused to turn over those rents and profits to the Receiver, despite repeated demands, (*see* Exhibit 5.) The Court finds that Mr. Mattone's communications with Christine were replete with misrepresentations by her regarding payments made for real estate taxes, insurance and her failure to provide any receipts for alleged expenses (*see* pgs. 29-34.) In fact, during Mr. Mattone's tenure as substitute Receiver, the only money that he received from James Cortazar consisted of one check which was written from James Cortazar's personal account, in the sum of \$7,414.00 of the \$13,641.76, in outstanding tenant security (*see* Exhibit 1, Exhibit 7 and pg. 36.)

Receiver Mattone entered into a Purchase and Sale Agreement (PSA) for the premises, on May 4, 2018 (*see* Exhibit 6 and pg. 36). The PSA was for a purchase price of \$2,500,000.00. The biggest issue in the sale was the fact that there were over \$500,000 in liens against the premises for violations concerning, for the most part, the illegal change and occupancy of the basement. The purchaser of the property, 519 Management Corp., pursuant to the PSA, took title to the property subject to the violations and had to establish a conditional escrow regarding these open judgments to close (*see* pg. 38.) These violations reduced the purchase price that the premises sold for. Documentary evidence revealed that the violations reduced to judgment totaled \$548,521.50, all entered at the time after James Cortazar wrested control of the premises from Vincent Cortazar (*see* Exhibit 22.) Although Mr. Mattone did testify that there were violations on the premises, which predated 2011 the title report, his testimony confirmed that these had been either paid or "written-off" before the date of the closing (*see* pg. 68.)

The premises was sold on June 29, 2018. At the time of the sale, there was \$16,936.21 due the City of New York for delinquent water and sewer charges, together with delinquent real estate taxes of \$50,500.00, all deducted from the proceeds of the sale to the Company's detriment and all accruing during James Cortazar's management of the Company (*see* Exhibit 7 & Exhibit 15.)

At the closing, the delinquent mortgage was paid off, in the sum of \$1,723,626.25. This sum represented \$1,097,904.31 in principal, and the balance in default interest, which increased from the date of default March 1, 2016 from 4.5% to 19.5%, in the total amount of \$625,721.94 (for default interest and lender's attorney's fees) (*see* Exhibit 7, 8 & 9 pgs. 39-43.)

TESTIMONY OF PETITIONER VINCENT CORTAZAR

Vincent Cortazar testified. He described the premises owned by the Company at 5-19 47th Road (the Premises) as a four-story walk-up with eight (8) rent stabilized apartments and a basement. Vincent Cortazar testified, that in 2009 and 2010, his brother James Cortazar went to California to develop property there for resale. The Premises was then used as collateral to acquire an \$800,000 mortgage (*see* pg. 95 Diss. Proc.). The documentary evidence produced during this trial and the dissolution proceeding set the date upon which this loan was given as August 25, 2009 (*see* Exhibit 6 & 8 Diss. Proc.) From these proceeds, a check in the sum of \$714,420.21 was given to 47th Road, LLC and, thereafter, endorsed by James Cortazar (*see* Exhibit 9 Diss. Proc.).

These proceeds (\$714,420.21) were used by James Cortazar to fund a development parcel, known as Rio Dell Pilar, in Rio Dell, California. Vincent Cortazar and James Cortazar had an understanding that they would each own 50% of this California development property (*see* pg. 95). Vincent Cortazar relied upon his brother's assurances that this money would be used to fund the California project and that they would both share equally in that project (*see* pg. 96-97). In or about late 2010 to early 2011, Vincent Cortazar's suspicions were aroused when he came to find out that his brother had forged his signature to transfer a parcel of property in Florida (*see* pg. 97). This incident caused Vincent Cortazar to research the California acquisition. He discovered that James Cortazar had purchased the Rio Dell property in the name of a Company only owned by James Cortazar.

These funds (\$714,420.21) were never returned to the Company.

