SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

DAVID ARONOV, INDIVIDUALLY AND AS A MEMBER OF 290 13TH STREET, LLC SUING ON BEHALF OF HIMSELF AND OTHER MEMBERS OF 290 13TH STREET, LLC SIMILARLY SITUATED AND IN THE RIGHT OF 290 13TH STREET LLC,

Plaintiffs,

-against-

EUGENE A. KHAVINSON, MIKHAIL KREMERMAN, MICHAEL KHAVINSON, VYACHESLAV FAYBYSHEV, YANA SOSKIL, VITALY KOCHNEV, ARTYOM KIRZHNER, MIKOLA VOLYNSKY, ALEXANDER BOGUSLAVSKY, OMNI BUILD INC. AND 290 13TH STREET, LLC,

Defendants.

Index No.: 500499/2016

Hon. Patria Frias-Colon

Mot. Seq. 6

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION UNDER CPLR § 4404(A) FOR JUDGMENT NOTWITHSTANDING VERDICT

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Defendants submit this reply memorandum in response to Plaintiff's opposition and in further support of their motion under CPLR § 4404(a) for judgment notwithstanding verdict.

PRELIMINARY STATEMENT

In their opening, Defendants argued that judgment notwithstanding verdict should be granted because no rational jury could have found liability based on the evidence presented. Defendants argued that no rational jury could have found liability because (1) Plaintiff's breach of fiduciary duty claims were unsupported by any evidence, Plaintiff failed to establish harm, and Defendants' actions were protected by the business judgment rule (Defs.' Mem. at 3-16 [Dkt. 185], (2) Plaintiff's fraud claim was unsupported by any evidence of scienter (*id.* at 17-18), (3) Plaintiff's duty of loyalty claim was duplicative of Plaintiff's breach of fiduciary duty claim and fails for the same reasons the fiduciary duty claim fails (*id.* at 16-17) and (4) Plaintiff's unjust enrichment and conversion claims were unsupported by any evidence and showing of harm (*id.* at 18-22).

In opposition, Plaintiff ***does not dispute*** Defendants' arguments that judgment should be entered in their favor on the fraud claim due to the absence of any showing of scienter. Thus, Defendants' motion should be granted as to Plaintiff's fraud claim.

In opposition, Plaintiff merely conjectured about how a jury could have found liability on his claims but failed to cite any evidence that the jury could have relied upon and to relate those facts to each of the elements of Plaintiff's claims. On this basis alone, Plaintiff's opposition should be disregarded.

Further, as discussed below, Plaintiff's conjectures are insufficient to defeat this motion because they are either unsupported by the evidence, or flatly contradicted by the evidence.

In opposition, Plaintiff argues that Defendants' motion must be denied because (1) Defendants "waived the right to make a 4404(a) motion for a judgement notwithstanding the verdict . . . because Defendants did not make a motion for a Directed Verdict, pursuant to CPLR

4401, at the close of Plaintiff's case" (R. Grasing Aff. ¶¶ 7-12, 18 [Dkt. 197]), (2) "[t]here is a rational basis, based on the entered evidence, for each of the causes of action that the jury found the Defendants liable to the Plaintiff for" (*id.* ¶¶ 15-18), and (3) Plaintiff should be awarded attorney's fees for opposing this motion (*id.* ¶ 4).

Plaintiff's arguments must be rejected, and Defendants' motion must be granted because (1) Defendants ***moved for a directed verdict at the close of Plaintiff's case*** and thus did not waive their right to bring this motion, (2) Plaintiff does not identify ***any evidence*** on the record upon which the jury ***could have relied*** to demonstrate the elements of his claims, including the elements of wrongdoing and harm on each of the asserted claims and the element of scienter on the fraud claim, and (3) there is no factual or legal basis for Plaintiff's fee application.

ARGUMENT[1]

I. Defendants Did Not Waive their Right to Bring their JNOV Motion Because Defendants Did Move for A Directed Verdict at the Close of Plaintiff's Case.

Plaintiff's argument that Defendants waived their right to bring this motion "because Defendants did not make a motion for a Directed Verdict, pursuant to CPLR 4401, at the close of Plaintiff's case" must be rejected because Defendants ***moved for a directed verdict at least twice*** after the close of Plaintiff's case, and before the jury was given the case.

