

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

WILLIAM HOWARD, suing in the right of
ARCHER RD. VISTA LLC, WILLIAM HOWARD,
Individually, and WESTSIDE DEVELOPMENT
OF ROCHESTER, INC.,

Plaintiffs

-vs-

Index No. 2013/8187

GARY L. POOLER,

Defendant

Special Term
August 27, 2015

APPEARANCES

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

MORGENSTERN DEVOESICK PLLC
Vivek Thiagarajan, Esq.
Attorneys for Defendant

RESERVE DECISION

Rosenbaum, J.

Plaintiffs, William Howard, suing in the right of Archer Rd. Vista LLC, William Howard, individually, and Westside Development of Rochester, Inc., move for an order pursuant to CPLR 3212 granting Plaintiff partial summary judgment as to liability on Counts I, VII, and VIII of the Complaint.

Archer Rd. was formed in 2007 to develop a residential subdivision known as Vista Villa Subdivision in Chili, New York. Effective June 29, 2007, Pooler and Howard executed and entered into an Operating Agreement for Archer Rd. Howard owns 40% of the membership interests and 50% of the voting interests; Pooler owns 60% of the membership interests and 50% of the voting interests. Pooler is the managing member and alleges that he alone has decision-making authority for financial related transactions, including making and repaying debts and decisions relative to real estate assets.

Howard alleges that Pooler has been reluctant to share information regarding the management of Archer Rd. with Howard. For instance, it is alleged that there are loans that Pooler's other entities have made to Archer Rd. but Howard was never advised of them, nor was Howard's approval ever sought or obtained. Pooler states that the loans taken were noted in financial statements and were taken for the purpose of paying down Archer Rd.'s secured debt.

On March 26, 2015, Pooler sent an email to Howard's wife, Maureen Howard, containing copies of certain Archer Rd. information for the 2014 calendar year, including a Balance Sheet and a copy of the check register. The Balance Sheet shows that Archer Rd. is indebted to Pooler Enterprises in the sum of \$970,782.32. Howard states that Pooler has caused Archer Rd. to make numerous payments to Pooler Enterprises and to Morgenstern Devoesick PLLC,

but no distributions to members have been made.

Howard additionally notes that Pooler states that all of the Phase I lots have been sold, but no profit distributions have been made and no information relative to the proceeds has been shared with Howard. During 2014, it is alleged that at least \$173,334.02 of Archer Rd.'s revenue has been directed to Pooler Enterprises, and defense counsel has been paid at least \$129,592.38.

On May 20, 2015, Pooler advised Howard that he had exercised his authority as the managing member and corrected the Capital Contribution of the Members pursuant to the Operating Agreement. Howard was advised that the Schedule was revised to reflect \$0.00 cash capital contribution by Howard and to further reflect a 0% interest of Howard in Archer Rd.

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id. See also, Olisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324, citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

First Cause of Action

The first cause of action alleges breach of contract derivatively on behalf of Archer Rd. It is alleged that Pooler breached his obligations to Archer Rd. by usurping the authority given to Howard to be primarily responsible for property lot sales and company relations with builders; by failing to perform his duties in

good faith and with the care of an ordinarily prudent person; by failing to take actions required with respect to granting a sewer easement and land use for wet land mitigation to Westside; by authorizing the transfer of substantially all of Archer Rd.'s assets with the consent of a majority of the members; and by otherwise exceeding his authority. Complaint, ¶35.

Archer Rd.'s Operating Agreement states:

[W]ithout the consent of a Majority Interest of the Members, the Manager shall not have the right, power or authority to, and covenants and agrees that he shall not. . .

(g) authorize or approve the Company to borrow an amount in excess of \$50,000; or

(h) enter into any agreement, arrangement or understanding, written or oral, to do any of the foregoing.

