To be Argued by:
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New York Supreme Court

Appellate Division – Second Department

Docket Nos.:
2008-04694
2008-11628

MAN CHOI CHIU and 45-52 NORTHERN BLVD., LLC,

Plaintiffs-Appellants,

– against –

WINSTON CHIU,

Defendant-Respondent.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Man Choi Chiu and 42-52 Northern Blvd., LLC respectfully submit this reply brief in further support of their appeal from the following two (2) Orders of the Supreme Court, Queens County (Dollard, J.): (i) the Order and Memorandum Decision, dated March 11, 2008 (the "March 2008 Order"), which granted, in part, defendant Winston Chiu's motion to dismiss Plaintiffs' Complaint; and (ii) the Order, dated July 7, 2008 (the "July 2008 Order"), which granted Plaintiffs' motion seeking leave to renew and/or reargue the March 2008 Order, but adhered to the prior determination.[1]

This appeal concerns a case of first impression with respect to whether a faithless fiduciary, who claims to be a "member" of a limited liability company, can be "ousted" or removed from the company in the absence of an express provision for ouster in the company's operating agreement.

The court below held that merely because the Company does not have an operating agreement that expressly provides for removal, the Company was powerless to remove Winston Chiu, notwithstanding the prior adjudication that

[1] References "R. __." are to the Record on Appeal filed by Appellants. Unless otherwise indicated, all terms defined and used in Appellants' Brief, dated January 12, 2009, shall have the same meaning here.

Winston Chiu had illegally and fraudulently conveyed title to the Company's valuable commercial property to his own personal trust.[2]

In dismissing Plaintiffs' second cause of action seeking Winston's ouster, the court below misread the applicable provision of the New York Limited Liability Company Law ("LLCL"), Section 701, which *expressly* refers to the "expulsion" of members of a limited liability company.

Contrary to Winston's assertion, LLCL § 701 is not applicable *only* to limited liability companies that have operating agreements expressly providing for the expulsion of its members. To hold otherwise, as the court below did, would effectively deprive companies that have no operating agreements at all, and that rely on the protection afforded to them by the "default provisions" of the LLCL, of their most potent remedy against adjudicated faithless fiduciaries, such as Winston Chiu.

On Plaintiffs' motion seeking leave to renew and/or reargue, the court below did not fully appreciate the breadth and scope of the Court of Appeals' groundbreaking decision in Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008). In Tzolis, the Court of Appeals went far beyond merely holding that members of a limited liability company may now bring "derivative actions" against

[2] Notably, this Court, in its March 13, 2007 decision, affirmed the trial court's November 18, 2005 decision insofar as it undid Winston's fraudulent conveyance of the Property and awarded legal fees and costs in favor of Man Choi and the LLC.

the company, which is the "very narrow" holding of the case urged by Winston Chiu.[3]

On the contrary, the Court of Appeals mandated that courts "devise" remedies for wrongs (including "ouster" of members, if appropriate under the circumstances), even, and perhaps, especially, when the statute itself does not expressly provide such remedies, so long as there is no legislative intent to expressly ban such remedies.

To read Tzolis in any other way would diminish the significance of its broad holding and play into the hand of faithless fiduciaries, such as Winston Chiu, who would seize upon the lack of an operating agreement as a "license to steal" and commit wrongdoing with impunity.

Moreover, independent of any remedies that may be available to the Plaintiffs under the LLCL, and in keeping with the spirit of Tzolis, there is a well-settled line of authorities holding that courts, in the exercise of their equity jurisdiction, are empowered to fashion appropriate relief to fit the particular circumstances of the case, including the "ouster" of a faithless fiduciary (see Point II below). Thus, to the extent that Plaintiffs' complaint can, and should, be liberally construed (on a motion to dismiss a pleading for failure to state a cause of action) to plead a cause of action for breach of fiduciary duty against Winston

[3] See Brief for Defendant-Respondent, dated March 9, 2009 ("Winston's Brief"), at p. 35.

Chiu, the court below was empowered to fashion an appropriate remedy with respect to Winston Chiu's fraudulent and illegal conduct, including his ouster and removal from the Company.

The Court should reject Winston's meritless argument that Plaintiffs' "ouster" claim should be dismissed by this Court on other grounds (specifically, *res judicata* and collateral estoppel) that were expressly rejected by the court below. Winston indisputably failed to take any appeal from the lower court's determination and thereby may not seek appellate review of such purported issue.

