Coventry Real Estate Advisors, LLC v Developers Diversified Realty Corp.
2014 NY Slip Op 31444(U)
June 2, 2014
Supreme Court, New York County
Docket Number: 115559/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
COVENTRY REAL ESTATE ADVISORS, LLC, et al.,

Plaintiffs,

-against-

DEVELOPERS DIVERSIFIED REALTY CORPORATION et al.,

Defendants.
--X

Index No. 115559/2009

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.

Motion Sequences 025 and 026 are consolidated for disposition.

Motions before the Court

Coventry[1] moves for summary judgment: 1) on liability on their fourth cause of action for breach of the Management Agreements (Seq 025); and 2) dismissing defendants' third through fifth counterclaims for breach of contract, tortious interference with business relationships and business libel (Seq 026).

I. Facts

In 2003, the Coventry Funds and DDR entered into a co-investment agreement, which

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[1]Captialized terms in this opinion have the same meaning as in the court's decision, dated April 18, 2013, Doc 532 ("Doc" numbers refer to the New York State Electronic Filing System number), which disposed of defendants' summary judgment motion, unless defined differently here. That decision incorporated the definitions of capitalized terms in the court's decisions and orders dated June 23 and December 8, 2010, Docs 27 and 76, respectively. The readers' familiarity with the three prior decisions is assumed. In this opinion, "Coventry" denotes the Funds (the Main Fund and the Parallel Fund), Coventry Real Estate Advisors, LLC (CREA), and the plaintiff Property Owner REITs. The Parallel Fund is a Coventry entity created to facilitate international investment in the Fund II Properties. "DDR" refers to all of the defendants.

was superceded by a 2004 Investment Agreement, and a 2009 Amended Investment Agreement (collectively, Investment Agreement). The Investment Agreement provided for the sale of subscriptions to investors in the Funds. The Funds were to provide 80% and DDR 20% of the financing for the acquisition of real properties (collectively, the Properties), although in some instances DDR transferred properties it already owned, including a portfolio of Service Merchandise Properties, which lowered its total cash contribution to below 20%.

Coventry Fund II Partners, LLC, was the Managing Member of the Funds and CREA was the Investment Manager. The Investment Agreement provided for the formation of an Investment Committee composed of three individuals selected by CREA and three individuals selected by DDR. The Investment Committee was to make most decisions by majority vote. However, if all of the Coventry representatives on the Investment Committee voted to sell an asset and DDR's representatives voted against it, Coventry's vote controlled, and the asset would be sold.

For each potential investment, DDR was required to perform "property due diligence", including but not limited to "review of leases and operating agreements, title and survey examination, and environmental, engineering and structural review." CREA was required to perform "financial due diligence" prior to an acquisition, including but not limited to "market analysis, review of historical and projected cash flows, historical and projected operating expenses and scheduled rent increases and term expirations."

Twelve Properties were acquired by DDR and the Funds, but for purposes of this opinion, "Properties" will exclude Bloomfield and Merriam because claims under their Management

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Agreements have been dismissed.[2] Affidavit of Loren Henry, sworn to on July 22, 2013, Doc 648 (Henry Aff), ¶12. The Properties acquired were each held in the name of a separate Delaware limited liability company, the Property Owner REITs, each of which was governed by an LLC Agreement.[3] For simplicity, in this opinion the "Property Owner REITs" will exclude the owners of the Bloomfield and Merriam Properties. Annual operating budgets of the Property Owner REITs were subject to the approval of the Investment Committee, which, as previously noted, had equal numbers of Coventry and DDR appointees.

The Investment Agreement provided that upon approval of an investment, the Investment Committee would decide whether DDR (or a DDR affiliate, at DDR's option) would be the development manager (if the asset needed development) and/or the property manager/leasing agent of the asset. DDR and the Property Owner REITs entered into essentially identical Management Agreements for the management and leasing of the Properties. The fees that DDR or its affiliates would receive for managing and leasing were listed on annexed schedules to the Investment Agreement. DDR was removed as Property Manager for the Properties on December 31, 2011. Henry Aff, ¶17.

Pursuant to the Management Agreements, DDR was empowered, *inter alia*, to lease and maintain the Properties. In addition, DDR was obligated to prepare and deliver to the Property Owner REITs proposed annual operating budgets for each fiscal year, monthly reports of receipts

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[2]The ten Properties concerning which claims remain are: Buena Park, Fairplain, Marley Creek, Watters Creek, Phoenix Spectrum Mall, Totem Lake, Tri County, Ward Parkway, Westover, and Service Merchandise (a portfolio of Properties in 51 locations). *Id.*

[3]Certain exceptions were permitted by the Investment Agreement. For example, the Bloomfield Property was owned by what are defined by the parties as "Intermediary Parties".

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and disbursements and annual profit and loss statements.

Section 1.1 of the Management Agreements provided:

> Owner hereby engages and authorizes Property Manager to take the sole, entire and exclusive charge of the management and leasing of the Property ... and Property Manager hereby accepts said engagement and authorization and agrees to use the skills and efforts of Property Manager to effect the management and leasing of the Property, all in accordance with the terms, conditions and provisions of this Agreement. ... Property Manager agrees to render capable and competent services and to exercise due care in accordance with standard practices then followed by first class management firms in connection with properties comparable to the Property [in the applicable geographical area] ....

Affirmation of Claire Wells Hanson, dated 9/20/13 (Hanson Aff), Doc 814, Exs 26-36, Docs 840-850. Section 2.8 provided (1.8 in Buena Park Management Agreement):

> Subject to the Operating Budget, Property Manager [DDR] shall in the name of Owner [Property Owner REIT], enter into such contracts and other agreements for utilities and other services either required or deemed as desirable by Property Manager in connection with the operation of the Property. Subject to the Operating Budget, Property Manager shall order, in the name of Owner, such equipment, tools, appliances, materials and supplies as it deems desirable to properly maintain the Property .... Property Manager shall respect its fiduciary duty to Owner in the execution of such contracts or orders and ***Property Manager shall*** attempt to secure for, and ***credit to, Owner any discounts, commissions or rebates*** obtainable as a result of such contracts or orders....

[emphasis supplied]. *Id.*

Section 2.2 of the Management Agreements (1.2 for Buena Park) required the Property Owner REITs to approve DDR's proposed Operating Budgets as soon as practical after entering into the agreement and at least ninety days before the beginning of each fiscal year. *Id.* Section 2.3 (1.3 for Buena Park) obligated DDR to set up operating accounts in the name of the Property Owner REIT. *Id.* Each of the Management Agreements contained a provision requiring the Property Owner REITs to pay all maintenance expenses:

> All expenses incurred in connection with such maintenance shall be timely paid out of the Operating Accounts, or in the event Property Manager advances its own funds to pay for any such expenses, such amounts advanced by Property Manager [DDR] shall be reimbursable by Owner [the Property Owner REIT] to Property Manager.