Operating Agreement, §5.4. The Operating Agreement defines a "Majority in Interest" as "the Member or Members holding in the aggregate a majority of all outstanding Percentage Interests of the Company." *Id.* at §1.1. "Percentage Interest" is defined as "with respect to any Member, the percentage set forth opposite such Member's name on Schedule I hereto." *Id.* Schedule I provides that "for all decisions requiring a vote of the members, the Percentage Interests shall be 50% Gary L. Pooler and 50% William Howard." *Id.*, at Schedule I.

Reading these provisions together, a Majority in Interest requires the consent of both Pooler and Howard. Here, it is undisputed that Pooler authorized and approved Archer Rd. to borrow, as of December 2014, \$970,782.32 from Pooler Enterprises without Howard's consent or knowledge. Such unilateral authorization and approval constitutes a breach of the Operating Agreement.

Section 5.11 of the Operating Agreement states:

The Manager, on behalf of the Company, is permitted

in his sole discretion to employ, retain, transact business or enter into contracts with or otherwise deal with any Person, notwithstanding that such Person is a Member or the Manager, is an Affiliate of the Company, the Manager of any Member, is otherwise employed or retained by, has a financial interest in, or has some other business relationship with the Company, any member or the Manager, provided that such interest or relationship is known to all Managers and Members and, provided that, in the sole discretion of the Manager, such dealings are on commercially reasonable terms to the Company. If any contract, action or transaction meets the foregoing standards, then no vote of the members shall be required to approve such contract, action or transaction solely by virtue of the affiliated relationship involved.

Operating Agreement, §5.11. It is undisputed on the record before the Court that Pooler did not disclose intercompany loans to Howard. Consequently, such actions were further breaches of his contractual obligations under the Operating Agreement.

Pooler's arguments raised in opposition fail to raise an issue of law or fact. Pooler interprets Section 5.4 of the Operating Agreement to permit him to incur or repay any amount of debt so long as no individual loan transaction exceeds \$49,999.99. "[A] contract should not be interpreted to produce a result that is absurd. . . commercially unreasonable . . . or contrary to the reasonable expectations of the parties." Matter of Lipper Holdings v. Trident Holdings, 1 A.D.3d 170, 171 (1st Dept. 2003) (citations omitted). "The best evidence of what parties to a written agreement intend is what they say in their writing." Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002), *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.*

The Court finds that Pooler's proffered interpretation of Section 5.4

would produce an absurd result that would render Section 5.4 meaningless. Pooler's interpretation would allow him to accrue massive debt without majority consent so long as no individual loan exceeded \$49,999.99. Had the parties intended such a result when drafting the Operating Agreement, they could have made such specific provision, but they did not. See Schron v. Troutman Sanders LLP, 20 N.Y.2d 430, 437 (2013).

Pooler also opposes the motion on this claim, arguing that he took actions in the best interests of Archer Rd. and in good faith. Under the unambiguous terms of the Operating Agreement, Pooler's motive in making the loans are not relevant. Pooler was required to obtain the consent of a Majority in Interest, and it is undisputed that he did not do so. While Pooler is given broad management authority by the Operating Agreement, his authority is limited by Section 5.4, and he was obligated to abide by the terms of that Section.

Finally, to the extent Pooler argues that he is not liable for any breach because Howard cannot provide his own personal performance under the Operating Agreement, that argument is also unsuccessful. The first cause of action is a derivative claim for breach of the Operating Agreement brought by Howard on behalf of Archer Rd. It is not a claim made by Howard individually. "Derivative claims against corporate directors belong to the corporation itself." Auerbach v. Bennett, 47 N.Y.2d 619, 631 (1979). Accordingly, Pooler is incorrect to assert that Archer Rd. should not be awarded summary judgment for Pooler's breach of the Operating Agreement because of any allegations of Howard's failure to perform. Howard's action or inaction under the Operating Agreement is irrelevant to Archer Rd.'s derivative claim.

As no question of law or fact is raised by Pooler in opposition, Plaintiffs' motion for summary judgment as to liability is granted on Count I.

