STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

JAY BIRNBAUM, derivatively on behalf of ELM MANOR NURSING HOME, INC., WEDGEWOOD NURSING HOME, INC. and as partner in EMG ASSOCIATES,

Plaintiff,

v.

ROHM SERVICES CORP., INC. and ROBERT W. HURLBUT,

Defendant.

DECISION AND ORDER

Index #2001/12235

Defendants, Rohm Services Corp., Inc. ("Rohm") and Robert W. Hurlbut ("Hurlbut"), have moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint.

Plaintiff, Jay B. Birnbaum ("Birnbaum"), derivatively on behalf of Elm Manor Nursing Home, Inc., Wedgewood Nursing Home, Inc., and as partner in EMG Associates, has cross-moved for summary judgment on its seventh and eighth[1] causes of action of its corporate claims, and its sixth cause of action of its partnership claims, and for dismissal of defendant's summary judgment motion.

Background Facts

---

[1] There is no denominated eighth cause of action of plaintiff's corporate actions in the verified complaint. Based on a review of plaintiff's cross-motion, however, it appears that plaintiff is seeking summary judgment on its accounting causes of action against both corporations and the partnership.

Birnbaum and Hurlbut are in the nursing home business together, and jointly own several facilities. Elm Manor Nursing Home is owned by Elm Manor Nursing Home, Inc. ("Elm Manor NH"), and Wedgewood Nursing Home is owned by Wedgewood Nursing Home, Inc. ("Wedgewood NH"). Birnbaum and Hurlbut each have a 50% ownership interest in each corporation.

In addition, Birnbaum and Hurlbut at one time owned and operated three proprietary homes for adults: Elm Manor Proprietary Home for Adults ("Elm Manor P.H.A."), Wedgewood Proprietary Home for Adults ("Wedgewood P.H.A."), and St. Elizabeth's Proprietary Home for Adults ("St. Elizabeth's P.H.A."). The three proprietary homes were owned by EMG Associates, a partnership between Birnbaum and Hurlbut. However, in 1995 Birnbaum and Hurlbut closed Wedgewood P.H.A; in 1999, they sold St. Elizabeth's P.H.A.; and in 2002, they closed Elm Manor P.H.A.

EMG Associates was governed by a Partnership Agreement, which by its express terms, governed only the three jointly-owned proprietary homes (Exhibit D to Hurlbut Affidavit, 3). Birnbaum and Hurlbut entered into this agreement on December 30, 1993, but the partnership began the day after the State of New York approved EMG as the owner/operator, or in January 1995. Hurlbut was the Managing Partner of EMG.

Both of the corporations have a Shareholders Agreement, each

entered into on December 30, 1993. One is between Elm Manor N.H., Birnbaum, and Hurlbut (Exhibit B to Hurlbut Affidavit), and the other is between Wedgewood N.H., Birnbaum, and Hurlbut (Exhibit C to Hurlbut Affidavit). Hurlbut is the President and CEO of the nursing home corporations. Birnbaum claims there is a Management Agreement for the corporations, an allegation which Hurlbut denies, but Birnbaum does not provide a copy of the claimed agreement to the court.

Birnbaum represents that he acquired a 50% interest in the five facilities (Elm Manor NH, Wedgewood NH, Elm Manor P.H.A., Wedgewood P.H.A., and St. Elizabeth's P.H.A., hereinafter "jointly-owned facilities") from his father's estate, Bernard Birnbam, in 1992. Hurlbut represents that he acquired his 50% interest in the two nursing homes and three proprietary homes from his father, Robert H. Hurlbut, which became effective in January 1995 when he became a partner with Birnbaum in these facilities. Hurlbut also represents that his family owns several other facilities separate and apart from the aforementioned jointly-owned facilities.