On December 18, 2023, in open court before the Honorable Judge Patria Frias-Colon, the undersigned motioned to the Court that "in view of the record and the provided evidence, [Defendants] respectfully move for a directed verdict Your Honor". (12/18/2023 Trial Tr. at 1:9-10 [Ex. L]; O. Mestechkin Reply Aff. ¶¶ 8-10.)

After reciting the law on motions for a directed verdict, the Honorable Judge Frias-Colon

[1] References to "[Ex. __]" are to exhibits attached to this motion, which are in the 1/12/2024 Oleg Mestechkin affirmation, and his 1/22/2024 reply affirmation.

ruled that "at this juncture I am not going to make a decision, rather I will reserve the decision until after a verdict has been rendered. And that determination will be with leave to renew post, and at that point I would ask that it be put in writing." (Dec. 18, 2023 Trial Tr. at 4:19-23.)

This ruling was made after Plaintiff's counsel, Raymond Grasing, specifically objected to Defendants' motion for a directed verdict. (*See* 12/18/2023 Trial Tr. at 1:13-2:6.)

Defendants' formal request in open court was preceded by an informal request made by the undersigned in a breakout room before the Honorable Judge Frias-Colon earlier that day on December 18, 2023, which was attended by Plaintiff's counsel, Mr. Grasing, my partner, Wing Chiu, and the Judge's court attorney, Ms. Holly Riley. (Mestechkin Reply ¶¶ 5-8.)

At that breakout room, the undersigned moved for a directed verdict; Mr. Grasing objected to that motion; and the Honorable Judge Frias-Colon held that she would make a ruling after the jury returned its verdict. (*Id*.)

Judge Frias-Colon then indicated that she wanted counsel for both parties to put Defendants' motion and Plaintiff's objections on the record, which all parties proceeded to do, as reflected in the portions of the trial transcript referred to herein. (*Id*. ¶ 7.)

Thus, given the fact that: (a) the undersigned clearly moved twice for a directed verdict after the close of Plaintiff's case and before the jury was given the case, (b) Plaintiff's counsel clearly heard those motions and objected twice to those motions, and (c) there were several witnesses to both of these exchanges, including the Court itself and the Court's law attorney, Plaintiff's assertions that Defendants did not move for a directed verdict are borderline frivolous. Thus, Plaintiff's waiver argument must be rejected.

II. The Court Should Enter a Directed Verdict of No Liability on All of Plaintiff's Claims.

In opposition to Defendants' arguments that no rational jury could have entered verdicts of liability on all of Plaintiff's claims, Plaintiff argues that there was sufficient evidence by which the

jury could have found that (1) the "Managing Members transferred money to third parties ... which was not related to the business of the LLC" (Grasing Aff. ¶ 16.A [Dkt. 197]), (2) the "managing members did not attempt to collect the remainder of the balance of the loan the LLC made to Omni Build Inc" (*id*. ¶ 16.B), (3) the "managing members tried to hide the loan to Omni Build for $749,800" and should have distributed the loan money instead to the Members (*id*. ¶ 16.C), (4) the "managing members . . .used the $250,000 that is listed, on the LLC's 2014 CITR as a repayment to Alexsandr Boguslavsky . . . for purposes unrelated to the LLC" (*id*. ¶ 16.D), (5) the "managing members manipulated the ownership interest of the managing members and the others" (*id*. ¶ 16.E), and (6) the "purchase of shares of the LLC by Alexsandr Boguslavsky did not actually occur" (*id*. ¶ 16.F). Each of these arguments must be rejected for the following reasons.

A. No Rational Jury Could Have Concluded that the Managing Members Transferred Money To Third Parties That was Not Related To The Business Of The LLC.

Plaintiff argues that the jury could have found that "managing members transferred money to third parties . . . which was not related to the business of the LLC" through the making of alleged "loan repayments". Plaintiff argues that the jury could infer that these "loan repayments" were illusory improper payments to third parties because there was no evidence of any loans, or any underlying loan documentation, agreements, or promissory notes. (Grasing Aff. ¶ 16.A [Dkt. 197].)

