To be Argued by: Janet D. Callahan, Esq.
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New York State Supreme Court
Appellate Division - Third Department

DOCKET NO. CV-24-0809

THOMAS AMICI,

Plaintiff-Appellant,

-v-

EDWARD A. MAZZA, ESQ., Individually and as Member of MAZZA AND AMICI, LLC, MAZZA AND AMICI, LLC, and for the Judicial Dissolution of MAZZA AND AMICI, LLC,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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Tompkins County Index No.: EF2022-0516

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PRELIMINARY STATEMENT

In 1986, plaintiff-appellant Thomas J. Amici ("Amici") entered into a 50/50 partnership with defendant-respondent Edward A. Mazza, Esq. ("Mazza"). As partners, they bought several small buildings. Over time, they bought more buildings together until, by 1998, they were joint owners of 20 income-producing properties. Mazza is a practicing attorney, who received a B.A. in Economics from Syracuse University in 1974 and a J.D. from Cornell Law School in 1977. He ran the business and finance side of the operation and acted as attorney for the partnership. Amici, who has a high school education, did the physical labor involved. He handled the repair and maintenance of the properties purchased by the partnership and relied on Mazza, his partner and the partnership's attorney, to handle the financial and legal matters.

In late 2011, Mazza unilaterally prepared and filed paperwork to convert the partnership to a limited liability company. At no time did Mazza advise Amici, who relied on him for legal advice, that if and when Amici wanted to retire and withdraw from the business, it would be close to impossible unless Mazza agreed, and certainly it would be infinitely more difficult to leave the limited liability company than it would have been for Amici to withdraw from the partnership.

In 2021, Amici was 73 and in declining health. He informed Mazza that he wanted to retire and withdraw his half of the business, which he had always

understood he had the right to do—and which, under the partnership, he did have the right to do. Mazza refused to allow him to withdraw and, in fact, refused even to discuss the situation with him. Amici then brought this action, alleging breach of fiduciary duty, breach of contract and breach of the implied covenant of good faith and fair dealing, and seeking rescission, dissolution of the LLC or an equitable buyout.

The appeal is from an order of Supreme Court, Tompkins County, (Hon. Christopher P. Baker) that granted Mazza's motion for summary judgment and dismissed Amici's Complaint in its entirety. On appeal, Amici submits that since the record demonstrates a number of triable issues of fact, the lower court erred in holding as a matter of law that Mazza owed no fiduciary duty and that there was no evidence of any wrongdoing on his part constituting a breach.

QUESTION PRESENTED

1. Where the record before the lower court demonstrated that Mazza owed an undisputed fiduciary duty to Amici as his partner and as the partner with superior knowledge and experience, and where issues of material fact were demonstrated as to whether Mazza breached that duty by unilaterally converting the parties' partnership, from which Amici had the right to withdraw at any time, to a limited liability company, from which it was virtually impossible for Amici to leave without Mazza's agreement, which Mazza refused to give, did the lower court err in granting

summary judgment to Mazza and dismissing Amici's Complaint in its entirety based on its holding as a matter of law that the unilateral conversion by Mazza of the partnership did not constitute misconduct?

This question must be answered in the affirmative. The lower court erred in granting summary judgment to Mazza where the record demonstrates material issues of triable fact as to whether the unilateral conversion by Mazza to a type of business entity from which Amici's right to withdraw was effectively destroyed constituted a breach of Mazza's undisputed fiduciary duty to Amici, both as Amici's partner of 38 years and as the person with superior knowledge and experience in legal matters.

STATEMENT OF FACTS

The facts and circumstances underlying the lawsuit

In 2012, Amici and Mazza were joint owners of residential real property they rented out to produce income. (R.17) They had started this enterprise in 1986 by purchasing several small buildings and they continued to acquire more properties over time. (R.17) They purchased their last building in 1998, at which time they were joint owners of 20 different income-producing properties. (R.17) They operated their business as a partnership, with each man holding a 50% interest. (R. 19, 331)

Amici is currently 76 years old and has a high school education. (R.69) Mazza has been a practicing attorney with his own office in the City of Ithaca for 47 years, sharing an office with father, who is his law partner. (R.327) Mazza's LinkedIn page

states that he focuses his practice on "Real Estate Law, Landlord Tenant Law, Business Law".