Seventh Cause of Action

The seventh cause of action alleges breach of fiduciary duty on behalf of Archer Rd., alleging that Pooler owed Archer Rd. fiduciary duties, that he breached those duties by his conduct, and that Archer Rd. has been damaged. Complaint, ¶¶59-63.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." Varveris v. Zacharakos, 110 A.D.3d 1059, 1059 (2d Dept. 2013). "A limited liability company manager owes fiduciary duties to the company and, derivatively, to its members." 190-210 16th St. LLC v. M&Y Sixteen LLC, 39 Misc.3d 1206(A), *5 (Sup.Ct. Kings Co. 2013). Indeed, Limited Liability Company Law Section 409(a) states:

A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.

See also, Willoughby Rehabilitation and Health Care Center, LLC v. Webster, 13 Misc.3d 1230(A), *4 (Sup.Ct. Nassau Co. 2006). "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." Abrams v. Donati, 66 N.Y.2d 951, 953 (1985).

"[I]t is elemental that a fiduciary owes a duty of undivided and undiluted 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." Pokoik v. Pokoik, 115 A.D.3d 428, 429 (1st Dept. 2014), quoting Birnbaum v. Birnbaum,

73 N.Y.2d 461 (1989). "included in this rule's broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person 'In such close relation [to the fiduciary] *** that possible advantage to such other person might *** consciously or unconsciously' influence the fiduciary's judgment." *Id.*, quoting Albright v. Jefferson County Nat'l Bank, 292 N.Y. 31, 39 (1944).

"A party who occupies a fiduciary position in relation to a corporation has the burden of explaining all transactions fully and of showing that no advantage has been taken of his position." Russo v. Zaharko, 53 A.D.2d 663, 666 (2d Dept. 1976).

Self-Dealing and Commingling Assets

Regardless of Pooler's intent in entering into the transactions, it is sufficient to find a breach of fiduciary duty where transactions have been undertaken that create a conflict of interest. "Deceitful intent is not an element of a cause of action for breach of fiduciary duty as it has consistently been articulated by the New York courts." Schneider v. Wien & Malkin LLP, 5 Misc.3d 1011(A), *18 (Sup.Ct. N.Y. Co. 2004).

Here, Pooler, without providing with required notice or obtaining the required consent, borrowed nearly \$1,000,000 from Pooler Enterprises, an entity owned by Pooler. As noted *supra*, Pooler breached that portion of the Operating Agreement forbidding loans in excess of \$50,000 and further engaged in a loaning relationship with his own entity that was not documented, memorialized or otherwise undertaken with any corporate formalities. Pooler's actions placed him in a compromising position as his own entity was assured of obtaining payment before Archer Rd. and its members. Pooler caused Archer Rd. to pay Pooler Enterprises over \$1,000,000 for undocumented loans, interest, and payments for undocumented site work contracts, but Archer Rd. did not have any money for the purposes of distribution to members.

The business judgment rule cannot save Pooler and his action in this case. The application of the business judgment rule presupposes that no fiduciary obligations have been breached and is applied only in the absence of any such breach. See Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 537-38 (1990).

As the Managing Member, Pooler had an obligation to Archer Rd. to not incur debt through self-dealing arrangements that placed his personal interests in conflict with the interests of the LLC. Pooler not only entered into such self-dealing arrangements, but he did so without adhering to the provisions of the Operating Agreement because he failed to give appropriate notices and seek required approvals. Plaintiffs establish prima facie entitlement to summary judgment as to liability on this issue, and Pooler fails to raise a question of law or fact.

Pooler Enterprises

Plaintiffs further allege that Pooler breached his fiduciary duties to Archer Rd. by contracting with Pooler Enterprises without submitting the work to bid, preparing a proposal for the work using Pooler Enterprise's ordinary methods, and refusing to cause the execution of a written, memorialized contract for the work. Pooler directed Archer Rd. to enter into an undocumented contractual relationship with Pooler Enterprises for nearly \$800,000. When invoices were submitted to Archer Rd., they were not accompanied by backup documentation to support the payment applications; the invoices were simply paid.

