

<b>Appell v L.A.G. Corp.</b>
2008 NY Slip Op 31988(U)
July 11, 2008
Supreme Court, New York County
Docket Number: 0602846/2005
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN BRANSTEN**

PART 3

Justice

Index Number : 602846/2005

**APPELL, MICHAEL**

VS.

**LAG**

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

3

INDEX NO. 602846/05

MOTION DATE 12/7/07

MOTION SEQ. NO. 04

MOTION CAL. NO. \_\_\_\_\_

is motion to/for Summary Judgment

PAPERS NUMBERED
1
2
3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this ~~motion~~

... IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION**

**FILED**

JUL 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: July 11, 2008 Eileen Bransten

**HON. EILEEN BRANSTEN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X  
MICHAEL APPELL, individually and  
derivatively on behalf of  
L.A.G. ASSOCIATES, LP,

Plaintiff,

-against-

Index No. 602846/05  
Motion Date: 12/7/07  
Motion Seq. No.: 004

L.A.G. CORP., ALAN KAHN, SIDNEY YOSKOWITZ,  
ROBERT TANNENHAUSER, DAVID TANNENHAUSER,  
EMILY TANNENHAUSER, ERIC ROSENFELD,  
ROBERT BERNSTEIN and L.A.G. ASSOCIATES, L.P.,

Defendants.

**FILED**

JUL 16 2008

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
BRANSTEN, J.:

In motion sequence number 004, plaintiff Michael Appell, individually (“Appell”) and derivatively on behalf of L.A.G. Associates, LP (“LAG Assoc”) moves for summary judgment as to liability on the First, Second, Fifth and Seventh causes of action in the Second Amended Complaint (“Complaint”) against defendants L.A.G. Corp. (“LAG Corp”), Alan Kahn (“Kahn”), Sidncy Yoskowitz (“Yoskowitz”), Robert Tannenhauser (“Tannenhauser”) Eric Roscnfeld (“Roscnfeld”) and Robert Bernstein (“Bernstein”) (collectively the “Individual Defendants”). Defendants oppose the motion.

### Background

LAG Assoc is a Delaware limited partnership that was created to serve as the sole general partner of Nassau Bay Associates, L.P. (“Nassau Bay”)--an entity created to acquire and manage a property in Manhattan (“the Property”). The general partner of LAG Assoc is L.A.G. Corp. (“LAG Corp.”), whose officers include some of the Individual Defendants. LAG Assoc’s limited partners include Appell and all of the Individual Defendants. The Individual Defendants are also limited partners in Nassau Bay.

Appell brought this action individually, and derivatively on behalf of LAG Assoc, claiming that LAG Corp and the Individual Defendants engaged in self-dealing and breached fiduciary duties in connection with the sale of partnership interests in non-party Nassau Bay.<sup>1</sup> Appell claims that, in May 2004, LAG Assoc’s other limited partners purchased limited partnership interests in Nassau Bay and that he was the only limited partner of LAG Assoc excluded from the opportunity. The other limited partners purportedly used their control over LAG Corp, the general partner of LAG Assoc, to exclude Appell and caused LAG Assoc to consent to the purchase and sale.

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<sup>1</sup> No claims remain against David or Emily Tannenhauscr, as the sole claim asserted against these defendants was dismissed in an April 27, 2006 Decision and Order.

The Complaint asserts four causes of action, including two claims for breach of fiduciary duty (first and seventh causes of action), one claim for aiding and abetting breach of fiduciary duty (second cause of action), and one claim for breach of contract (fifth cause of action).<sup>2</sup> Appell now moves for summary judgment, as to liability only, on these claims.

The factual background of this case was stated in detail in the court's prior decisions, dated April 27, 2006 and December 20, 2006. Therefore, the court presumes that the parties are familiar with the facts of this case, and any additional necessary facts on Appell's summary judgment motion are stated below in the Discussion. Unless otherwise stated, terms in this decision shall have the same meaning as used in the April 27, 2006 and December 20, 2006 decisions.

