SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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S.O.S. REALTY ASSOCIATES L.L.C.,

Plaintiff,

- v -

DAVID BLUMBERG,

Defendant.

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INDEX NO. 653342/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

DAVID BLUMBERG,

Plaintiff,

-against-

NAOMI BLUMBERG and LYNDA BLUMBERG,

Defendants.

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Third-Party
Index No. 595605/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 99, 100

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 93, 94, 95, 96, 97, 98, 101

were read on this motion to DISMISS.

Rosenberg & Estis, P.C., New York, NY (Warren A. Estis and Adam Lindenbaum of counsel), for plaintiff S.O.S. Realty Associates L.L.C. and third-party defendant Naomi Blumberg.
Fox Rothschild LLP, New York, NY (Ernest Edward Badway and Matthew J. Schenker of counsel), for defendant.

Gerald Lebovits, J.:

This is a family dispute involving membership interests in plaintiff S.O.S. Realty Associates, L.L.C. (SOS), a limited liability company that owns and manages a building. The parties dispute the authenticity of signatures purportedly executed by defendant/third-party plaintiff David Blumberg on agreements assigning him his membership interests and amending SOS's operating agreement, and each seek competing declarations. David Blumberg contends

that the assignment agreements clearly grant him a 10% interest in SOS, which SOS has recognized for the last 20 years, but that the amended operating agreement, which he allegedly signed, is a forgery. Third-party defendant Naomi Blumberg, whom David claims assigned him the 10% interest, contends that the operating agreement was amended as part of the same transaction as the assignments, and that if it is a forgery then the assignments also are forged. She also contends that the assignments were not acknowledged or delivered as required by SOS's operating agreement and thus were not effective. Naomi's counterclaims assert that David was unjustly enriched by distributions from SOS since he was not properly assigned a membership interest, and that he breached an earlier settlement agreement between the parties.

In motion sequence 001, David moves for an order, pursuant to CPLR 3212, dismissing the complaint, and granting him summary judgment on his first counterclaim for a declaratory judgment, declaring that he owns a 10% membership interest in SOS and that the amended operating agreement is invalid, and for sanctions against SOS, pursuant to 22 NYCRR 130-1.1. In motion sequence 002, David moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing Naomi's counterclaims.

Motion sequences 001 and 002 are consolidated here for disposition.

BACKGROUND

SOS is a limited liability company that was formed in October 1995 by third-party defendant Naomi and non-party Melvyn Oberlander (Mel), each then owning a 50% membership interest (NYSCEF No. 1, compl., paras. 6, 7, 9). SOS owned and operated a building with 15 residential units and ground floor retail space located at 132 Second Avenue in Manhattan (*id.* at para. 2). In connection with forming SOS, Naomi and Mel entered into an Operating Agreement dated December 4, 1995 (the 1995 Operating Agreement) (*id.* at para. 10; *see* Operating Agreement, NYSCEF No. 28). Naomi is David's mother, and third-party defendant Lynda Blumberg is his sister (NYSCEF No. 1, para 12).

In or around December 1, 1998, Naomi sought to assign a five percent membership interest in SOS to David (*id.*, para. 13). An Assignment and Acceptance Agreement was prepared by Naomi's counsel for David to sign (December 1998 Assignment Agreement). It was signed by Naomi, Mel, and allegedly by David, and returned to SOS (NYSCEF No. 30).

In or around January 1, 1999, Naomi sought to assign another five percent of her SOS membership interest to David, preparing an identical Assignment and Acceptance Agreement (January 1, 1999 Assignment Agreement) (together, the Assignment Agreements) (NYSCEF No. 1, compl, para. 20; *see* NYSCEF No. 31). It was signed by Naomi, Mel, and allegedly by David and returned to SOS (NYSCEF No. 31). At the same time as both of those assignments, Naomi assigned and transferred 10% of her SOS membership interest to Lynda (NYSCEF No. 1, compl, para. 23).