The process followed by the two men with respect to the purchase of their jointly owned properties was consistent. A property would come to their attention and Amici would inspect it. (R.3) Sometimes Mazza would become aware of an opportunity through one of his contacts, and he would tell Amici. (R.17) Sometimes a property came to Amici's attention. (R.71) It was always Amici who inspected the property and then discussed its condition with Mazza, at which time the two men would reach a joint decision on whether or not to make an offer. (R.17, 71) For the properties they acquired, Amici was responsible for all physical labor, maintenance and repairs of the rental units. (R.17, 331) Mazza, as a practicing attorney, was responsible for the office and legal and financial aspects of the property ownership. He also acted as the partnership's attorney. (R.17, 331)

When the two men first went into business together, Mazza presented a formal proposed partnership agreement to Amici. (R17) The two men never discussed it, however, and they never signed any partnership agreement. (R.17) However, despite the fact that no formal partnership agreement was ever signed, the two men ran the business as a general partnership for years, as 50/50 partners. (R.331)

In late 2011, Amici happened to mention to Mazza that he had noticed other property owners in the area registering their properties as limited liability companies

and he wondered what that was about, since he knew nothing about LLCs. (R.332, 72) Mazza explained generally to Amici what the purpose of an LLC was, but never explained to him the differences between an LLC and a partnership. (R.72) Most significantly, Mazza never at any time informed Amici of the difference with respect to the right of a member of an LLC to terminate the entity as contrasted with the rights of a partner to withdraw at any time. (R.332, 72) At the time, Mazza was acting as attorney for the partnership and knew that Amici relied on him for legal information and to handle the legal affairs of the partnership. (R.332) In addition, he and Amici had been partners in their business enterprise for some 38 years.

Despite the fact that Mazza was the attorney for the partnership and had previously prepared a proposed partnership agreement when the two men first formed their business (R.27), he claims without explanation that he had his father, Attorney Bruno Mazza, who was also his law partner, prepare the paperwork to create an LLC rather than doing it himself. (R.28) He claims he did not act as attorney for either the business or Amici in connection with the formation of the LLC. (R.28) All 20 of the properties owned by the two men were placed in the LLC. (R.333) Among the papers prepared at that time was a proposed operating agreement. (R.35-46) Amici and Mazza never discussed the proposed operating agreement and it was never signed or filed. (R.72, 35-46) In fact, it was never even shown to Amici at any time prior to its production in discovery in this lawsuit. (R.35-

46, 72, 332) Amici played no role in, and had no input into, the formation of the LLC. (R.310)

Articles of Organization for the LLC were filed unilaterally by Mazza, but they failed to include a stated purpose of the LLC. (R.340-341) In addition, the Articles of Organization were signed by Edward Mazza in the capacity of "Sole Organizer." (R.341) They were not signed by Bruno Mazza as alleged attorney for the LLC. (R.341)

Despite the fact that Mazza was a long-standing attorney and functioned as the attorney for the partnership, at no time did he ever discuss any aspects of an LLC with Amici. (R.332) Mazza simply advised Amici that the partnership between the two men had been converted to an LLC, and their jointly-owned properties had been transferred to the LLC. (R.332) Mazza never advised Amici that the paperwork for the conversion had been prepared by Mazza's father and law partner, and Bruno Mazza never spoke to Amici regarding either the fact or the details of the formation of the LLC. (R.332) Further, as noted previously, the Articles of Organization for the LLC were signed not by Bruno Mazza as attorney but, rather, by Edward Mazza as "Sole Organizer."[1] (R.337-342)

[1] The alleged Operating Agreement, which was never signed, was produced by Mazza in discovery in this action. (R.35-46) The metadata for that document shows that it was saved and modified by "Ed-Optl790" on January 17, 2014, which appears to refer to Edward Mazza, not Bruno. (R.46) The metadata also does not indicate that Bruno Mazza authored that document.

In 2021, Amici's health began to decline from many years of performing physical labor. (R.333) He was advised by his physician that he needed surgery to repair a shoulder injury, and that the anticipated recovery time would be six to nine months. (R.333) In addition he has recently been diagnosed as suffering from terminal pancreatic cancer. Because of his health situation, Amici approached Mazza and told Mazza he wanted to retire and withdraw his half of the business from the LLC, which he had always understood he had the right to do. (R.333)

Mazza refused to discuss an exit from the LLC by Amici. (R.333) The relationship between the two men soured and, consequently, they were unable to discuss the future of the business or their respective roles in connection herewith. (R.333) Amici has consistently pushed for a sale of the properties and has on numerous occasions brought potential buyers to Mazza. (R.333) Each time he has done so, however, Mazza has either ignored them or has indicated that he is not willing to evaluate the offer. (R.333)

During the course of this lawsuit, Amici learned for the first time through discovery that Mazza had unilaterally placed his wife on the payroll of the LLC as a full-time employee. (R.334) Prior to that time, Amici had been aware that Mazza's wife had done some very limited work in connection with the financial records of the LLC, depositing rent checks and paying some bills. (R.27) It was his

understanding, however, that Mazza, as his share of the responsibilities for the LLC, had been handling the day-to-day business records. (R.334)

In January 2023, Mazza unilaterally placed $800,000 of the LLC's cash, which represented a significant portion, into certificates of deposit. (R.334) By doing so, he tied up the ability to access those funds and he did so without informing Amici. (R.334) It was not until the lawsuit was commenced that Amici was able to gain access to some of the bank records for the LLC and track Mazza's actions. (R.334) He also learned at that time that, without explanation, Mazza was paying for alleged LLC expenses with his personal credit cards rather than using LLC bank accounts. (R.334)