Moreover, there is no substance to such argument, which is based on Winston's intentional and repeated misreading of this Court's prior decision modifying the trial court's granting of a post-trial motion to amend the complaint (in the prior action) so as to conform to the evidence adduced at trial.

As explained in more detail in Point III below, this Court's prior determination, on a purely procedural motion at trial, was not made "on the merits" and did not result in the entry of judgment in favor of Winston on this particular issue. Therefore, Man Choi and the Company's second cause of action in the present action, seeking Winston Chiu's "ouster," cannot be barred by either *res judicata* or collateral estoppel.

Indeed, entire portions of Winston's Brief are devoted to deliberately distorting the record, including (and especially) this Court's prior decision, and

improperly seeking to "relitigate" the prior action between the parties, which, after a non-jury trial held in 2005, Winston Chiu undeniably lost.

Thus, for instance, Winston's purported "Statement of Facts" repeats the very same allegations previously made by Winston Chiu at trial, which the trial court found were "unbelievable and self-serving" (R. 68). Contrary to Winston's disingenuous claim that he provided "investment funds" for the purpose of purchasing the commercial building (used *solely* by Man Choi and his businesses, in which Winston Chiu did not have any interest), and arranged to obtain a mortgage for the Company,[4] the trial court previously found that "[e]very act [Winston Chiu] performed was done, not to benefit his brother or the LLC, but for his personal gain" (R. 68-69).

Moreover, Winston Chiu's relatively minor, so-called "contribution" toward the purchase of the Property "was 'washed' through the LLC solely for [Winston Chiu] to gain a tax advantage" (R. 69). As the trial court previously found, "all funds 'contributed' by [Winston Chiu] were re-paid to him almost immediately after the 'wash cycle' was completed" (R. 69). Nonetheless, Winston seeks to parlay his purported "contribution" of $193,854.51 (monies that he took back after the closing) into an unjust windfall for himself by forcing the dissolution of the Company and the sale of its valuable Property.

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[4] See Winston's Brief, at p. 10.

Winston's Brief also repeats his self-serving misreading of this Court's March 13, 2007 decision as having "held" that Winston Chiu has, *at least*, a twenty five (25%) percent ownership interest in the Company.[5] Likewise, in support of his disingenuous *res judicata* and/or collateral estoppel argument, Winston has mischaracterized the March 13, 2007 decision as having "held" that Plaintiffs' claims to "exclude" Winston Chiu from the LLC "were barred by laches," and that this court also "determined that the proposed amended claims failed on substantive grounds."[6]

The Court should reject Winston's attempt to distort the record, including the Court's March 13, 2007 decision.

Accordingly, on this appeal, the two (2) Orders of the court below should be *modified* to the extent of denying Winston Chiu's motion to dismiss Plaintiffs' second cause of action seeking Winston Chiu's "ouster" as a purported member of the Company.

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[5] See Winston's Brief, at pp. 13, 22.

[6] See Winston's Brief, at pp. 19-20.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DISMISSING PLAINTIFFS' SECOND CAUSE OF ACTION SEEKING WINSTON'S "OUSTER" AND REMOVAL FROM THE COMPANY

The court below erred in dismissing Plaintiffs' second cause of action seeking Winston's "ouster" and removal, as a purported member of 42-52 Northern Blvd., LLC (the "LLC" or "Company"), merely because the LLC does not have an "operating agreement" that expressly provides for the ouster of members who have breached their fiduciary duties and committed other wrongs.

Contrary to the lower court's holdings in the two (2) Orders on appeal, and the arguments made by Winston in his Brief, the legal authority to oust members of a limited liability company is found both in the express provisions of the LLCL then in effect, and in the broad holding of the Court of Appeals' recent, landmark decision in Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008).

A. *The LLCL Expressly Provides for the Expulsion of Members*

Both the court below and Winston concede that LLCL § 701 *expressly* refers to the "expulsion" of a member of a limited liability company. Yet, the court below failed to recognize the significance of such express reference by stating that "the mere reference to the expulsion of a member in a statute pertaining to the

continuing existence of a limited liability company does not amount to a statutory grant of power to the court to order the expulsion of a member" (R. 13).

According to Winston, such remedy, set forth in LLCL § 701, is only available to companies that have an "operating agreement" that expressly provides for ouster in the first instance. See Winston's Brief, at p. 34.