Article 12 of the 1995 Operating Agreement, entitled "Assignment of Interests," provides in relevant part, that an assignment only permits the assignee to allocations and distributions, unless the assignee is admitted as a member, and that

> "No assignment, transfer or other disposition of all or any part of the interest of any Member permitted under this Agreement shall be binding upon [SOS] unless and until a duly executed and acknowledged counterpart of such assignment or instrument of transfer, in form and substance satisfactory to [SOS], has been delivered to [SOS]"

(NYSCEF No. 28, article 12 at 10). Article 13 of the 1995 Operating Agreement, entitled "Admission of New Members," provides, in relevant part, that

> "As a condition to the admission of a new Member, such Member shall execute and acknowledge such instruments, in form and substance satisfactory to [SOS], as [SOS] may deem necessary or desirable to effectuate such admission and to confirm the agreement of such Member to be bound by all of the terms, covenants and conditions of this Agreement, as the same may have been amended"

(*id.*, article 13 at 11).

On January 1, 1999, as part of the same transactions of assigning membership interests to David and Lynda, SOS's members amended the operating agreement (Amended Operating Agreement), naming both David and Lynda as members each possessing a 10% interest in SOS (NYSCEF No. 32). The amended agreement expressly states in a whereas clause that "Naomi Blumberg has assigned and transferred part of her interest in [SOS] to Lynda Blumberg and David Blumberg" (*id.* at 1). The Amended Operating Agreement was signed by Naomi, Mel, Lynda, and allegedly by David (*id.* at 20).

SOS has the originals of the Assignment Agreements, and has recognized David as a member for over 20 years, paying distributions to him, and sending him Schedule K-1's (NYSCEF No. 25; *see* NYSCEF No. 24, affidavit of David Blumberg, dated October 29, 2019 [Blumberg aff], paras. 7-8). In 2014, upon his request, it also sent an accounting to him along with documents substantiating that accounting for distributions made to him from 1999 to 2014 (NYSCEF No. 34).

On May 9, 2014, David filed a complaint against SOS and Kenco Realty Management, alleging that SOS was excluding him from management and depriving him of distributions (the 2014 Action) (NYSCEF No. 33). He sought dissolution and an accounting, he also alleged a violation of New York Limited Liability Corporation Law (LLCL) sec. 609, breach of fiduciary duty, conversion, breach of the duty of good faith, and sought a permanent injunction (*id.*). On July 15, 2014, David entered into a settlement agreement and general release with SOS, Kenco, and Naomi and Mel as managers of SOS (the July 2014 Settlement) in which David was paid a settlement sum of $349,113.65 (NYSCEF No. 56). There was no admission of liability, David discontinued the action with prejudice, and the parties released each other from claims "which existed, arose or occurred on or prior to the date of the execution of this Settlement Agreement" (*id.*, para. 5 at 2).

In February 2019, SOS obtained a mortgage commitment from First National Bank of Long Island (FNBLI) to refinance its mortgage with a proposed closing date of April 30, 2019 (NYSCEF No. 1, compl, para. 37).

On March 15, 2019, SOS's manager responded to David's questions about distributions from SOS, explaining why such distributions to all members had been halted since August 2018 (NYSCEF No. 35; *see* NYSCEF No. 38, answer, counterclaims para. 39).

On March 22, 2019, SOS's counsel, Michael Parachini, contacted David's counsel, Ernest Badway, to request a copy of David's photo identification in connection with the FNBLI refinance closing, and FNBLI's counsel, Joseph P. Keneally, was copied on the email message (NYSCEF No. 26, affidavit of Ernest Badway, dated October 30, 2019, para. 14; NYSCEF No. 37, email chain at 4). In an email response to David's question as to the need for this identification, Mr. Keneally stated that the new banking regulations required it since David is a 10% owner of borrower SOS (NYSCEF No. 37, email chain at 2-3). By email dated March 24, 2019, David's counsel stated to SOS's counsel that "you should be aware that the Amended SOS agreement (the Amended Operating Agreement) that has my client's signature is forged" (*id.* at 1). Mr. Keneally was not sent or copied on this email (*id.*). The FNBLI loan did not close (NYSCEF No. 1, compl, para. 44).

The Pleadings

On June 6, 2019, SOS commenced this action against David Blumberg, asserting two causes of action. The first seeks a declaration that David does not have any membership interest in SOS because he failed to comply with the requirements of the 1995 Operating Agreement, and that the Amended Operating Agreement erroneously included David as a 10% member (NYSCEF No. 1, compl, paras. 46-53). The second cause of action alleges that David tortiously interfered with SOS's loan commitment with FNBLI by intentionally communicating directly with SOS's counsel without SOS's consent, and unequivocally stating that his signature was forged on the Amended Operating Agreement, which precluded SOS from closing on the FNBLI loan (*id.*, compl, paras. 54-69).