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<sup>2</sup> The original complaint was dismissed by an April 27, 2006 Decision and Order. Thereafter, Appell served an amended complaint, moved to reargue, renew and/or resettle, and requested leave to serve the second amended complaint. By Decision and Order dated December 20, 2006, the Court denied the motion to reargue and/or renew and granted leave to assert claims for breach of contract and breach of fiduciary duty, which are contained in the second amended complaint (in the fifth and seventh causes of action, respectively). Appell appealed, and by decision dated June 21, 2007, the First Department modified the court's decision on the underlying motions, reinstating the dismissed causes of action for breach of fiduciary duty and aiding and abetting breach of fiduciary duty (in the first and second causes of action), and otherwise affirmed the decision. *See Appel v. LAG Corp*, 41 A.D.3d 277 (1<sup>st</sup> Dept. 2007).

### Analysis

#### Breach of Fiduciary Duty (First Cause of Action)

Appell argues that, under New York law, he is entitled to summary judgment on his first cause of action for breach of fiduciary duty, which is asserted against Tannenhauser, Kahn, Yoskowitz, Bernstein, Rosenfeld (together, the LP Defendants), and LAG Corp. This claim is based upon these defendants' alleged self-dealing in causing LAG Assoc to decline to purchase Nassau Bay limited partnership interests and to consent to the individual defendants' purchase of these interests. In opposition, defendants argue that Delaware law applies to Appell's claims for breach of fiduciary duty, because LAG Assoc is a Delaware limited partnership. Defendants' argument relies almost exclusively upon Delaware law. Thus, the parties dispute whether the laws of New York or Delaware apply to Appell's claims for breach of fiduciary duty.

“It is well settled that the law of the state in which an entity was incorporated (here, Delaware) is controlling as to matters relating to its internal affairs,” such as claims for breach of fiduciary duty and usurpation of corporate opportunities (*Venturetek, L.P. v Rand Pub. Co., Inc.*, 39 AD3d 317, 317 [1st Dept 2007]; *Carroll v Weill*, 2 AD3d 152, 153 [1st Dept 2003]). However, “the doctrine of judicial estoppel precludes a party who assumed a

certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed” (*Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005] [citation and internal quotation marks omitted]; *see also Nestor v. Britt*, 270 AD2d 192, 193 [1st Dept 2000] [under “the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding” (citation omitted)]). “[T]his rule has, properly, been applied as well to court rulings that are not denominated as ‘judgments’” (*D & L Holdings, LLC v RCG Goldman Co., LLC*, 287 AD2d 65, 71 [1st Dept 2001]).

In addition, under the doctrine of law of the case, “when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). “[P]ursuant to law of the case principles,” the First Department “give[s] effect” to the trial court’s “unappealed determination that New York law applies” (*Avid Equities, Ltd. v Commerce and Indus. Ins. Co.*, 225 AD2d 446, 446 [1st Dept 1996]; *see also AIG Trading Corp. v Valero Gas Marketing, L.P.*, 254 AD2d 117, 118 [1st Dept 1998] [the “motion court did not err when, in the order now before us, it gave law of the case effect to its prior order

. . . or by holding that defendant-appellant was estopped from contending that New York law did not apply after having relied on it in this litigation”]).

Here, it is undisputed that LAG Assoc is a Delaware limited partnership. Throughout this litigation, however, the parties have consistently relied upon New York law in connection with Appell’s claims for breach of fiduciary duty. Early in this action, defendants relied upon New York law in arguing for the dismissal of the original complaint. Defendants’ opening brief on that motion cited eight New York cases, but only one Delaware case. The parties did not undertake a choice of law analysis at that time. Furthermore, defendants received a favorable ruling on that motion, as the court dismissed the action, relying upon New York law.

Defendants also argued, in their reply memorandum of law on their original motion to dismiss, that “Delaware law (like New York law) precludes ... a determination” that LAG Assoc “could properly raise its own ministerial interests above the fiduciary duty it owes to Nassau Bay as Nassau Bay’s general partner” (Defendants’ 10/27/05 Reply Mem. of Law, at 3 n 2), which supports the conclusion that “there is no reason to engage in a choice of law analysis”<sup>3</sup> (*Elson v Defren*, 283 AD2d 109, 114 [1st Dept 2001] [where “no conflict exists

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<sup>3</sup> Defendants argue that New York and Delaware law differ on whether there must be proof that an entity had funds with which to take advantage of a corporate opportunity.

between the laws of the jurisdictions involved, there is no reason to engage in a choice of law analysis”]). In their briefs on Appell’s motion to reargue and renew, and their cross motion to dismiss the amended complaint, defendants cite Delaware law only in support of their argument that *Appell* breached fiduciary duties by soliciting purchasers for the property at issue and seeking a brokerage commission, which is not at issue in Appell’s action.

