

**B Mex Corp. v Fast March Invs., LLC**

2014 NY Slip Op 33821(U)

July 22, 2014

Supreme Court, New York County

Docket Number: 650255/2014

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: **SHIRLEY WERNER KORNREICH**  
J.S.C.

PART 54

Justice

Index Number : 650255/2014  
B MEX CORP.  
vs.  
FAST MARCH INVESTMENTS, LLC  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 4-19


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

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

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

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

Dated: 7/22/14

**SHIRLEY WERNER KORNREICH**  
J.S.C.  
  
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

-----x  
B Mex Corp. and Ninemex Corp.,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 650255/2014

Fast March Investments, LLC, Skyward Investments,  
LLC, Triumph Investments, LLC, David Kalach  
Mizrahi, Rafael Kalach Mizrahi, and Adolfo  
Kalach Mizrahi,

Defendants.

-----x  
SHIRLEY WERNER KORNREICH, J.

Defendants Fast March Investments, LLC, Skyward Investments, LLC, and Triumph Investments, LLC (collectively, Defendants) move to dismiss the complaint and for an award of sanctions for frivolous conduct. Plaintiffs B Mex Corp. and Ninemex Corp (collectively, Plaintiffs) oppose.

This is an action by members of a New York limited liability company (LLC), 511 9th LLC (511), against other members. The basis of the claim is that Defendants breached the operating agreement and their fiduciary duties and are liable for indemnification because they brought a prior lawsuit, also pending before this court, entitled *Beatrice Investments v 940 8th Ave, LLC*, Index No. 654052/2013 (Beatrice Action).

511, 511 Manager Corp. (Manager), who is its manager, and Salim "Solly" Assa (Assa), who is the Manager's President and managing member, are defendants in the Beatrice Case. The complaint in the Beatrice Action (Beatrice Complaint) alleges that Assa and Manger improperly diverted funds of 511 and did not allow Defendants to inspect all of the 511 books and records

that they requested. The Beatrice Complaint contains causes of action for: 1) breach of contract; 2) breach of fiduciary duty; 3) unjust enrichment; 4) conversion 5) an injunction directing inspection of records; and 6) an accounting.

### *Breach of the Operating Agreement*

Plaintiffs' claim for breach of the operating agreement is dismissed for failure to state a claim. The elements of breach of contract are the existence of 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). Plaintiffs allege that Defendants violated Article 6.2 of 511's Operating Agreement because in the Beatrice Action they sued Assa, a member of 511. Plaintiffs' Memorandum of Law, Doc 17, p 7. Plaintiffs do not allege that suing Manager was a breach of the Operating Agreement. Article 6.2 provides as follows:

6.2. Limitation of Liability. The Members shall have no liability under this Agreement or otherwise except as expressly provided herein or in the Act, and neither the Manager nor any Member shall take any action that would subject any Member to liability by reason of such person's status as a Member.

Doc 9, pp 15-16.

Defendants counter that the Beatrice Action alleges misconduct by Manager and Assa as Managers of 511, not "by reason of their status as a Member." They point to Article 5.6 of the Operating Agreement, which requires the Manager to act in "good faith" in a manner that he "reasonably believes is in or not opposed to the best interest of [511]," but also limits the Manager's liability to decisions or actions that amount to "willful or wanton misconduct, gross negligence or a breach of the terms of this [Operating] Agreement..." *Id.*, Art 5.6, p 14.

Defendants cite LLC Law §417 and *Arfa v Zamir*, 75 AD3d 443, 444 (1st Dept 2010). *Afra* held that an individual who uses his control over an LLC entity-manager to divert assets

from the LLC to himself, is individually liable for breach of fiduciary duty under New York and Delaware law. LLC Law §417(a)(1) prohibits operating agreements from containing provisions limiting the liability of managers for acts or omissions that amount to “bad faith” or involve “intentional misconduct”, “knowing violation of law” or the receipt of personal gain to which the manager is not legally entitled.

Here, the Beatrice Complaint stated a cognizable claim for liability against Assa as Manager that does not breach the Operating Agreement. Even under the lower standard imposed by Article 5.6 of the 511 Operating Agreement, Assa could be held liable for diversion of assets for his individual benefit to the detriment of 511. Such conduct would be willful, lacking in good faith, and could not reasonably be believed to be in the best interest of 511. In addition, the Operating Agreement must comply with LLC Law §417, which prohibits eliminating manager liability for taking personal advantage of an LLC. Finally, Assa could be held to be personally liable for breaches by the Manager, which Assa controls. *Arfa v Zamir, supra*.

To the extent that Plaintiffs urge that it is a question of fact whether Assa’s conduct was willful, lacking in good faith, and harmed 511, that issue will be determined in the Beatrice Action. It does not save Plaintiffs’ claim for breach of contract here. The issue here is whether Defendants breached the Operating Agreement by suing Assa for diversion of assets, not whether Assa will be held to be liable in the Beatrice Action.

Finally, although not argued by Defendants, according to the Amended and Restated Operating Agreement, dated June 1, 2006, Assa is not a member of 511. Doc 9, Art 1.1(cc), p 5 and Schedule 1. Hence, it was not a breach of §6.2 of the Operating Agreement for Defendants to sue Assa. As previously noted, Defendants do not allege that it was a breach of the Operating Agreement to sue the Manager. Plaintiffs’ Memorandum of Law, Doc 17, p 7.

### *Access to Records*

With respect to access to records, Plaintiffs are incorrect when they say that the Beatrice Complaint admits that Defendants were given access to all of the records they requested. The complaint clearly states that they were not. Beatrice Complaint, Doc 8, ¶¶ 3 & 28-31. The correspondence annexed as exhibits to the Beatrice Complaint evidences disagreement over what was supplied by the Manager and Assa. *Id.*, Exs. 1-4.

### *Breach of Fiduciary Duty*

Plaintiffs' claim for breach of fiduciary duty is dismissed. To state a claim for breach of fiduciary duty, a plaintiff must allege that (1) the defendant owed them a fiduciary duty, (2) the defendant committed misconduct, and (3) the plaintiff suffered damages caused by that misconduct. *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 (1st Dept 2011). The complaint here fails for lack of the first element, that Defendants owed Plaintiffs a fiduciary duty.

Plaintiffs' brief makes clear that their claim rests on the common law fiduciary duty members owe to one another. Doc 17, p 10. However, Article 6.2 of the Operating Agreement, prohibits suing members for breach of fiduciary duty arising solely from their status as members. That is exactly what the claim in this action involves. Further, the case on which Plaintiffs rely, *Willoughby Rehab. & Health Care Ctr., LLC v Webster*, 13 Misc3d 1230(A) (Sup Ct NY Co 2006), is distinguishable because there the defendant was a managing member of Willoughby and a provision in the Willoughby operating agreement required a managing member to act in good faith and in the best interest of the LLC. Here, Defendants are not managing members and the operating agreement provides that members cannot be sued solely based on their status as

members, which is the only basis on which Plaintiffs' breach of fiduciary duty claim is predicated. Thus, plaintiffs have not stated a cognizable claim for breach of fiduciary duty.

### *Indemnification*

Plaintiffs are not entitled to indemnification on the ground that the Manager of 511 must be indemnified by 511. Plaintiffs allege that 511 has a contractual obligation to indemnify the Manager pursuant to §5.8 of the Operating Agreement, which provides that:

the Company [511] shall, to the fullest extent permitted by law, indemnify and hold harmless the Manager and any officer and agent of the Company, made, or threatened to be made, party to an action or proceeding, whether civil or criminal, by reason of the fact that such person is or was a Manager, an officer or agent of the Company, including, without limitation against amounts paid in settlement and reasonable expenses, including attorneys' fees, actually or necessarily incurred by him, her or it in connection with the defense or settlement of such action, or in connection with an appeal.

Doc 9, p 15. The indemnity under this provision requires the LLC, 511, to indemnify the Manager, not its members, such as Defendants, and does not entitle Plaintiffs to be indemnified. The indemnity on its face runs from 511 to the Manager. Further, if Assa loses the Beatrice suit due to his own wrongdoing, the law would not permit indemnification. *TIC Holdings, LLC v HR Software Acquisitions Group, Inc.*, 301 AD2d 414, 415 (1st Dept 2003) (complaint sufficiently alleges intentional wrongdoing and bad faith to render indemnification provisions ineffective under both common law and LLC Law §420<sup>1</sup>).

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<sup>1</sup> LLC Law §420 provides that "no indemnification may be made to or on behalf of any member, manager or other person if a judgment or other final adjudication adverse to such member, manager or other person establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled."

### *Leave to Amend*

The court denies Plaintiffs' application for leave to amend. They neither attached a proposed amended pleading nor stated what causes of action they wish to assert, making it impossible to determine whether the amendment has merit. Doc 17, p 18. CPLR 3025(b) (proposed amended pleading should be submitted); *Perotti v Becker, Glynn, Melamed & Muffy, LLP*, 82 AD3d 495 (1st Dept 2011) (amendment should be denied where it is palpably insufficient or clearly devoid of merit).