On July 11, 2019, David answered the complaint, denying the claims, asserting various affirmative defenses, and asserting eight counterclaims and third-party claims against SOS, Naomi, and Lynda. The first counterclaim seeks declarations that he owns a 10% interest in SOS, and that his signature on the Amended Operating Agreement was forged and, therefore, the agreement is invalid (NYSCEF No. 38, answer, counterclaims paras. 81-89). The remaining counterclaims seek dissolution, an accounting, assert a violation of LLCL sec. 609, breach of the July 2014 Settlement against SOS and Naomi, breach of fiduciary duty, conversion and seek an injunction. They are based on allegations of SOS's and Naomi's actions in connection with the refinance of SOS's mortgage and the failure to pay distributions after August 2018, and on Naomi's and Lynda's actions in allegedly forging his signature on the Amended Operating Agreement (*id.*, answer, counterclaims paras. 90-127).

On July 31, 2019, SOS filed its reply to David's counterclaims (NYSCEF No. 39). In August 2019, David served some discovery demands. SOS responded, serving its own discovery

demands, to which David has not yet responded. On October 23, 2019, Naomi and Lynda answered the third-party complaint with two third-party counterclaims (NYSCEF No. 49). The first third-party counterclaim for unjust enrichment alleges that David never signed or delivered any document that accepted the attempted assignments in accordance with the 1995 Operating Agreement, and so he was unjustly paid distributions by SOS at Naomi's expense (*id.*, third-party answer with counterclaims, paras. 51-58). The second third-party counterclaim is for breach of the July 2014 Settlement, alleging that David's claims in the main action were already released in that settlement (*id.*, paras. 60-67).

The Present Motions

David moves for summary judgment dismissing SOS's first claim for declaratory relief, and granting his first counterclaim for a declaration that he has a 10% interest in SOS and that the Amended Operating Agreement is forged and invalid. He asserts that SOS's claim is belied by the Assignment Agreements, executed by him and produced by SOS in response to discovery demands, that show that he accepted the transfer of the SOS membership. He also asserts that SOS has treated him as an owner for over 20 years, making distributions to him, and filing federal tax returns reflecting his interest (*see* NYSCEF No. 25). In his affidavit, he affirms that he executed each assignment agreement, delivered them to Naomi, and never transferred or assigned his 10% membership in SOS to anyone (NYSCEF No. 24, Blumberg aff, paras. 3-5). He further states that he never signed the Amended Operating Agreement, submitting a copy of that agreement (*id.*, para. 6; *see* NYSCEF No. 32). David urges that SOS's tortious interference claim must be dismissed because it is only based on statements made to SOS, not to FNBLI. Finally, he argues that SOS should be sanctioned for maintaining a frivolous declaratory judgment claim.

In opposition, Naomi attests that she assigned part of her membership interests to her children for estate planning purposes, the Assignment Agreements and the Amended Operating Agreement were prepared by her attorneys for simultaneous executions, and the only reason one assignment was dated December 1998 and the other January 1999 was for federal gift tax purposes (NYSCEF No. 67, affidavit of Naomi Blumberg, dated 2019 [Naomi aff], paras. 9-12). She states that David's signatures are not acknowledged on the Assignment Agreements, and that he never states how and when he delivered them to her. She urges that David's claim of "forgery" on the Amended Operating Agreement is inconsistent with his claim that he signed the Assignment Agreements since they were all part and parcel of the same transaction. After pointing out the similarity of the signatures, Naomi contends that if he did not sign the Amended Operating Agreement, then he also did not sign the Assignment Agreements (*id*., paras. 13-15).

SOS contends that the Assignment Agreements were not duly executed, acknowledged and notarized as required by the 1995 Operating Agreement. It admits that it has been in possession of the signed Assignment Agreements for many years that showed David's signature. However, upon his claim for the first time in March 2019 that the Amended Operating Agreement was forged, SOS reviewed the Assignment Agreements and concluded that his signatures thereon were not authentic. SOS submits various documents, contending that they show differences in David's signature, and an affidavit of a handwriting expert, Jennifer Naso, urging that this creates a triable issue of fact (NYSCEF Nos. 77, 79-88). On the tortious

interference claim, SOS argues that there is no requirement that a defendant direct his conduct to a third party, and, in any event, David did communicate directly with FNBLI. It asserts that sanctions are unwarranted as its claim is not frivolous. Finally, it urges that the motion is premature, because David has not responded to its discovery demands or been deposed.