Hurlbut is also the President of Rohm Services, Corp., Inc. (Rohm), a corporation that provides various management services to the jointly-owned facilities. Hurlbut asserts that he has no ownership interest in Rohm. Sometime prior to Birnbaum and Hurlbut becoming joint-owners, Rohm entered into an agreement

with the estate of Bernard Birnbaum to provide management services to these facilities. Rohm continued to provide services to the jointly-owned facilities after Birnbaum and Hurlbut entered into their business relationships.

This dispute revolves around allegations that the jointly-owned facilities were being overcharged for both management fees in excess of Rohm's agreed upon management fee and for other third party expenses. Since 1995, Birnbaum co-signed the checks with Hurlbut for the payment to Rohm for its management services. When Birnbaum refused by letter in April 2001 to co-sign checks from Elm Manor NH, Wedgewood NH, and Elm Manor PHA to Rohm for services rendered (see Hurlbut Reply Affidavit, Exhibit C), Hurlbut sent Birnbaum a letter in October 2001 informing him that he was planning on opening a separate bank account to pay Rohm's management fees. (Birnbaum Affidavit, Exhibit D).

Shortly thereafter, plaintiff commenced the instant lawsuit on October 17, 2001, and an order to show cause with temporary restraining order was served by plaintiffs seeking a preliminary injunction. (Wolford Affidavit, Exhibit B; Bauer Affidavit, Exhibit B). After oral argument, the Honorable Thomas Stander signed an order dated March 24, 2002, which enjoined defendants from altering their banking arrangements, and also directed Birnbaum to sign checks payable to Rohm and return the same timely. The order also enjoined all parties from changing the

Rohm management fee to anything above $150,000 (Bauer Affidavit, Exhibit C).

Defendants interposed an answer with affirmative defenses on or about January 8, 2002 (Wolford Affidavit, Exhibit B). Discovery and depositions have taken place in this matter, and various conferences have been held with Justice Stander. In addition, Justice Stander has heard and ruled on several motions. A summary of the proceedings to date are detailed in the Wolford Affidavit, ¶¶ 4-12. Following one of the conferences with the court, it was decided that a different company would be hired as a replacement manager for Rohm. Only one alternative manager was found, The McGuire Group, who bid a fee of $300,000.00. (Ex. D). McGuire was never hired, as Rohm is still the management company for the jointly-owned facilities.

The verified complaint alleges a total of 18 causes of action, and are grouped according to which entity is asserting the claim. The first cause of action is brought on behalf of all three entities (Elm Manor NH, Wedgewood NH, and EMG Associates) and seeks a preliminary and permanent injunction. Next, Birnbaum, on behalf of the corporations Elm Manor NH and Wedgewood NH, asserts the second through seventh causes of action: breach of fiduciary duty by Hurlbut regarding the Rohm fees and the third-party expenses (second causes of action), breach of contract by Rohm regarding the Rohm fees (third causes

of action), mismanagement and waste of corporate assets by Hurlbut regarding the architect's fees (fourth causes of action), conversion by Hurlbut regarding the Rohm fees (fifth causes of action), unjust enrichment against Hurlbut and Rohm regarding the Rohm fees (sixth causes of action), and a demand for an accounting (seventh causes of action). The second through sixth partnership causes of action are asserted on behalf of EMG Associates: conversion of partnership assets regarding the Rohm fees (second cause of action), breach of fiduciary duty by Hurlbut regarding the Rohm fees (third cause of action), breach of contract by Rohm regarding the Rohm fees (fourth cause of action), unjust enrichment against Hurlbut and Rohm regarding the Rohm fees (fifth cause of action), and a demand for an accounting (sixth cause of action).

Defendants' Position

Defendants present their position to the court in an affidavit by defendant Hurlbut, an affidavit by Dennis Mart ("Mart"), who avers as the Controller of defendant Rohm Services Corp., Inc., an affidavit by attorney Wolford, and a memorandum of law.

