SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 26

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GEORGINA SIMON, Individually and on behalf of 2845 ASSOCIATES LLC,

Plaintiff,

-against-

MICHAEL MOSKOWITZ AND MOSS MANAGEMENT LLC

Defendants.

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Index No. 23060/2015E

Hon. **RUBÉN FRANCO,**

Justice Supreme Court

The following papers numbered 1 to ___ . Read on this motion, (Seq. No. 002) for **SUMMARY JUDGMENT** noticed on **April 19, 2019** and duly submitted as No.___ on the Motion Calendar of _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	**No(s).**
Answering Affidavit and Exhibits	**No(s).**
Replying Affidavit and Exhibits	**No(s).**

Respectfully Referred to: _____

Dated: _____

MOTION IS DECIDED IN ACCORDANCE WITH THE MEMORANDUM DECISION FILED HEREWITH.

Dated: May 6, 2020

Hon._____
RUBÉN FRANCO, J.S.C.

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1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

GEORGINA SIMON, Individually and on behalf of 2845 ASSOCIATES LLC,

Plaintiff,

-against-

MICHAEL MOSKOWITZ and MOSS MANAGEMENT LLC,

Defendants.

Index No. 23060/2015E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

This is a derivative and an individual action for the right to gain access to books and records, for breach of fiduciary duty, conversion, accounting, and seeking injunctive relief. Defendants move for summary judgment (CPLR 3212).

The facts, as culled from the pleadings and exhibits submitted with the instant motion, are as follows: Plaintiff Georgina Simon (Simon), an 81-year-old retiree, currently owns an 18.75% membership interest in 2845 Associates LLC (Associates), a New York limited liability company. The remaining 81.25% is owned by Joe Rose LLC, of which defendant Michael Moskowitz (Moskowitz) owns 5.47%, as do each of his two sisters, and the balance is owned by their mother Rosette Moskowitz. Associates owns a 60-plus-unit residential building located at 2845 University Avenue in Bronx County. The building is managed by Moskowitz, through defendant Moss Management LLC. Simon seeks payment of distributions from Associates.

Simon obtained the books and records of Associates and had an analysis prepared by her expert Andrew Hoffman (Hoffman). Associates refinanced its mortgage, from which it received $1.3 million, which was deposited into Associates' savings account and has not been withdrawn. The funds constitute Associates' cash reserves, with the rest held in Associates' operating account. Simon

received distributions from Associates until 2014, however, commencing in 2015, no distributions have been made. Simon does receive Form K-1's from Associates that sets forth the income attributable to her 18.75% interest, and she must report and pay taxes on the sum indicated. Simon claims that the building is profitable and that defendants receive $80,000 as an 8% management fee, which is higher than the customary 5% fee.

Defendants contend that the Operating Agreement conveys upon the manager "the power and authority on behalf of this Company to do all things as set forth in Sec. 202(a)-202(q) of the New York Limited Liability Company Law" (Art. III, ¶ 7 [e]). These powers include the right to mortgage or refinance the mortgage on the property (Limited Liability Company Law § 202 [c]); the authority to establish and maintain the Company's cash reserves (Limited Liability Company Law § 202 [f]); and, the authority to decide whether, and when, to make distributions. Under the Operating Agreement there is no requirement that the manager make any distributions, nor do the members have a right to demand to receive contributions (Art. V). The Operating Agreement does not require the manager to inform members or seek members' approval before exercising the power to mortgage or refinance the mortgage on the property. With respect to Simon's claim of breach of fiduciary duty in Simon's individual capacity and on behalf of Associates, the Operating Agreement eliminates the manager's "liability to this Company or to its members … for any breach of duty" unless the manager's acts involved intentional misconduct or a knowing violation of the law (Art. III, ¶ 7 [g]).

A party moving for summary judgment must show *prima facie* an entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]; *Friends of Thayer Lake LLC v Brown.*, 27 NY3d 1039, 1043 [2016]; *Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]; CPLR 3212 [b]). The inability to make such a demonstration must lead to denial of the motion, no matter how inadequate the opposition papers may be (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503

[2012]; *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; *see Hoover v New Holland N. Am., Inc*., 23 NY3d 41, 56 [2014]). The movant has the initial burden on the motion (*see Gammons v City of New York*, 24 NY3d 562, 569 [2014]; *Melman v Montefiore Med. Ctr*., 98 AD3d 107, 137-138 [1st Dept 2012]; *Jaroslawicz v Prestige Caterers*, 292 AD2d 232, 233 [1st Dept 2002]). Admissible evidence includes affidavits by persons having knowledge of the facts (*see Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co*., 25 NY3d 498, 508 [2015]).