On the motion to dismiss Naomi's third-party counterclaims, David urges that the unjust enrichment claim fails to state a claim because Naomi fails to allege that she conferred a benefit on him, instead, it was SOS that conferred a benefit. He also contends that the Assignment Agreements are documentary evidence demonstrating that David accepted her assignment of his 10% membership interest, and SOS repeatedly affirmed that he has been an owner for 20 years. On the breach of the July 2014 Settlement counterclaim, David argues that he is seeking redress for Naomi's conduct after the settlement.

In opposition, Naomi asserts that she raised a fact issue as to whether the Assignment Agreements were duly executed, acknowledged and delivered, and once it is declared that David has no ownership interest, then she has a valid claim that he has been unjustly enriched by the distributions and the settlement payment. She urges that SOS made those payments under the mistaken belief that the assignments were valid, which caused it to amend its operating agreement to erroneously name David as a member. Naomi alleges in her answer that she was damaged because she funded the settlement payment (NYSCEF No. 49, answer, third-party counterclaims para. 62). She maintains that David's recent forgery contention rehashes claims previously resolved in the July 2014 Settlement, and to raise them is a breach of that agreement.

DISCUSSION

David Blumberg's motion for summary judgment (motion sequence 001) is granted to the extent that (i) the branches of SOS's first cause of action challenging David's entitlement to a 10% membership interest in SOS, and his rights as an assignee and an owner of a membership interest in SOS are dismissed; (ii) SOS's second cause of action is dismissed in its entirety; and (iii) summary judgment is granted to David on the branch of his first counterclaim seeking a declaration that he owns a 10% membership interest in SOS. The motion is otherwise denied.

David's motion to dismiss Naomi Blumberg's two counterclaims (motion sequence 002) is granted to the extent that (i) the first counterclaim is dismissed; and (ii) the second counterclaim is dismissed except as to David's actions in alleging that his signature was forged on the Amended Operating Agreement.

Summary Judgment Motion

On a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law, submitting sufficient evidence demonstrating the absence of triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon such a showing, the burden shifts to the opposing party to submit admissible evidence demonstrating the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). All reasonable inferences are drawn in favor of the nonmoving party, and where different conclusions may be drawn from the evidence or the credibility of a witness is at

issue, the motion should be denied (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]; *Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481-482 [1st Dept 2018]).

SOS's First Cause of Action and David's First Counterclaim

David has presented prima facie proof of his 10% membership in SOS through submission of the duly executed Assignment Agreements, his affidavit, and supporting documentary proof that SOS has recognized his interest for 20 years (*see* NYSCEF Nos. 24, 45, 46, 51, 52). The burden, therefore, shifts to SOS and Naomi to raise a triable issue of fact. They fail to do so.

SOS and Naomi contend that David's signatures on the Assignment Agreements were forged. To support this contention, they submit several signature exemplars and a handwriting expert's affidavit stating that "David Blumberg probably did not write the questioned signatures" (NYSCEF Nos. 77 at 5, 79-88). That affidavit, though, is not sufficient to create an issue of fact, standing alone (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004] [holding that "where an expert is used to counter the moving party's prima facie proof, the expert opinion must . . . state with reasonable professional certainty that the signature at issue is not authentic"]).

Additionally, David himself does not deny the authenticity of his signature. To the contrary, he affirmatively states that he *did* sign the Assignment Agreements, and seeks to enforce them. SOS and Naomi admit that Naomi intended to assign a 10% interest in SOS to each of her children. The decision by Naomi and Mel to amend the Operating Agreement and name David and Lynda as 10% members of SOS is expressly premised on Naomi having assigned those 10% interests to her children (*see* NYSCEF No. 32 at 1). And SOS made distributions to David for 20 years based on that membership interest, listed him as a 10% member on its tax returns, and issued him Schedule K-1s to that effect. SOS and Naomi offer no explanation as to who in these circumstances would have forged David's signature, why David's signature would have been forged, or why the issue of forgery was not raised long since.

