

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

WILLIAM HOWARD, suing in the right of
Archer Road Vista LLC, WILLIAM HOWARD,
Individually, and WESTSIDE DEVELOPMENT
OF ROCHESTER, INC.

Plaintiffs

-vs-

Index No. 2013/8187

GARY L. POOLER,

Defendant

and

ARCHER RD. VISTA LLC and GARY L. POOLER,
the Manager of Archer Rd. Vista LLC, suing in
in the right of Archer Rd. Vista LLC,

Intervenors.

BENCH DECISION

APPEARANCES

BOND SCHOENECK & KING, PLLC
Joseph Nacca, Esq.
Attorneys for Plaintiffs

MORGENSTERN DEVOESICK PLLC
Vivek J. Thiagarajan, Esq.
Attorneys for Defendant

UNDERBERG & KESSLER LLP
David M. Tang, Esq.
Attorneys for Intervenors

Rosenbaum, J.

This matter came before the Court for a Bench Trial on March 20–27, 2017. The parties' extensive post-trial submissions were received by the Court on September 22, 2017.

By Decision dated March 18, 2016, the Court granted Plaintiffs summary judgment as to liability with respect to several causes of action: 1. The Court found that Pooler is liable to Plaintiffs for breach of the obligations under the Operating Agreement, due to Pooler authorizing and approving Archer Rd. Vista LLC to borrow money from Pooler Enterprises without Howard's consent or knowledge and by failing to disclose these loans. 2. Pooler was found liable for breach of fiduciary duty because he entered into undocumented, unmemorialized, self-dealing loans with Pooler Enterprises, as well as Pooler Development and Pooler Realty without providing Howard with notice or

obtaining his consent. The Court also found that Pooler breached his duties by contracting with Pooler Enterprises without submitting the work to bid, preparing a proposal for the work, refusing to cause the execution of a written contract, and paying invoices that were unaccompanied by back-up documentation. 3. Finally, Pooler was found liable for breaching fiduciary duties by using the Company's revenue to pay his legal fees. Liability has been determined by the Court on these issues. The trial in this matter was solely for the determination of damages.

The Court has reviewed the extensive post-trial submissions and has given due consideration as well to the testimony and evidence presented during the Bench Trial. With respect to the testimony given, the Court has weighed the relative credibility of the witnesses. After due consideration, the Court makes the following determinations with respect to damages:

1. Based upon the evidence presented at trial and testimony heard, it is the Court's determination that Pooler was not justified when he refused to allow Howard to procure a new builder. Despite asking Pooler on multiple occasions to reduce the lots' prices, Pooler refused to do so at Howard's request but then terminated Howard's responsibilities with builders and lot sales and subsequently entered into a contract with Another builder for the sale of lots at an even lower price than that proposed by Howard. Pooler's actions demonstrate a lack of good faith and a breach of disregard for his obligations under the Operating Agreement. The evidence before the Court at trial demonstrated that Howard found a buyer (Biltucci) and a contract to the sell the requisite lots was negotiated. Howard satisfied his obligations under the Operating Agreement, and indeed, nevertheless continued to take actions to increase lot sales. However, Pooler's actions rendered further performance by Howard impossible. See 1-10 Indus. Assocs., LLC v. Trim Corp. of Am., 297

A.D.2d 630, 631–32 (2d Dept. 2002); Willoughby Rehab. & Health Care Ctr., LLC v. Webster, 2006 N.Y. Misc. LEXIS 3130, at *15–16 (Sup.Ct. N.Y. Co. 2006). Howard is consequently entitled to \$130,900 relating to the lot sales, plus pre-judgment interest at the rate of 9%, for a total of \$193,376.66.