In support of the motion for summary judgment, counsel for defendants highlights particular statements that Birnbaum made during his deposition testimony of 1/17/06, which are listed in paragraphs 14(a) through (p). (Ex. E). In sum and substance,

counsel submits that Birnbaum acknowledged that he was giving control over the operations of the facilities to Hurlbut and that Hurlbut would be able to incur expenses on behalf of the two nursing homes, that he was aware how the fees were calculated and paid as far back as 1993, that he signed the checks paying for the management fees, that he knew that the fees would go up over time, that he was presented with sufficient documentation so that he could have calculated the fees, but chose not to, that he is not blaming Rohm for the decline of profitability of the facilities, and that he did not raise an objection about the fee increases until 2000 and to the fee allocation until 2000 or 2001.

Counsel points out that Birnbaum did not complain about the management fees until the profitability of the jointly-owned facilities went down. Counsel also submits that the partnership agreement, which required both partners to approve the management fees, is no longer operative since it only covered the "proprietary homes" which have now closed. He further asserts that there is nothing in the shareholder's agreement which would serve to limit the management fees charged by Rohm. Finally, he points out that the fees charged by Rohm are eminently fair since no other company can come close to the fee which Rohm charges.

In his affidavit, Hurlbut states that he is the President of defendant Rohm, but he is not the owner. Hurlbut then proceeds

to describe the fees paid to Rohm over the years from approximately 1990 to 2000. He avers that through this entire process, Birnbaum was provided with all the records he needed to ascertain that the fees were reasonable, and what they were being assessed to cover. He essentially avers that the increases always reflected the increased cost of operating the facilities. He submits that Birnbaum did not complain until mid-2000, and he asserts that the fee that year was actually low when seen in conjunction with what the controller, Dennis Mart submitted in his affidavit. He avers that Rohm in fact undercharged on the facilities when the fee is seen juxtaposed with what any other management company would have charged. Accordingly, he asserts that there is no basis for any claim that Rohm charged excessive fees. Furthermore, Hurlbut asserts that there is nothing in the Shareholder's Agreement which would prevent Rohm from charging what it did here. (Ex. B; Ex. C; and the Partnership Agreement, Ex. D).

Next, Hurlbut contends that the causes of action grounded in the assertion of excessive architectural fees are baseless and should be dismissed. He describes the need for renovations and maintains that he discussed the hiring of the architectural firm with Birnbaum. Moreover, he submits letters from Birnbaum in which Birnbaum had agreed to the fees of the firm and the

expenditure of the funds, and in fact signed the checks. (Ex. E). He states that Birnbaum cannot complain of that now.

Lastly, Hurlbut submits that any assertion of the improper payment for third party expense is groundless. In the first instance, each expenditure was presented to Birnbaum with documents to substantiate the payment, and Birnbaum executed each of the payment checks without question. Moreover, Hurlbut asserts that the total amount, approximately $16,000, represents legitimate expenses which were not improper.

Dennis Mart's affidavit is used primarily to corroborate Hurlbut's assertions that the fees charged by Rohm were fair and reasonable. He explains that he provided Birnbaum with monthly statements as to expenses, as well as "year-to-date" totals, and includes a copy of a monthly profit and loss statement as an example. (Ex. B). Additionally, Mart avers that the accounting firm would send yearly prepared statements to Birnbaum, which would include the fees paid to Rohm. Mart also states that when Birnbaum complained about the amount of fees in 2000, he prepared a chart which indicated, *inter alia*, that the allocation fees should have been over $194,000.00, but Rohm charged only $161,000.00. (Ex. D). He avers that the facilities would have expended significantly more money if they had changed to a different management firm.

Lastly, Mart asserts that all of the architectural fees were vouchered to Birnbaum as well as to Hurlbut, and Birnbaum had paid them without question. He concludes that the jointly-owned facilities have paid a disproportionately low amount since the 2001 TRO, which has hurt the other Hurlbut enterprises. Also, Mart represents that all expenses have been legitimate.