Furthermore, none of the decisions of this court, or the Appellate Division, First Department, indicate that the parties *ever* undertook a substantive choice of law analysis. Nor did defendants cross appeal, or argue to the First Department that New York law did not apply to Appell’s claims for breach of fiduciary duty in this action. The First Department applied only New York law in reinstating Appell’s dismissed claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty (*Appell*, 41 AD3d 277). Nothing contained in the First Department’s decision purports to reinstate Appell’s claims under Delaware law (*Walentas v Johnes*, 126 AD2d 417, 421 [1st Dept. 1987] [whatever ““is necessarily implied in the former decision, is for the purpose of the estoppel deemed to have been actually decided””). Thus, New York law applies to Appell’s claims for breach of fiduciary duty.

On the merits, “[p]artners ..., and particularly managing partners, owe a fiduciary duty to the other partners” (*Birnbaum v Birnbaum*, 73 NY2d 461, 465 [1989]).

“[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and ‘inflexible’ rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty. Included within this rule’s broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person ‘in such close relation [to the fiduciary] . . . that possible advantage to such other person might . . . consciously or unconsciously’ influence the fiduciary’s judgment”

(*id.* at 466 [internal citations omitted]).

For example, in *Schneidman v Tollman* (190 AD2d 524, 525 [1st Dept 1993]), the “unequivocal language of the parties’ binding partnership agreement and certificate of limited partnership was a complete expression of their intention to form a limited partnership ‘for the purpose of owning and managing certain real property and the improvements thereon consisting of Days Inn Motels located in California and Nevada.’” The Court granted partial summary judgment, holding that the defendants “breached their fiduciary duties to plaintiffs by transferring the partnership’s purchase rights in the California/Nevada properties, without consideration, to another partnership entity that they formed for that purpose and from which plaintiffs alone were excluded,” thereby extinguishing the plaintiffs’ “limited partnership equity interests in the California/Nevada rights ...” (*id.*).

Similarly, in *Meinhard v Salmon* (249 NY 458 [1928]), the parties were involved in a joint venture concerning a 20-year commercial lease. The plaintiff invested money, but neither time nor labor, in the joint venture, and the defendant managed the project. With less than four months remaining on the lease, the owner of the property offered the managing partner, individually, a new 20-year lease, with successive covenants for renewal. The new lease covered the same property as the old lease, plus an adjacent property, and it was to begin at the conclusion of the old lease. The Court of Appeals determined that, because there was a “nexus” between the new lease and the business of the joint venture (*id.*, at 468), the defendant breached his fiduciary duty by failing to offer his partner the opportunity to participate in the new lease, which the Court determined was “an incident of the enterprise” (*id.* at 464). The Court admonished the defendant for his “abuse of special opportunities growing out of a special trust as manager or agent” (*id.*, at 467). The Court also found distinguishable the factual situation of the owner offering the manager-defendant, individually, a commercial lease “at a location far removed,” which the defendant might have held for himself, because in *Meinhard*, “the subject-matter of the new lease was an extension and enlargement of the subject-matter of the old one” (*id.*, at 468). The Court stated:

“The trouble about [the defendant’s] conduct is that he excluded his coadventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency. This chance, if nothing more, he was

under a duty to concede. The price of its denial is an extension of the trust at the option and for the benefit of the one whom he excluded”

(*id.*, at 465).