2. With respect to commissions to be earned by Howard on lot and home sales, Pooler's testimony was not credible as to why the partners agreed to a 60%/40% split in allocation of profits. Pooler's actions deprived Howard of the benefit of acting as realtor for home sales at Archer Road Vista's development. "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995). This duty "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . ." Id. Pooler breached his obligation with respect to Howard's right to act as exclusive listing agent for Archer Rd. Vista's lots and to have primary responsibility for sales and customer relations with builders. It is undisputed that Howard was unable to represent the other builder, Faber, on home sales because Faber had their own in-house realty. Howard testified that he would serve as the realtor for 80% of the home sales in the development and would receive a 6% commissions (3% as listing agent and 3% as buyer's agent). Based upon total home sales of \$8,334,527, Howard is entitled to damages of \$324,553.30, plus pre-judgment interest at 9%.

3. The testimony and evidence at trial established the parties' intent to donate Archer Rd. Vista land to the Town of Chili, to include land needed by Westside for wetland mitigation and a sewer easement. See, e.g., Operating Agreement, §5.14. The Operating Agreement makes Westside a third party beneficiary. See Bd. of Mgrs. of the Alfred Condo. v. Carol Mgmt., 214 A.D.2d 380, 382 (1st Dept. 1995). Westside is entitled to the land necessary for wetland mitigation and the sewer easement. The amount and location of the land

necessary for wetland mitigation will be ultimately determined by the DEC and Corps of Engineers, as discussed *infra*.

Pooler's interpretation of the Operating Agreement would render Section 5.14 meaningless, a result loathed by New York law. See City of Buffalo City Sch. Dist. v. LPCiminelli, Inc., __ A.D.3d __, 2018 WL 1357529, *4 (4th Dept. March 16, 2018). Pooler's interpretation is thus rejected.

4. With respect to damages incurred from unauthorized loans, Pooler caused Archer Rd. Vista to transfer \$901,557.51 to the Pooler entities, as repayment of principal and interest. Pooler contended at trial that the restructuring of the debt saved Archer Rd. Vista approximately \$100,000 in interest and bank fees and prevented insolvency of over \$600,000. Howard seeks damages in the sum of \$901,557.51, with \$70,630 attributable to interest. It is the Court's determination that at trial Howard did not establish entitlement to the entire sum transferred to Pooler entities as repayment of principal and interest on the undocumented loans. Pooler's testimony relative to loaning the money to preserve Archer Rd. Vista's assets was credible. Damages for breach of contract are computed at the time of the breach. See J.M. Rodriguez & Co. v. Moore-McCormack Lines, Inc., 32 N.Y.2d 425, 429 (1973). The theory underlying damages in a breach of contract matter "is to make good or replace the loss caused by the breach of contract." Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C., 91 N.Y.2d 256, 261 (1998). It is uncontroverted that Pooler caused Archer Rd. Vista to borrow \$1,506,623 from the Pooler Entities and thereafter caused Archer Rd. Vista to repay \$901,557.51 of the debt. Despite Plaintiffs' contentions Pooler need not repay the \$901,557.51 as damages because awarding such damages would be a windfall and leave Archer Rd. Vista in a position where it borrowed a substantial sum of money and did not pay it back. Accordingly, the Court does not find that amount repaid to Pooler entities as principal on the loans is

recoverable as damages. However, as the loans were not memorialized in writing and there is not evidence of the alleged interest rate, monies repaid to the Pooler entities as interest in the sum of \$70,630 on the unmemorialized loans is awarded to Plaintiffs as damages.

5. Pooler caused Archer Rd. Vista to pay \$234,389.61 in connection with this litigation as attorneys' fees. The Court previously determined that Pooler breached the Operating Agreement by using Archer Rd. Vista's funds to pay his legal expenses. Plaintiffs are entitled to recovery of this sum, plus pre-judgment interest.