Id, §2.9 (1.9 in Buena Park Management Agreement).

With respect to insurance, each Management Agreement required DDR to obtain insurance for the Property Owner REITs:

> through [DDR's] insurance program ..., at Owner's sole cost and expense, subject to the Operating Budget, ...

Id, §2.10(a) [1.3(a), p 6, of Buena Park Management Agreement, in which there are two sections numbered 1.3].

II. Procedural Background

Many issues raised by the complaint have been eliminated in prior motion practice, including Coventry's claim for breach of fiduciary duty. That ruling was affirmed by the Appellate Division.

On August 6, 2010, DDR moved for summary judgment (Mot Seq 019). Coventry filed its opposition on December 21, 2011. In September 2012, DDR enlarged the record, due to a final judgment by a Michigan court, which bore on the issues. Coventry responded in February 2013. This court's decision dismissed Coventry's claims for: fraud; fraudulent inducement; negligent misrepresentation; economic distress; breach of the Investment Agreement; breach of the LLC Agreements that governed the Property Owner REITs, which owned the Properties jointly acquired by Coventry and DDR; and breach of the Development Agreements. *See*, Doc 532. In addition, the decision dismissed all claims relating to the Merriam Property and all

claims for breach of the Management and Development Agreements applicable to the Bloomfield Property. *Id.* What remained was Coventry's fourth cause of action for breach of the Management Agreements relating to the Properties other than Merriam and Bloomfield.

However, the decision eliminated the following portions of Coventry's fourth cause of action for lack of evidence: 1) failure to obtain leases for Properties other than Buena Vista and Totem Lake; 2) failure to provide narrative leasing reports; and 3) failure to obtain a provision in third party vendor contracts that the Property Owner REIT could cancel upon thirty days written notice. *Id.* The remaining questions of fact with respect to DDR's alleged breach of the Management Agreements were identified as: 1) failing to share savings realized from various contractors (Oxford, Control, Facility Source and CentiMark); 2) failing to pursue opportunities to lease the Buena Vista and Totem Lake Properties; 3) failing to maintain the Ward Parkway Property; 4) increasing the operating costs of the Properties, due to the Oxford/Control/Facility Source/CentiMark contracts; 5) overcharging for insurance; and 6) improperly charging $35,000 for "corporate national programs" at the Tri-County Mall. *Id.*

Discovery was delayed regarding DDR's communications with Oxford, Facilities Source and Control Building. In January 2013, Coventry was still litigating over documents from Control Building. Coventry had to commence proceedings in Georgia to obtain documents. The note of issue was filed on May 21, 2013.

DDR had filed an answer with counterclaims on July 30, 2010. Coventry moved to dismiss. On May 22, 2012, the first and second counterclaims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty were dismissed. Doc 399. The third through fifth counterclaims for breach of contract, business libel and tortious interference with business

relationships survived. *Id.*

III. Coventry's Motion for Summary Judgment

Coventry asserts that DDR violated the Management Agreements, §§ 1.1 and 2.8, as a matter of law. DDR denies the allegation and asks the court to grant summary judgment in its favor, pursuant to CPLR 3212(b). DDR, in opposition to summary judgment, argues that: 1) it is law of the case that plaintiffs are not entitled to summary judgment; 2) Coventry failed to give contractually mandated notice of breach; 3) Coventry cannot prove damages; and 4) the record conclusively establishes that DDR did not breach the Management Agreements, or, alternatively, questions of fact preclude summary judgment. DDR further contends that summary judgment should be granted in its favor since, in the absence of expert opinion, plaintiffs have failed to present any proof that DDR's services were not "in accordance with standard practices followed by first class management firms in connection with comparable properties" in the relevant geographical area.

A. Law of the Case

DDR argues that the court should not consider Coventry's summary judgment motion because it is supported by the same evidence presented in opposition to DDR's previous summary judgment motion and, without new evidence or extraordinary circumstances, the denial of Coventry's request for summary judgment is law of the case. Coventry counters that: it never moved for summary judgment; denial of DDR's motion is not law of the case as to Coventry's present motion; and the denial of summary judgment never is law of the case because it does not address the merits of a claim. DDR replies that Coventry asked for summary judgment on the prior motion, pursuant to CPLR 3212(b), which is true. However, when DDR moved for

summary judgment, discovery was ongoing. The note of issue was not filed until after DDR's motion was resolved.

DDR cites *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721 (2d Dept 2006); *Campbell v Campbell*, 43 AD3d 1264, 1265-1266 (3d Dept 2007) and *Caiola v Allcity Ins. Co.*, 277 AD2d 273, 274 (2d Dept 2000). *Brownrigg* and *Campbell* both held that the denial of summary judgment is law of the case only if no new evidence is presented. Coventry cites *Chappelear v Dollar Rent-A-Car Sys., Inc.*, 33 AD3d 513 (1st Dept 2006) and *Banque Indosuez v Sopwith Holdings Corp.*, 257 AD2d 519 1st Dept 1999), which ruled the same way. *Caiola* is not on point. It held that it was error for the trial court to consider a late summary judgment motion on the eve of trial, in violation of CPLR 3212(a). And, in *RPG Consulting, Inc. v Zormati*, 82 AD3d 739 (2d Dept 2011), also relied upon by Coventry, the Appellate Division ruled that the defendant's motion to dismiss the complaint was properly denied based upon law of the case because the plaintiff's motion for summary judgment already had been granted on the merits and the time to appeal had expired.

Thus, the decision on DDR's summary judgment does not bar Coventry's current motion. Law of the case is a judicially crafted policy not to reopen what has been decided in a case; it is not a limit on judicial authority, and its application rests in the court's discretion. *People v Evans*, 94 NY2d 499, 503 (2000). Denial of summary judgment is law of the case only if no new evidence is presented. *Brownrigg*, *Banque Indosuez*, *Chappelear* and *Campbell*, *supra*. Here, the parties present new affidavits and documentary proof. Consequently, Coventry's motion is not barred by the doctrine of law of the case.

B. Failure to Give Notice of Default

DDR urges that, pursuant to §4.4(c), the Property Owner REITs had to give notice of default in order to sue for breach of the Management Agreements. The court disagrees.

Section 4.4 is entitled "Termination for Cause". Subsection (a) provides, *inter alia*:

> (a) ... Owner may terminate this Agreement upon at least thirty (30) days' prior written notice to Property Manager for "cause" as defined in Section 4.4(b) below or in the event that a Property Manager Event of Default (as hereinafter defined) shall have occurred and shall be continuing at the time of the giving of such termination notice....