Thus, under both the lower court's and Winston's misreading of the statute, limited liability companies without an operating agreement containing an "ouster" provision cannot avail themselves of a remedy that is *expressly* referenced in three (3) separate sections of the statute: Sections 701, 414 and 417 of the LLCL.

Surely, the Legislature could not have intended to afford such disparate treatment to limited liability companies not having operating agreements expressly providing for ouster of members, leaving them without recourse or remedy against miscreant members. Thus, the court below should have applied the statute as written, permitting limited liability companies to "oust" members, and not as it thought the statute ought to have been written. See Stinton v. Robin's Wood, Inc., 45 A.D.3d 203, 842 N.Y.S.2d 477, 482 (2d Dep't 2007), leave to appeal denied, 10 N.Y.3d 708, 842 N.Y.S.2d 477 (2008); People by Whalen v. Woman's Christian Association, 56 A.D.2d 101, 104, 392 N.Y.S.2d 93, 95 (3d Dep't 1977).

The Court should also reject Winston's meritless argument that, because the purported "Operating Agreement" did not address the "expulsion" of members,

"the *only* provision that addresses the withdrawal or removal of an LLC member is LLCL § 606." See Winston's Brief, at p. 32 (emphasis added).[7]

Winston asserts that LLCL § 606 allegedly governs the expulsion of members of a limited liability company, because his own goal is to force the dissolution of the Company and the sale of its valuable Property. Dissolution would permit Winston to reap an unjust "windfall" based on his tax-driven, minor "investment" of funds in the purchase of the Property (funds that the Trial Court previously found Winston took back after the closing in 1999) (R. 73).

However, LLCL § 606 is not the applicable provision here. LLCL § 606 (then in effect) provides that a member may "withdraw" upon giving proper and timely prior "written notice" to the company. The statute further provides that, "[n]otwithstanding anything to the contrary set forth in this chapter or under applicable law, an operating agreement may provide that a member may not withdraw from a limited liability company . . . prior to the dissolution and winding up of the limited liability company" (emphasis added).

Notably, the post-1999 amended version of LLCL § 606 (which applies here) provides that "unless an operating agreement provides otherwise, a member

[7] In fact, no such "Operating Agreement" exists, or has ever existed, for the LLC. In May 1999, the LLC was organized pursuant to Articles of Organization, but since its inception the LLC has been operating without an "operating agreement."

may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company" (emphasis added).

The difference is that under the former version of LLCL § 606 (which applies here), a limited liability company is dissolved upon the withdrawal of a member *only if* the operating agreement provides for dissolution, whereas, under the amended version of the same statute, dissolution of the company is the "default setting" (becomes automatic) "unless an operating agreement provides otherwise" (emphasis added).

Thus, Winston's argument is simply wrong and should be rejected, because under the former version of LLCL § 606 (applicable here) the limited liability company would have to be dissolved upon the withdrawal of a member only if the operating agreement provides for dissolution. By Winston's own admission,[8] there is no such provision in the purported "Operating Agreement" for the LLC (and, indeed, no such provision can exist, because there is no "operating agreement" for the LLC in the first instance).

Significantly, the very same argument now asserted by Winston was expressly rejected by the Court in Horning v. Horning, 12 Misc. 3d 402, 816 N.Y.S.2d 877 (Sup. Ct., Monroe Co. 2006).

[8] See Winston's Brief, at pp. 31-32.

There, as here, petitioner argued that in the absence of an operating agreement, LLCL § 606 required dissolution, citing Spires v. Casterline, LLC, 4 Misc. 3d 428, 778 N.Y.S.2d 259 (Sup. Ct., Monroe Co. 2004).

The Court, in Horning, *supra*, held otherwise, stating:

> Spires, however, does not stand for that proposition nor could it in the face of section 701(b). Indeed, the Limited Liability Company Law was designed to protect members from such disruptions and expressly avoid such a result. While section 606(a) requires dissolution and winding up upon withdrawal of a member, withdrawal is not available just for the asking, especially if there is no operating agreement.[9]

12 Misc. 3d at 407-408, 816 N.Y.S.2d at 881.

Thus, the Horning Court concluded that, "instead of triggering dissolution upon announced intention to withdraw, the Limited Liability Company Law provides for just the opposite. Dissolution in the absence of an operating agreement can only be had upon satisfaction of the standard of section 702, i.e.,

[9] As noted in Horning, *supra*, the amended version of LLCL § 701(b) expressly provides that a member's withdrawal "shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution." 12 Misc. 3d at 408, 816 N.Y.S.2d at 881 (emphasis added). Under the prior version of LLCL § 701, the limited liability company would be dissolved and its affairs wound up upon a member's withdrawal, *unless* (as would have been the case here), within 180 days after such event a majority in interest of the remaining members consent or vote to continue the limited liability company. Here, had such a vote been taken, Man Choi would have certainly voted to continue the LLC.