Plaintiff's argument must be rejected because the evidence of record overwhelmingly contradicted such conjecture such that no rational jury could have arrived at such conclusions based on this conjecture.

First, Plaintiff argues that the jury could have inferred that the managing members transferred money to third parties through these loan repayments, while completely ignoring the evidence of record that irrefutably showed that these third parties first deposited money to the Company before the Company made these loan repayments back to these third parties.

Ironically, it was Plaintiff who introduced this overwhelming evidence by spending several days during trial eliciting testimony from the Managing Members that the Company took out loans in 2010-2011 to support his theory of liability that the Managing Members took out loans from third-parties without unanimous consent. (*See, e.g.*, E. Khavinson Trial Tr. at 61:21-62:6 [Ex. F]; *id*. at 74:12-20; Faybyshev Trial Tr. at 24:6-20 [Ex. I].)

If Plaintiff is arguing now that the payments received by the Company from those third parties in 2010-2011 are not loans, then Plaintiff concedes that the Managing Members did not breach their fiduciary duty by taking out loans without the unanimous consent of the Members.

Second, because these payments to the third parties were made only after those third-parties had first deposited the same amount of money to the Company three years prior, the Company did not suffer any harm as a result of these back-and-forth interest-free payments. Because the Company did not suffer any harm resulting from the payments to and from the Company, a rational jury could not have and should not have concluded that "managing members transferred money to third parties . . . which was not related to the business of the LLC" and, thus, breached their fiduciary duty (*see* *Madison Hudson Assocs. LLC v. Neumann*, 44 A.D.3d 473, 484 (1st Dept. 2007); *Oshman v. Yasser*, 183 A.D.2d 648, 649 (1st Dept. 1992)).

Further, the same absence of harm is fatal to Plaintiff's conversion claim based on these loan repayments (*see* *Waldman v New Phone Dimensions, Inc.*, 109 A.D.2d 702, 704 (1st Dept. 1985)), Plaintiff's fraud claim based on these loan payments (*see* *County of Suffolk v Long Is. Power Auth.*, 100 A.D.3d 944, 949 (2d Dept. 2012)), and Plaintiff's unjust enrichment claims based on these loan repayments (*see* *Adrian Family Partners I, L.P. v Exxonmobil Corp.*, 23 Misc.3d 1120(A) (Sup. Ct. N.Y. County 2007), *aff'd*, *appeal dismissed*, 61 A.D.3d 901 (2d Dept. 2009)). Thus, no rational jury could have found that the Managing Members violated their fiduciary duty

to the Company by making these loan repayments.

B. The Managing Members Did Not Try To Collect The Remainder Of The Balance Of The Loan Made To Omni Build Because It Was Not Financially Feasible.

Plaintiff's argument that a jury could have found that the Managing Members breached their fiduciary duty by failing to collect on the remainder of the $750,000 loan to Omni Build must be rejected because it is contradictory to the evidence presented at trial.

As Defendant Khavinson testified at trial, "Yes, we did make attempts to recover the balance", but made no further attempts because "there's no place to recover balance from." (Khavinson Trial Tr. at 94:13-14 [Ex. F].)

This is because Defendant Faybyshev testified at trial, at the time the remainder of the loan became due under the promissory note with Omni, Omni simply lacked financial resources to repay the balance of the loan (Faybyshev Trial Tr. at 7:3-25 [Ex. I]). Therefore, the Managing Members made a business decision not to pursue litigation against Omni because it would not have been financially feasible.

Finally, Plaintiff's allegations of the Managing Members' breach of their fiduciary duty to enforce the terms of the Promissory Note against Omni because it supposedly benefited Omni makes no sense because collection of the loan by the LLC would have resulted in distribution of the lion's share of the repaid loan to the Managing Members themselves! Thus, a reasonable jury could not, and should not, have concluded that the Managing Members breached their fiduciary duty failing to collect on the remainder of the Omni loan.

C. There is No Evidence That the Managing Members Tried To Hide The Loan To Omni and There Was No Option to Pay the Members that Money Instead of Lending it to Omni.