In addition, through acquiring access for the first time to the LLC's records, Amici learned that the LLC had been making regular payments to Excellus Blue Cross Blue Shield for years. (R.366-383) In 2016, the LLC paid $26,994.05 for health insurance for Mazza and $6,350 for health insurance for Amici. (R.366-367) The same disproportionate payments were made in subsequent years. (R.366-374) Mazza had never informed Amici that the LLC was paying for health insurance. (R.334) Throughout the course of their business relationship, Mazza had continually advised Amici that each man was responsible for his own medical costs, and Amici had paid for his out of pocket. (R.334) When questioned, Mazza was unable to explain the disparity in the amount of the payments for his health insurance as

contrasted with Amici's, and also purported to be unable to explain whether it was due to the fact that the LLC was paying for health insurance for his wife as well as himself. (R.334)

In addition, Amici learned for the first time, upon having the ability to view the LLC's books, that the LLC was paying a number of expenses for Mazza's own personal law practice, including phone and internet costs and the purchase of copy machines. (R.334) At no time had Mazza ever consulted with or even advised Amici that he was dipping into LLC funds to pay for expenses associated with his personal law office, nor did Amici ever approve of such use of LLC funds. (R.334)

By 2022, the continuing business relationship between the two men had become untenable. (R.334) Because of the deteriorating relationship, communication was almost non-existent and what limited communication there was tended to be acrimonious. (R.334-335) As a result of the impossibility of the two men to continue to do business together and Amici's wish to retire due to his age and declining health, Amici was forced to bring this lawsuit alleging breach of fiduciary duty and seeking either dissolution of the LLC, or rescission, or an equitable buyout.

The proceedings in the lower court

Amici's Complaint (R.50-61) asserted causes of action for breach of fiduciary duty (first cause of action), breach of contract (second cause of action) and breach of the implied covenant of good faith and fair dealing (third cause of action), and

sought rescission (fourth cause of action), common law dissolution (fifth cause of action), statutory dissolution under LLCL § 702 (sixth cause of action), equitable buyout (seventh cause of action) or withdrawal (eighth cause of action). (R.50-61). Issue was joined and discovery was conducted.

Following the completion of discovery, Mazza and the LLC moved for summary judgment. (R.15) In support of their motion, defendants first argued that Mazza had not breached any fiduciary duty because, despite his role as one of the two equal members of the LLC and the fact that he was a long-time practicing attorney and in fact acted as attorney for the LLC and handled all its business and financial affairs while Amici's role was to perform the physical labor, Mazza owed no duty to Amici to provide him with information regarding the drastic differences between a partnership and an LLC in terms of Amici's ability to either withdraw from or dissolve the entity. (R.28)

Mazza argued that since each man was a 50% member of the LLC, each had "equal rights and obligations", completely ignoring the fact that his rights and obligations gave him authority over the business and financial aspects of the business while Amici's rights and obligations under the division of responsibilities the two men had agreed to and had operated under for many years called for Amici to be in charge of repairing and maintaining the properties owned by the partnership. (R.28-29) Accordingly, Mazza contended that the first four causes of action of the

Complaint must be dismissed because Amici had failed to "demonstrate [ ] economic harm to himself as a result of anything he alleges that Mazza may have said or left unsaid." (R.20)

Next, Mazza argued that Amici should not be allowed to dissolve the LLC because he failed to show "that it is not reasonably practicable to carry on the business of the LLC" as required by LLCL § 1 in order for a court to order dissolution. (R.20) He also argued that dissolution should not be allowed because Amici had failed to demonstrate any financial harm as a consequence of Mazza's conduct, since the tax returns for the LLC showed that it was profitable. (R.47-48)

In opposition to Mazza's motion, Amici contended that Mazza breached his fiduciary duty and his obligation to Amici as a partner by unilaterally converting the partnership into an LLC since, as partners and therefore fiduciaries, they owed each other an obligation of the utmost good faith and integrity in their dealings with one another as to partnership affairs. (R.312) Further, Amici argued that when a partner communicates with another partner in a matter relating to the partnership, the communicating partner is under a fiduciary duty to make full disclosure of all material facts. (R.313)

Amici also argued that in the context of the partnership, a fiduciary duty was created by the fact that Mazza held specialized knowledge that he relied on. (R.313-314) Amici argued that the record before the lower court demonstrated material

issues of fact as to Mazza's fiduciary role toward Amici in the partnership and whether he made disclosure of all material facts in connection with his conversion of the partnership into an LLC, as he was required to do. (R.314)