'whenever it is not reasonably practicable to carry on the business.'" 12 Misc. 3d at 408, 816 N.Y.S.2d at 881 (emphasis added) (citation omitted).[10]

Here, the issues of whether Winston gave proper and timely "written notice" of his purported intention to "withdraw" from the LLC, and whether he had satisfied the standard set forth in LLCL § 701 to cause the dissolution of the LLC, are the subject to a pending, related appeal before this Court.[11] In any event, as the Court found in Horning, *supra*, merely because the LLC does not have an operating agreement expressly providing for the ouster of members does not mean that the LLC must be dissolved before Winston is permitted either to withdraw or be ousted from the LLC.

As the Court held in Horning, *supra*, the applicable provision is LLCL § 701, which, because it expressly refers to the "expulsion" of members of a limited

[10] Likewise, in Out of the Box Promotions LLC. v. Koschitzki, 15 Misc. 3d 1134A, 841 N.Y.S.2d 821 (Sup. Ct., Kings Co. 2007), the Court held that, absent a contrary provision in the organizational or operating documents, in order to remove a member a proceeding for dissolution of the company must be commenced under LLCL § 702 showing that it is not reasonably practicable to carry on the business in conformity with its operating agreement. Thus, Out of the Box does not stand for the proposition, erroneously urged by Winston, "that the only provision that addresses the withdrawal or removal of an LLC member is LLCL § 606." See Winston's Brief, at p. 32 (emphasis added).

[11] See Winston Chiu v. Man Choi Chiu and 42-52 Northern Blvd., LLC (Docket No. 2008-10602). In that related appeal, Man Choi and the LLC contend that the court below should have dismissed Winston's purported causes of action seeking an Order permitting him to "withdraw" from, and "dissolving" the, LLC, because (among other reasons) Winston had failed to comply with the "timing" and "notice" requirements of LLCL § 606. In addition, Winston had failed to satisfy the standard for dissolution under LLCL §§ 701 and 702 by showing that it is not reasonably practicable to carry on the business of the LLC due to an alleged "deadlock" fabricated by Winston himself.

liability company, provides statutory authority for the relief sought by Plaintiffs in their second cause of action.

In sum, given the express provision of LLCL § 701, it is respectfully submitted that the court below erred in dismissing Plaintiffs' second cause of action seeking Winston's "ouster" and removal from the LLC as a result of his illegal, fraudulent conduct and breaches of fiduciary duty.

B. *The Court of Appeals' Groundbreaking Decision in Tzolis Mandates that Courts "Devise" Appropriate Remedies for Breaches of Fiduciary Duty*

This Court should reject Winston's attempt to minimize the significance of the Court of Appeals' landmark decision in Tzolis by deliberately giving it a cramped and "very narrow" reading. See Winston's Brief, at p. 35.

Contrary to Winston's limited view of the "holding" in Tzolis, the Court of Appeals did not merely hold (for the first time) that members of a limited liability company have a right to commence a "derivative action" against the company.[12] Indeed, the "holding" of Tzolis is far broader, mandating that courts "devise" appropriate remedies for breaches of fiduciary duty even if (and perhaps, especially because) the statute (LLCL) does not expressly provide for such relief, so long as there is no express legislative ban on such remedies.

[12] See Winston's Brief, at p. 35.

The Court of Appeals' decision in Tzolis heavily relied, and *expanded*, upon common law decisions stressing the importance of courts providing a judicial remedy for breaches of fiduciary duty. Thus, the Court of Appeals noted that "we continue to heed the realization that influenced Chancellor Walworth in 1832, and Lord Hardwicke 90 years earlier: [w]hen fiduciaries are faithless to their trust, the victims must not be left wholly without a remedy" lest an "intolerable grievance" be permitted. 10 N.Y.3d at 105, 855 N.Y.S.2d at 8.

Indeed, Tzolis is but the latest in a long line of authorities upholding the established legal maxim that "there is no wrong without a remedy.[13] Accordingly, the Court in Tzolis fashioned an appropriate remedy with respect to members of a limited liability company who had engaged in self-dealing (by first leasing, and then selling, the company's principal asset for sums below market value), and thereby breached their fiduciary duty. 10 N.Y.3d at 103, 855 N.Y.S.2d at 7.