Defendants assert that, pursuant to their lawful authority, they have determined that it is in the best interest of Associates not to make distributions, but to strengthen its cash reserves for eventualities such as repairs, capital improvements, and other contingencies. In *Auerbach v Bennett* (47 NY2d 619, 629 [1979]), the Court explained the business judgment doctrine as follows:

> That doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. "Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." (*Pollitz v Wabash R. R. Co*., 207 NY 113, 124 [1912].)

(*See Matter of Levandusky v One Fifth Ave. Apt. Corp.,* 75 NY2d 530, 539 [1990].)

Simon does not demonstrate that Moskowitz has acted in bad faith because the management fee paid is higher than the standard fee; nor does she provide support for her expert's opinion that the reserves could be less; or, that she should be paid $476,404 for the years 2013 through 2017 when distributions were not made. Simon has also not made a showing of self-dealing and misconduct by

defendants. Simon's conclusory statements do not present questions of fact, and are insufficient to overcome the business judgment rule.

A breach of fiduciary duty claim requires the plaintiff to establish "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." (*Rut v Young Adult Inst., Inc*., 74 AD3d 776, 777 [2nd Dept 2010]; *see Schroeder v Pinterest Inc*., 133 AD3d 12, 22 [1st Dept 2015]). Simon's claims that Moskowitz breached his fiduciary duty by maintaining Associates' cash reserves and not making distributions, are without merit.

As stated in *Zuckerbrod v 355 Co., LLC* (113 AD3d 675, 676 [2nd Dept 2014]): "The business judgment rule 'bars 'judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes' ' (*North Fork Preserve, Inc. v Kaplan*, 68 AD3d 732, 733 [(2nd Dept) 2009], quoting *Auerbach v Bennett*, 47 NY2d 619, 629 [1979])." Moskowitz' decision not to deplete the cash reserves is in the lawful and legitimate furtherance of the purposes of Associates (*see Konrad v 136 E. 64th St. Corp.,* 254 AD2d 110 [1st Dept 1998]). As the manager, he has the authority to make the decision not to make distributions, and the decision is "shielded from judicial review by the business judgment rule …." (*Konrad v 136 E. 64th St. Corp*, 254 AD2d at 110; *see Feldmeier v Feldmeier Equip., Inc*., 164 AD3d 1093, 1095-1096 [4th Dept 2018]). Simon cannot make a meritorious claim that Moskowitz has breached his fiduciary duty

The cause of action in conversion "is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner (*Payne v White*, 101 AD2d 975, 976 [3rd Dept 1984]; *Peters Griffin Woodward v WCSC, Inc*., 88 AD2d 883 [1st Dept 1982])." (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The property must be specifically identifiable, which

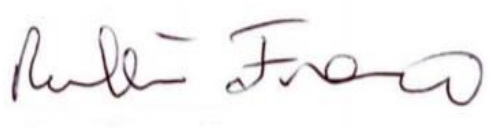
includes a specific, named bank account (*id.*). There is no basis for a cause of action for conversion of the refinancing proceeds because the funds have been properly deposited in Associates' savings account, from which Simon seeks a distribution. However, Simon has not shown a right to ownership of these proceeds. Nor is there conversion of the management fees, which are permissibly earned by Moskowitz (Limited Liability Company Law § 202 [h]).

The causes of action for access to books (Limited Liability Company Law § 1102), accounting, and injunctive relief "turn on whether there was any breach of fiduciary duty" (*Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d at 1095; *see LoGerfo v Trustees of Columbia Univ. in City of N.Y.*, 35 AD3d 395, 397 [2nd Dept 2006]). This has not been established by Simon (*see Auerbach v Bennett*, 47 NY2d at 629; *Zuckerbrod v 355 Co., LLC*, 113 AD3d at 676; *North Fork Preserve, Inc. v Kaplan*, 68 AD3d 732, 733 [2nd Dept 2009]). The location of the funds is undisputed and Moskowitz' failure to make a distribution is not a breach of fiduciary duty under the business judgment rule.

Although not raising questions of fact, Simon presents arguments which do not warrant the imposition of sanctions for frivolous conduct (22 NYCRR 130–1.1 [a]).

Accordingly, defendants' motion for summary judgment is granted.

This constitutes the Decision and Order of the court.



Dated: May 6, 2020

Rubén Franco, J.S.C.