In response, Pooler fails to produce admissible evidence that he did not personally profit from the self-dealing. Plaintiffs note that Pooler admits that interest was charged, and furthermore, the amount of any personal gain received is irrelevant for the purposes of establishing liability on this claim. Pooler submits the Affidavit of Brian Sauers, a CPA, but that affidavit does not provide any evidence as to the interest applied, the rate, schedule, or terms.

Other than stating that he prepares Archer Rd.'s taxes, Sauers also provides no further explanation of his first hand knowledge.

Plaintiffs have established prima facie entitlement as to self-dealing on this issue. Pooler's arguments relative to the amount of his benefit is irrelevant; the issue of damages will be the subject of a trial. In this application, Plaintiffs seek summary judgment as to liability only and to that extent the motion is granted.

Misappropriation of Company Revenue

Plaintiffs allege that Pooler breached his fiduciary duties because the intercompany loans and undocumented contracts were used by Pooler to frequently transfer Archer Rd. revenue to Pooler Enterprises. Specifically, it is alleged that Pooler used the loans as a means to ensure that Archer Rd.'s revenue was paid first to Pooler Enterprises and to Pooler's individual debts, i.e. payments made to Morgenstern Devoesick PLLC for legal representation. Additionally, it is alleged that Pooler has commingled assets between Archer Rd. and Pooler Enterprises, with money transferred back and forth without documentation or memorialization.

Pooler does not dispute that Archer Rd. funds have been used to pay attorneys in connection with this litigation. Pooler cites to the Operating Agreement, Section 5.10:

The Manager, if a Member, shall be entitled to his share of the distribution and allocations to Members provided in Section 4 hereof, but shall not be entitled to any salary or other compensation (other than reimbursement of expenses as provided below) without the written consent of a Majority in Interest of the Members. The Manager is specifically authorized to reimburse, out of Company funds, himself or any Member, officer, employee or agent of the Company (and their Affiliates) for any and all reasonable out-of-pocket costs and expenses incurred by any such Person in connection with the organization, formation

or management of the Company.

Pooler further cites Section 5.3(f):

Except to the extent otherwise provided in this Agreement or required by the non-waivable provisions of the Act, the Manager shall have the full and exclusive right, power, authority, discretion and responsibility to manage, control, administer, direct and operate the business and affairs of the Company and to make all decisions and to take all actions for and on behalf of the Company necessary, convenient, desirable, appropriate or incidental in or to the furtherance of the purposes, business and objectives of the Company, including, without limitations, the right, power and authority to:

(f) institute, prosecute, defend, settle, compromise, confess judgment and dismiss lawsuits and other judicial and administrative actions and proceedings, at law or in equity (including submission of claims or liabilities of the Company to arbitration), brought by or on behalf of, or again, the Company, the manager or the Members in connection with activities arising out of, connected with, or incidental to this Agreement upon such terms as the Manager may determine and upon such evidence as he may deem sufficient and to engage counsel or other in connection therewith.

New York's Limited Liability Company Law, Section 420 states:

Subject to the standards and restrictions, if any, set forth in its operating agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person, or any testator or intestate of such member, manager or other person, from and against any and all claims and demands whatsoever; provided, however, that no indemnification may be made to or on behalf of any member, manager, or other person if a judgment or other final adjudication adverse to such member, manager or other person establishes (a) that his or her

acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled.

Here, Pooler has paid his personal attorneys' fees directly from the funds of Archer Rd. He has not sought and received reimbursement for fees paid; rather, he has paid his legal bills directly with Archer Rd.'s funds.

Plaintiffs establish prima facie entitlement as to this issue. If it is ultimately determined that Pooler engaged in conduct whereby he financially profited or gained some other advantage to which he was not entitled; Section 420 will require him to pay back any fees "reimbursed" to him. Here, Pooler disregarded the unambiguous provision made in Section 5.10 of the Operating Agreement, did not pay his own legal fees, and instead paid the fees directly from the funds of Archer Rd. Consequently, if he is found liable, he will not have access to a pool of reimbursement funds paid to him by Archer Rd. Again, Pooler's disregard for the formalities of the LLC and breach of his fiduciary duties to Archer Rd. would in that event harm Archer Rd.