See Ward Parkway Management Agreement, Doc 848. Subsection (c), the provision upon which DDR relies, defines a Property Owner Event of Default regarding breach of its duties as:

> i) the failure of Property Manager to perform its duties as set forth herein, which default is not cured in all material respects within thirty (30) days (or, if such default cannot be cured solely by the payment of money and cannot reasonably be cured within such thirty (30) day period, such additional time as may be reasonably necessary to cure such default as long as Property Manager is diligently pursuing such cure) after receipt of written notice from the Owner specifying such default in reasonable detail....

Id. However, §4.4(e) provides:

> (e) In addition to the parties' respective rights to terminate this Agreement as provided under clause (a) above, the parties shall have all other rights and remedies available to it at law or in equity as a result of a Property Manager Event of Default....

Id. Subsection (b) governs notice of termination, and subsection (e) preserves all legal and equitable remedies for DDR's failure to perform its duties under the Management Agreements. The notice provision applies to termination of the Management Agreements, but does not create a condition precedent to a suit for breach of contract.

C. Lack of Expert Proof

DDR contends that it is entitled to summary judgment or, alternatively, Coventry's motion should be denied because it did not submit an expert affidavit. Expert opinion is proper

when it would help to clarify an issue calling for professional or technical knowledge possessed by the expert and beyond the ken of the typical juror. *People v Taylor*, 75 NY2d 277, 288 (1990); *De Long v County of Erie*, 60 NY2d 296, 307 (1983).

Here, Coventry is moving for summary judgment on the ground that DDR charged more than market rates for its own insurance program; inflated the expenses of running the Properties through kickback schemes with Oxford and Centimark, a roofing contractor; failed to lease the Properties; and allowed Ward Parkway to fall into disrepair. DDR argues that Coventry should have submitted expert proof that it failed to supply"first class management services" in the relevant geographical area as required by section 1.1 of the Management Agreements, and that without it, Coventry's motion must be denied. The court disagrees.

It is not beyond the ken of a juror to understand that a management and leasing company should try to lease, should not allow a property to deteriorate to the point of structural deficiencies, rats and garbage, and should not overcharge for maintenance and insurance. Jurors are capable of understanding that, first class or not, a management and leasing company should try to lease, maintain the premises in accordance with the budget, and not overcharge.

D. Failure to Share Oxford Rebates/Discounts

The Management Agreements establish that bills for maintenance services were paid by the Property Owner REITs. Management Agreements, §2.9 (§1.9 for Buena Park). In January 2008, DDR and Oxford Building Services, Inc. (Oxford) entered into a Services Agreement, pursuant to which Oxford was to coordinate maintenance services for the Property Owner REITs, as well as DDR's other properties. Affidavit of Devin Robinson, sworn to 7/22/13, Doc 682

(Robinson Aff), Ex 49, Doc 731 (Oxford Contract).[4] During the initial term, Oxford was to service 835 open air shopping centers or specialty centers owned and/or managed by DDR in the United States, defined in the contract as "Business Units", not just the twelve Properties in which the parties invested . *Id*, §1(b) & (c) and Recital B. DDR could amend the list of Business Units from time to time. *Id*, §1(c). The Oxford Contract was for a one-year term, with automatic annual renewals in the absence of written notice of termination by either party. *Id*, §2(a).

Section 3 of the Oxford Contract provided that for each Business Unit, Oxford would submit to DDR "Business Unit Invoices" derived from "Service Provider Invoices", whereupon DDR was to issue checks to pay Oxford for the Business Unit Invoices, and Oxford was to pay the Service Provider Invoices. *Id*, §3. Oxford was "solely entitled" to retain "any administrative, service and/or program fees negotiated with respective Service Providers rendering the various services or supplying materials to the Business Units." *Id*, §4. The record contains a form service/materials agreement between Oxford and a snow removal contractor, Kalin, hired to work at the Fairplain Property Owner REIT. Robinson Aff, Ex 61, Doc 743. It provided that Kalin would pay Oxford a 3% service fee. *Id*, §4(f).

Defendants' witness John S. Kokinchak testified that Oxford received 3% of the Service Provider Invoices, pursuant to the Oxford Contract. Hanson Aff, Ex 157, Doc 971, pp 73-74. He further testified that DDR received 97% of Oxford's 3% pursuant to a separate "advertorial agreement", which was a concept raised by DDR. *Id*. Coventry argues that the advertorial agreement was a pretext to hide a kickback to DDR. Coventry presents a schedule of the "kickbacks" DDR received from Oxford for maintenance services at the Properties. Henry Aff,

[4]Control Building Services, Inc., guaranteed Oxford's performance of the contract. *Id*.

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Ex 1, Doc 639.

The "advertorial agreement" is a Preferred Vendor Agreement between Oxford and DDR (Oxford PVA), supplemented by Term Sheets for the years 2008 through 2010, inclusive, as well as an amendment to the PVA, dated January 22, 2010. Robinson Aff, Exs 50-54, Docs 732-736. The first Term Sheet was effective January 11, 2008, the same month as the Oxford Contract. *Id*, Ex 49, Doc 731 & Ex 51, Doc 753. The effective date of the Oxford PVA incorporates the effective date of the first Term Sheet. Robinson Aff, Exs 50, 732, §1(e).

"Advertorial" is defined in the Oxford PVA as:

> informational advertisement which highlights Vendor's [Oxford's] products or services and its relationship with DDR. Advertorials are approximately one page in length (at DDR's discretion) and are generally printed in Momentum.

Oxford PVA, Doc 732, §1(a). "Momentum" is defined as a DDR publication. *Id*, §1(i). DDR's compensation was contained in the Term Sheets. *Id*, §3. The Term Sheets obligated DDR to provide a maximum of one advertorial per year, to mention Oxford in DDR press releases about its preferred vendor program, to mention Oxford in other DDR press releases if in DDR's sole judgment it had a valid business or economic reason, to permit Oxford to exhibit advertising and use a table at annual trade conferences in New York and Las Vegas, to receive ten tickets each year to DDR's Las Vegas Event, and to provide co-branding advertising and promotional materials, subject to DDR's approval. Hanson Aff, Ex 51-54, Docs 733-735. Networking opportunities were to be mutually agreed upon. *Id*.

Coventry submits documents authored in 2007 by Control Holding Group (Control) or Facility Source, Inc. (Facility), who negotiated the Oxford PVA and Term Sheets. Control and Facility are affiliated with Oxford. Oxford ultimately was chosen to sign the Oxford PVA

instead of Facility. Coventry relies on the documents generated the during negotiations to prove that the PVA and term sheets were a pretext. However, these documents are hearsay and cannot support summary judgment in plaintiffs' favor. Moreover, they are not the final agreement, which is why some of them refer to Control or Facility, instead of Oxford, as the entity sharing fees with DDR.

