

**Colton v Gibber**

2012 NY Slip Op 31403(U)

May 24, 2012

Supreme Court, New York County

Docket Number: 108800/11

Judge: Cynthia S. Kern

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**CYNTHIA S. KERN**

PRESENT: \_\_\_\_\_ *J.S.C.*  
Justice

PART 55

Index Number : 108800/2011  
CHARLES K. GOLDNER, LLC  
vs.  
GIBBER, ELLIOTT  
SEQUENCE NUMBER : 006  
DISMISS

INDEX NO. 108800/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 06

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

# FILED

MAY 25 2012

NEW YORK  
COUNTY CLERK'S OFFICE  
*OK*

Dated: 5/24/12

\_\_\_\_\_  
**CYNTHIA S. KERN**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER

- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
NAOMI COLTON, individually and derivatively  
on behalf of CHARLES K. GOLDNER, LLC,

Plaintiffs,

Index No. 108800/11

-against-

**DECISION/ORDER**

ELLIOTT GIBBER and DEBORAH GIBBER,

**FILED**

Defendants.

**MAY 25 2012**

-----X  
**HON. CYNTHIA KERN, J.S.C.**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Plaintiff Naomi Colton ("Colton") commenced this proceeding seeking to resolve a dispute regarding her and her sister, defendant Deborah Gibber's joint membership interests in a limited liability company, Charles K. Goldner LLC ("Goldner"), which owns a building on West 77<sup>th</sup> Street in Manhattan. Defendants have brought the present motion to dismiss plaintiff's verified amended complaint and to reimpose a stay on discovery pending a determination of this motion. Plaintiff has brought a cross motion for leave to serve a second amended complaint. Moses Marx, who plaintiff seeks leave to add as a defendant in the second verified amended complaint, has brought a cross motion for an order denying plaintiff's motion for leave to serve a

second amended complaint and add him as a defendant and for a protective order quashing a subpoena served by plaintiff for documents relating to Mr. Marx. At the oral argument of this motion, both plaintiff and defendants agreed to treat this motion as a motion to dismiss the second amended complaint rather than a motion to dismiss the amended complaint and a cross motion for leave to serve the second amended complaint. As will be explained more fully below, defendants' motion to dismiss the second amended complaint is granted in part and denied in part and the cross motion by Marx for a protective order is granted. All outstanding discovery is stayed as moot except as stated in the remainder of this decision.

By deed dated June 9, 1999, Charles K. Goldner conveyed his 75% interest and Pearl Goldner conveyed her 25% interest in 201 West 77<sup>th</sup> Street to Goldner. On that same date, a limited liability operating agreement (the "Operating Agreement") was executed by Charles and Pearl. Article 7.1 of the Operating Agreement provides that Charles is the managing member but that if he is unable to serve, Colton and Deborah are designated as co-managing members. Each of the sisters and their respective families own a 50% membership interest in Goldner.

In plaintiff's original complaint, she alleged that her sister improperly sought a loan from New Basket LLC (the "New Basket Loan") based on false corporate documents pledging interests in Goldner as security. She commenced the present action seeking preliminary injunctive relief, which was granted by the court and remains in effect. Plaintiff also sought an injunction preventing defendants from pledging Goldner's assets or from performing certain other acts as agents or on behalf of Goldner. She also sought a declaratory judgment stating that defendants have no right to execute Goldner documents or pledge its assets. It is undisputed that the New Basket Loan never proceeded and was never funded and that plaintiff was aware of this

information at the time she commenced this action.

The defendants previously made a motion to dismiss the complaint. The court denied the motion except to the extent that Goldner was dismissed as a plaintiff unless an amended complaint was served. The plaintiff did serve an amended complaint and defendants have now moved to dismiss that amended complaint. In response, plaintiff brought a cross motion to serve a second amended verified complaint, which contains eleven causes of action.

The Goldner Operating Agreement provides in Article 11.2 that the “right to receive allocations of Profits and Losses and to receive Distributions may not be transferred” unless certain terms and conditions have been satisfied. Article 11.3 of the Operating Agreement provides that :

Except for the right to receive to receive allocations of Profits and Losses and to receive Distributions, a Membership Interest of any Member may not be transferred in whole or in part, and a transferee shall not have a right to become a Member unless the following terms and conditions have been satisfied:

- (a) All of the other Members shall have consented in writing to the transfer and substitution, which consent may be arbitrarily withheld by any such Member:
- (b) The transferee shall have assumed the obligations, if any, of the transferor to the Company....