Plaintiff's argument that the jury could have found that the Managing Members breached their fiduciary duty to the Company by hiding the loan to Omni Build, and by even making the

loan to Omni Build in the first place, as opposed to distributing that available money to the Company's Members (Grasing Aff. ¶ 16.A [Dkt. 197]), must be rejected for two reasons.

First, there was no testimony by any witnesses, including Plaintiff Aronov himself, that the loan to Omni was hidden from the Company's members at the time it was made. Indeed, Plaintiff points to no testimony in the record to support this supposed theory of liability.

The only evidence to support Plaintiff's theory of the Managing Members trying to hide the Omni loan is the Company General Ledger that listed the loan as "Legal Settlement". (Grasing Aff. ¶ 16.C [Dkt. 197].) However, in order for Plaintiff to prevail on this theory that the ledger entry was somehow a fraudulent misrepresentation, Plaintiff needed to show "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173, 178 (2011)) – a showing which Plaintiff never made at trial. Thus, no rational jury could have concluded that the Managing Members breached for their fiduciary duty based on a theory of hiding loans for which there was no evidence in the record.

Second, Plaintiff's argument that jury could have found that the Managing Members breached their fiduciary duty to the Company's Members by lending that money to Omni Build as opposed to simply distributing that money to the Company's Members must be rejected because no money would have been available to the Company in the first place had the Managing Members not agreed to lend the money to Omni Build.

As explained in Defendants' opening papers, the only way that the Company could have gotten access to the proceeds from the sold subject property, escrowed by the attorneys of Mr. Snop, and avoided bankruptcy altogether was to settle the litigation with Mr. Snop. The only way

to settle the Mr. Snop case was for Omni Build to contribute $750,000 to the Settlement. But Omni did not have the money to pay the settlement, so the Managing Members and Omni solicited a short-term zero-interest funding from 35 West End Avenue LLC. 35 West End agreed to lend the money to the Company, but only if the Company would repay the borrowed funds immediately upon gaining access to the proceeds from the sale of the condominiums and lend it to Omni so that Omni could pursue a lawsuit against its insurance broker to recoup the $750,000. Thus, the Company was required under its agreement with 35 West End to lend that money to Omni.

Had the Company not agreed to these terms for its loan from 35 West End, there would have been no sale of the condominiums, there would have been a continued litigation with Mr. Snop, and the Company would likely have been bankrupt – leaving no distributions whatsoever to any Members. (*See* Defs.' Mem. at 12-15 [Dkt. 185].)

Thus, no rational jury could have found that the Managing Members breached their fiduciary duties to the Members by lending the money to Omni Build, as opposed to simply distributing that money to the Members.

Further, the testimony of Serge Rozenberg cited by Plaintiff as support for this theory does not say anything remotely resembling what is attributed to him (*see* Grasing Aff. ¶ 16.A [Dkt. 197], citing Rosenberg Trial Tr. at 82:21-83:14 [Pl. Ex. 6]). Plaintiff grossly mischaracterized the trial testimony of Mr. Rosenberg because in the referenced portion of his testimony Mr. Rosenberg never stated that "*if the transaction had not been made the LLC would have had that much more money, $749,800, in income. Each member, in turn would have been entitled to their pro rata share of that additional profit*", as alleged by the Plaintiff.

In fact, Mr. Rosenberg testified on the record that "settlement expense of $750,000" would have ***no effect*** on the profit of the LLC. Thus, no rational jury could have concluded that the

Managing Members breached their fiduciary duty to the Members by hiding the loan to Omni Build, and by even extending the loan to Omni Build in the first place.

D. The Managing Members Did Not Make Any $250,000 Payment To Aleksandr Boguslavsky For Purposes Unrelated To The Company.

With respect to the $250,000 loan repayment that was supposedly made to Defendant Boguslavsky for purposes unrelated to the purposes of the Company (Grasing ¶ 16.A & 16.D), no reasonable jury could have found that the Managing Members ever made such a loan repayment. This is because the only proof of such a loan repayment was a Company Tax Return. The evidence that was admitted at trial, including bank statements (Defendants' Exhibit A), the LLC ledger (Plaintiff Exhibit 2 or 3), and witness testimony, is devoid of any corroborating proof of any such payments from or to Mr. Boguslavsky reflecting any $250,000 loan.