Amici contended that the record demonstrated a question of fact as to whether Mazza breached his fiduciary duty as a partner by creating an LLC without providing for an operating agreement that allowed one of the two members to withdraw, which resulted in a drastic difference regarding the rights of the parties from what they had been in the partnership. (R.315) Amici contended that Mazza's unilateral conversion of the partnership into an LLC that eternally bound Amici without allowing him any input or participation in the decision, constituted a breach of the fiduciary duty imposed by the partnership that rendered the transaction voidable. (R.316)

Further, he argued that rescission was an appropriate remedy, in the absence of an operating agreement, and that it would eliminate any restrictions placed on Amici's withdrawal by the provisions of Limited Liability Company Law ("LLCL") § 702 for withdrawing. (R.316)

Amici also argued that the requirement of LLCL § 702 that judicial dissolution is allowed only when "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement" did not preclude dissolution in this case, notwithstanding the fact that the business was still operating at a profit, since the Articles of Organization unilaterally prepared by and executed

by Mazza failed to include "the business purpose for which the limited liability company is formed." Since no business purpose was identified, there was no basis from which the lower court could reasonably conclude that the LLC was "able to operate in conformity with its articles of organization." (R.317)

Finally, Amici argued that an equitable buyout was an appropriate remedy in the absence of an operating agreement precluding such a buyout. (R.319)

Decision of the lower court

The lower court issued a Decision & Order granting summary judgment in favor of Mazza and dismissing Amici's Complaint in its entirety. (R.3-8)

The lower court acknowledged that there were differing accounts regarding the manner in which the business of the parties changed from a partnership to a limited lability company. It noted that according to Mazza, "Amici presented to me the idea of forming an LLC for this business. I told Amici that I was not sure that forming an LLC would be of much benefit to us. However, Amici said that he wanted to form one, so an LLC was formed and filed." (R.4) The lower court then pointed out that Amici's version of events was markedly different and that, according to Amici, "I told him that some people on the hill, property owners, are doing LLCs. And I says what's that about? And Ed, you know, briefly told me what it would entail and that was the end of that discussion basically." (R.4)

The lower court noted further that in an affidavit submitted by Amici in opposition to Mazza's motion for summary judgment, Amici stated that there were no discussions between the two men regarding how an LLC was formed or how the partnership would be converted to an LLC. (R.4) Most significantly, there was never any discussion between the two men regarding the manner in which one of them would be able to withdraw from the LLC—something as to which Mazza, as an attorney, would certainly have superior knowledge.

Notwithstanding, the lower court dismissed the cause of action for breach of fiduciary duty, finding as a matter of law that Amici failed to submit evidence of any wrongdoing by Mazza: "[h]e only formed the LLC after Amici raised the possibility of doing so, and there is no evidence that he did so to harm Amici' s interests." (R.5) By so holding, the lower court impermissibly adopted Mazza's version of how the conversion occurred and rejected Amici's.

The lower court also rejected Amici's contention that as an experienced, practicing attorney with superior knowledge and experience and also Amici's business partner for 38 years, Mazza owed Amici an obligation to explain the implications of entering into an LLC, including the limited ability to withdraw, before unilaterally converting the business. (R.5-6) The lower court noted that Mazza was bound by the same limitations and actually suggested that Amici might try selling his interest to the LLC "although doing so would not be without

complications." (R.6) In so suggesting, the lower court ignored the fact that the LLCL allows a member to assign his interest, but that the effect of such an assignment is nothing more than to "entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled." LLCL § 603 (a)(3). It does not include the right of the assignee "to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member." LLCL § 603 (a)(2).

As for Amici's breach of contract cause of action, the lower court agreed that the undisputed proof demonstrated that the parties "clearly had either a verbal or implied contract to carry on their real estate rental business, and that each of them had distinct roles within the business", but held that the partnership "simply ended and was replaced with the LLC" and that such change—despite the fact that it was brought about unilaterally by Mazza and made it difficult if not impossible for Amici to retire and withdraw—did not constitute a breach of the verbal or implied contract between the two men to conduct their rental property business. (R.6)

Next, the lower court addressed Amici's claim of breach of the covenant of good faith and fair dealing, finding as a matter of law that Mazza's unilateral conversion of the partnership to an LLC with a limited ability of members to withdraw, did not constitute a withholding of benefits as is necessary to state this claim, citing *Michaan v. Gazebo Horticultural, Inc.,* 117 A.D.3d 692,693 (2d Dep't

2014), quoting *Collard v. Incorporated Vil. of Flower Hill*, 75 A.D.2d 631,632 (2d Dep't 1980), aff'd 52 N.Y.2d 594 (1980). The "benefits" cited by the lower court were the profits, which the court noted had continued following the conversion. (R.6)

As for the claim of rescission, the lower court held that the theory of rescission applies to contracts only and cannot be used to restore parties to the status quo in connection with a business relationship. (R.7)

Finally, as to the dissolution claims, the lower court held that Amici failed to meet the high bar established by LLCL § 702, which provides that an LLC may only be judicially dissolved if "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." (R.7) The court held that the fact that Amici, because of his advanced age and failing health, was unable to continue the physical labor that had always been his contribution to the business, "does not render the LLC unable to realize or achieve its business purposes." (R.7) Accordingly, the lower court granted summary judgment to Mazza and dismissed the Complaint in its entirety. Amici has appealed.