Nevertheless, they do raise issues of fact as to whether advertising was a method of hiding the 97% of Oxford's fee returned to DDR, who did not share it with the Property Owner REITs. One document has a flow chart indicating that the 3% program "contribution" of service providers would be paid back to DDR, less Control's costs, in a "vehicle to be determined, for example: rent, advertising, rebate". Robinson Aff, Ex 55, Doc 737, Bates DDR1128919. Another 2007 Facility document contains a table showing DDR's projected "shared incentive" of the service vendors' 3% fee based on their estimated bills, with the incentive to be shared by Control and DDR in varying ratios. Robinson Aff, Ex 60, Doc 742, *Summary of Proposed Facility Maintenance Management Program*, p2. In addition, Coventry offers documents prepared by Aileen Smith, DDR's Procurement Manager, which calculate the amount of money DDR would earn from its "share" of Oxford 3% fee to service vendors. Robinson Aff, Exs 71 & 72, Docs 753 & 754.

DDR's accountant, Neil Infante, testified that during the initial negotiations for the Facility contract, his understanding was that maintenance expenses would be increased by a percentage, that "we would pay that increased price" and "a portion of that would come back to DDR". Robinson Aff, Ex 39, Doc 721. Mr. Infante also was party to discussions of how the income from Facility would be treated by DDR. Robinson Aff, Ex 39, Doc 721. He was told

that DDR "wanted this revenue to come back at the DDR level," as opposed to the "property level". *Id.* He said that DDR talked about different methods of treating the income, such as a fee, rent, advertising, or a rebate. *Id.* Mr. Infante admitted that if the money was booked at the property level, the joint ventures, including Coventry, would share in it, but if it went to DDR at the corporate level, it would not be shared. *Id.* In June 2007, Mr. Infante wrote an internal DDR e-mail, which said:

> I understand your reasons on wanting it recorded this way. I think we need to discuss this ... since it affects the JV [joint venture] partners.... I can ask ... to set up a meeting .... to make sure we are recording this in accordance with the JV agreement.

Robinson Aff, Ex 40, Doc 722.

In addition, there is evidence, also presented on defendants' summary judgment motion, that at the Tri-County Mall, vendors increased their bills by 3% fees to make up for Oxford's fee. Robinson Aff, Ex 47, Doc 729, Lyons Tr, pp 72-73. In 2009, when Ward Parkway was taken over by its lender and the vendors' service contracts were rebid without Oxford, there was a 10% reduction in annual expenses. Robinson Aff, Ex 42, Doc 724.

DDR denies that the Oxford Contract increased costs and points out that the final version obligated the service vendors to pay Oxford's fee. DDR also presents evidence that the Oxford Contract resulted in savings to the Property Owner REITs. Affirmation of Claire Wells Hanson, dated 9/20/13, Doc 814 (Hanson Aff), Ex 157, EBT of John S. Kokinchak, pp 141-145.

DDR contends that Coventry was not damaged because the vendors paid Oxford's fee. Coventry responds that: 1) the large amounts paid to DDR, between $900,000 and $1,800,000 per year (*See* Hanson Aff, Ex 51-54, Docs 733-735), do not reasonably correspond to the value of

the "advertorials"[5]; 2) payment for the advertorials was based on vendors' invoices, not the value of advertising;[6] 3) vendors raised their bills to the Property Owner REITs by 3% to neutralize the Oxford fee; 4) DDR did not reduce its management fee to the Property Owner REITs, although the Oxford program lowered DDR's own costs and provided it with income; 5) the Property Owner REITs paid the increased bills, which were not passed on to tenants where spaces were vacant; 6) the Property Owner REITS were damaged by higher maintenance costs because it lowered their net income, which had an impact on their ability to obtain financing and increased tenant maintenance costs,[7] making it harder to retain and attract tenants and causing them to demand lower rents; and 7) where unhappy tenants negotiated reductions with DDR, the rebate was not shared with the Property Owner REITs. Henry Aff, ¶¶ 4, 22 & 32; Henry Reply Affidavit of Loren Henry, sworn to 11/19/13, Doc 1013 (Henry Reply), ¶¶ 7-10.

Whether or not DDR's share of Oxford's 3% was payment for advertorials or a pretext to disguise a rebate is a disputed issue of fact that precludes summary judgment in favor of either party. Section 2.8 of the Management Agreements required DDR to "attempt to secure for, and credit to, Owner any discounts, commissions or rebates obtainable." A rebate is a "return of part of a payment, serving as a discount or reduction." *Black's Law Dictionary* (9th ed), © 2009

[5]For example, DDR admits that in 2010, the value of the Momentum ad was $5000. Robinson Aff, Ex 104, Doc 786.

[6]The record reflects that at the end of a year, DDR and Oxford adjusted "advertorial" income to reflect actual billings, as opposed to the maintenance budget estimates contained in the Term Sheets. *See*, Robinson Aff, Exs 72, Doc 754. If billings were lower than estimated, DDR owed money to Oxford and vice-versa.

[7]This affected tenants whose leases required them to pay common area maintenance (CAM) charges.

Thomson Reuters. If Oxford's 3% fee increased maintenance costs paid by the Property Owner REITs, the part that DDR received back, was a rebate, i.e. a reduction. Failure to share it would be a breach, unless the advertorial agreements were legitimate. The issue of pretext turns on credibility, which requires a trial. As previously noted, the documentary evidence is hearsay. Hence, summary judgment is denied on this issue.

E. Failure to Share Centimark Rebates/Discounts

On March 18, 2006, Centimark, a roofing contractor, entered into a preferred vendor agreement (2006 PVA) with DDR. Hanson Aff, Ex 144; Robinson Aff, Ex 76.[8] The initial term of the 2006 PVA was one year, renewable for an additional year, if approved in writing by both parties. *Id.* The 2006 PVA provided that Centimark would pay DDR a "volume incentive" ranging from one to three percent for roofing contract sales of half million or more per calendar year. *Id.* Centimark's Senior Vice-President, Jason Meyers (Meyers), testified that the incentive payment was not divided by specific properties, but was paid for all DDR properties, Hanson Aff, Ex 159, Meyers EBT, p 36. DDR was paid the incentive payment for 2006 in the first quarter of 2007. *Id*, pp 37-38. Meyers testified that DDR acted pursuant to the 2006 PVA in 2007. *Id.*, p 42.

According to Meyers, after 20007, Centimark wanted to increase its business using DDR advertising and contacts. *Id*, pp 43-53. Toward that end, Centimark and DDR entered into agreements similar to the ones between DDR and Oxford. There was a 2008 preferred vendor agreement (2008 Centimark PVA) and a 2008 Term Sheet, effective March 1, 2008. Hanson

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[8] The record does not contain a copy of the agreement signed by Centirmark. *Id.* However, Centimark's witness identified it during his deposition.

Aff, Exs 147-148. The 2008 Term Sheet provided that DDR would place one advertorial for Centimark in Momentum and give Centimark five tickets to DDR's Las Vegas event. *Id.*, Ex 148. DDR also promised to mention Centimark in press releases about its preferred vendor program, and other press releases at DDR's sole discretion, and the parties agreed to agree on co-branding and networking opportunities. *Id.* The 2008 Term Sheet covered all of DDR's properties. Hanson Aff, Ex 159, Meyers EBT, p 64.

Coventry contends that this was a DDR scheme, just like the one with Oxford, to hide kickbacks. However, Meyers testified that the advertising and contacts DDR agreed to in the 2008 Term Sheet was "worth something", although he could not put a dollar value on it. *Id*, pp 55-57. Pursuant to the 2008 Term Sheet, Centimark paid DDR a fee of $427,500 based on an estimate of Centimark's annual sales volume and referrals from DDR, but the figure was adjusted later based upon actual sales and referrals. *Id*, pp 61-64. Effective March 1, 2009, DDR and Centimark issued a new Term Sheet, with identical terms, except that the estimated payment to DDR was lowered to $402,526. Hanson Aff, Ex 149; Meyers EBT, pp 65-71. Again, the estimated sales and referrals were adjusted based on actual numbers. *Id.* Centimark and DDR entered into new Term Sheets for 2010 and 2011, with estimated payments by Centimark to DDR in the amount of $151,980 and $122,730, respectively. Hanson Aff, Exs 150 and 151. The 2010 estimated payments were reconciled at the end of the year. Meyers EBT, pp 71-74. Meyers testified that Centimark did not increase its bids for roofing work to include money it paid to DDR under the Term Sheets for advertorial services. *Id*, p 83.

Coventry says that it is entitled to summary judgment with regard to money DDR received from Centimark for services performed for the Property Owner REITs. Coventry claims

it has conclusively established that the 2008 Centimark PVA and the Term Sheets were a pretext for giving DDR a kickback. Coventry submitted a chart showing payments in the amount of $54,107 that Centimark allegedly paid to DDR in the period 2008 through 2011, pursuant to the Term Sheets, with respect to the Properties. Henry Aff, Ex 1, Doc 649.[9]

DDR is granted summary judgment with respect to the claim that the Centimark program breached the Management Agreements because there is no proof that it increased the roofing costs of the Property Owner REITs. Without evidence that roofing costs increased, Mr. Henry's rationale, that lower net income generated losses, does not apply. With respect to 2006 and 2007, while it appears that Centimark paid DDR a fee for roofing work, there is no evidence linking roofing work at the Properties to Centimark's fee. The sole exhibit Coventry offers identifying a Centimark fee during this period is an e-mail chain from July 2007 relating to the Tri-County Property, in which the manager of the mall queried whether Centimark's fee, which increased its bid, was going to DDR or the owner of the mall, i.e., a Property Owner REIT. Coventry's Statement of Facts, Doc 638, ¶115. The response is not in the record. With respect to 2008 through 2011, there is evidence of fees paid by Centimark to DDR based on roofing work at the Properties. Henry Aff, Ex 1, Doc 649. While Mr. Henry avers that Centimark paid DDR a kickback and the advertorials were a pretext, he does not say, in either his moving or reply affidavit, that the Centimark program increased roofing costs. Even if Centimark paid DDR for advertising of little value, so long as it did not increase the Property Owner REITs' costs, there was no damage. Summary judgment is granted dismissing the Centimark claim.

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[9]Coventry did not present evidence of payments by Centimark to DDR in 2006 and 2007 for roofing work at the Properties.

F. Overcharging for Insurance

Partial summary judgment on liability is granted to DDR with respect to the allegedly inflated amount of premiums it charged the Property Owner REITs for insurance. Coventry does not dispute that it approved the insurance charges that were disclosed in the Property Owner REITs' operating budgets. Defendants' Statement of Material Facts, dated 9/20/13, Doc 809 (Defendants' Facts), ¶193, referring to Affidavit of Kevin Kessinger, sworn to 9/19/13, Doc 812 (Kessinger Aff), ¶23. On a motion for summary judgment, uncontradicted facts are deemed admitted. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept. 1984), *appeal dismissed*, 62 NY2d 942 (1984); *Callisto Pharm., Inc. v Picker*, 74 AD3d 545, 546 (1st Dept 2010)(failure to dispute defendants' statement of facts warrants summary judgment on plaintiff's contract claim), citing 22 NYCRR § 202.70, Commercial Division Rule 19-(a). Accordingly, it is established that Coventry approved the premiums charged by DDR.[10]

However, Coventry is entitled to summary judgment on liability on the issue of DDR's failure to share lower insurance premiums charged to PetSmart, a tenant of the Properties at Buena Park, Fairplain, Westover and five Service Merchandise locations. Pursuant to §2.8 of the Management Agreements, DDR had to share discounts with the Property Owner REITs. The parties agree that the Property Owner REITs paid DDR for the insurance and then passed on the cost to each tenant for its proportionate share. Coventry presents evidence that in February 2010, DDR renegotiated insurance premiums with PetSmart, lowering its rates retroactive to January 1, 2009. Plaintiffs' Statement of Facts, dated 7/22/13, Doc 639 (Plaintiffs' Facts), ¶¶ 179-181,

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[10]On Defendants' prior motion for summary judgment, it argued that the premiums were in monthly reports, not budgets that Coventry approved.

referring to Affidavit of Allison Mack, sworn to 7/17/13, Doc 639, ¶10 & Ex A, Doc 640; & Henry Aff, ¶¶ 103 & 104 & Ex33. Exhibit 33 to Mr. Henry's affidavit shows that the Property Owner REITs paid more to DDR than PetSmart was charged after the reduction. The failure to share reductions given to PetSmart is deemed admitted because DDR does not dispute it.[11] Therefore, summary judgment on liability is granted to Coventry on this claim, solely as it relates to PetSmart's reduced premiums. In all other respects, the insurance claim is resolved in DDR's favor.

G. Failure to Maintain Ward Parkway

There are disputed issues of fact that preclude summary judgment regarding DDR's failure to maintain Ward Parkway. DDR presents evidence that, in 2003, when the Property was acquired, repair to the parking decks was an anticipated expense. Hanson Aff, Ex 126, Doc 940. In 2006, Mr. Henry of Coventry agreed that it should be repaired in 2006. Hanson Aff, Ex 128, Doc 942 at Bates DDR 0327831. On January 16, 2009, the lender's agent for Ward Parkway sent an email to DDR that complimented DDR's maintenance of the Property. Hanson Aff, Ex 137, Doc 951, at Bates Coventry 00391852. However, shortly thereafter, on February 5, 2009, the lender's agent toured Ward Parkway with an engineer and wrote a letter to Coventry stating that the lender was concerned about several life and safety issues including the parking deck, a developing sink hole, roof damage, dead animal carcasses, litter, untreated ice, and a strong sewage odor. Hanson Aff, Ex 137, Doc 951; Kessinger Aff, ¶¶ 15-16.

DDR submits a self-serving email, dated February 5, 2009, to demonstrate that it attended

[11]Defendants' Response to Plaintiffs' Facts, dated 9/20/13, Doc 808, ¶¶ 178 - 180 referring to Defendants' Facts, ¶¶188-196, Kroll Aff & the Kessinger Aff, where there is no mention of the PetSmart reduction.

promptly to, or was in the process of fixing, the cited maintenance deficiencies, which admits that they existed. Hanson Aff, Ex 137, Doc 951. The same day Mr. Kokinchak, DDR's Executive Vice President for Property Management, wrote to his Assistant, admitting that some of the conditions were unacceptable:

> While there is a logical explanation for each issue....That is not an acceptable excuse for some of the conditions that existed on the day of the property inspection. Kevin was well aware that this inspection was going to occur and should have taken the necessary steps to insure that the property was in a condition that represented the company and the property management department in the best possible way.

Reply Affidavit of Devin R. Robinson, sworn to 11/19/13, Doc 1021 (Robinson Reply), Ex 16, Doc 1037.

By way of excuse, DDR presents evidence that Coventry failed to provide funds for repairs to the parking deck that were recommended by an engineer in August 2008. Hanson Aff, Exs 133 & 134, Doc 947 & 948; Kessinger Aff, ¶¶ 10-12. DDR contends that the other maintenance problems were minor. Kessinger Aff, ¶16. DDR points to Coventry's default on the Ward Parkway loan to buttress its accusation that it could not fund repairs. Hanson Aff, Ex 136, Doc 950 (1/6/09 notice of default). It is undisputed that on March 6, 2009, the lender repossessed Ward Parkway. Kessinger Aff, ¶19. In addition, DDR says that there were increased costs for security due to violent crimes at Ward Parkway in 2007 and 2008. Hanson Aff, Ex 129-131, Docs 943-945. According to Coventry, it was short of cash for repairs because DDR overcharged pursuant to the Oxford Contract.[12] Affidavit of Loren Henry, sworn to

[12]Coventry also blames DDR's failure to lease Ward Parkway, but that claim was dismissed by the decision resolving DDR's motion for summary judgment. After that decision, failure to lease remained an issue only as to Buena Vista and Totem Lake.

11/19/13, Doc 1014 (Henry Reply Aff), ¶58. Coventry does not dispute that it approved its share of the parking deck repairs in December 2008 or that it lacked funds to pay for the work.

There are issues of fact as to what caused the lack of maintenance at Ward Parkway. As previously noted, section 2.2 of the Management Agreements required DDR to maintain the Properties subject to the Operating Budget, and made the Property Owner REITs responsible for the cost. There is evidence, although slim, that DDR caused Coventry's inability to provide a sufficient operating budget.[13] Neither party is entitled to summary judgment on this issue.

H. Failure to Lease Buena Park and Totem Lake

While there is more detail offered by Coventry as to DDR's failure to lease Buena Park, the same issues of fact present on DDR's prior motion persist. DDR presents evidence that it diligently tried to, and did in fact, lease Buena Park to the best of its ability. Affidavit of Marc Hays, sworn to 9/20/13, Doc 813 (Hays Aff), ¶¶ 19-27. Coventry presents evidence that it did not. Henry Aff, ¶¶ 70-87; Robinson Aff, Ex 36, Doc 718 (Tr May Wong Hui), pp 36-38, 40-46.

With respect to Totem Lake, issues of fact require a trial. DDR presents evidence that it did not get long-term leases because Coventry wanted only month to month tenants, due to its plan for an extensive redevelopment. Hays Aff, ¶¶ 6 & 8-18. DDR says that Coventry did not finalize the development plan for four years, then decided in June 2008 to sell instead of redevelop, and changed its mind again in February 2010. *Id.* Coventry says that it lacked funds for redevelopment because of DDR's ineffective efforts to lease. Henry Aff, ¶¶ 42-66.

I. Other Alleged Overcharges

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[13]The court notes that Coventry's evidence shows that DDR earned $39,782 at Ward Parkway from the Oxford contract, whereas Coventry agreed to fund $1,000,000 of the parking deck repair. *Compare*, Henry Aff, Ex 1, Doc 649 & Hanson Aff, Ex 134, Doc 948.

Partial summary judgment is granted to DDR on the issue of whether it improperly charged for a corporate national program at Tri-County and for advertising at Buena Park. Coventry complains that these charges had no valid corporate purpose. Henry Aff, ¶111; Affidavit of Patricia Neill, sworn to 7/18/13, Doc 642. However, Coventry does not dispute that it approved the budgets that contained these expenses. Kessinger Aff, ¶24.

IV. Coventry's Motion for Summary Judgment Dismissing DDR's Counterclaims

Coventry moves for summary judgment dismissing DDR's counterclaims for breach of contract, tortious interference with business relations and business libel.

A. Breach of the LLC Agreements - 3d Counterclaim

The LLC Agreements governing the Property Owner REITs provide that:

> In the event that the Company enters into a [Management Agreement], [the Coventry Main Fund] shall (i) have no authority to bind the Company or any Property Owner with respect to actions that shall have been delegated to the Property Manager [DDR] pursuant to the [Management Agreement] (the "Property Manager Actions") ....

LLC Agreements, §4.2(c).[14] It is undisputed that Delaware law governs the LLC Agreements.[15] Section 1.1 of the Management Agreements provide that the Property Owner REIT will give DDR "sole, entire and exclusive charge of the ... leasing of the Property".

DDR says that Coventry breached the LLC Agreements by interfering with leasing. Coventry moves for summary judgment on the grounds that DDR: 1) cannot prove damages because it collected all of its fees under the Management Agreements; 2) failed to provide proof of damages in discovery or in expert disclosure; 3) waived the claim by accepting the leases that

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[14]The parties agree that all the LLC Agreements contain substantially identical provisions.

[15]Coventry's Statement of Facts, Doc 550, ¶19 & DDR's Response, Doc 994, ¶19.

Coventry negotiated; and 4) did not fully perform its duties, which required Coventry to step in to mitigate damages.

The elements of a claim for breach of contract are the existence of a valid contract, plaintiffs performance of his/her obligations thereunder, defendant's breach and resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 (1st Dept 2007). Here, the only tangible proof of damages offered by DDR is that Coventry negotiated a rent reduction with A.C. Moore at one of the Service Merchandise Properties. Affidavit of Kevin Kessinger, sworn to 9/27/13 (Kessinger CC Aff), ¶9. The alleged loss stems from a reduction in DDR's income from the Property Owner REIT, in which DDR had a twenty percent stake, or a reduction of DDR's fee, which was "dependent on the Property's performance." Defendants' Memorandum of Law, dated 9/27/13, Doc 993, p 13.

DDR admits that its damages are derivative and it has not brought a derivative action.[16] Under Delaware law, the analysis of whether a claim is direct or derivative depends upon the answer to two questions: who was harmed and who will benefit from recovery. *Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031 (Del. Sup Ct 2004); *Kelly v Blum*, 2010 Del. Ch. LEXIS 31, 2010 WL 629850 (Del Ch.)(nor). In Delaware, case law governing corporate derivative suits is applicable equally to suits on behalf of an LLC. *Kelly* at WL, p 9.

In order to assert a direct claim:

> The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was

[16] In a derivative action on behalf of an LLC, the complaint must "set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort." 6 Del. C. § 18-1003. DDR did not plead demand or futility.

> owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

Tooley at 1039. Here, DDR admits that it cannot show an injury without showing an injury to the Property Owner REIT, i.e., a reduction in its income. Thus, DDR individually has not been damaged.

To the extent that DDR would have earned fees based upon leases obtained, the claim is entirely speculative because there is no proof that A.C. Moore would have signed a lease for a higher amount. Where an anticipated profit would require action by a party over which the defendant has no control, the damages are too speculative to permit recovery. *Hoeffner v Orrick, Herington & Sutcliffe*, 20 Misc.3d 1139(A)(Sup. Ct. NY Co. 2008), modified on other grnds. 61 AD3d 614 (1st Dept 2009); sub appeal 85 AD3d 457 (1st Dept 2011) (reiterating prior holding). However, the breach of contract counterclaim is not dismissed. Coventry admits that it interfered with leasing, which was a breach. Where there is a contract and a breach, nominal damages are recoverable. *Id.* Hence, DDR is entitled to nominal damages. It is unnecessary to address Coventry's other grounds for summary judgment on the contract claim.

B. Business Libel - 5th Counterclaim[17]

The counterclaim for business libel pleaded that Coventry: 1) made accusations about DDR's alleged misconduct to Eurohypo, a lender's agent for Service Merchandise, suggesting that Eurohypo investigate and terminate DDR as property manager; and 2) told Aegon (collectively, with Eurohypo, Lenders), the lender for Buena Park, that it should terminate DDR as property manager. Counterclaims, Doc 32, ¶¶ 54-59 & 79-80. The counterclaims also allege

[17]The parties agree that for purposes of the motion, the court should apply New York law to the tort claims because there is no difference between Ohio and New York law.

that Coventry made defamatory statements to Bed, Bath & Beyond, without specifying the words used. *Id*, ¶79. DDR alleges that the statements were false and made intentionally with ill will or malice in order to harm its reputation.

Coventry moves for summary judgment dismissing the business libel claim on the grounds that: 1) the statements to the Lenders were absolutely privileged because they were a fair and accurate report of a judicial proceeding; 2) the statements to the Lenders and Bed, Bath & Beyond were subject to a qualified privilege because Coventry had a common business interest in speaking to the Lenders and tenants of the Properties; 3) DDR cannot prove special damages or libel per se; and 4) an allegedly defamatory e-mail by Coventry to Buy Buy Baby was not raised by DDR until its opposition to this motion.

DDR offers in opposition: a temporary restraining order, dated December 7, 2009, issued in the Ohio Action (TRO); a letter to Europhypo, dated February 11, 2010 (Eurohypo Letter); and an e-mail to a broker for Buy Buy Baby, dated February 6, 2010 (BBB E-mail). Hanson Affirmation, dated 9/27/13 (Hanson CC Aff), Exs 4, 8 & 9, Docs 1001, 1005 & 1006, respectively. DDR also offers an affidavit of Mr. Kessinger, who states in conclusory fashion that the Eurohypo Letter and BBB E-mail were "motivated by malice and were intended to and did harm DDR's relationships and reputation with those entities." Kessinger CC Aff, ¶14. He avers that when they were sent, DDR had business relationships with Buy Buy Baby and Eurohypo that were independent of the Coventry Fund II Properties. *Id*, ¶13. On this motion, DDR abandoned its claim regarding statements to Aegon and Bed, Bath & Beyond.

1. Eurohypo Letter

The Eurohypo Letter notified Eurohypo that this action had been filed and quoted from

the complaint and an affidavit, which were enclosed. Hanson CC Aff, Ex 8. Coventry opined that DDR had engaged in malfeasance and misconduct that, if proven, would damage the Service Merchandise Properties and the Tri-County Property, which stood as collateral for the loan. *Id.* Coventry added:

> Now that you have been provided with formal notice of DDR's alleged misconduct, we exhort you to exercise the rights reserved to you as Lenders under the Loan Agreement to require DDR to permit inspection of its books, records and accounts relating to the Service Merchandise portfolio, and to terminate DDR pursuant to your rights as Lenders if your investigation so warrants. If similar malfeasance to that alleged in the DDR Lawsuit is occurring in the Service Merchandise portfolio, your intervention will prove critical in halting any further erosion of NOI [net operating income] and portfolio value, as well as impeding further negative balance sheet impact.

Coventry claims that it was required under the loan documents to notify Eurohypo of any material adverse event or the filing of a lawsuit.[18]

DDR denies that an absolute privilege applies to the Eurohypo Letter because: 1) Coventry failed to raise privilege as an affirmative defense; 2) it was not a fair and true report of a judicial proceeding; 3) it did not mention that a TRO had been granted in DDR's favor in the Ohio Action and that DDR had moved to dismiss this action; and 4) it was not published by the press.

Privilege is not a defense waived if not raised by answer or a motion to dismiss prior to

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[18]That obligation was imposed on the Borrowers, a list of Service Merchandise entities. Affidavit of Brian J. Burns, sworn to 7/22/13, Doc (Burns Aff), Ex 40, §§ 1.1 & 6.7, & Exs A&B. The first two whereas clauses of the agreement recited that the Main Fund, Parallel Fund and DDR owned Service Holdings, LLC, which owned Service Bridge, LLC, which owned the Borrowers.

[* 28]

joinder of issue. CPLR 3211(a); *see also*, CPLR 3018.[19] The cases cited by DDR are not on point. *See* DDR's Memorandum of Law, dated 9/27/13, Doc 993, p 6, fn 4. One involved the burden of proof on a motion to dismiss, and the other involved the failure to raise lack of standing, which is waived if not raised. CPLR 3211(a)(3) and (e).

The Eurohypo Letter was a fair and true report because Coventry's summary of the complaint and affidavit was substantially accurate, and the rest was couched in terms making it clear that an opinion was being expressed. A true and fair report must be substantially accurate considering content of the communication as a whole, as well as its tone and apparent purpose. *GS Plasticos Limitada v Veritas*, 84 AD3d 518, 518-519 (1st Dept 2011)(report of judicial proceeding to lab accreditation entity). The absolute privilege applies to reports made to private parties, not just publications in the press. *Id.*

Here, the suggestion that Eurohypo should terminate DDR, which was not in the complaint, was couched in terms making it clear that investigation was warranted because the allegations of the complaint remained to be proved. As such those words were non-actionable opinion, not statements of fact. *Id.* The failure to mention the TRO issued by the Ohio court, or the motion to dismiss here, does not make the report untrue or inaccurate. The absolute privilege applies where the report is "basically accurate" even if it omits "relatively minor details." *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 383 (1977); *Sassower v New York Times Co.*, 48 AD3d 440, 441 (2d Dept 2008) (decision to omit minor details not actionable). Here, the TRO was issued in the Ohio Action, not this one. It was not necessary to mention it when

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[19]Coventry raised the qualified common interest privilege in its motion to dismiss the counterclaims, but not the absolute privilege for report of judicial proceedings that is raised on this motion. Coventry's Memorandum of Law, dated 10/1/10, Doc 57, pp 23-24.

reporting the filing of this case. Furthermore, while the TRO found that DDR was likely to prevail on the merits, it was a preliminary ruling with no binding effect here or in the Ohio Action. The motion to dismiss was a minor detail. It is unnecessary to consider the other grounds for summary judgment raised by Coventry with respect to the Eurohypo Letter. The letter was privileged.

2. The BBB E-mail

Coventry objects that the BBB E-mail was neither pleaded in DDR's counterclaim, nor disclosed in its response to interrogatories. Burns Aff, Ex 3, Doc 585 ¶¶ 51-58; & Ex 6, Doc Response to Interrogatory 17, pp 24-25. The counterclaim pleaded alleged defamatory statements Coventry made to Bed, Bath & Beyond (not Buy Buy Baby's broker), Eurohypo, and Aegon, while DDR's interrogatory response mentioned statements made to a broker for Buy Buy Baby, without identifying the BBB E-mail, although the question requested identification of supporting documents. *Id.* Furthermore, the response stated that Coventry made the following defamatory statement to Buy Buy Baby: "DDR was not adequately representing Coventry Fund II." DDR did not raise the BBB E-mail in response to Coventry's motion to dismiss the counterclaim for business libel. DDR's Memorandum of Law, dated 10/29/13, Doc 60, pp 7 & 22-24.

In the BBB E-mail, Coventry wrote:

> I appreciate your patience and persistence in learning the details regarding the availability of the Whole Foods box. I understand from experience the frustration in knowing of an imminently available box and not being able to gather the facts on that real estate while being steered to another location. DDR's practice of pushing real estate they want retailers to lease rather than providing a retailer with all the options DDR can offer is obviously self-serving and misleading. It would have made everything much better if DDR had taken the time to show you the Whole Foods space, which clearly is more appropriate for you, but they want to

move their own space first.

Hanson Aff, Ex 9, Doc 1006.

In a case for libel or slander, the particular words complained of must be set forth in the pleading. CPLR 3016(a). The rule is strictly enforced. *Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667 (1st Dept 1967). Summary judgment dismissing the complaint should be granted when the rule is violated. *Murganti v Weber*, 248 AD2d 208 (1st Dept 1998). Further, a plaintiff may not oppose summary judgment on a ground it raised for the first time in its opposition to a motion for summary judgment. *Hassan v Bellmarc Prop. Mgmt. Servs.*, 12 AD3d 197 (1st Dept 2004); *Carminati v Roman Catholic Diocese of Rockville Ctr.*, 6 AD3d 481 (2d Dept 2004). Here, DDR, a counterclaim plaintiff, waited until Coventry moved for summary judgment on the counterclaims to mention the BBB E-mail. Coventry is granted summary judgment dismissing the fifth counterclaim for business libel.

C. Tortious Interference with Business Relations - 4th Counterclaim

Similarly, Coventry is granted summary judgment dismissing the fourth counterclaim. Coventry moves for summary judgment on the ground, *inter alia*, that DDR cannot prove, either a business relationship that was terminated or a business relationship it was prevented from entering or continuing. DDR opposes on the ground that the Eurohypo Letter and BBB E-mail damaged its reputation with those entities, with which it had relationships unrelated to the Properties it acquired with Coventry. DDR says that injury to its reputation in its field of business is per se actionable.

The court disagrees. With respect to tortious interference with prospective business relationships, one of the elements of interference is loss of anticipated business. *Amaranth LLC*

v J.P. Morgan Chase & Co., 71 AD3d 40, 49 (1st Dept 2009)(plaintiff's client to withdrew from prospective deal); *Zetes v Stephens,* 108 AD3d 1014, 1020 (4th Dept 2013)(plaintiff identified customer it had lost, an essential element). The reference to per se injury in *Zetes,* cited by DDR, was made in connection with a libel claim. In a claim for interference with an existing contract, the plaintiff must show that the defendant intentionally and improper procured a breach. *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). Here, DDR has shown neither that it lost an existing contract with Eurohypo or Buy Buy Baby, nor that it lost anticipated business with one of those entities. Thus, Coventry motion is granted and the fourth cause of action is dismissed. Accordingly, it is

ORDERED that:

1) plaintiffs' motion for summary judgment on liability (Seq 025) is:

a) granted solely as to the portion of the fourth cause of action for breach of the Management Agreements by defendant DDR relating to failure to share reduced insurance premiums for PetSmart, and in all other respects the motion is denied; and

b) in searching the record, summary judgment is granted to defendants dismissing the portions of the fourth cause of action relating to the Centimark roofing program, corporate national program charges at Tri-County, advertising expenses at Buena Park and the cost of DDR's insurance program not related to PetSmart premium reductions;

and it is further

ORDERED that plaintiffs' motion for summary judgment dismissing defendants' third, fourth and fifth counterclaims (Seq 026) is granted to the extent of dismissing the fourth and fifth counterclaims for business libel and tortious interference with business relationships, which are dismissed, and the motion to dismiss the third counterclaim for breach of contract is denied; and it is further

ORDERED that, in searching the record, defendants are granted summary judgment on the their third counterclaim for breach of contract with recovery limited to nominal damages; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 54, Room 228 of the courthouse located at 60 Centre Street, New York, NY, on June 19, 2014 at 11 a.m.

Dated: June 2, 2014

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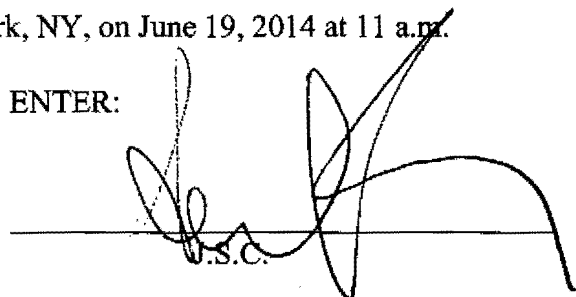

J.S.C.