Here, it is undisputed that LAG Corp is the general partner of LAG Assoc, that Tannenhauser and Kahn are president and vice president of LAG Corp, respectively, and that these defendants are also limited partners of Nassau Bay.<sup>4</sup> LAG Assoc’s “Certificate of Amendment of Certificate & Agreement of Limited Partnership” states that “[t]he nature of the business and the purposes to be conducted and promoted by [LAG Assoc] is to engage solely as the General Partner of [Nassau Bay] in connection with Nassau Bay’s ownership and operation” of the 35th Street Property (Appell Aff., Ex. B, ¶ Second [a]). LAG Corp owned 1% of LAG Assoc, and Appell and each of the LP Defendants owned 16.5% of LAG Assoc as limited partners. LAG Assoc’s limited partnership agreement (“LAG Assoc LP Agreement”) states that LAG Assoc was formed “to carry on the acquisition, development and management of real property, described under the name of Nassau Bay Associates, Limited Partnership” (*id.*, Ex. C, ¶ 1). Thus, LAG Corp, and the individuals who controlled

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<sup>4</sup> Defendants claim that Bernstein, Yoskowitz and Rosenfeld are not officers, directors or in control of LAG Corp.

it, such as Tannenhauser and Kahn, owned and controlled LAG Assoc, and, through it, Nassau Bay.

Paragraph 8.04 of the Nassau Bay Certificate prohibits a limited partner of Nassau Bay from selling, transferring or disposing of a partnership interest “without the prior written consent of the General Partners.” Section 8.05 (d) of the Nassau Bay Certificate states:

“[t]he General Partners may, but shall not be obligated to, acquire one or more Partnership Interests from any Limited Partner, with the consent of said Limited Partner ... and if, with respect to such Partnership Interests, the General Partners become Limited Partners ..., the General Partners shall, with respect to the Interests purchased, enjoy all the rights and be subject to all the obligations and duties of a Limited Partner.”

Thus, LAG Corp, as managing partner, and Tannenhauser and Kahn, who controlled LAG Corp, owed fiduciary duties to LAG Assoc and its limited partners, including Appell. Moreover, there was clearly a nexus between the business of LAG Assoc and the purchase of Nassau Bay’s limited partnership interests, because LAG Assoc’s purchase of Nassau Bay limited partnership interests was expressly recognized as a possibility in the Nassau Bay Certificate when the entities were formed; therefore, the opportunity to purchase Nassau Bay limited partnership interests arose as an incident of, and had a nexus to, LAG Assoc’s business.

It is undisputed that the LP Defendants acquired Nassau Bay limited partnership interests in June 2004 and refinanced the mortgages on the 35th Street Property, resulting in available cash of approximately \$4 million. Thereafter, Nassau Bay sold the 35th Street Property, distributing millions of dollars to the LP Defendants. All of this occurred, however, to the exclusion of Appell, depriving him of “any chance to enjoy the opportunity for benefit” (*Meinhard*, 249 NY, at 465; *see also* 11/27/07 Tannenhauser Aff., ¶ 12 [admitting that Tannenhauser, his children, Rosenfeld, Bernstein, Yoskowitz and Kahn bought the limited partnership interests, and stating: “I did tell Appell that he would not be part of the group that was going to buy out the limited partnership interests”]). Thus, Appell has made a *prima facie* showing that LAG Corp, Tannenhauser and Kahn breached their fiduciary duties by failing to offer the opportunity to purchase Nassau Bay’s limited partnership interests to LAG Assoc and to him, and by consenting to the LP Defendants’ purchase of Nassau Bay limited partnership interests, to the exclusion of LAC Assoc and Appell (*Schneidman*, 190 AD2d 524; *Meinhard*, 249 NY 458).

Appell has also made a *prima facie* showing that LAG Corp, Tannenhauser and Kahn breached their fiduciary duty to treat Appell equally with LAG Assoc’s other limited partners, by their exclusion of Appell from the opportunity to purchase Nassau Bay limited partnership interests, while consenting to the LP Defendants’ purchase of those interests

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(*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 572 [1984] [“there exists a fiduciary duty to treat all shareholders equally . . . . This duty arises as a concomitant to the power reposed in the majority over corporate governance”]; *see also Schwartz v Marien*, 37 NY2d 487, 491 [1975] [“members of a corporate board of directors nevertheless, owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly”]).