In August 2011, after the New Basket Loan did not close, the defendants and their company, Deb-El Food Products, LLC, obtained a \$16.7 million loan from a different lender (the “Marx Loan”). The Marx Loan was secured by a pledge of Deb-El Food Products LLC’s assets and by an inducement agreement (the “Inducement Agreement”) which obligated Deborah Gibber :

under certain circumstances, to deliver to [the lender] all or part of (a) any proceeds derived by [Deborah] from the sale of her membership interest in [Goldner] , or (b) any distribution or other payment received by [Deborah] from Goldner or anyone acting on its behalf with respect to her membership interest in Goldner whether before or after a sale

of the premises owned by Goldner.

The Inducement Agreement provides that in “the event that [Deborah] sells, assigns, transfers or otherwise disposes of Borrower’s membership interest”, she shall immediately pay to the lender any sums she receives from the transaction. It further provides that if “Goldner makes any distribution or other payment with respect to Borrower’s Membership Interest”, she will pay the lender any amount she obtains.

As previously stated, the court on consent of the parties, will treat defendants’ motion to dismiss the amended complaint as a motion to dismiss the second amended complaint and will address each of the eleven causes of action. Initially, the first cause of action for a declaratory judgment declaring that the transfer to the lender in connection with the Marx Loan is void ab initio is dismissed on the ground that it fails to state a cause of action. The court finds, based on a review of the unambiguous language of the Inducement Agreement and other Marx loan documents, that Deborah Gibber did not transfer her membership interest in Goldner and did not transfer her economic interest in Goldner in connection with the Marx Loan. Pursuant to the Marx loan agreement and Inducement Agreement, Deborah Gibber only agreed to deliver the proceeds she derived from Goldner in the event of a sale of her membership interest in Goldner or any distribution or payment received from Goldner. The Operating Agreement only prevents a member from transferring her membership interest or her right to receive allocations of profits and losses and to receive distributions from Goldner. It does not prevent a member from transferring her right to receive the proceeds from a sale of her membership interest after the sale has already taken place and does not prevent her from transferring her right to receive distributions from Goldner once she has already received the distribution. As a result, as a matter

of law, the plaintiff would not be entitled to a declaratory judgment that the transfers made in connection with the Marx Loan are void ab initio.

The Court also dismisses the second cause of action for an injunction directing Deborah to remove the Marx Loan UCC. As previously stated, the Operating Agreement does not prohibit Deborah from transferring to a lender her right to receive proceeds from a sale of her membership interest after the sale has taken place and does not prevent her from assigning her right to receive distributions and other payments after she has received them from Goldner. Therefore, the claim for an injunction directing that the UCC-1 financing statements in connection with that transfer be removed is without legal merit.

For the same reasons, plaintiff's ninth and tenth causes of action in the second amended complaint against Moses Marx, which assert claims against Marx for tortious interference and aiding and abetting a breach of fiduciary duty, are also without merit. Both of these claims are based on the assumption that the transfer of Deborah's interests pursuant to the Marx Loan constituted a breach of the Goldner Operating Agreement. Based on this court's finding that these transfers did not constitute a breach of the Operating Agreement, there can be no valid claim against Marx for tortiously inducing Deborah to breach the Operating Agreement by agreeing to make the Marx Loan or for aiding and abetting any breach of fiduciary duty by Deborah in agreeing to these transfers. Therefore, these causes of action are dismissed.

The court also dismisses plaintiff's third cause of action for permanent injunctive relief. In her third cause of action, plaintiff alleges that the Gibbers engaged in fraudulent conduct by intentionally fabricating or causing to be fabricated counterfeit corporate documents of Goldner and forging or causing to be forged Colton's signature on these documents. She alleges that the