Further, the Company's accountant, Mr. Serge Rozenberg, affirmatively testified that a supposed loan in the amount of $250,000 from Boguslavsky to the Company and its supposed repayment to Boguslavsky as reflected in the subject Tax Return was an accounting error, that there was no such loan and there was no repayment of such loan to Boguslavsky. (*See* Rozenberg Tr. 48:20-49:22; 53:12-54:3 [Ex. J].)

Furthermore, both Defendants Khavinson and Boguslavsky testified that no such loan was ever made to the Company and that $250,000 was never repaid by the Company to Mr. Boguslavsky. (E. Khavinson Trial Tr. at 72:10-19 [Ex. F]; Boguslavsky Trial Tr. at 7:22-8:6 [Pl. Ex. 7].) Thus, no rational jury could, or should, have concluded that $250,000 was ever paid by the LLC Mr. Boguslavsky.[2]

[2] But even if the Tax Return was accurate that a loan repayment was made, and even if the jury were to disregard the uncontradicted testimony of three witnesses who testified that the Tax Return was inaccurate and that no such loan repayment was made, that one Tax Return upon which Plaintiff relies, also shows that a loan payment was ***made by Mr. Boguslavsky to the Company*** – meaning the Company was no worse off by the alleged loan repayment after

E. The Managing Members Did Not Manipulate The Ownership Interest Of The Managing Members and There was No Harm Shown Anyway.

Plaintiffs' assertion that the Managing Members breached their fiduciary duty to the Company by manipulating the ownership interest of the Managing Members and of other members without heeding the requirements of the Operating Agreement appears to be an argument that the Managing Members breached their fiduciary duty to the Company by adding members and changing membership percentages without following the procedures established in the Operating Agreement. If so, this argument must be rejected for the following reasons.

First, the terms of the Operating Agreement of the Company do not preclude the Members of the Company, including the Managing Members, from selling all or part of their membership interests in the LLC, as long as such transaction involves a fair market value of the transacted membership share. The testimony of Messrs. Boguslavsky, Khavinson, and Kremerman all state that Mr. Kremerman and Mr. Faybyshev, each, sold 2.5% of their respective membership shares in the Company to Mr. Boguslavsky for a sum of $150,000 and that this amount was duly deposited on the account of the LLC in 2009. (*See* 12/8/2023 Khavinson Trial Tr. at 20:17-21:10 [Ex. M]; Boguslavsky Trial Tr. at 4:12-15 [Pl.'s Ex. 7]); Kremerman Trial Tr. at 20:17-21:4 [Ex. G]; Faybyshev Trial Tr. at 20:3-7 [Ex. I].)

Further, Defendants' Trial Exhibits C-1 and C-2, admitted into evidence, is a true and correct copy of Mr. Boguslavsky's bank statement dated August-September 2009 showing deposit of two checks in a total amount of $150,000 issued to the LLC, where the memo of the checks states the name of the LLC.

having received a loan payment from Mr. Boguslavsky, and meaning the Company was not harmed by the supposed loan repayment. Thus, no rational jury could have found a breach of fiduciary duty, breach of duty of loyalty, conversion, unjust enrichment, or fraud based on this alleged $250,000 payment.

Second, Plaintiff has not shown how the jury could have found that the Company was harmed by this change of ownership percentages. As discussed in Defendants' opening papers, no Members' percentage interests were affected by the addition of Mr. Boguslavsky other than those of the Members who sold Mr. Boguslavsky his interests (and were thus not harmed).

As discussed in Defendants' opening papers, where a plaintiff is alleging a breach of fiduciary duty based on the addition of new members without consent, the harm that s/he is typically alleging is diluting the plaintiff's membership interests, voting rights, or value. *See, e.g.,* *Beatrice Investments, LLC v. 511 9th LLC*, 177 A.D.3d 551, 551 (1st Dept. 2019). However, the inclusion of Defendant Boguslavsky as a Member ***did not change*** plaintiff's membership interests or those of any members except those Members who sold Mr. Boguslavsky his interests. Where there is no change in the membership interests, voting rights, or value arising from a corporate action that is alleged to change any of those rights, there can be no claim for breach of fiduciary duty claim based on that action because there is no harm to the plaintiff. *See* *Celauro v. 4C Foods Corp.*, 187 A.D.3d 836, 132 N.Y.S.3d 159, 163 (2d Dept. 2020).