Defendants’ opposition relies almost exclusively upon Delaware law, which, as discussed above, is not applicable to Appell’s claims for breach of fiduciary duty. Much of their argument relies upon their assertion that Appell offers no evidence showing that LAG Assoc was financially able to exploit the opportunity to purchase limited partnership interests in Nassau Bay. However, as defendants concede, the First Department has consistently held --contrary to Delaware law--that “[d]espite the corporation’s inability or refusal to act it is entitled to the officer’s undivided loyalty” (*Owen v Hamilton*, 44 AD3d 452, 454 [1st Dept 2007] [citing *Foley v D’Agostino*, 21 AD2d 60, 68 (1st Dept 1964)]; *see also Bankers Trust Co. v Bernstein*, 169 AD2d 400, 401 [1st Dept 1991] [“to establish that (the) corporate opportunity was improperly diverted it need not be proved that the corporation would have availed itself of the business opportunity but for the defendant's acts”]). Therefore, this argument is ultimately unpersuasive.

Defendants also argue that the opportunity was presented to defendant Yoskowitz in his personal capacity, and that Yoskowitz exercises no control over LAG Corp. However, Yoskowitz's affidavit states that he asked Tannenhauser "to see if he could find the money (or investors) ... to buy out [the limited partnership interests] in Nassau Bay" (Yoskowitz Aff., ¶ 6). Tannenhauser concedes that he agreed with Yoskowitz to buy these interests (Tannenhauser Aff., ¶ 6). Moreover, LAG Assoc's purchase of Nassau Bay limited partnership interests was expressly recognized as a possibility when the entities were formed, and the opportunity to purchase Nassau Bay limited partnership interests arose as an incident of, and had a nexus to, LAG Assoc's business. Nassau Bay's limited partners were permitted to sell or transfer their interests only after obtaining the prior written consent of LAG Assoc. Therefore, once Tannenhauser was presented with the opportunity to purchase the Nassau Bay limited partnership interests, from Yoskowitz or otherwise, he had a fiduciary duty to present that opportunity to LAG Assoc, and either all of its limited partners or none of them. As discussed above, Tannenhauser and Kahn admit that they controlled LAG Assoc through LAG Corp. Thus, it is irrelevant whether the opportunity was initially presented to Yoskowitz, because LAG Corp, Tannenhauser and Kahn must have consented, on behalf of LAG Assoc, to the sale of Nassau Bay's limited partnership interests to the LP Defendants

to the exclusion of Appel. Accordingly, this argument fails to rebut Appel's *prima facie* showing.

Defendants next argue that, even under New York law, a claim for wrongful diversion or usurpation of corporate opportunity belongs to LAG Assoc, not individual limited partners such as Appel. However, under New York law, plaintiff may seek redress for the breach of the fiduciary duty owed to him "independent of any duty owing to the [entity] wronged" (*Abrams v Donate*, 66 NY2d 951, 953 [1985]; *see also Collins v Telcoa Intl. Corp.*, 283 AD2d 128, 133-34 [2d Dept. 2001] [individual claim for breach of fiduciary duty sustained after additional stock was issued to certain stockholders, "without a valid corporate purpose, without ... fair consideration for the shares, and for the purpose of diluting the plaintiff's percentage of ownership"]; *Hammer v Werner*, 239 App Div 38, 44 [2d Dept. 1933] ["that a particular act of directors may constitute a wrong to the corporation which may be righted ordinarily on behalf of the corporation does not bar a stockholder from having redress if that act effects a separate and distinct wrong to him independently of the wrong to the corporation.

Redress of this latter wrong is available to him personally despite the right of a present stockholder to redress the wrong in a derivative action so far as it relates to the corporation"). As discussed above, LAG Corp, Tannenhauser and Kahn diverted the

opportunity from both LAG Assoc and Appell, and breached their “fiduciary duty to treat all shareholders equally” (*Alpert*, 63 NY2d at 572 [citation omitted]). Therefore, Appell may seek redress individually or derivatively.