In defendants' memorandum of law, counsel submits that defendants are entitled to summary judgment because plaintiff acquiesced on the contested payments either because he co-signed all payments after proper paperwork was made available to him, or because he declined to object to them for years after they were made. It is also noted that between Hurlbut and Birnbaum, Hurlbut made the executive decisions and Birnbaum would then co-authorize them. It is asserted that there were no breaches of any duties owed to Birnbaum when Hurlbut and Rohm made all paperwork and records available to Birnbaum, and Birnbaum would subsequently execute the checks. Counsel submits that Birnbaum's failure to complain for over six years constituted a forfeiture of his right to protest. Counsel also points out that Birnbaum may not bring this as a stockholders' derivative suit when he failed to bring it in a timely manner as a shareholder.

With respect to the accounting claims, defendants submit that the case law supports the premise that court have not hesitated to dismiss accounting claims when the plaintiff "had

full knowledge of the subject transaction and did not protest the same and/or the plaintiff consented to the transaction." Moreover, it is asserted that there is no need for an accounting in a situation such as this where the plaintiff has full knowledge of the defendants' actions.

Lastly, counsel submits that defendants are protected by the "business judgment rule." That, in sum and substance, it protects a person from suit if corporate actions are taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of a corporate purpose.

Accordingly, counsel concludes that the request for a permanent injunction should be denied because defendants have sufficiently demonstrated that the underlying claims are baseless.

Plaintiff's Opposition and Papers in Furtherance of the Cross Motion

Plaintiff files an attorney affidavit, an affidavit by Birnbaum, an affidavit by Beryl Nusbaum, as prior active counsel for plaintiff, and a memorandum of law all in support of the position taken by plaintiff in opposition to the motion and in support of its request for partial summary judgment.

Birnbaum states that under the Partnership Agreement, Hurlbut was the party responsible for the daily management of the facilities. (Ex. A). He further asserts that the facilities were always intended to be jointly operated. In that regard, under

the Partnership Agreement, among the things that needed the consent of the partners was the terms of employment of any services company. Birnbaum avers that he knew that Hurlbut had an interest in Rohm, so he insisted on "limitations" on the management. Therefore, Birnbaum asserts that Hurlbut's October 5, 2001 letter in which Hurlbut wanted to place all the operating money in one account, "prompted [him] to investigate the fees being paid" to Rohm. Birnbaum asserts that his investigation led him to uncover that the fees paid by the facilities were inflated by Rohm, and that Rohm "routinely" overcharged the facilities. Birnbaum asserts that despite the agreements and the "established custom and practice," Hurlbut repeatedly failed to allow him the proper input.

Birnbaum continues by noting that Rohm is paid solely for management services, not payroll or similar costs. He then proceeds to explain the "apportionment" method and states that the apportionment method favors larger facilities. He maintains that the Hurlbut-owned facilities make up 93.01% of the beds managed by Rohm, but they pay only 91.5% of the Rohm budget. He concludes that by looking at Rohm's total budget of $2,077,073.00 in 2003, this "weighted formula employed by Rohm" shifts approximately $30,000.00 in costs from Hurlbut facilities to the jointly-owned facilities. He contends that he would not have understood this without the discovery from this litigation, and

the information which he received at the "year-end" was often stale, unaudited, and hence, unreliable.

Birnbaum further maintains that he never waived any right to contest these fees because he never had any prior explanation of what they consisted of. He asserts that he never would have given Hurlbut exclusive control over an entity which could be totally controlled by Hurlbut and his family. He asserts that he called some of this into question as early as January 16, 2001 in a letter he sent to Hurlbut. (Ex. E). He then recites a number of "skewed" payments in Rohm's budget which have nothing to do with the business, such as political donations, family salaries, life insurance, and computer software. [¶ 41]. He contends that since all of these items do not relate to the facilities, Rohm's budget is not a valid basis for determining a "fair" fee to be charged to the facilities.