### *Sanctions*

Under 22 NYCRR §130-1.1(a), "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . ." Conduct is frivolous if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; 2) it is intended to harass or maliciously injure another; or 3) it asserts material factual statements that are false. 22 NYCRR §130-1.1(c). In determining whether to award costs, the court must consider: 1) the circumstances surrounding the conduct, including time available to properly investigate the legal or factual basis for it; and 2) whether it was continued when its lack of legal or factual basis was or should have been apparent. *Id.*

Sanctions are appropriate where there is no bona fide basis for a claim. *644 BRDY Realty v 684 Owners Corp.*, 216 AD2d 43 (1st Dept. 1995). However, a court should avoid the imposition of sanctions where a claim or argument is "colorable, albeit unpersuasive," and where made "in good faith and without an intent to harass or injure." *Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67 (1st Dept. 2006).

Defendants claim that sanctions are appropriate here. First, they argue the three causes of action alleged were baseless pursuant to the 511 Operating Agreement and the LLC Law. Second, they allege that Plaintiffs brought the case to harass and maliciously injure Defendants for bringing the Beatrice Action, as evidenced by a check issued by 511 to Plaintiffs' attorneys, Kornfeld & Associates, PC [Doc 13]. Third, they contend that factual statements in the instant complaint were false. Lastly, they argue that Plaintiffs filed the complaint a day after Defendants' attorney sent an e-mail warning that they would seek sanctions if it were filed. The court agrees that sanctions are appropriate here.

The Operating Agreement on its face did not support the breach of contract claim. Even if it had, it would have been unenforceable pursuant to black letter law, LLC Law §417. Similarly, the breach of fiduciary claim was unsupportable based upon Article 6.2 of the Operating Agreement, which exempted members from claims of breach of fiduciary duty based on their status as members, the same provision upon which Plaintiffs posited their unsupportable breach of contract claim. The Operating Agreement on its face did not entitle Plaintiffs to indemnification from Defendants.

Additionally, the court finds that Plaintiffs made false statements about the allegations in the Beatrice Complaint, i.e., that it admitted that Defendants received all the records they asked for and that breach of fiduciary duty was not pleaded with the particularity required by 3016(b). The Beatrice Complaint clearly alleged that the requested records were not supplied. It also made specific allegations about Assa's diversion of 511's assets to himself and his affiliated entities. Beatrice Complaint, Doc 8, ¶¶ 34-36. Specifically, the Beatrice Complaint alleged that: Assa's entities (Denver West and Gemstone 45) received development and administrative fees in excess of the amounts authorized by the Operating Agreement; entities partially owned by Assa

(Donna Loren, Denver West and SI Partners) received money from 511 for no apparent business purpose; Assa personally received almost half a million dollars from 511; and 511 engaged in numerous unexplained transactions with two other LLCs affiliated with Assa (Waterscape Resorts and Assa Realty). *Id.* In sum, breach of fiduciary was alleged in the Beatrice complaint with particularity.

Plaintiffs did not deny that their legal fees are being paid by 511, leading to the inference that this suit was retaliatory. After being warned about the possibility of sanctions and reading Defendants' motion to dismiss, Plaintiffs did not withdraw the complaint.

The actual damage suffered by Defendants' -- their reasonable attorneys' fees and costs incurred in making this motion -- shall be awarded as a sanction against Plaintiffs. The issue of the amount of the sanction shall be referred to a Special Referee. Accordingly, it is

ORDERED that the motion of Defendants Fast March Investments, LLC, Skyward Investments, LLC, and Triumph Investments, LLC ("Defendants") to dismiss the complaint is granted, the action is dismissed since the remaining defendants were not served, and the Clerk shall enter judgment accordingly in favor of Defendants, together with costs and disbursements as taxed by the Clerk upon presentation of a bill of costs ; and it is further

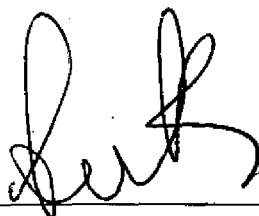
ORDERED that Defendants' motion for sanctions is granted, and the sanction shall be paid by plaintiffs B Mex Corp. and Ninemex Corp. ("Plaintiffs") the issue of the reasonable costs and attorneys' fees incurred by said Defendants in prosecuting this motion is referred to a Special Referee to hear and report, or, if the parties agree, to hear and determine; and it is further

ORDERED that the request by Plaintiffs for leave to amend the complaint is denied; and it is further

ORDERED that Defendants shall serve a copy of this Decision and Order with notice of entry, as well as a completed information sheet,<sup>2</sup> on the Special Referee Clerk at [sprefnyef@nycourts.gov](mailto:sprefnyef@nycourts.gov), who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and to notify the parties of the date of the hearing.

Dated: July 22, 2014

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

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<sup>2</sup> Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".