The Court permitted plaintiffs to bring a "derivative action" on behalf of the limited liability company, notwithstanding that the LLCL was apparently silent on the issue of derivative suits, and indeed, in a draft version of the bill, the Legislature had intentionally deleted an entire article (proposed Article IX of the

[13] See, e.g., National Tradesmen's Bank v. Wetmore, 124 N.Y. 241, 251 (1891); Von Au v. Magenheimer, 126 A.D. 257, 110 N.Y.S. 629 (2d Dep't 1908).

LLCL) pertaining to the right of members of limited liability companies to bring derivative actions. 10 N.Y.3d at 106-107, 855 N.Y.S.2d at 9.

In Tzolis, the Court of Appeals reasoned that merely because the statute was apparently silent as to the "remedy" did not mean that such remedy did not exist, "since the Legislature obviously did not intend to give corporate fiduciaries a license to steal, a substitute remedy must be devised." 10 N.Y.3d at 105, 855 N.Y.S.2d at 8 (emphasis added).[14]

Here, Winston has not disputed (nor can he) that the LLCL does not expressly prohibit the expulsion of members as a remedy for a breach of fiduciary duty. In fact, to the contrary, it is Plaintiffs' contention that the LLCL expressly provides for the expulsion of members and the continued existence of the company thereafter. See LLCL § 701.

Winston's assertion that "prevailing law" allegedly does not permit ouster of "partners" absent a specific provision in a partnership agreement is not dispositive of the issue. This is a case of first impression under the LLCL, much as Tzolis was in establishing the right of members of a limited liability company to commence derivative actions. Given these circumstances, the *ratio decidendi* of Tzolis clearly has application here.

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[14] See, also, Gottlieb v. Northriver Trading Co. LLC, 58 A.D.3d 550, 551, 872 N.Y.S.2d 46 (1st Dep't 2009) (holding that members of a limited liability company may seek an "equitable accounting," thereby rejecting the "assertion that such members are limited to statutory remedies with regard to potential fraud [as] inconsistent with the reasoning in Tzolis").

Moreover, as discussed in detail in Point II below, the common law right to expel a faithless fiduciary, based upon the same equitable principles underlying Tzolis, is well engrained in the law. Thus, in the "absence of [*any*] evidence that the Legislature decided to abolish this remedy when it passed the [LLCL],"[15] it was incumbent upon the court below, exercising its equity jurisdiction, to "devise" an appropriate remedy, including "ouster," rather than simply dismissing the claim. See, also, Gottlieb, *supra*.

Indeed, as the Court of Appeals stated in Tzolis, it would be an "intolerable grievance"[16] to permit Winston to remain as a purported member of the Company, despite having fraudulently transferred to his own personal trust the Company's sole asset (a multi-million dollar commercial building), and despite his ongoing efforts to coerce a windfall "buy out" of his purported interest in the Company by threatening to have the LLC judicially dissolved.

Accordingly, the lower court's Orders should be modified so as to deny Winston's motion to dismiss Plaintiffs' second cause of action seeking Winston's "ouster" and removal from the Company. Such remedy should remain available to Plaintiffs in connection with this litigation. See Tzolis, *supra*.

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[15] Tzolis, 10 N.Y.3d at 103, 855 N.Y.S.2d at 7.

[16] Tzolis, 10 N.Y.3d at 105, 855 N.Y.S.2d at 8.

POINT II

COURTS ARE EMPOWERED TO FASHION AN APPROPRIATE REMEDY FOR BREACHES OF FIDUCIARY DUTY

Independent of any rights and remedies that the Company has under the LLCL with respect to faithless fiduciaries and consistent with the spirit of Tzolis, courts are empowered, in the exercise of their broad equity jurisdiction, to fashion an appropriate remedy for breaches of fiduciary duty.

Winston's Brief gives short-shrift to the long line of Second Department authorities, which hold that courts have the power to remove or replace faithless fiduciaries. Thus, in Friedman v. Dalmazio, 228 A.D.2d 549, 644 N.Y.S.2d 548 (2d Dep't 1996), leave to appeal denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17 (1996), this Court held that the lower court properly terminated defendants from acting as the managing agent for the limited partnership by reason of their breach of fiduciary duty.