In these circumstances, no triable issue of fact exists as to David's 10% membership interest in SOS under the Assignment Agreements (*see Karma Props. LLC v Lilok, Inc.*, 2020 NY Slip Op 03595, at *1 [1st Dept June 25, 2020] [affirming grant of summary judgment where defendant failed to explain circumstances in which tenant came to occupy premises and agreed to pay higher rent absent lease amendment having been signed by defendant]; *1424 Millstone Rd., LLC v James B. Fairchild, LLC*, 136 AD3d 556, 557 [1st Dept 2016] [affirming grant of summary judgment where tenant's attestation that signature on lease extension was forged was refuted by his own emails acknowledging that he was aware of and a party to lease extension]; *cf. Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009] holding that a "party to litigation may not take a position contrary to a position taken in an income tax return"]).

SOS's and Naomi's contention that the Assignment Agreements were not in the form required by articles 12 and 13 of SOS's 1995 Operating Agreement, because they were not duly executed, acknowledged and notarized, is not supported by the terms of those agreements. Under

article 12 of SOS's 1995 Operating Agreement, an assignment of an interest of a member would not be binding on SOS "unless and until a duly executed and acknowledged counterpart of such assignment or instrument of transfer, in form and substance satisfactory to the Limited Liability Company, has been delivered to the Limited Liability Company" (NYSCEF No. 28, SOS 1995 Operating Agreement, section 12 at 10). There is no requirement of notarization, and the assignments were executed and acknowledged. In addition, while Naomi and SOS challenge when and how David delivered the assignments, it is undisputed that SOS has had possession of the original Assignment Agreements for many years. Article 13 states that:

> "As a condition to the admission of a new Member, such Member shall execute and acknowledge such instruments, in form and substance satisfactory to the Limited Liability Company, as the Limited Liability Company may deem necessary or desirable to effectuate such admission and to confirm the agreement of such Member to be bound by all of the terms, covenants and conditions of this Agreement, as the same may have been amended"

(*id.* SOS 1995 Operating Agreement, section 13 at 11). The Assignment Agreements were drafted by Naomi's attorneys and sent to David for execution (NYSCEF No. 67, Naomi aff, para. 10). Both assignments contain identical language that David as "Assignee" desired to accept the assignment from Naomi "and assume all obligations in connection therewith" (NYSCEF Nos. 30 and 31). They further provided that "[a]ssignee does hereby accept the assignment of the Transferred Interest and agrees and consents to be bound by all the terms, conditions and provisions of the Operating Agreement, as in effect on the date hereof, as a Member thereunder, as if the Assignee were a signatory thereto" (*id.*).

This language satisfies the requirements set forth in SOS's 1995 Operating Agreement, and SOS and Naomi fail to raise a triable issue of fact (*see Gartner v Cardio Ventures, LLC*, 121 AD3d 609, 609 [1st Dept 2014] [where transfer approved in writing by majority and authorized by operating agreement, no declaration that transfer void]; *Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC*, 92 AD3d 449, 450 [1st Dept 2012], *affd* 20 NY3d 438 [2013] [where agreement was unambiguous, plaintiff declared one third owner in LLC]).

SOS's and Naomi's contention that summary judgment is premature because David has not been deposed and has not responded to their discovery demands is unpersuasive. While the motion has been made before discovery was complete, the documentary evidence is sufficient to determine the declaratory claim, and they fail to demonstrate that discovery might lead to relevant evidence with respect to the validity of the Assignment Agreements, or that facts essential to oppose the motion is exclusively in David's knowledge and control (*see Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020]; *Citibank, N.A. v Villano*, 140 AD3d at 553).

David's request for sanctions, pursuant to 22 NYCRR 130-1.1, is denied. The declaratory relief was sought by SOS because of David's claim of forgery with respect to the Amended Operating Agreement, which, according to Naomi, was part of the same transaction as the Assignment Agreements. Thus, there was a good faith basis for seeking a declaration.

To the extent that David seeks a declaration that his signature was forged on the purported Amended Operating Agreement executed by the members of SOS, including Naomi, Mel, Lynda and David in January 1999 (NYSCEF No. 38, answer, paras. 24, 84, 85), such relief is denied. David's conclusory claim fails to satisfy his prima facie burden. His alleged signature on the copy of the Amended Operating Agreement submitted by him is very light and difficult to see or compare (NYSCEF No. 32). In addition, he fails to point out any differences or distinctions with that signature and his signature on the Assignment Agreements or any other documents. This is insufficient (*See Karma Props. LLC v Lilok, Inc*., 2020 NY Slip Op 03595 at * 1). Even if David did meet his initial burden, his assertion is disputed by Naomi, who attests that the two Assignment Agreements and the Amended Operating Agreement were all signed simultaneously (NYSCEF No. 67, Naomi aff, paras. 9-10, 12, 14). Thus, the branch of David's motion for summary judgment on those aspects of SOS's first cause of action and of David's first counterclaim that pertain to the validity (or invalidity) of the Operating Agreement as amended is denied.