Next, Birnbaum submits that the fee schedule is improper because a number of the charges pass directly through the facilities. He submits that the cost of subcontractors, for example, should be borne directly by Rohm, rather than be part of the "weighed per bed formula" used in setting the rate. [¶43, which cites to Ex. Q through Ex. Y]. Birnbaum also asserts that it was discovered through the deposition testimony of Hurlbut that several of Rohm's employees were billed to the facilities for hours not expended there.

Birnbaum continues by asserting that he never waived or acquiesced regarding Rohm's fees. He had agreed that Hurlbut would manage the facilities, but he never agreed to delegate all authority, in essence, to Rohm, an enterprise owned and controlled by members of the Hurlbut family. He submits that Hurlbut violated his duties to the facilities by deciding to hire Rohm. Birnbaum insists that he never had any input to the fee schedule as set up by Rohm and Hurlbut. He submits that he did not seek a lowering of the fees until the businesses began losing money and he wanted to investigate why, and it was only after this inquiry that the found out that Rohm was overcharging. He states that when he brought this to Hurlbut's attention, there was a dispute between the two which resulted in an agreement that the fee would be set at $150,000.00. According to Birnbaum, that set fee was violated in 2001 when the actual fees charged were $163,000.00. This alleged violation prompted this suit because Birnbaum concluded that he had been overcharged from the start.

The affidavit by counsel argues that the "non-Rohm" bid, which was supplied by Hurlbut, should not be considered by the court because it was initiated for settlement purposes only, and has not been studied to determine if it reflects the same type of services supplied by Rohm. Moreover, counsel asserts, it does not relieve Hurlbut from his obligations to allow Birnbaum to understand the financial obligations of the facilities.

Defendants' Reply

Defendants submit an attorney reply affidavit, an affidavit by Hurlbut, an affidavit of Dennis Mart, and a memorandum of law in opposition to plaintiff's cross-motion and in further support of their summary judgment motion.

Counsel first asserts that since plaintiff's papers in support of its cross-motion and in opposition to defendants' motion make no reference to those claims regarding the architectural fees, then it is evident that plaintiff does not oppose defendants' motion for summary judgment to dismiss these claims (the fourth causes of action on behalf of Elm Manor N.H. and Wedgewood N.H., respectively).

Next, counsel addresses plaintiff's assertion that the material regarding the solicitation of bids for a new manager is inadmissible because it was obtained in an effort to resolve this dispute. Counsel avers that there should be no dispute that the search for a proposed new manager was initiated by plaintiff's counsel, and it was suggested at a conference with Justice Stander on or about November 19, 2003. Moreover, counsel asserts that it was agreed at this conference that if defendants would agree to this search, Rohm fees would be increased 6% effective January 1, 2004. As a result of the search, it was learned that The McGuire Group proposed annual fees of approximately $300,000,

as compared to the then Rohm fees of $136,000, and the proposed Rohm fees of $191,000.

Counsel then asserts that there is no basis to assert a claim that there were excessive salaries paid to Rohm's management and that the third party expenses were unnecessary and of no benefit to plaintiffs, especially in light of the fact that there are no allegations in the complaint or interrogatory responses to suggest that excessive compensation was paid or that the third-party expenses are inappropriate. Counsel refers the court to the reply affidavit of Dennis Mart for a detailed explanation of all the charges and expenses.

Finally, counsel points to Birnbaum's deposition testimony which expressly contradicts Birnbaum's claims that he didn't knowingly approve of the method of allocating Rohm's fees. Counsel asserts that this theory is different from Birnbaum's original theory of recovery that he didn't approve the management fees or know the amounts. Counsel cites to pages 61-62 and 100-102 of Birnbaum's deposition testimony where he admits that he received a budget and formula on the allocation fees in 1993, that he understood how it was applied, and that he never complained about it.

In his reply affidavit, Hurlbut initially asserts that it was never the parties' intentions to operate *all* of the jointly-owned facilities under the terms of the partnership agreement.