For the foregoing reasons, Appell’s motion for summary judgment on his first cause of action for breach of fiduciary duty is granted as against LAG Corp, Tannenhauser and Kahn. Defendants submit affidavits stating that Bernstein, Yoskowitz and Rosenfeld are not officers, directors or in control of LAG Corp. However, with his reply papers, Appell submits an affidavit of Rosenfeld, stating that he is an officer of LAG Corp (Appell Aff., Ex. MM). Appell also submits Nassau Bay’s Certificate of Limited Partnership, signed by Rosenfeld as an officer of LAG Corp, and a Certificate of Amendment of Nassau Bay, signed by Bernstein as an officer of LAG Corp. Thus, a question of fact exists as to whether Bernstein, Rosenfeld and Yoskowitz were officers, directors, or in control of LAG Corp such that they owed or breached fiduciary duties to Appell, and, accordingly, Appell’s motion is denied as to these defendants.

#### Aiding and Abetting Breach of Fiduciary Duty (Second Cause of Action)

Appell’s claim for aiding and abetting the breach of fiduciary duty is asserted only against the LP Defendants, and is based on the LP Defendants allegedly directing LAG Corp

to have LAG Assoc consent to the sale of Nassau Bay limited partnership interests to the LP Defendants.

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Plaintiff must also show “‘substantial assistance’ by the aider and abettor in the achievement of the primary violation” (*Design Strategy, Inc. v Davis*, 469 F3d 284, 303 [2d Cir 2006] [citation omitted]).

Here, as discussed above, LAG Corp, Tannenhauser and Kahn breached fiduciary obligations to Appell. Tannenhauser’s affidavit admits that he excluded Appell from “the group that was going to buy out the limited partnership interests,” because Appell “had not contributed any funds or investors to the deal” (Tannenhauser Aff., ¶ 12). Kahn’s affidavit states that “Tannenhauser made it perfectly clear to [him] that none of us had any right to buy any interests ..., and that what Appell [calls] an ‘opportunity’ to participate in the purchase of these interests was not afforded to [Kahn] because of [Kahn’s] status as a limited partner in LAG” (Kahn Aff., ¶ 16). Kahn claims that Tannenhauser told Kahn that, “if [Kahn] believed that Appell should be allowed to buy any of the interests, that [Kahn] should allow [Appell] to buy half of the shares [that Kahn himself] was buying,” and that Tannenhauser

“made it clear to [Kahn] that if [Kahn] wanted to share any of [his] allotment with Appell, [Kahn] could do so ... ” (*id.*, ¶ 17).

These facts make clear that LAG Corp, Tannenhauser and Kahn knowingly excluded Appell from the opportunity to purchase limited partnership interests in Nassau Bay, and rendered substantial assistance in connection with the breach of fiduciary duty, resulting in damages to Appell.

Appell, however, fails to make a *prima facie* showing that defendants Yoskowitz, Bernstein or Rosenfeld knowingly induced or participated in the breach, or that these defendants provided substantial assistance in the achievement of the primary breach. Therefore, Appell fails to provide a legal or factual basis supporting his request for relief with respect to these defendants. Accordingly, Appell’s motion for summary judgment on his second cause of action for aiding and abetting breach of fiduciary duty is granted as against LAG Corp, Tannenhauser and Kahn, and denied as against Yoskowitz, Bernstein and Rosenfeld.

#### Breach of the LAG Assoc LP Agreement (Fifth Cause of Action)

The fifth cause of action is asserted solely against LAG Assoc, and is based on section 6.03 (b) (5) of Nassau Bay’s partnership agreement and paragraph 5 (b) of the LAG Assoc

LP Agreement. Section 6.03 (b) (5) entitles LAG Assoc to proceeds, once proceeds are applied in accordance with the priority order of Nassau Bay's partnership agreement (Appell Aff., Ex. D). Paragraph 5 (b) provides that "[a]vailable funds of the partnership shall be distributed to the partners quarterly" (*id.*, Ex. C; *see also* 11/27/07 Tannenhauser Aff., ¶ 30 ["after the Property had been sold, I had to make appropriate distributions to the partners"]). Paragraph 5 (b) also states that "[f]unds shall be deemed available for distribution only after amounts sufficient to satisfy known obligations have been set aside but any reserve for depreciation shall not be considered a 'known obligation' within the meaning of this paragraph" (*id.*).