POINT I

THE LOWER COURT ERRED IN DISMISSING AMICI'S CLAIM FOR BREACH OF FIDUCIARY DUTY AS A MATTER OF LAW WHERE THE UNDISPUTED PROOF DEMONSTRATED THAT MAZZA, AN EXPERIENCED, PRACTICING ATTORNEY AND AMICI'S PARTNER FOR 38 YEARS, UNILATERALLY CONVERTED THE BUSINESS FROM A PARTNERSHIP TO AN LLC WITH STRINGENT, RESTRICTIVE STATUTORY RULES FOR DISSOLUTION WITHOUT INFORMING HIS PARTNER OF THE DETRIMENTAL LEGAL IMPLICATIONS OF THAT CONVERSION

Initially, it should be noted that the lower court failed to apply the well-settled rule that the party moving for summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form." *Collado v. Jiacono*, 126 A.D.3d 927, 928 (2d Dep't 2015); see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "On a summary judgment motion, a moving defendant does not meet its burden of affirmatively establishing its entitlement to summary judgment by merely pointing to gaps in the plaintiff's case; rather, it must affirmatively demonstrate the merit of its defense" (*Vanderhurst v. Nobile*, 130 A.D.3d 716, 717 (2d Dep't 2015). "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings." *Koziar v. Grand Palace Rest*., 125 A.D.3d 607, 608 (2d Dep't 2015). As will be demonstrated below, Mazza failed to affirmatively demonstrate, *prima facie*, that he did not breach any fiduciary duty owed to Amci during the course of the

transactions described in the Complaint. See *Zimmerman v. Leatherstocking Cooperative Ins. Co*., 226 A.D.3d 1239 (3d Dep't 2024). Nor did Mazza affirmatively establish, as he was obligated to do, that Amici did not sustain any damages as a result of his alleged misconduct (see generally *Brown–Jodoin v. Pirrotti*, 138 A.D.3d 661, 664 (2d Dep't 2016).

Moreover, it is equally well settled that summary judgment should not be granted where facts are in dispute, or where conflicting inferences may be drawn from the evidence, or where there are issues of credibility. *Spiegel v. Spiegel*, 206 A.D.3d 1178 (3d Dep't 2022); see *Lisa I. v. Manikas*, 188 A.D.3d 1392 (3d Dep't 2020); *Nationwide Mut. Fire Ins. Co. v. Maitland*, 79 A.D.3d 1348 (3d Dep't 2010); *Pozament Corp. v. Aes Westover, LLC*, 27 A.D.3d 1000 (3d Dep't 2006). As will also be demonstrated below, the lower court improperly determined facts in dispute and/or credibility issues in favor of Mazza, the moving party, as a result of which the order granting summary judgment to Mazza dismissing Amici's Complaint must be reversed on appeal.

The lower court dismissed Amici's claim for breach of fiduciary duty, holding that Amici failed to submit evidence of any wrongdoing by Mazza: "[h]e only formed the LLC after Amici raised the possibility of doing so, and there is no evidence that he did so to harm Amici' s interests." (R.5) The court also rejected Amici's contention that as an experienced, practicing attorney and Amici's business

partner for 38 years, Mazza owed Amici a fiduciary obligation to explain the implications of entering into an LLC, as opposed to the partnership arrangement under which the business had been conducted for years, including the drastically different and restricted ability to withdraw. (R.6) The lower court noted that Mazza was bound by the same limitations and even suggested that Amici might try selling his interest to the LLC. (R.6) It is submitted that the lower court's refusal to acknowledge a fiduciary duty and its failure to acknowledge that the duty was breached by Mazza, constitutes reversible error.

Mazza was a 50% general partner with Amici. In addition, he acted as the attorney for the partnership and handled its legal affairs. It is undisputed that as partners, both men were fiduciaries who owed each other an obligation of the utmost good faith and integrity in their dealings with one another with respect to partnership affairs. See *Birnbaum v. Birnbaum*, 73 N.Y.2d 461 (1989); see, generally *Carella v. Scholet,* 34 A.D.3d 915 (3d Dep't 2006); *Smallberg v. Raich Ende Malter & Co., LLP*, 140 A.D.3d 942 (2d Dep't 2016); *Le Bel v. Donovan*, 96 A.D.3d 415 (1st Dep't 2012). It is also undisputed that Mazza's fiduciary duty toward Amici was heightened as a result of the significant disparity in education, legal knowledge and expertise between the two. *Greene v. Greene,* 56 N.Y.2d 86, 92 (1982) (holding that the relationship between an attorney and his or her client is a fiduciary one, and the attorney cannot take advantage of his or her superior knowledge and

position); *Beltrone v. General Schuyler & Co.,* 252 A.D.2d 640, 641 (3d Dep't 1998) *Howard v. Murray,* 43 N.Y.2d 417, 420-421 (1977).