Likewise, in Homburger v. Levitin, 130 A.D.2d 715, 515 N.Y.S.2d 825 (2d Dep't 1987), appeal denied, 70 N.Y.2d 795, 522 N.Y.S.2d 112 (1987), this Court held that the lower court properly exercised its discretion in fashioning the remedy of removing the general partner in order to preserve the partnership's valuable leasehold interest.

The significance of Homburger, which Winston fails to understand, is that a court, in granting equitable relief, "may mold its relief to accord with the

exigencies of the case." Newman v. Sherbar Development Co., 47 A.D.2d 648, 364 N.Y.S.2d 20, 21 (2d Dep't 1975), appeal denied, 37 N.Y.2d 705, 374 N.Y.S.2d 1026 (1975). Thus, in order to preserve the valuable leasehold, the Court, in Homburger, removed and replaced the general partner. 130 A.D.2d at 718, 515 N.Y.S.2d at 827-828.

Here, as in Homburger, *supra*, the appropriate remedy is Winston's ouster as a member of the Company in order to preserve the Company's valuable Property from being sold at a "fire sale" price (so that Winston can "monetize" his purported "investment" and receive an unjust windfall).

Indeed, as the Court noted in Drucker v. Mige Associates II, 225 A.D.2d 427, 429, 639 N.Y.S.2d 365, 367 (1st Dep't 1996), leave to appeal denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164 (1996), "[w]hen . . . a partner's breach of his fiduciary duty responsibility has rendered the partnership an entity that is no longer viable," courts have a choice to make in formulating the appropriate "remedial action." Courts have the option of "discharging a partner or liquidating the partnership." 225 A.D.2d at 429, 639 N.Y.S.2d at 367.[17]

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[17] Contrary to Winston's claim, Drucker does not stand for the proposition that in order to oust a partner who has breached his fiduciary duty, the company must be dissolved, because there the Court used its discretion, as a court of equity, to "remove" the general partner and permit the company's continued existence free of such faithless fiduciary, as should be the case here.

Here, the Company is financially sound and fully functional and will continue to be a viable entity so long as Winston is barred from having any say or role in its business affairs.

There can be no dispute that the "Supreme Court is a court of original, unlimited and unqualified jurisdiction,"[18] with authority to hear both actions at law and in equity. As a court of equity, it "will mold its decrees to suit the needs of the particular case without distinction as to whether it chooses legal or equitable principles as the basis for its determination." Cornell v. T.V. Development, 24 A.D.2d 471, 473, 260 N.Y.S.2d 865, 870 (2d Dep't 1965) (internal quotation marks and citation omitted) rev'd on other grounds, 17 N.Y.2d 69, 268 N.Y.S.2d 29 (1966); Newman, *supra*.

Here, Plaintiffs' Verified Complaint sets forth Winston's breaches of fiduciary duty, including his adjudicated fraudulent conveyance of the Property to his own personal trust (R. 58-59).[19] By reason of the foregoing, the Complaint

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[18] Matter of Fry v. Village of Tarrytown, 89 N.Y.2d 714, 718, 658 N.Y.S.2d 205, 207 (1997), citing N.Y. Const., art. VI, § 7; Wells Fargo Bank Minnesota, National Ass'n v. Mastropaolo, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007).

[19] Specifically, the Complaint alleges that, in the event it is determined that Winston has any interest in or to the LLC, Winston owed, to Man Choi and the LLC, the "fiduciary duties of loyalty and care," including the duty to "manage its assets and conduct its affairs with the utmost of good faith." The Complaint further alleges that Winston's fraudulent conveyance "was done in the utmost of bad faith and in breach of his fiduciary duties to the LLC and Man Chiu Choi," and that it "constituted an unconscionable and inequitable action for his own benefit and the benefit of the Trust" (R. 61).

seeks a judgment "ousting and removing Winston Chiu as a member and/or officer of the LLC" (R. 62).

To the extent that Plaintiffs' Complaint is liberally construed to plead a cause of action for breach of fiduciary duty against Winston,[20] the court below indisputably had the power to fashion an appropriate remedy, including Winston's "ouster," based upon his breaches of fiduciary duty. See Friedman, *supra*; Newman, *supra*; Drucker, *supra*.

Accordingly, the court below erred in summarily dismissing Plaintiffs' "ouster" claim, which should be reinstated independent of any rights and remedies that Plaintiffs have under the LLCL.