6. Pooler awarded Pooler Enterprises an unmemorialized contract, and the Court has already found Defendant liable in connection therewith. Pooler's testimony with respect to the contract price was not credible. Moreover, sufficient documentation relating to the contract was not maintained by Pooler, leaving him without back-up documentation for his allegations at trial. Pooler ultimately caused Archer Rd. Vista to pay Pooler Enterprises \$692,080 on this unmemorialized contract, with at least \$103,812 of that amount attributable to overhead and profit. Accounting for the actual value of the work, the overstatement in the invoices, and the actual amount of work performed, Archer Rd. Vista is entitled to \$317,146 in damages, plus pre-judgment interest. Archer Rd. Vista is also entitled to recovery of an additional \$103,812, which constitutes the overhead and profit charged by Pooler Enterprises. See Excelsior 57th Corp. v. Lerner, 160 A.D.2d 407, 408-09 (1st Dept. 1990) ("where claims of self-dealing and divided loyalty are presented, a fiduciary may be required to disgorge any ill-gotten gain even where the [Company] has sustained no direct economic loss"). Pooler is not entitled to the overhead and profit charged by Pooler Enterprises.

7. The evidence before the Court demonstrates without question that it is no longer practicable for Howard and Pooler to carry on the business of

Archer Rd. Vista. See Limited Liability Law §702. An order of dissolution of Archer Rd. Vista is granted. Upon dissolution and in the course of winding up, the receiver shall provide for the wetland mitigation lands, and the undeveloped land of the Company shall be held in escrow until it is determined how much land is necessary for wetland mitigation. Also in the course of winding up and dissolution, Pooler shall indemnify Archer Rd. Vista against any entitlement to interest or principal payments alleged by the Pooler entities with respect to additional outstanding loans not otherwise covered by this Decision. To the extent the damages awarded herein are not recoverable from Pooler, such recovery may be made by the receiver from Pooler's share of distributions made upon dissolution. The distribution shall be 60%/40%, as set forth in the Operating Agreement. An independent receiver will be appointed by the Court.

8. Upon the conclusion of this matter and the Decision herein, the Notice of Pendency filed by Plaintiff is moot.

9. Both Howard and Pooler made the initial capital contributions as required and agreed. Pooler never made a claim that Howard had not made his initial contribution until after the commencement of this lawsuit. Prior to the commencement of litigation, Pooler did not question whether the contribution was made or suggested that Archer Rd. Vista was "missing" \$900,000. The Court notes that Pooler filed tax returns for Archer Rd. Vista and caused K-1's to be prepared. Both the tax returns and the K-1's reflect that Howard and Pooler both made the required initial contribution of \$900,000 in order to facilitate Archer Rd. Vista to acquire the property that constituted the primary asset of the company. Pooler's arguments to the contrary lack credibility. The Court finds that Pooler was aware of and approved of the form of Howard's capital contribution.

10. Howard seeks the reimbursement of attorneys' fees in connection with the derivative claims. The Court agrees and damages in that regard are

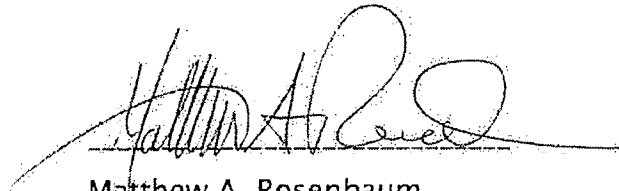
granted. Likewise, Howard seeks fees as a derivative Plaintiff acting on Archer Rd. Vista's behalf. The Court agrees, and fees in this regard are also granted. See, e.g., Tzolis v. Wolff, 10 N.Y.3d 100 (2008); Seinfeld v. Robinson, 246 A.D.2d 291, 294 (1st Dept. 1998). An affirmation in support of an award of attorneys' fees must be submitted to the Court.

To the extent Howard seeks fees in his individual capacity, no fees are awarded.

11. Archer Rd. Vista is entitled to a constructive trust in the total sum of damages awarded to the Company. See Nastasi v. Nastasi, 26 A.D.3d 32, 37 (2d Dept. 2005).

This is the Decision of the Court. Please submit an order on notice.

Signed at Rochester, New York this 2nd day of April, 2018.

A handwritten signature in black ink, appearing to read "Matthew A. Rosenbaum", written over a horizontal line.

Matthew A. Rosenbaum
Supreme Court Justice