A fiduciary duty can be created where, as here, one party holds specialized knowledge on which the other relies. See *L.H.P. Realty Co. v. Rich*, No. 601537/00, 2001 WL 1537744, at *3 (N.Y. Sup. Ct. Aug. 31, 2001); *Stevenson Equip., Inc. v. Chemig Const. Corp.,* 170 A.D.2d 769, 771 (3d Dep't 1991), aff'd 79 N.Y.2d 989 (1992) ('"where one party possesses superior knowledge not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge', there is a duty to disclose that information") citing *Aaron, Ferer & Sons v. Chase Manhattan Bank, Natl. Assn.,* 731 F.2d 112, 123 (2d Cir. 1984).

Here, there is no question that Mazza had superior knowledge and experience and that Amici placed his trust and reliance in Mazza. There is also no question that Mazza took advantage of that trust and reliance, as Amici learned for the first time during the course of discovery in this lawsuit. Specifically, Amici learned during discovery that Mazza unilaterally placed his wife on the LLC's payroll as a full-time employee when there is no indication that she was working full time; deposited $800,000 in LLC funds in certificates of deposit such that access to the funds was restricted; paid health insurance premiums for himself and most likely his wife while claiming inaccurately that Amici was responsible for his own medical expenses; and charged expenses for his personal law office to the LLC. Most significantly, Mazza

unilaterally converted the partnership to a limited liability company by filing articles of organization without advising Amici that he was doing so, and without discussing with Amici the advantages and disadvantages of the conversion. It should also be noted that while Mazza claims he had his father and law partner, Bruno Mazza, draft the paperwork, the metadata for the proposed operating agreement—which was never shown to Amici, never executed and never filed—indicates that it was prepared by Edward, not Bruno, Mazza. Further, the articles of organization were executed only by Mazza, who signed in the capacity of "Sole Organizer."

It is undisputed that during the years when Amici and Mazza operated their business as a partnership, either man was able to terminate the partnership and compel partition of the properties at an time. *Harshman v. Pantaleoni,* 294 A.D.2d 687 (3d Dep't 2002); *Carola v. Grogan,* 102 A.D.2d 934 (3d Dep't 1984). Once Mazza converted the partnership to an LLC, however—and in the absence of an operating agreement that allowed a member to withdraw—the conversion eliminated that option. The conversion to an LLC made it extremely difficult (or, if Mazza's interpretation of the law is correct, impossible) for Amici or even his estate to terminate his business relationship with Mazza.

On a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *See Jacobsen v.*

New York City Health and Hospital Corp., 22 N.Y.3d 824 (2014); *Negri v. Stop & Shop, Inc.,* 65 N.Y.2d 625 (1985). If there is any doubt about the existence of a triable fact, the court must deny the motion. *Rotuba Extruders, Inc. v. Ceppos,* 46 N.Y.2d 43 (1978). Here, there were a number of triable issues of fact that should have compelled the denial of Mazza's motion for summary judgment, and the lower court's grant of his motion and dismissal of the Complaint were erroneous.

First, there are clearly factual issues with respect to Mazza's breach of his fiduciary duty to Amici. For example, while Mazza claims that Amici "wanted to form an LLC", Amici testified that he simply posed a question to Mazza, since he saw other similar businesses forming them and he knew nothing about them. (R.332) In addition, it is undisputed that Mazza never discussed the pros and cons of an LLC with Amici, and never brought up the differences between an LLC and a partnership in terms of a partner's right to terminate the relationship and the far more restrictive right of a member of an LLC. (R.332) Also, Mazza never informed Amici, his 50/50 partner, that he had taken it upon himself to convert the partnership to a limited liability company, and he never showed Amici an operating agreement, proposed or otherwise, prior to discovery in this lawsuit. (R.332) It is also significant that while Mazza claims his father and law partner draw up the paperwork, the metadata associated with the proposed operating agreement indicates otherwise. (R.46)

When a partner communicates with another partner in a matter relating to the partnership relationship, the communicating partner is under a fiduciary duty to make full disclosure of all material facts. *Dubbs v. Stribling & Associates,* 96 N.Y.2d 337, 341 (2001). Consequently, partners who are the beneficiaries of this fiduciary duty are not required to perform independent investigations of the representations made to them by their fiduciary to prove reasonable reliance on the fiduciary's representations. *See Frame v. Maynard,* 83 A.D.3d 599 (lst Dep't 2011).