Summary judgment on this issue is granted.

Misappropriation of Howard's Interest

Finally, Plaintiffs allege that Pooler breached his fiduciary duty by stripping Howard of his membership interest in Archer Rd. and misappropriating all of Archer Rd.'s membership interest to himself. Pooler bases his decision on Section 3.2 of the Operating Agreement, "Initial Capital Contribution," and states that Howard never made his required contribution. Section 3.2 states:

Upon execution of this Agreement, the Members shall contribute initial Capital Contributions to the Company in-cash in the amount set forth opposite their respective names on Schedule I hereto in exchange for their respective Percentage Interests as set forth in

Schedule I hereto. Each Member admitted to the Company after the date of the Agreement, other than as a Substitute Member pursuant to Article 10 hereof, shall make a Capital Contribution to the Company in the amount and form required to be made by such Member in accordance with Section 3.10 hereof and such Member's subscription or contribution agreement, and the Manager shall have the authority to amend Schedule I to reflect such admission, such Capital Contribution and the resulting amended Percentage Interests.

Pooler argues that he removed Howard's interest on the advice of counsel. Pooler also states that he learned for the first time that Howard did not make the required contribution only recently and that he then amended Schedule I.

Summary judgment is denied on this issue, as Plaintiffs have failed to establish prima facie entitlement. There is a question as to the appropriateness of Pooler's actions in this regard.

Eighth Cause of Action

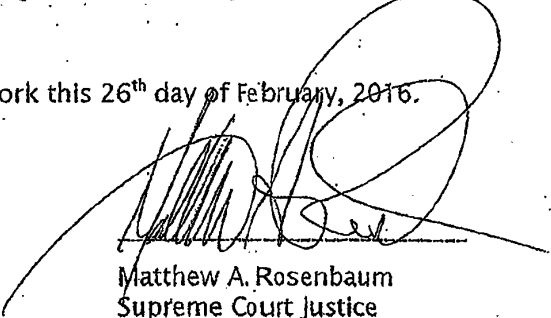
The eighth cause of action seeks an accounting derivatively on behalf of Archer Rd. Plaintiffs allege that Pooler's conduct entitles Archer Rd. to an accounting of all transactions and agreements entered into by Pooler on behalf of Archer Rd. Complaint, ¶65.

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." Lawrence v. Kennedy, 95 A.D.3d 955, 958 (2d Dept. 2012), quoting Palazzo v. Palazzo, 121 A.D.2d 261, 265 (2d Dept. 1986). "A fiduciary relationship 'whether formal or informal, is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances, between close friends . . . or even where confidence is based upon prior business dealings.'" AHA Sales, Inc. v. Creative Bath Prods., Inc., 58 A.D.3d 6, 21 (2d Dept. 2008),

quoting Apple Records v. Capitol Records, 137 A.D.2d 50, 57 (1st Dept. 1988).
"To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law." *Unitel Telecard Distrib. Corp. v. Nunez*, 90 A.D.3d 568, 569 (1st Dept. 2011).

Here, Pooler does not deny Plaintiffs' entitlement to an accounting, but rather notes that Howard has not requested an audit of Archer Rd.'s financial statements pursuant to Section 8.4 of the Operating Agreement. The Court agrees with Plaintiffs and determines that Archer Rd.'s entitlement to a full accounting is entirely independent of whether Howard, individually, exercised any right to require financial statements of Archer Rd. to be audited. Plaintiffs are entitled to a full accounting, which must include, for example, an accounting of undocumented transactions, the calculation of interest payments and the amount of interest, the amounts paid by Archer Rd. to Pooler Enterprises. Summary judgment is granted on the eighth cause of action.

Signed at Rochester, New York this 26th day of February, 2016.



Matthew A. Rosenbaum
Supreme Court Justice