same pattern of fraudulent conduct is capable of repetition and imperils the membership interests of the company's members and the value of the company. The relief she seeks is to enjoin the Gibbers from executing any documents on behalf of the company appurtenant to the transfer of the company, Gibber or Colton interests; prohibiting the Gibbers from transferring any assets of the company or the Gibber or Colton interests; directing that all checks on behalf of the company and all pledges of assets of the company be executed by Colton; and directing the Gibbers to cease and desist from interfering with the management and operation of the company. To the extent that plaintiff is seeking an injunction directing defendants to comply with the terms of the Operating Agreement, such injunction is unnecessary as they are already required to comply with the Agreement. To the extent she is seeking an injunction preventing Deborah from transferring any proceeds or profits once she has received them, the court has already found that this action is not prohibited by the Operating Agreement. Finally, her claim for an injunction directing the Gibbers to cease and desist from interfering with the management of the company and directing that all checks be executed only by Goldner is without basis. In order for plaintiff to be able to obtain an injunction for this relief, the court would of necessity have to make a determination that Deborah is no longer a managing member of the company. If she remains a managing member of the company, she is entitled to participate in the running of the company. It is only if she is removed as managing member that she would not be able to be involved in the management of the company. However, plaintiff has explicitly taken the position that she is not seeking any claim for relief in this action as to whether Deborah has been removed as a managing member in accordance with the Operating Agreement. In the absence of any such determination, there is no basis for this court to issue an injunction directing that Deborah cease and desist from being

involved in the management of the company and from writing checks on behalf of the company.

The court also finds that the fourth cause of action, which is the company's claim for breach of contract, and the fifth cause of action, which is Colton's claim for breach of contract, are without merit and these causes of action are dismissed. In the fourth and fifth causes of action, plaintiff asserts that as a result of Deborah's actions taken in connection with her attempted transfer of her membership interest with respect to the New Basket Loan and the transfer of her interests with respect to Marx Loan, Deborah breached the Operating Agreement. She claims that as a result of these breaches, she and Goldner have sustained damages in the "form of foreseeable expenditures to protect the assets of the company and its members from further impingement, including instituting this lawsuit to nullify the transfer of Deborah's interests pursuant to the Marx Loan." She also claims that she and the company have sustained damages because the improper encumbrance of the Gibber interests depresses the value of the company and Colton's interests in the company to prospective purchasers or lenders. In addition to seeking compensatory damages, she also seeks punitive damages in these two causes of action.

Initially, as previously stated, plaintiff cannot state a cause of action for breach of the Operating Agreement based on the existence of the Marx Loan and Deborah's transfer of her interests in connection with that Loan as the transfer of Deborah's interests in proceeds or distributions she has already received from Goldner do not constitute a breach of the Operating Agreement. Since these transfers do not constitute a breach of the Operating Agreement as a matter of law, plaintiff cannot base a breach of contract claim on these transfers.

To the extent that plaintiff is claiming a breach of the Operating Agreement based on Deborah's actions with respect to the New Basket Loan, she cannot state a valid breach of

contract claim as she cannot articulate any damage she has sustained as a result of the actions taken by Deborah in connection with the attempted New Basket Loan. As it is conceded by all parties that the New Basket Loan never closed and that no interests were transferred in connection with that Loan, plaintiff cannot articulate any damages she has suffered in connection with the attempted New Basket Loan.

To the extent that plaintiff is claiming that there was some depressed value of Goldner or the Colton Interests in Goldner as a result of the failed New Basket Loan, such claim must fail as any such claim of damages would be pure speculation. The law is clear that damages for breach of contract may not be speculative but must be reasonably certain and directly traceable to the breach. *See Kenford Co., Inc. v Erie County*, 67 N.Y.2d 257, 261 (1986); *StoreRunner Network, Inc. v CBS Corporation*, 8 A.D.3d 127, 128 (1<sup>st</sup> Dep't 2004).

To the extent that plaintiff is claiming that she suffered damages as a result of the alleged breach of contract by having to pay attorney's fees, she is barred from recovering any attorneys fees incurred in prosecuting this action unless there is an express provision in the Operating Agreement providing that she is entitled to attorneys' fees in the event that she is forced to bring legal action based on another member's breach of the Operating Agreement. *See Hooper Associates v AGS Computers*, 74 N.Y.2d 487 (1989). As the Court of Appeals there stated, "inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." Since plaintiff has failed to cite to any provision of the Operating Agreement which

provides that she is entitled to recover attorneys' fees in an action against another member for breach of the Operating Agreement, she is not entitled to recover such fees. Based on the foregoing, plaintiff's breach of contract claims fail to state a viable claim.