Hurlbut then asserts that he does not recall any discussion between Birnbaum and himself that the partnership agreement would govern said operation of the facilities. In fact, Hurlbut points to the express terms of the partnership agreement which state that it was to govern only the proprietary homes and no other facility. Moreover, Hurlbut avers that there was never a Management Agreement which governed the operation of the nursing homes. Hurlbut also asserts that Birnbaum was indeed approved as an owner of the separate corporations that operate the nursing homes, and that Birnbaum approved keeping Rohm on to administer the jointly-owned facilities and was regularly kept informed of all the financial transactions.

Hurlbut asserts that the formula employed by Rohm to allocate the fees to the nursing homes is reasonable as set forth in the Mart reply affidavit, and Birnbaum never complained about it until this litigation was commenced. Moreover, Hurlbut maintains that he never refused to perform an accounting, but more importantly, Birnbaum never requested one, which precludes plaintiff's accounting request.

Finally, Hurlbut asserts that all of the expenses in Rohm's budget that are listed in paragraph 41 of Birnbaum's affidavit do in fact provide a benefit to the jointly-owned facilities and are not outside the scope of appropriate expenditures for nursing

home operations. Hurlbut refers the court to Mart's reply affidavit for a detailed explanation of these expenses.

In his reply affidavit, Mart asserts that the formula for allocating Rohm's costs to the various nursing homes has been in effect for over 15 years, that it was used when Rohm first began to provide services to the jointly-owned facilities in 1990, and that this methodology has been approved by the New York State Department of Health. Mart next asserts that Birnbaum was indeed provided with a copy of the budget and formula by letter in 1992 and 1993, which Birnbaum acknowledged at his deposition to receiving. Mart then discusses the methodology used in this formula. Mart also confirms that there are 17 other entities that are serviced by Rohm.

Mart then justifies how each of ten items listed in paragraph 41 of Birnbaum's affidavit indeed provide a benefit to plaintiff, and also explains how each expense was allocated to each facility. These items include golf outings for political candidates, salaries to Rohm's management, social functions, life insurance, and computer hardware, software, and licenses and loan payments for same. Mart next explains how and why nine different items listed in Birnbaum's affidavit at paragraph 43 were allocated in order to refute Birnbaum's claims that Rohm has passed through these charges to the various facilities and Birnbaum's assertion that these expenses should be absorbed by

Rohm. These charges include delivery charges, legal fees, computer services, human resources counseling, and payroll and accounting services. In sum, Mart asserts that all of the charges assessed against each of the homes are legitimate and done in a fair and reasonable fashion.

To summarize, defendant assert that defendants are entitled to summary judgment because Birnbaum waived his right to assert the claims in the complaint by virtue of Birnbaum's prior knowledge of, and implicit agreement to the Rohm fee formula, Rohm fees, and the third party expenses. Defendant also maintain that they were permitted to use the third party nursing home management bid information to support their motion. Defendants insist that Birnaum's cross-motion for an accounting should be denied because plaintiff has not established as a matter of law every element to the equitable accounting claims. Moreover, defendants contend that plaintiff's cross-motion is improperly supported by inadmissible evidence, evidence which violates the best evidence rule, and the parole evidence rule. Defendants maintain that Birnbaum's contentions concerning a custom and practice between the parties do not compel a grant of summary judgment. Finally, defendants assert that Birnbaum's new complaint over Hurlbut's salary and other fringe benefits must be disregarded.

Summary Judgment

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted); see also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v. Johnson, 147 A.D.2d 312, 317 (2d Dept. 1989) (citations omitted).