POINT III

THIS COURT LACKS JURISDICTION TO CONSIDER WINSTON'S ARGUMENT THAT THE LOWER COURT SHOULD HAVE DISMISSED PLAINTIFFS' "OUSTER" CAUSE OF ACTION ON DIFFERENT GROUNDS

This Court lacks jurisdiction to consider the arguments, set forth in Point II of Winston's Brief (at pp. 41-55), that Plaintiffs' second cause of action seeking Winston's "ouster" should have been dismissed on the grounds of *res judicata* and

[20] On a motion to dismiss pursuant to CPLR § 3211(a)(7), as was the case here, pleadings are "afforded a liberal construction," and courts must "accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Farber v. Breslin, 47 A.D.3d 873, 876, 850 N.Y.S.2d 604, 607 (2d Dep't 2008) (numerous citations omitted). Thus, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. See, e.g., Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 401 N.Y.S.2d 182 (1977).

collateral estoppel—grounds that are different from the basis for dismissal relied upon by the court below in its March 2008 Order.

A. *Winston's Argument Is Not Properly Presented for Appellate Review*

The court below, in its March 2008 Order, granted Winston's motion to dismiss Plaintiffs' "ouster" cause of action based upon the court's finding that Plaintiffs did not "cite any statute or case authorizing the judicial expulsion of a member" (R. 13). The court "denied" the "remaining branches" of Winston's motion to dismiss the Complaint (R. 14), including, as set forth in Winston's Notice of Motion, that the "causes of action asserted in the Complaint may not be maintained because of *res judicata* and collateral estoppel" (R. 19).

It is indisputable that while Plaintiffs filed a timely notice of appeal from the court's March 2008 Order, Winston elected not to do so. Having failed to timely cross-appeal from the March 2008 Order, this issue cannot now be considered by this Court on Appellants' instant appeal. See, e.g., Cruz v. First Call Ambulette Service Corp., 243 A.D.2d 599, 663 N.Y.S.2d 262 (2d Dep't 1997) (holding that defendant's arguments were not properly presented for appellate review in the absence of a cross-appeal), citing Hecht v. City of New York, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983). See, also, Molinoff v. Sassower, 99 A.D.2d 528, 471 N.Y.S.2d 312 (2d Dep't 1984) (court cannot consider arguments where defendant failed to file a notice of appeal).

Likewise, Winston failed to file a timely appeal from the trial court's July 2008 Order. That Order denied Winston's cross-motion seeking leave to "reargue" the March 2008 Order on the basis that the trial court purportedly did not consider Winston's *res judicata* and collateral estoppel arguments (R. 488-489).[21] The trial court held that it was "not necessary to dismiss a cause of action on more than one ground" (R. 18).

Even if Winston had filed a timely cross-appeal from the July 2008 Order, such appeal would have been dismissed, as a matter of law, because there is no right to appeal from the denial of a motion for reargument. See, e.g., Cordero v. Mirecle Cab Corp., 51 A.D.3d 707, 858 N.Y.S.2d 717 (2d Dep't 2008); Rochester v. Quincy Mutual Fire Ins. Co., 10 A.D.3d 417, 781 N.Y.S.2d 139 (2d Dep't 2004).

The Court should reject Winston's argument that "appellate courts need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision." American Dental Co-op, Inc. v. Attorney General of the State of New York, 127 A.D.2d 274, 279, 514 N.Y.S.2d 228, 232 fn. 3 (1st Dep't 1987).

Neither in American Dental, *supra*, nor in any of the other purported authorities erroneously relied upon by Winston, did the lower court issue an order

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[21] Contrary to Winston's assertion, his motion only sought leave to reargue the March 2008 Order. Winston did not move "for reargument and renewal." See Winston's Brief, at p. 30 (emphasis added).

specifically denying respondent's motion, such that it became necessary for respondent to file a cross-appeal in order to seek appellate review. See Cruz, *supra*; Molinoff, *supra*.[22]

Accordingly, as Winston failed to present such issue for appellate review by not filing a timely cross-appeal from the March 2008 Order, this Court has no jurisdiction to consider such argument on Appellants' instant appeal.

B. *Plaintiffs' "Ouster" Claim Is Not, In any Event, Barred by Res Judicata or Collateral Estoppel*

Even if Winston had properly sought appellate review (which he did not), Winston's *res judicata* and/or collateral estoppel argument must still be rejected.