For the same reasons, plaintiff's sixth and seventh causes of action, which assert breach of fiduciary duty claims on behalf of Colton and Goldner, also fail to state a claim. In the breach of fiduciary duty claims in the second amended complaint, plaintiff asserts the same factual allegations as she does in her breach of contract claims. For all of the same reasons that the breach of contract claims fail to state a cause of action, the breach of fiduciary duty claims also fail to state a cause of action. To the extent that Deborah asserts that she has suffered damages as a result of the alleged breach of fiduciary duties by Goldner having to pay management fees to Deborah as a managing member after she breached her fiduciary duties, plaintiff's claims for management fees that Goldner has paid to Deborah as a managing member must be brought in conjunction with a claim seeking a declaration that Deborah is no longer a managing member and is therefore not entitled to any management fees. Since there is an express provision in the Operating Agreement that deals with the removal of a managing member, any dispute as to whether Deborah is entitled to managing member fees should be determined at the same time as a determination is made as to whether she should be removed as a managing member.

The eighth cause of action asserted for indemnification on behalf of Goldner also fails to state a cause of action. Plaintiff is seeking indemnification from Deborah pursuant to the indemnification provision contained in the Operating Agreement. That provision provides that "Members shall indemnify the Company for all costs or damages incurred by the Company as a result of any unauthorized action by such member." The amounts which plaintiff seeks to

recover pursuant to the foregoing indemnification clause are “costs and/or damages as a result of Deborah’s unauthorized aforementioned conduct and actions, including without limitation, the reasonable attorneys’ fees, costs and expenses incurred in prosecuting this action.” Verified second amended complaint paragraph 156. Based on this court’s holding that Deborah’s actions with respect to the Marx Loan were not unauthorized and based on the fact that the New Basket Loan never closed, the only indemnification which the company could be seeking is attorney’s fees incurred in prosecuting this action.

As previously discussed in this decision, the Court of Appeals has held that “inasmuch as a promise by one party to a contract to indemnify the other for attorney’s fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney’s fees, the court should not infer a party’s intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.” *Hooper Associates v AGS Computers*, 74 N.Y.2d 487 (1989). See also *Flores v Las Americas Communications*, 218 A.D.2d 595 (1<sup>st</sup> Dep’t 1995 )(lower court erred in awarding attorneys’ fees to plaintiff where the language of the parties’ agreement did not clearly provide for the recovery of attorneys’ fees). In the instant case, the indemnification clause contained in the Operating Agreement upon which plaintiff relies does not contain any unambiguous language providing for the recovery of attorneys’ fees in an action against a member for breach of the Operating Agreement. Therefore, pursuant to the well established rule that each party in a litigation is responsible for their own attorneys’ fees, plaintiff cannot recover attorneys’ fees from defendant in this action.

Finally, the motion to dismiss the eleventh cause of action in the amended complaint

against Elliott Gibber for tortious interference with contractual and business relations is granted solely to the extent stated below. In that cause of action, plaintiff asserts that Goldner had a contractual relationship with the building superintendent and other building employees and building tenants. It also asserts that Elliott interfered with these relationships by wrongfully cajoling the superintendent to take bribes which Elliott knew violated the terms of the superintendent's employment and wrongfully urged the other employees to leave Goldner's employ and work for him and wrongfully contacted the tenants to discuss their interactions with Goldner. Finally, the claim asserts that Elliott's wrongful interference with the contract of the building's superintendent induced the Building's superintendent to breach his contract with Goldner.

The law is well established that to state a claim for tortious interference with contractual relations, there must be a breach of the contract that is allegedly interfered with. *NBT Bancorp v Fleet /Norstar Fin. Group*, 87 N.Y.2d 614,620-621 (1996). Plaintiff does allege in the second amended complaint that the Superintendent was induced to breach his contract with Goldner. As a result, the allegations with respect to the Superintendent do state a claim for tortious interference. However, the allegations with respect to the interference with the other employees' contracts and with the tenants' contracts fail to state a viable claim as there is no allegation that any of these other employees breached their contract with Goldner and there is no allegation that any of the tenants' breached their contract with Goldner. Therefore, the motion to dismiss the cause of action for tortious interference is granted except with respect to the allegations regarding the superintendent.

Based on the foregoing, the second amended complaint is dismissed except for the cause

of action for tortious interference against Elliott Gibber to the extent stated in this decision, the motion by defendants for a stay of discovery is granted except as to those allegations relating to the cause of action for intentional interference with contractual and business relations and the cross motion by Marx for a protective order is granted. This constitutes the decision and order of the court.

Dated: 5/24/12

**FILED**

MAY 25 2012

OK

J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

**CYNTHIA S. KERN**  
J.S.C.