In early 2011, the brothers had a confrontation over this and other related matters and Vincent Cortazar was forced out of the Company's offices. Vincent Cortazar left behind all of the Company's paperwork and accounts with James Cortazar in the Company's office (*see* pg. 98).

Since 2011, Vincent Cortazar has never received any funds from the Company and no disbursements of profit have been shared with him (*see* pg. 99).

On October 4, 2010, the Company borrowed \$250,000 from Hypothecator Realty Corp. After payment of expenses, the sum of \$151,759.33 was given to the Company (*see* Exhibit 13, 14, 15 Diss. Proc.). These proceeds were lost when the brothers jointly invested in a stock purchase which later turned out to be a Ponzi scheme (*see* Exhibit D).

CALCULATION OF DAMAGES

Since James Cortazar provided no bank records or expense reports to this Court, to Receiver Risi or Receiver Mattone or opposing counsel, in violation of the Court's Dissolution Order and contempt citation that ordered this production. The Court finds his outrageous and contemptuous conduct to be a violation of respondent's fiduciary duty. Breaches of fiduciary duties are treated as a special breed of cases where the normally stringent rules for damage calculation are relaxed (*see Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 [1st Dept 1999].) The respondent created this difficulty in calculating lost profits and approximation of lost profits by his failure to provide an accounting or books and records.

The Court finds the petitioner's methodology to be a competent evidence of losses and consequent loss of profits arising from the respondent's wrongdoing so that the damages award is not merely speculative (*see EW Bruno Co v Friedberg*, 28 AD2d 91 [1st Dept 1967].) Accordingly, the Court allowed Vincent Cortazar to testify from his own knowledge of the premises' expenses and from a historical expense report dating to 2010 the last time he was managing the Company. Using the 2010 expenses spreadsheet (*see Exhibit 13*) and certified DHCR rent records (*see Exhibit 14*), Vincent Cortazar, after applying the Consumer Price Index annual adjustment, was able to fairly calculate the rents received and expenses for the Company from 2011 through the time of trial (*see Exhibits 15 & 16*). This rental income and expense extrapolation was put into evidence as Exhibit 18. The Court finds that, except for some minor adjustment to be discussed herein, it fairly reflects the Company's income and expenses on an annual basis. In fact, these figures are conservative in that there is no account for the illegal basement apartment rent or the Air B&B rental of the units (*see pg. 119*). None of this income was shared with Vincent Cortazar as a 50% member and owner of the Company.

The premises was refinanced for the last time with the Hudson Valley Bank, on February 14, 2011, for the sum of \$1,200,000.00 (*see Exhibit 16 Diss. Proc.*). This mortgage was thereafter assigned to Santander Bank and then further assigned to 47th Road Funding, Inc (*see Exhibit 9*.) The mortgage had an interest rate of 4.5% and matured by its own terms on March 1, 2016. In the event of a default the default rate increased 1% every month and was at 19.5% when paid by Receiver Mattone at closing (*see Exhibit 8*). The Premises could not be refinanced to avoid foreclosure and the

exorbitant default interest penalty because James Cortazar would not recognize Vincent Cortazar as a co-equal member of the Company (*see* pg. 124-125; *see also* Dissolution Order Exhibit 1, pg. 20). Even throughout this trial, James Cortazar refused to acknowledge Vincent Cortazar as a 50% member/owner of the Company (*see* pg. 485.)

The record additionally reveals, that upon taking over the Company, James Cortazar persistently failed to pay the mortgage in a timely manner. Numerous default notices were sent by the mortgagee to the Company, together with a forbearance agreement that reflected a failure to make mortgage payments, from July 2012 to November 2012 (*see* Ex. 23 pg. 459-460), and default notices Oct. 22, 2013, Oct. 8, 2013, August 19, 2015 and Jan. 13, 2016 (*see* Exhibits 23-26 Diss. Proc.). As previously noted, the monetary damage suffered by the Company for this failure was \$625,721.94, which comprised the default interest and attorneys fee due, and paid by the Receiver Mattone at the closing.

RESPONDENT'S CASE

Defendant witness, Guadalupe Escudero Rodriguez (Mr. Rodriguez was the individual identified by the Receiver as having lived in the basement apartment), testified (*see* pg. 300.) At first, Mr. Rodriguez testified that he did not know Alfredo Tapia, despite the fact that Mr. Tapia advised Receiver Mattone, via email, that he was Mr. Rodriguez' attorney, and that Mr. Rodriguez was living in the basement of the Premises (*see* email of Feb. 23, 2018; Exhibit 24). After being confronted with the email, Mr. Rodriguez acknowledged that attorney Tapia represented him with respect to the illegal occupancy of the basement of the Premises.

VIOLATION STATUS OF THE BASEMENT

The Court finds that based upon the totality of evidence produced with respect to the continued occupancy of the illegal basement apartment and the continuing violations issued by the City of New York for this illegal basement, the evidence clearly supports Vincent Cortazar's testimony that, the basement had been brought into compliance prior to his 2011 ouster. Clear photographic evidence and credible testimony by Vincent Cortazar show the plumbing fixtures and partitions were removed (*see* Exhibit G). The

photo was taken during the appraisal of the property, on May 29, 2009, that shows the vacant status of this area (*see p. 246.*)

After James Cortazar returned from California, he took over control of the property and LLC. The Court finds that he created a violation status by reconstructing an illegal apartment in the basement for use as living quarters and Mr. Rodriguez lived there until at least Feb. 2018 when, due to the Receiver's demand, he vacated the premises (*see p. 273-274; Exhibit G; Exhibit 24.*)

These persistent violations resulted in judgments against the premises, from June 2011 through Feb. 2015, in the total sum of \$548,521.50 (*see Exhibit 22*) all docketed at a time when James Cortazar was the controlling member of the Company.

JAMES CORTAZAR'S TESTIMONY

James Cortazar testified that when he managed the premises, from 2011 to 2018, he never permitted the occupancy of the basement of the premises for living purposes (*see pgs. 354-356.*) James Cortazar's testimony is clearly and convincingly contradicted by Receiver Mattone's observations, by Mr. Tapia's email, and by the persistent violations issued post 2011 regarding this illegal occupancy. Even James Cortazar's own evidence confirms the installation of an intercom system for nine (9) apartments, in 2014 (*see Exhibit Q*).

As part of the respondent's claims, James Cortazar put into evidence receipts for bills paid during his control of the Company which were extraordinary expenses. These items were for the installation of an intercom system for nine (9) apartments, on Feb. 10, 2014, for \$1,248; conversion of oil heat to gas for \$18,800 and Rhino Heating & Mechanical Systems, on April 10, 2014, for \$953.84 (*see Exhibit Q*.) Petitioner agreed that in calculating profits due that these expenses would be deducted.

PONZI SCHEME

James Cortazar testified that Vincent Cortazar, without his knowledge or consent, took the balance of the proceeds from the \$250,000 Hypothecator Loan (\$151,759.33) (*see Exhibit 15 Diss. Proc.*) and invested it in a Ponzi Scheme in the name of A Plus Construction. Vincent Cortazar has consistently maintained that both he and his brother

James Cortazar decided together to invest in the Green Solutions Company which turned out to be a scam which resulted in a federal investigation and arrests (*see* pgs. 28 and 53; Diss. Proc. Exhibit 20). James Cortazar was inconsistent claiming that A Plus Construction was Vincent Cortazar's Company, while earlier in the trial he alleged that he (James Cortazar) founded and funded A Plus Construction (*see* pg. 348). The testimony of James Cortazar, with regard to the \$151,759 Ponzi Scheme transfer in light of the totality of the evidence, is not credible. This Court finds that such investment was made with the knowledge and consent of both Vincent Cortazar and James Cortazar and was a joint investment.

Respondent James Cortazar testified that despite this Court's Order to the contrary, he did not supply Receiver Mattone with any rent payments (although emails from his office to the Receiver confirm the collection of rents) or with any bank records at any time during the pendency of this action (*see* pgs. 491-504.) In fact, the defendant admitted to depositing rent checks in his own personal account after the Dissolution Order (*see* pg. 502.) Respondent's constant refrain, that he would "have to check his records" when asked questions about compliance with the Court's directives, confirm the his total lack of regard for these proceedings, this trial and the Court's Orders (*see* pgs. 520-521).

CONCLUSIONS OF FACT AND LAW AS TO RESPONDENT'S FIDUCIARY DUTY

The Court finds that the petitioner Vincent Cortazar sustained his burden to prove that respondent James Cortazar breached his fiduciary duties owed to his brother as a 50% owner/member of the Company (*Coty v Steiger*, 291 AD2d 796 [4th Dept 2002].)

(1) by diverting the sum of \$714,420.21 from the Company to the Rio Dell Project, on August 25, 2009, and not sharing same with the Company or Vincent Cortazar despite his representations to the contrary;

(2) by permitting the sum of \$548,521.50 to be docketed as Judgment liens against the premises during his control of the Company;

(3) by failing to pay and allowing the mortgage on the premises to go into default by refusing to recognize Vincent Cortazar as a member of the Company, causing default

interest to become due with bank attorney's fees, in the sum of \$625,721.94, as paid at the closing of June 29, 2018;

(4) in failing to disburse and properly share with Vincent Cortazar 50% of the rents and profits of the Company, from May 1, 2013 through June 29, 2018, in the sum as more specifically set forth in Appendix #1 herein;

(5) in failing to provide the Receiver with the sum of \$6,227.76 in rent securities (\$7,414 received of \$13,641.76 outstanding); and

(6) in failing to pay water and sewer rents to the City of New York in the sum of \$16,936.21 (*see* Exhibit 7.)

RESPONDENT'S CONTEMPT

The Court also finds that respondent James Cortazar violated this Court's Order of Dissolution, dated Feb. 16, 2017, and the Order of Contempt, dated June 11, 2018, and that the Contempt Order was personally served upon James Cortazar, on June 20, 2018. James Cortazar has failed and refused to purge himself of the contempt and shall be fined the sum of \$250 per day, from June 20, 2018 (the date of service) through the commencement of this trial Oct. 17, 2018, in the sum of \$29,750 (119 days x \$250.)

COUNSEL FEES

Finally, the Court finds that the petitioner Vincent Cortazar shall be awarded counsel fees, in an amount to be determined. Petitioner's counsel shall submit an Affirmation of Attorney's Fees in connection with this matter.

RESPONDENT'S CASE

Respondent James Cortazar's counterclaims are dismissed. Respondent failed to offer sufficient credible proof of any viable claims against Vincent Cortazar for any period of time, within the Statute of Limitations. James Cortazar's incredible testimony and lack of any documentary evidence in support of his claims leads the Court to this finding. The doctrine of unclean hands and estoppel bars the respondent from any equitable claims (*Ross v Moyer*, 286 AD2 610 [1st Dept 2001].)

Respondent failed to call his employee, Christine Gavino, to testify about her day to day management of the Company, since 2015, even though Ms. Gavino clearly had many email interactions with the Receiver (*see* Exhibit 5) and was intimately involved with rent collections and deposits and the Airbnb use of one of the apartments. She appeared to be in a unique position to testify to support James Cortazar's otherwise unsupported claims, yet when called to testify by her own employer, the respondent, she refused.

THE LAW

As members of the 47th Road LLC (the Company) both Vincent Cortazar and James Cortazar had a fiduciary duty not only to each other but also to the Company. The members of a limited liability Company may stand in a fiduciary relationship to each other and to the LLC (*Jones v Voskresenskaya*, 125 AD 3d 532 [1st Dept. 2015].) The managing member of a limited liability Company owes a non-managing member a fiduciary duty (*Pokoik v Pokoik*, 115AD3d 428 [1st Dept 2014].) When James Cortazar locked Vincent Cortazar out of the Company's day-to-day operations, he had a duty to manage the Company in a proper and responsible manner and a duty to provide Vincent Cortazar with an appropriate share of the rents and profits of the Company during his ouster.

"It is elemental that a fiduciary owes a duty of individual loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (*Birnbaum v Birnbaum* 73 NY2d 461, [1989].) That duty not only extends to the fellow members of the Company but to the Company itself. James Cortazar owed the Company his individual loyalty and he was not permitted to derive a personal profit at the expense of the Company (*Kulik v Hoteltron Systems, Inc.* 96 AD2d 1038 [2d Dept 1983].)

As noted in the Finding of Fact in this trial and the consolidated dissolution proceeding, James Cortazar, during his management of the Company, collected the rents and failed to make needed repairs subjecting the Company to exorbitant judgments and violations while at the same time defaulting in making the premise's mortgage payments and allowing the mortgage to come in to default.

To establish a breach of fiduciary duty the movant must prove the (1) existence of a fiduciary relationship; (2) misconduct by the other party including situations of self dealing or personal interest conflicts; (3) the fiduciary injuring or acting contrary to the interests of the person to whom a duty of loyalty is owed; (4) resultant damages that were caused by the defendant's conduct (*see Ernest Edward Badway, New York Causes of Action: Elements & Defenses 2016*, sections 1-13 at 11-12 (NYLJ Publication [2016]); *Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007].)

Petitioner Vincent Cortazar presented credible evidence that James Cortazar breached his fiduciary duty to both the petitioner Vincent Cortazar and the Company by failing to provide the petitioner with his 50% share of the rents and profits of the Company, since early 2011; in permitting the mortgage loan to default with accumulated default interest; in permitting the violations against the premises to go to judgement and in wrongfully taking the net proceeds of the Company's \$800,000 mortgage to acquire his own California development project. Throughout this litigation respondent James Cortazar has consistently violated this Court's Orders in failing and refusing, even after a citation for contempt, to provide the Receivers Risi and Mattone the books, records and bank accounts of the Company. In fact, the only receipt of any sort by Receiver Mattone was a check for partial payment of the tenants' security, drawn on the personal account of James Cortazar.

BURDEN OF PROOF IN CALCULATING DAMAGES

Petitioner has the burden of proving damages (*Coty v Steigerwald*, 291 AD2d 796 [4th Dept 2002].) However cases involving breaches of fiduciary duties are treated as a special breed of cases. Under such circumstances, the stringent rules for damage calculations are relaxed. Where a breach of fiduciary duty has been established, this Court has significant discretion in ascertaining a fair approximation of the losses suffered by the Company and by Vincent Cortazar. (*Ssee Gibbs v Breed, Abbot & Morgan*, 271 AD2d 180 [1st Dept 2000].) Such discretion is important in this case where, after all, when the difficulty faced in calculating lost profits due Vincent Cortazar was attributable to the respondent's misconduct and contemptuous behavior (*see Wolf v Rand*, 258 AD2d 401 [1st Dept 1999].)

The Court finds that the methodology utilized by the petitioner in determining an annualized loss of profit or distribution to him was reasonable and supported by both documentary evidence and historical data (*See Venizelos v Oceanic Maritime Aging*, 268 AD2d 291 (1st Dept [2000].)

PREJUDGMENT INTEREST

In an equitable action, such as a case involving a claim of breach of fiduciary duty, an award of prejudgment interest, pursuant to CPLR 5001(a), is within the court's discretion. An award of prejudgment interest is "virtually mandated" where a fiduciary has failed to properly account for many years and has enjoyed the benefit of the injured party's money during that time (*see Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790 [1st Dept. 2007]; *Aurnou v Greenspan*, 161 AD2d 438, 164 AD2d 794 [1st Dept. 1990].)

Under such circumstances it is appropriate to award petitioner Vincent Cortazar with pre-judgment interest on the ending date of each year, within the applicable three year statute of limitations, for the annualized damages as set forth in Appendix A (i.e. from April 28, 2013 to June 12, 2018) (*see Wolf v Rand, supra.*)

With respect to the accumulation of violations that reduced the value of the premises, which is the only asset of the Company, all of these judgments were entered and imposed upon the Company after the last refinance of the Premises with Hudson Valley National Bank, on February 4, 2011.

The Court finds that no pre-refinance monetary violations existed after the refinance because Hudson Valley Bank required, as part of the terms of its loan, a payment of all outstanding monetary violations against the Premises. Thereafter, under the management of James Cortazar, the Premises were allowed to be burdened and the sole asset of this Company depleted by the imposition of judgments against the Company, in the sum of \$548,521.50. Rather than converting the rents and profits of the Company for his own use, respondent James Cortazar was obligated to fulfill his fiduciary obligations to the Company by the correction of this violation. Rather than correct this continuing violation, the respondent continued to maintain the basement as an illegal dwelling unit even through Receiver Risi and Mattone's appointments and until at or near the closing on the Premises. Such conduct was in clear violation of the duties and obligations of

James Cortazar, as the manager of the Company, and caused a distressed sale of the Premises, subject to the judgments, reducing the ultimate value of the premises. Based upon the foregoing, this Court awards Vincent Cortazar judgment against James Cortazar, in the sum of 50% of the full amount of the docket judgments of \$548,521.50, to wit: the sum of \$274,260.75, with interest from the date of this Order.

As previously noted it was James Cortazar's failure to even recognize his brother Vincent Cortazar as member of the Company that prevented the Company from refinancing the Premises at a time before the default of the mortgage. As a result of this default, the rate of default interest increased from 4.5% to 19.5%, accumulating to \$617,671.33, at the time of the closing, just in default interest and bank attorney's fees. This entire loss was directly attributable to James Cortazar's conduct.

As a result, petitioner Vincent Cortazar is entitled to a judgment, in the sum of 50% of the full amount of the default interest, and bank attorney fees, in the sum of \$617,671.33, to wit: the sum of \$303,835.66, with interest, from the date of this Order.

ESTOPPEL

The Statute of Limitations for a breach of fiduciary duty depends upon the substantive remedy sought by the petitioner. Where the claim seeks equitable relief, it is governed by the six year statute of limitations of CPLR 213(1). (*See IDT Corp. v Morgan Stanley Dean Witter & Company* 12 NY3d132 [2009].) Where the claim seeks legal relief, it is governed by the three year statute of limitations (*see Dragon Inv. Co. II LLC v Shanahan*, 49AD2d 403 [1st Dept 2008].)

Where, however, the claim for damages is based upon a fraud committed by one of the members against the other, the statute of limitations for such claims is six years from the date the cause of action accrues subject to the doctrine of equitable estoppel (*see Matter of Piccilo*, 19 AD3d 1087 [4th Dept 2005]; *Erbe v Lincoln Rochester Trust Co.*, 13 AD2d 161[4th Dept Year?].)

In this action, petitioner Vincent Cortazar requests damages from James Cortazar for fraudulently converting the sum of \$714,420.21 of proceeds from the first mortgage placed on the Premises. Rather than use these funds as promised, for a joint venture in California, the respondent purchased acreage in Rio Dell California, under his own Company to the detriment of Vincent Cortazar and 47th Road, LLC, who was now

saddled with this indebtedness. This money was taken from the Company by check endorsed by James Cortazar, on August 31, 2009. Since the Summons & Complaint in this action was filed in April 2016, such claim would normally be barred by the statute of limitations.

However, in this action, the doctrine of equitable estoppel precludes the respondent from asserting the statute of limitations as a defense.

The doctrine of equitable estoppel will preclude a respondent from asserting the defense of statute of limitations where it is the respondent's affirmative wrongdoing which produced the delay between the date of accrual and date of the legal proceeding. (*North Coast Outfitters, Ltd v Darling* 134 AD2d 998 (2d Dept [2015].) Here the petitioner reasonably relied upon James Cortazar's representations that the proceeds of the loan were going to be used for their joint benefit when his brother James Cortazar left New York for several years to facilitate that development. It was only after the discovery of his brother's fraud, in 2011, that Vincent Cortazar was ousted from the Company.

Under these circumstances, the Court finds that equitable estoppel is appropriate to prevent the respondent's utilization of the defense of the statute of limitation (*Simcuski v Saeli*, 44 NY2d 442 [1978].) As such, petitioner Vincent Cortazar is awarded damages, in the sum of 50% of such conversion (\$357,210.10), with interest from the date of this Order.

Petitioner has also requested that his attorney's fees be asserted against the respondent as his legal fees may be recouped in this action. Under such circumstances and under these facts, the Court finds that petitioner Vincent Cortazar is entitled to be reimbursed for his attorneys fees directly from respondent James Cortazar, in a sum to be determined after the submission of an Affirmation of Legal Fees by petitioner's counsel (*See Tzolis v Wolff*, 10 NY3d 100 [2008].)

ORDERS, JUDGMENTS AND DECREETALS

Thus, for the reasons set forth above, this Court hereby finds that the petitioner is entitled to the following relief, and, accordingly, it is

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar be awarded judgment against respondent James Cortazar for loss of rents and profits, as set

forth in Appendix 1, with pre-judgment interest at 9% per annum for each annualized period, as of December 31st of that year to the date of this Order, as set forth in Appendix 1, in the sum of \$226,783.00, with interest from the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar be awarded judgment against respondent James Cortazar for default interest imposed and accumulated against the Company, in the sum of \$303,835.66, with interest from the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar be awarded judgment against respondent James Cortazar for the damages done to the value of the Company by the docketing of judgments against the Premises, in the sum of \$274,260.75, with interest from the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar be awarded judgment against respondent James Cortazar equal to 50% of the proceeds of the first mortgage used to finance James Cortazar's California development project, in the sum of \$357,210.10, with interest from the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar have judgment against respondent James Cortazar, in the sum of \$29,250.00, as and for James Cortazar's violation of this Court's Contempt Order, as with interest from the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar have judgment against respondent James Cortazar, in the sum of \$3,024.62, as and for 50% of the security not provided to Receivers Mattone and Risi by James Cortazar, and the sum of \$2,250.00 paid by Vincent Cortazar to Receiver Risi for the Receiver's bond, all in the sum of \$5,274.62, with interest from the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that petitioner Vincent Cortazar shall be awarded attorney's fees, in an amount as may be fixed by the Court, in accordance

with this Order, on at least twenty (20) days' notice to respondent James Cortazar, setting forth in detail the schedule of services performed and time spent and disbursements proceeding and derivative action, and that judgment on such award shall be by further order of this Court entered against respondent James Cortazar; and it is further

ORDERED, that respondent James Cortazar's counterclaims are dismissed, as the respondent failed to offer sufficient credible proof of any viable claims against Vincent Cortazar for any period of time, within the Statute of Limitations; and it is further

ORDERED, that Receiver Mattone prepare and file a final accounting with this Court, within thirty (30) days of the entry of this Order, and, upon confirmation of said accounting and payment of final fee to the Receiver Mattone, that the monies left as a balance in Receiver Mattone's account be paid to petitioner Vincent Cortazar, through his attorneys White, Cirrito & Nally, LLP, and that 50% of that sum received be as a credit against the sums awarded in this Order.

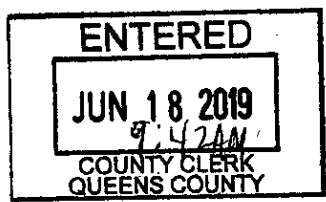
Dated: June 7, 2019

Timothy J. Dufficy

TIMOTHY J. DUFFICY, J.S.C.

Audrey J. Pfeffer

Clerk



FILED & RECORDED
JUN 18 2019
COUNTY CLERK
QUEENS COUNTY