Accordingly, no reasonable could have found that the Managing Members breached their fiduciary duty to the Company by manipulating membership interests without heeding the requirements of the Operating Agreement.

F. The Purchase Of Shares Of The Company By Alexsandr Boguslavsky Did Actually Occur.

Plaintiff's argument the jury could have found that the purchase of shares of the Company by Mr. Boguslavsky did not actually occur appears to be an argument that the jury could have found that the Managing Members breached their fiduciary duty to the Company by making an improper payment to Mr. Boguslavsky (although it is not clear because Plaintiff does not articulate what theory of liability that this supposed fact is relevant to).

Nonetheless, this theory for liability must be rejected because it is contradicted by the evidence of record, all of which show that Mr. Boguslavsky did purchase shares. (*See* 12/8/2023 Khavinson Trial Tr. at 20:17-21:10 [Ex. M]; Boguslavsky Trial Tr. at 4:12-15 [Pl.'s Ex. 7]); Kremerman Trial Tr. at 20:17-21:4 [Ex. G]; Faybyshev Trial Tr. at 20:3-7 [Ex. I].)

Also the absence of the LLC's Operating Agreement listing Mr. Boguslavsky as a member of the LLC was explained by Mr. Khavinson at trial when he testified that the LLC's Operating Agreement containing the signature of Mr. Boguslavsky and of other members of the LLC was in existence and was kept in Mr. Khavinson office until it disappeared with the departure of the Plaintiff's wife who was, at that time, employed by Mr. Khavinson's law firm as a paralegal and who resigned shortly before the Plaintiff commenced his this lawsuit. (12/7/2023 Khavinson Trial Tr. at 37:13-39:6 [Ex. F].)

Further, the LLC's accountant, Mr. Rosenberg testified that tax returns of the LLC may contain discrepancies, so the inadvertent removal of Mr. Boguslavsky's from the LLC's tax returns for certain years can be attributed to such discrepancies. (Rozenberg Trial Tr. at 85:20-23 [Ex. J].)

Thus, based on the record in evidence, no reasonable jury would or could have held that a purchase of shares of the LLC by Mr. Boguslavsky did not actually occur and that the Managing Members breached their fiduciary duty to the Company by merely paying money to him.

III. There is No Factual or Legal Basis for Attorneys' Fees in Opposing this Motion.

Finally, Plaintiff's request for attorneys' fees must be denied because, like his claim for fees under the Business Corporation Law for a derivative suit brought on behalf of a limited liability company, there is no factual or legal basis for his request.

To the extent that Plaintiff relies on the prevailing party standard for his application, that request would fail because (1) no finding has been made on the merits of Defendants' motion and thus any request as a prevailing party would be premature, and (2) based on the submissions of

both parties, it is apparent that there is merit to Defendants' motion, and at least a good faith basis for Defendants' motion, such that any grant of attorneys' fees to Plaintiff would be unwarranted.

CONCLUSION

For the foregoing reasons, Defendants' motion pursuant to CPLR § 4404(a) for judgment notwithstanding verdict must be granted, along with such other and further relief as this Court deems just and proper.

Dated: January 22, 2024
Brooklyn, New York

Respectfully submitted,

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Certification Pursuant to 22 NYCRR 202.8-b

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court, Section 202.8-b, the preceding Memorandum of Law contains 4101 words. This count was determined, per the terms of Section 202.8-b, using the word count feature of the word-processing program used to prepare this document. The total word count of this document is less than the limitation of four-thousand and two-hundred words (4,200) words as proscribed by the Uniform Civil Rules.

These statements are certified to be true, and this document is certified to be in compliance with Section 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court by the signature of the undersigned attorney.

Dated: January 22, 2024
Brooklyn, New York

Respectfully submitted,

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