The lower court held that even assuming that Mazza owed a fiduciary duty to Amici as his partner, there was "no evidence that Mazza engaged in any misconduct." (R.5) It based that holding, however, on an inappropriate determination of a factual issue raised by the record. Specifically, the lower court either ignored or rejected Amici's testimony that Amici simply broached the concept of a limited liability company to Mazza but had no idea what one was, and that it was Mazza who then took it upon himself to effect the conversion without further conversation. Instead, the lower court adopted Mazza's version of events—that it was Amici's idea to convert the partnership to an LLC. It is well settled that on a motion for summary judgment, the court's role is issue finding, not issue determination. *Sillman v. Twentieth Century Fox Film*, 3 N.Y.2d 395 (1957). See, e.g. *McDay v. State of New York*, 138 A.D.3d 1359 (3d Dep't 2016); *Gadani v.*

Dormitory Authority of State of New York, 43 A.D.3d 1218 (3d Dep't 2007); *Robinson v. Strong Memorial Hosp*., 98 A.D.2d 239 (4th Dep't 1983) (holding that on a motion for summary judgment, "the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion"). Applying those standards to Mazza's motion for summary judgment, the lower court erred in resolving factual issues in favor of Mazza, the moving party. Clearly, the intentional unilateral conversion of the partnership to an LLC, thereby depriving Amici of his previous right to withdraw at will, constitutes an act of misconduct. The lower court's holding to the contrary was erroneous.

Most significantly, the lower court impermissibly inserted its own judgment to reach another improper factual determination, finding that Amici had not been damaged by his inability to terminate the LLC since it "remained highly profitable" and that while it was true that he could not retire and withdraw from the LLC, "the record reveals no reason that he cannot sell his interest in the LLC, although doing so would not be without complications" (R.6), citing LLCL § 603. The section cited by the lower court, however, allows a member to *assign* his membership interest but does not permit a dissolution. See LLCL § 603 (a)(2). Additionally, as set forth in § 603 (a)(3), "the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled." In other words, the lower

court reached a determination that Amici was not damaged by being unable to terminate the LLC because he could assign his interest under a statute that would only allow the assignee to receive Amici's share of any profits generated by the business, without the member's right to participate in the management. It is difficult to fathom how such an alternative outcome would be beneficial to Amici as found by the lower court and would prevent him from being damaged by Mazza's conversion of the partnership into an LLC, since no one interested in buying Amici's interest, nor anyone he chose to leave it to, would have a say in running the business.

Amici wanted—and continues to want—to retire, by reason of both his advanced age and his ill health. He is unable to do so, because of Mazza's unilateral conversion of the partnership, from which Amici would have been able to withdraw at any time, to an LLC, from which he cannot withdraw and which the lower court has held he has no right to dissolve. Under the circumstances, there is at least a triable question of fact whether Mazza's unilateral conversion of the partnership to an LLC without discussing the conversion with Amici or explaining its import, was a breach of Mazza's fiduciary duty to Amici as his partner.

As the lower court acknowledged, it is far more difficult for a member to withdraw from an LLC than for a partner to withdraw from a partnership. On application by an LLC member, the court may order dissolution only when "it is not reasonably practicable to carry on the business *in conformity with the articles of*

organization or operating agreement." *PFT Tech., LLC v. Wieser*, 181 A.D.3d 836, 838 (2d Dep't 2020), quoting LLCL § 702; see, also *Matter of FR Holdings, FLP v. Homapour*, 154 A.D.3d 936, 937 (2d Dep't 2017). "[T]o demonstrate entitlement to dissolution, the member seeking such relief 'must establish, *in the context of the terms of the operating agreement or articles of incorporation*, [either] that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible' " (*Matter of FR Holdings, supra,* 154 A.D.3d at 937–938, quoting *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 131 (2d Dep't 2010). The lower court found, simply because the business was continuing to make a profit after the conversion to an LLC, it was as a matter of law "reasonably practicable" to carry on the business.

Another point overlooked by the lower court is that LLCL § 417 states that the members of a limited liability company "***shall*** adopt a written operating agreement that contains any provisions not inconsistent with law or its articles of organization relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents, as the case may be." Where, as here, no written operating agreement was ever adopted, there was no agreement that established "procedures or policies for the operation of the business

or that delineated the conduct of its affairs or that set forth the rights, powers and responsibilities of its members, managers and employees." See *Spires v. Casterline*, 4 Misc. 3d 428 (Sup. Ct. Monroe Cty., May 6, 2004).

Most significantly, no provision was made to permit one of the two members of the LLC to withdraw, which was a drastic departure from the terms of the partnership agreement pursuant to which the parties had operated for 25 years. Amici had the right to withdraw from the partnership at any time. Once Mazza unilaterally converted the partnership to an LLC, that right disappeared. Instead, in the absence of an operating agreement setting out circumstances permitting withdrawal, Amici could only withdraw from the LLC under the very limited circumstances described in LLCL § 606, upon "the dissolution and winding up of the limited liability company." Clearly, the drastic constraints placed on Amici's right to withdraw by Mazza's conduct in failing to have the LLC adopt an operating agreement allowing one of the two members to withdraw, as they had the right to do under their prior partnership arrangement, constituted a breach of Mazza's fiduciary duty to Amici. For this reason as well, the lower court erred in holding as a matter of law that there was no breach.