Here, Appell submits as evidence his Schedule K-1 from LAG Assoc, showing his share of income for the tax year 2005. The K-1 shows a "[c]urrent year increase" of \$1,348,484, an "[e]nding capital account" of \$1,166,323, and a "[n]et section 1231 gain" of \$1,380,127 (Appell Aff., Ex. T). Defendants admit to withholding Appell's distribution, arguing that, under paragraph 5 (b) of the LAG Assoc LP Agreement, they are entitled to withhold these funds as a reserve in the event that LAG Assoc is deemed liable in a separate action, in which Appell and an alleged co-broker of Appell seek commissions in connection with the sale of the 35th Street Property (*Georgia Malone & Co. v Nassau Bay Assoc., L.P., L.A.G. Assoc., L.P., L.A.G. Corp., Michael N. Appell Assoc., Inc. and Michael N. Appell*

[Sup. Ct., N.Y. County, Index No. 109972/05] [“Commission Action”]). Tannenhauser claims that he alone calculated the reserves, and he concedes that he used Appell’s distributions “to establish reserves for[] the payment of legal fees to defend against these actions and for the payment of any judgment that might be rendered” (Tannenhauser Aff., ¶¶ 30, 34).

As a preliminary matter, it is unclear why any LAG Assoc funds were reserved in connection with the Commission Action. Claims concerning commissions from the sale of the 35th Street Property belong to Nassau Bay, the seller of the property, not LAG Assoc. It appears that defendants shifted the reserve from Nassau Bay to LAG Assoc, and at the LAG Assoc level withheld from Appell a greater reserve share than LAG Assoc’s other partners. Appell raises this argument, but defendants do not even respond to it.

In any event, “there is no right to set off a possible, unliquidated liability against a liquidated claim that is due and payable” (*Spodek v Park Property Dev. Assoc.*, 263 AD2d 478, 478-79 [2d Dept 1999]). For example, in *Willett v Lincolnshire Mgt., Inc.* (302 AD2d 271 [1st Dept 2003]), the defendant managing agent of an equity fund withheld distributions owed to the plaintiff. As an affirmative defense, the defendant maintained that it withheld the distributions to offset a substantial obligation owed from the plaintiff. The Appellate Division, First Department affirmed the trial court’s summary judgment dismissal of the

affirmative defense, holding that the “obligation purportedly owing from plaintiff to [defendant] is currently being disputed and ‘there is no right to set off a possible, unliquidated liability against a liquidated claim that is due and payable’” (*id.* at 271 [citing *Spodek*, 263 A.D.2d at 478-79]).

Likewise, here, LAG Assoc cannot withhold Appell’s right to a distribution based on defense or other costs related to the mere possibility of a future judgment in the Commission Action. These claims are presently being disputed. Thus, any potential future obligation concerning the Commission Action was not, and is not, a “known obligation” of LAG Assoc, pursuant to paragraph 5(b) of the LAG Assoc LP Agreement. Indeed, defendants’ opposition brief concedes that the reserve is a “known *contingent* liabilit[y]” (Def. Opp. Mem. of Law, at 19 [emphasis added]), not a “known obligation” under paragraph 5 (b) of the agreement.

Defendants argue that they were not making a set off, but rather, were exercising their right to recoupment under Delaware law. However, defendants fail to explain why Delaware law is applicable to Appell’s breach of contract claim. In any event, while “both ‘recoupment’ and ‘set-off’ seek to offset a defendant’s liability, the two concepts are distinguished by the nature of the offsetting liability - a defendant’s recoupment claim is related to the same transaction as the plaintiff’s claim, whereas a defendant’s setoff claim is

unrelated to the plaintiff's claim" (*NVF Co. v New Castle County*, 276 B.R. 340, 353 [D. Del. 2002], *aff'd* 61 Fed. Appx. 278 [3d Cir 2003]).

Here, according to the papers submitted by defendants, the amounts withheld from Appell were reserves for the Commission Action, which is unrelated to Appell's claims here (Tannenhauser Aff., ¶¶ 30-34; Def. Opp. Mem. of Law, at 16-23). Tannenhauser concedes that he "established a second reserve, for Appell's claims in this action. This second reserve was funded by the partners *other than* Appell" (Tannenhauser Aff., ¶ 33 [emphasis added]). Thus, defendants concede that the funds withheld from Appell were not "related to the same transaction as the plaintiff's claim," but rather, were a setoff claim that was "unrelated to the plaintiff's claim" (*NVF Co.*, 276 B.R. at 353).