As a general rule, "contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned." Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P., 7 N.Y.3d 96, 104 (2006), *citing,* Nassau Trust Co. v. Montrose Concrete Prods. Corp, 56 N.Y.2d 175, 184 (1982). "Such abandonment 'may be established by affirmative conduct or by failure to act as so as to evince an intent not to claim a purported advantage.'" Fundamental Portfolio Advisors, Inc., supra, 104, *quoting*, General Motors Acceptance Corp. v. Clifton-Fine Central School District, 85 N.Y.2d 232, 236 (1995). "However, waiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection." Fundamental Portfolio Advisors ,Inc., supra, 104, *quoting*, Gilbert Frank Corp. v. Federal Insurance Co., 70 N.Y.2d 966, 968 (1988). Also, in general, "the existence of an intent to forgo such a right is a question of fact." Fundamental Portfolio Advisors, Inc, supra, 104, *citing*, Jefpaul Garage Corp. v. Presbyterian Hospital of New York, 61 N.Y.2d 442, 446 (1984).

The court finds that there is more than enough evidence in the record, namely admissions by Birnbaum in his deposition testimony, to conclude that Birnbaum was aware of the fee formula and the monies being paid out, and that he knowingly consented to said payments by failing to register an objection until years

later. Birnbaum cannot now contest the transactions at issue. Birnbaum signed the checks, and was also provided all the documentation which supported each expenditure. He also knew how the Rohm fee allocation worked as early as 1993, but did not complain about it until 2001. As such, defendants' motion for summary judgment dismissing plaintiff's causes of action for breach of fiduciary duty, breach of contract, unjust enrichment, conversion, and waste of corporate assets (14 in all) asserted derivatively on behalf of the corporations and partnership is granted.

Moreover, since plaintiff had full knowledge of the subject transactions, and did actually consent to and did not protest the transactions, plaintiff's accounting cause of actions are dismissed. Gutwirth v. Carewell Trading Corp., 12 A.D.2d 920 (1st Dept. 1961). In addition, Birnbaum admits in his verified complaint that he "obtained a comprehensive review of all fees charged by Rohm to the nursing homes and proprietary homes from 1995 forward." As such, there is no need for an accounting. Raymond v. Brimberg, 99 A.D.2d 988, 989 (1st Dept. 1984). Moreover, plaintiff never demanded an accounting and defendants never denied plaintiff an accounting, so plaintiff is not entitled to one. Non-Linear Trading Co., Inc. v. Braddis Associates, Inc., 243 A.D.2d 107, 119 (1st Dept. 1998).

Defendants' motion for summary judgment on the accounting claims is granted, and plaintiff's cross motion on the same is denied.

In addition, the court's inquiry into Hurlbut's management of the nursing homes is precluded by the business judgment rule. "[T]he business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 537-538 (1990), *quoting*, Auerbach v. Bennett, 47 N.Y.2d 619, 629 (1979). "So long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.'" Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y.2d at 538, *quoting*, Pollitz v. Wabash R.R. Co., 207 N.Y. 113, 124 (1912). Defendants do not deny the existence of a fiduciary relationship with plaintiff. However, plaintiff has not established that defendants breached their fiduciary obligations, especially in light of the fact that Birnbaum was aware of and signed each check for every expenditure at issue in this case.

Finally, with respect to the permanent injunction, plaintiff's request for such relief is denied because it has

failed to meet its burden of establishing the causes of action, and has also failed to demonstrate irreparable harm. Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D.3d 595, 596 (2d Dept. 2005). In particular, there is no agreement governing the nursing homes which requires consent of both parties regarding the management fees, nor does the shareholder's agreement provide for such a result. Indeed, plaintiff has yet to produce said alleged management agreement. The partnership agreement had such a provision, but that it is no longer in effect since Birnbaum and Hurlbut no longer own the three proprietary homes. And since the partnership agreement expressly provided that it governed only the proprietary homes, and not the nursing homes, it is not applicable to the corporations that are still running the two nursing homes. As such, plaintiff is not entitled to a permanent injunction which would require that Birnbaum consent to and sign checks for all Rohm fees and other expenses of the nursing homes. Any such temporary relief as has been ordered by the court in the proceedings thus far is hereby vacated.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 4, 2006
Rochester, New York