POINT II

THE LOWER COURT ERRED IN REFUSING TO CONSIDER THE MERITS OF AMICI'S REQUEST FOR RESCISSION, DISSOLUTION OR AN EQUITABLE BUYOUT AS POSSIBLE REMEDIES FOR MAZZA'S BREACH OF FIDUCIARY DUTY

The lower court dismissed Amici's requests for rescission of the formation of the limited liability company, or statutory dissolution, or an equitable buyout as possible remedies for Mazza's breach of fiduciary duty. It is respectfully submitted that this was error.

As for rescission, the lower court held that rescission is available only to declare a contract void. (R.7) In support of that holding, the lower court relied on *Lenel Systems Intl. Inc., v. Smith*, 106 A.D.3d 1536 (4th Dep't 2013). The issue in that case, however, was whether the record demonstrate triable issues of fact whether option agreements between the parties had been breached so as to justify rescission. There was no discussion as to whether the doctrine is limited in use so that it could not have application to a situation such as that presented here, to nullify the formation of a limited liability company. The lower court's reliance on *Lenel Systems* as the ground of its holding that rescission was not a remedy available to Amici was in error. It should also be noted that it has been held that rescission is not a separate cause of action, but merely a form of relief sought. See *Atl. Gas & Wash LLC v. 3170 Atl. Ave. Corp.,* 37 Misc. 3d 1226(A), 964 N.Y.S.2d 57 (Sup. Ct. 2012).

In other words, if Amici's cause of action for breach of fiduciary duty were upheld, rescission could be considered as an appropriate form of belief. Further, to the extent the lower court held that rescission is only available to void a contract, it has been held that "the dissolution of a limited liability company under LLCL 702 is initially a contract-based analysis." *In re 1545 Ocean Ave., LLC,* 72 A.D.3d 121, 128 (2d Dep't 2010).

As to the lower court's outright rejection of statutory dissolution as a possible remedy, it has been held that a determination of whether it is "reasonably practicable" to continue the business of a limited liability company mandates an examination of the operating agreement or articles or organization defining the purposes of the LLC. See *Natanel v. Cohen*, 43 Misc. 3d 1217(A) (Sup. Ct. Kings Cty., April 18, 2014). Where, as here, however, there is no operating agreement and the articles of organization fail to recite the purpose of the LLC, "the statute cannot define the purely contractual basis for forming the LLC so as to permit a determination of whether its purpose is being thwarted by the conflict between the members."

Finally, there is case law holding that an equitable buyout may be appropriate as a means to dissolve an LLC under certain circumstances. See *Matter of Superior Vending, LLC [Tal–Plotkin*], 71 A.D.3d 1153, 1154 (2d Dep't 2010), where the Appellate Division held that while the LLCL does not expressly authorize a buyout

in a dissolution proceeding, it also does not preclude an order authorizing a buyout, which may be an appropriate equitable remedy. See, also *Mizrahi v. Cohen,* 104 A.D.3d 917, 920 (2d Dep't (2013), where the Appellate Division held that a buyout was appropriate and remitted the matter to Supreme Court, Kings County, for further proceedings and for a determination as to the value of the defendant's interest in the LLC in order to determine a fair buyout amount.

Based on the foregoing cases, it is respectfully submitted that the lower court's dismissal of the various claims by Amici for equitable relief, including rescission and buyout, also constituted reversible error.

CONCLUSION

The lower court erred in dismissing Amici's Complaint as a matter of law. By holding that Amici failed to establish either that Mazza owed him a fiduciary or that Mazza committed wrongdoing that breached that duty, the lower court engaged in impermissible issue determination rather than issue finding and committed reversible error. At the very least, the record before the lower court demonstrated triable issues of fact as to both issues.

The lower court's order dismissing Amici's Complaint in its entirety should be reversed and the cause of action for breach of fiduciary duty and the claims for equitable relief in the form of rescission and equitable buyout should be reinstated.

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Respectfully submitted,

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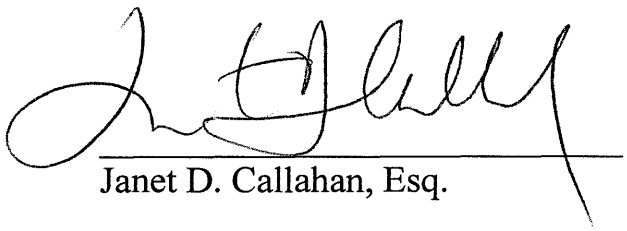

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