SOS's Second Cause of Action

The branch of David's motion seeking summary judgment dismissing the second cause of action for tortious interference with contract is granted. To establish a claim for tortious interference with contract, the plaintiff must demonstrate that: (1) it had a valid contract with a third party; (2) the defendant was aware of that contract; (3) the defendant intentionally induced the third party to breach the contract without justification; (4) actual breach; and (5) resulting damages (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). The second claim alleges that David interfered with SOS's contract with FNBLI to refinance its existing commercial loan by asserting that his signature was forged on the Amended Operating Agreement causing FNBLI to terminate its commitment to close the loan (NYSCEF No. 1, compl, paras. 61-63).

SOS's claim is insufficient because SOS fails to assert that David had any direct contact with FNBLI in which he induced a breach. Instead, SOS alleges only that David's counsel wrongfully communicated directly with SOS's counsel, without SOS's consent, asserting his signature was forged in order to "torpedo the FNBLI loan" (NYSCEF No. 1, compl, paras. 60-65). This is insufficient to support a tortious interference claim (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004] [tortious conduct must be conduct "directed not at the plaintiff itself, but at the party with which the plaintiff has . . . a relationship"]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424-425 [1996]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]. David's conduct must be directed at FNBLI as the third party. David presents prima facie proof of the March 24, 2019 email communications that his counsel, Mr. Badway, had directly with SOS's counsel in which he stated that his signature on the Amended Operating Agreement was forged (NYSCEF No. 37). This message was not sent to Mr. Keneally, counsel for FNBLI (*id.* at 1). The only communications directly between Mr. Badway and Mr. Keneally were several days before, on March 22, 2019, regarding the bank's requirement of a copy of David's photo identification as a 10 % owner of SOS as borrower (*id.* at 3-4).

In opposition, SOS fails to present any proof to the contrary. Moreover, SOS fails to allege that FNBLI breached the commitment agreement; instead, it asserts that it decided not to

go forward until it resolved David's forgery claim (*see Lama Holding Co. v Smith Barney*, 88 NY2d at 425). Accordingly, the tortious interference claim fails as a matter of law.

Motion to Dismiss

David's motion to dismiss Naomi's counterclaims in the third-party action is granted as to the first counterclaim. With respect to the second counterclaim, the motion to dismiss is denied as to the branch of the counterclaim asserting a breach-of-contract cause of action arising from David's actions in alleging that his signature was forged on the Amended Operating Agreement, and is otherwise granted.

On a motion to dismiss, the complaint is liberally construed, the alleged facts are accepted as true, and the plaintiff is afforded every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Naomi's First Counterclaim

The first counterclaim for unjust enrichment alleges that because David never signed and delivered the Assignment Agreements, he has no membership interest in SOS, and it is against equity to permit him to retain the distributions he has been paid by SOS from 1999 through 2019. To state a claim for unjust enrichment, the plaintiff must allege that the defendant was enriched at the expense of the plaintiff, and allowing the defendant to retain such benefit would be against equity and good conscience (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 455 [2018]; *Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1st Dept 2009]). Based on the determination above declaring that David has a 10% membership interest, he has not wrongfully received SOS membership distributions, and he did not benefit at Naomi's expense. Accordingly, this claim fails as a matter of law.

Naomi's Second Counterclaim

Naomi's second counterclaim in the third-party action for breach of the July 2014 Settlement states a claim only as to David's challenge to the validity of his signature on the Amended Operating Agreement. The motion to dismiss is denied as to that branch of the counterclaim, and otherwise granted.