For the foregoing reasons, Appell's funds should have been "deemed available for distribution" under paragraph 5 (b). Accordingly, Appell is entitled to summary judgment on his fifth cause of action for breach of contract.

#### Breach of Fiduciary Duty (Seventh Cause of Action)

Appell's seventh cause of action is asserted only against LAG Corp and the LP Defendants. This cause of action is based upon these defendants treating Appell in a

disparate manner by withholding his distributions but allocating him taxable income, while issuing distributions to the other limited partners of LAG Assoc.

In his affidavit dated May 5, 2006, Tannenhauser admits that other limited partners “have had at least a portion of [their] erstwhile distributions withheld” (Tannenhauser Aff., ¶ 5), while at the same time admitting that “all of Appell’s distribution was withheld from him” (*id.*, ¶ 21; *cf.* 11/27/07 Tannenhauser Aff., ¶ 12 [admitting that Tannenhauser, his children, Rosenfeld, Bernstein, Yoskowitz and Kahn bought the limited partnership interests, and stating: “I did tell Appell that he would not be part of the group that was going to buy out the limited partnership interests”]). Thus, defendants admit treating Appell in a disparate manner by “improperly withh[olding] a greater amount of money from plaintiff” (*Appell*, 41 AD3d at 278; *see also Alpert*, 63 N.Y.2d at 572 [“there exists a fiduciary duty to treat all shareholders equally”]; *Drucker v Mige Assoc. II*, 225 AD2d 427, 428 [1st Dept 1996] [breach of fiduciary duty found where defendant’s conduct “would have resulted in him receiving an amount of money in excess of what the other general partners were going to obtain and would have reduced the amount that was left over for the limited partners”]). Accordingly, Appell’s motion for summary judgment on his seventh cause of action for breach of fiduciary duty is granted.

Affirmative Defenses

Defendants' sixth affirmative defense claims that Appell's claims are barred by the business judgment rule, which:

“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. 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. Apt. Corp.*, 75 NY2d 530, 537-38 [1990] [internal quotation marks and citations omitted]). However, “[i]t is black-letter, settled law that when a corporate director or officer has an interest in a decision, the business judgment rule does not apply”(*In re Croton River Club, Inc.*, 52 F3d 41, 44 [2d Cir 1995] [citing *Alpert*, 63 NY2d 557]). Moreover, “[d]irectors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally” (*Marx v Akers*, 88 NY2d 189, 202 [1996]; see also *Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept. 2002] [“business judgment rule is not an insuperable barrier, however, and ‘permits review of improper decisions, as when the challenger

demonstrates that the board's action ... deliberately singles out individuals for harmful treatment'" (citation omitted)).

Here, the business judgment rule is inapplicable, because, as discussed above, LAG Corp, Tannenhauser and Kahn breached their fiduciary duties. The facts underlying Appell's claims for breach of fiduciary duty establish that the LP Defendants received favorable treatment at Appell's expense, thereby singling out Appell for harmful treatment. Accordingly, the business judgment rule does not apply, and defendants' sixth affirmative defense is dismissed.

"The other affirmative defenses pleaded by defendant[s] are both legally and factually insufficient. 'It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial'" (*City of New York v Caristo Constr. Corp.*, 94 AD2d 688, 690 [1st Dept 1983] [citation omitted], *aff'd* 62 NY2d 319 [1984]). Here, defendants have made no showing that any of their additional affirmative defenses have merit. Therefore, these affirmative defenses are dismissed.

Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment, as to liability only, in favor of plaintiff and against defendants LAG Corp, Alan

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Kahn and Robert Tannenhauser on the first and seventh causes of action for breach of fiduciary duty and on the second cause of action for aiding and abetting breach of fiduciary duty, and against defendant LAG Associates, LP on the fifth cause of action for breach of contract, and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein, and plaintiff's motion is otherwise denied; and it is further

ORDERED that the action shall continue as against the remaining defendants.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
July 11, 2008

ENTER



Hon. Eileen Bransten

HON. EILEEN BRANSTEN

**FILED**

JUL 16 2008

COUNTY CLERK'S OFFICE  
NEW YORK