Contrary to Winston's assertion, this Court, in its decision on Winston's prior appeal, never "held" that the remedy of "ouster" is not available to the Company. Rather, this Court, *modified* (not "reversed," as Winston erroneously asserts) the Trial Court's November 2005 Order to the extent that the lower court had granted a *post-trial* motion to amend the complaint (to add an entirely new cause of action seeking a declaration that Winston was merely a "nominal"

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[22] Thus, in Mandel v. Liebman, 278 A.D. 637, 637, 102 N.Y.S.2d 563, 564 (1st Dep't 1951), rev'd, 303 N.Y. 88 (1951), relied upon by Winston, the First Department stated that "any sufficient ground may be raised on appeal to sustain a judgment or order which could have been addressed to the lower court." Here, Winston's *res judicata* and/or collateral estoppel arguments were addressed by the lower court and, indeed, his motion on such grounds was denied (R. 14). In Gryphon Domestic VI, LLC v. APP Int'l Finance Co., B.V.18 A.D.3d 286, 795 N.Y.S.2d 43 (1st Dep't 2005), also relied upon by Winston, the First Department held that because plaintiff-respondent had raised the argument in the motion court, it was properly preserved as a ground for affirming the judgment. Gryphon is distinguishable because there, unlike the case here, the motion court did not deny the motion on such ground.

member, who could be expelled from the Company upon the payment to him of the value of his minimal capital account). In determining that the motion to amend should have been denied, this Court did not make any determination, *on the merits*, concerning whether the Company may seek to have Winston ousted. Rather, this Court merely determined, on a purely procedural motion, that the "post-trial application" was improvidently granted (R. 65).

The fatal flaw in Winston's argument is that *res judicata* only applies when a final judgment is rendered *on the merits*. See, e.g., Jiminez v. Shippy Realty Corp., 213 A.D.2d 377, 622 N.Y.S.2d 983 (2d Dep't 1995); Tubridy v. City of New York, 222 A.D.2d 430, 635 N.Y.S.2d 51 (2d Dep't 1995). Here, of course, no "judgment" was ever entered dismissing Plaintiffs' amended claims in the prior action.

Similarly, in order for a claim to be barred by collateral estoppel, the identical issue necessarily must have been decided in the prior action and be decisive of the present action. See, e.g., Matter of Juan C. v. Cortines, 89 N.Y.2d 659, 657 N.Y.S.2d 581 (1997); Kaufman v. Eli Lilly & Company, 65 N.Y.2d 449, 492 N.Y.S.2d 584 (1985).

Here, this Court's modification so as to delete that portion of the Trial Court's November 2005 Order and Judgment with respect to Winston's "expulsion" from the LLC was clearly not on the merits, but merely on procedural

grounds. See Wilson v. New York City Housing Authority, 15 A.D.3d 572, 791 N.Y.S.2d 567 (2d Dep't 2005) (holding that where dismissal did not involve a determination "on the merits," the doctrine of *res judicata* does not apply).

Thus, this Court found that "plaintiffs' post-trial application to add an entirely new cause of action under the guise of conforming the pleadings to the proof, apart from evincing gross laches on the part of the movant, was arguably prejudicial to the defendant" (R. 65). This Court's prior finding that Plaintiffs waited too long to assert their amended claims in that action cannot, and does not, in any way bar or preclude Plaintiffs from seeking such relief in the instant action.

Accordingly, Winston's *res judicata* and/or collateral estoppel argument should be rejected on both procedural and substantive grounds.

<u>**CONCLUSION**</u>

For all of the foregoing reasons, it is respectfully requested that this Court modify the lower court's March 11, 2008 and July 7, 2008 Orders, to the extent of denying Winston Chiu's motion to dismiss Plaintiffs' second cause of action seeking Winston Chiu's "ouster" and removal from the Company, and grant such other and further relief as this Court deems just and proper, including costs.

Dated: New York, New York
April 29, 2009

Respectfully submitted,

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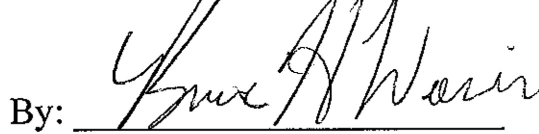
By: 
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CERTIFICATE OF COMPLIANCE

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April 29, 2009

Respectfully submitted,

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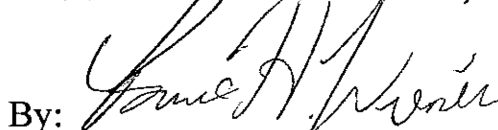

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