To state a claim for breach of contract, the plaintiff must allege the existence of a valid contract, the plaintiff's performance of its obligations, the defendant's breach and resulting damages (*Reznick v Bluegreen Resorts Mgt., Inc.*,154 AD3d 891, 893 [2d Dept 2017]; *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]). This counterclaim alleges that David repudiated the July 2014 Settlement by reasserting previously resolved and released claims, resulting in damages to Naomi at least in the amount of the settlement payment she personally made of $349,113.65 (NYSCEF No. 49, third-party counterclaims, paras. 62, 65). David maintains that this claim is based on his March 2019 email to SOS's counsel which did not occur on or prior to the July 2014 Settlement. Naomi counters that this claim of forgery was or could have been resolved in the July 2014 Settlement (NYSCEF No. 97, Naomi memo in opp at 8).

In the July 2014 Settlement Agreement, David released Naomi from, among other things,

> "allegations asserted or that could have been asserted in the [2014 Action], and any of the allegations asserted in the Proceeding as well as any and all rights arising out of any alleged violation of any statute, regulation or any tort, including common law and constitutional rights of privacy, defamation and tortious interference with contractual relations or prospective economic advantage, breach of contract and breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, aiding and abetting any breach of fiduciary duty, negligence and/or unjust enrichment"

(NYSCEF No. 56, settlement sec. 5 at 2).

The release explicitly applies to losses and damages "resulting from, out of or related in any matter, event, fact, act or omission, cause or thing which existed, arose or occurred on or prior to the execution of this Settlement Agreement" (*id.*). While the March 2019 email communication itself did not occur on or prior to the July 2014 Settlement, the facts that the Amended Operating Agreement existed since 1999, David was aware of it, and that it contained his allegedly forged signature "existed, arose or occurred on or prior to the execution of this Settlement Agreement" (*id.*). Therefore, David's claim based on a forgery of the Amended Operating Agreement appears to be released in the settlement, and to pursue that claim may constitute a breach of the settlement agreement.

And although Naomi's earlier payment of the July 2104 Settlement may not constitute damages resulting from David's alleged breach of the settlement (*see Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]), she pleads "contractual damages in an amount not less than $349,113.65, plus consequential damages and attorneys' fees and expenses," for the failed refinance which satisfies her burden for pleading on a CPLR 3211 motion to dismiss (*see Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd.*, 60 AD3d 497 [1st Dept 2009] [the fact that the damages are not yet known due to a related action being brought against the plaintiff does not preclude the breach of contract claim]).

However, to the extent that Naomi's second counterclaim also asserts a breach based on David's counterclaims and third-party claims seeking dissolution, an accounting, and various claims of breach of fiduciary duty and conversion, Naomi's second counterclaim fails to state a cause of action.

These claims and counterclaims by David arise out of his allegations that (i) he has not received any distributions from SOS since August 2018 while other members have continued to receive distributions; (ii) he was denied access to the lender or documents in connection with SOS's 2019 refinance; (iii) SOS engaged in corporate waste by entering into the 2019 refinance loan; and (iv) Naomi and SOS breached the July 2014 Settlement by failing to make distributions to him as required by that agreement (NYSCEF No. 38, Blumberg answer and counterclaims, paras. 39-40, 54, 68, 110, 115). These claims are based on and arise out of actions since 2018 and are not barred by the July 2014 Settlement.

Accordingly, it is

ORDERED that the branch of defendant David Blumberg's motion under CPLR 3212 (motion sequence 001) seeking summary judgment dismissing plaintiff SOS's first cause of action is granted as to branches (a), (b), (c), (d), and (f) of the first cause of action, and is denied as to branch (e) of the first cause of action; and it is further

ORDERED that the branch of David's motion under CPLR 3212 (motion sequence 001) seeking summary judgment dismissing SOS's second cause of action is granted; and it is further

ORDERED that the branch of David's motion under CPLR 3212 (motion sequence 001) seeking summary judgment in his favor on his first counterclaim is granted only as to David's request for a declaration that he owns a 10% membership interest in SOS, and is otherwise denied; and it is further

ADJUDGED and DECLARED that David owns a 10% membership interest in SOS; and it is further

ORDERED that the branch of David's motion under CPLR 3212 (motion sequence 001) seeking sanctions against SOS is denied; and it is further

ORDERED that the branch of David's motion under CPLR 3211 (motion sequence 002) seeking dismissal of third-party defendant Naomi Blumberg's first counterclaim is granted; and it is further

ORDERED the branch of David's motion under CPLR 3211 (motion sequence 002) seeking Naomi's second counterclaim is granted, except as to the branch of the second counterclaim asserting a breach-of-contract claim arising from David's actions in alleging that his signature was forged on the Amended Operating Agreement.

7/7/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE