

Mace v Tunick

2016 NY Slip Op 32762(U)

May 23, 2016

Supreme Court, Westchester County

Docket Number: 68644/2015

Judge: Alan D. Scheinkman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,
Justice.**

-----X
DAVID J. MACE,

Plaintiff,

-against-

Index No. 68644/2015
Motion Seq. # 002
Motion Date: March 25, 2016

NICHOLAS TUNICK, NICHOLAS TUNICK AS TRUSTEE
FOR THE BENEFIT OF NICHOLAS TUNICK UNDER
AGREEMENT, DATED NOVEMBER 27, 2012,
AND PEDANI REALTY SERVICES, LLC,

DECISION & ORDER

Defendants.

-----X

Scheinkman, J:

Defendants Nicholas Tunick, Nicholas Tunick as trustee for the benefit of Nicholas Tunick under agreement dated November 27, 2012 (together, "Tunick"), and Pedani Realty Services, LLC ("Pedani") (collectively, "Defendants") move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the Amended Complaint of Plaintiff David J. Mace ("Plaintiff" or "Mace"). Plaintiff opposes the motion.

FACTUAL AND PROCEDURAL BACKGROUND

This action was initiated by Plaintiff's filing of his Summons and Complaint on October 26, 2015.

On January 11, 2016, Defendants filed a Request for Judicial Intervention and a motion to dismiss. On January 21, 2016, Plaintiff filed an Amended Complaint. A Preliminary Conference was held on February 5, 2016, at which Defendants' counsel, while withdrawing the motion directed to the original pleading, indicated intent to move to dismiss the Amended Complaint. After a discussion of the merits of Defendants' anticipated motion to dismiss the Amended Complaint, the Court declined to issue a Preliminary Conference Order.

On March 1, 2016, Defendants moved to dismiss the Amended Complaint. Plaintiff furnished an opposition memorandum of law; Defendants submitted a reply, and the motion was deemed fully submitted on March 25, 2016.

THE ALLEGATIONS OF THE AMENDED COMPLAINT

The following is a summary of the allegations of the Amended Complaint, which the Court must deem to be true for the purposes of this motion.

Pedani is a New York limited liability company formed on July 9, 2007, of which the sole members are Plaintiff and Tunick (Amended Complaint at ¶¶ 3-4). A copy of Pedani's Articles of Organization is attached to the Amended Complaint (*id.* at Ex. 1).

Plaintiff alleges that when Pedani was formed in 2007, the original membership interests were: Plaintiff 20 percent; Defendant Nicholas Tunick 20 percent; and non-party Peter Tunick 60 percent (*id.* at ¶ 5). Peter Tunick is Nicholas Tunick's father (*id.*).

Plaintiff alleges that at the time of Pedani's formation in 2007, its owners also owned Ceres Chemical Co., Inc. ("Ceres"), in the same percentages as their ownership interests in Pedani (*id.* at ¶ 6). He further alleges that Ceres had been renting office space prior to 2007, and its owners formed Pedani at that time for the sole purpose of purchasing and holding property located at 26 Westchester Avenue in Pound Ridge, New York (the "Property") to serve as Ceres' headquarters (*id.* at ¶ 7).

Pedani purchased the Property for \$1,250,000 on September 26, 2007 with owner contributions in the same percentages as their respective ownership interests in Ceres (*id.* at ¶ 8). Plaintiff alleges that the Property is the sole asset of Pedani, other than a small amount of cash (*id.* at ¶ 9). He further alleges that from October 2007 through December 2012, Ceres leased the Property and paid \$13,000 per month as rent to Pedani (*id.* at ¶ 10).

Plaintiff alleges that in 2012 Peter Tunick transferred his ownership interests in Ceres to Defendant Nicholas Tunick, both in Tunick's individual capacity and as trustee for the benefit of Tunick (*id.* at ¶ 11). By an assignment agreement dated December 17, 2012, Peter Tunick also assigned his 60 percent ownership interest in Pedani to Tunick in his capacity as trustee, with the consent of all members of Pedani (*id.*). Plaintiff alleges that the ownership of Pedani is currently: Plaintiff 20 percent; Defendant Nicholas Tunick 20 percent; and Defendant Nicholas Tunick as trustee 60 percent (*id.* at ¶ 12).

According to the Amended Complaint, after December 31, 2012, Ceres stopped paying rent for the Property to Pedani (which would ultimately have found its way to the owners in the form of distributions) but paid the \$13,000 monthly rental amount directly to Ceres' owners in accordance with their percentage interests (*id.* at ¶ 13). As such, Plaintiff was receiving 20 percent of this payment each month (*id.*).

Plaintiff alleges that on October 31, 2013, he sold his 20 percent ownership interest in Ceres to Tunick, with the understanding that Ceres would now pay rent to Pedani, of which Plaintiff remained a 20 percent owner (*id.* at ¶ 14). He further alleges that Tunick, both individually and as trustee, promptly breached that agreement by permitting Ceres to occupy the Property rent free and without compensating Pedani (*id.* at ¶ 15). Plaintiff alleges that after December 31, 2013, Ceres vacated the Property, but also alleges that Ceres used the Property "throughout 2013 and thereafter" pursuant to a written agreement between Ceres

and Pedani (*id.* at ¶¶ 16-17). He further alleges that Tunick purported to terminate any lease or other agreement between Pedani and Ceres when Ceres vacated the Property (*id.* at ¶ 18). Plaintiff also alleges that upon Ceres' vacature of the Property, the purpose for which Pedani was formed no longer existed (*id.* at ¶ 19). As such, Plaintiff requested that Tunick sell the Property and dissolve Pedani, but Tunick refused this request (*id.*).

Instead, by notice dated November 14, 2014, Tunick called a meeting of Pedani's members, at which November 25, 2014 meeting Tunick elected himself Operating Manager and stated that Pedani required a \$25,000 capital infusion (*id.* at ¶¶ 20-21). To meet that objective, Tunick sent a Notice of Offer of Additional Membership Interests to Pedani's members on November 26, 2014 (the "Notice of Offer"), which required that Plaintiff contribute \$5,000 or his membership interest would have been diluted from 20 percent to 18.67 percent (*id.* at ¶ 22). Plaintiff alleges that Tunick lacked authority to authorize this capital call, and that his actions are belied by the terms of Pedani's operating agreement (*id.* at ¶¶ 23-26). He also contends that even if the capital call had been authorized, the offer price vastly undervalued the Property (*id.* at ¶ 27). In any event, Plaintiff paid the \$5,000 "under protest" to avoid the dilution of his interest in Pedani and prevent Tunick from increasing his ownership at a discounted rate (*id.* at ¶¶ 28-29).

Plaintiff further alleges that in June 2015 Tunick stated that he had unilaterally leased the Property to a new tenant for a substantially below fair market value sum of \$3,625 per month (*id.* at ¶ 30). Plaintiff alleges that Tunick has a fiduciary duty to Plaintiff and to Pedani, and that Tunick's interests as the controlling shareholder of Ceres were in direct conflict with his interests as controlling member of Pedani (*id.* at ¶¶ 31-32). As such, Plaintiff alleges that Tunick breached his fiduciary duty by taking actions beneficial to Ceres and detrimental to Pedani (*id.* at ¶ 34).

Plaintiff asserts four causes of action. In the First Cause of Action, Plaintiff seeks a judicial dissolution of Pedani (*id.* at ¶¶ 13- 37). He alleges that upon Ceres' vacature of the Property, the purpose for which Pedani was formed no longer existed, and that Tunick refused Plaintiff's request to sell the property and dissolve Pedani (*id.* at ¶¶ 19, 35-36). He further alleges that there is disagreement between Plaintiff and Tunick regarding Pedani's operations that are so fundamental and intractable as to make it unfeasible for Pedani to carry on its business as originally intended (*id.* at ¶¶ 35-36). In the Second Cause of Action, Plaintiff seeks examination of Pedani's books and records (*id.* at ¶¶ 38-42). Specifically, he alleges that despite Plaintiff's right to examine Pedani's books and records pursuant to New York Limited Liability Company Law "LLCL" § 1102(b) and Section 11.1(C) of Pedani's Operating Agreement, Tunick has ignored Plaintiff's oral and written requests to examine Pedani's books and records (*id.* at ¶¶ 33, 38-42). The Third Cause of Action is for breach of fiduciary duty, and alleges that Tunick breached his fiduciary duties to Plaintiff and Pedani by, *inter alia*, (a) permitting Ceres to occupy the Property rent free after October 31, 2013; (b) unilaterally terminating the Ceres tenancy at the Property for the benefit of Ceres and to Pedani's detriment; and (c) leasing the Property to a new tenant in June 2015 for inadequate rent (*id.* at ¶¶ 34, 43-44). Plaintiff seeks monetary damages in the amount of \$250,000 in connection with this claim. Plaintiff's Fourth Cause of Action alleges that Tunick and Pedani breached Section 6.3 of Pedani's operating agreement when Tunick sent the Notice of Offer on November 26, 2014, requiring that Plaintiff contribute \$5,000 or his membership interest would

have been diluted from 20 percent to 18.67 percent (*id.* at ¶ 22). Plaintiff alleges that he suffered \$5,000 in monetary damages as a result of this breach (*id.* at ¶¶ 45-46).¹

DEFENDANTS' CONTENTIONS IN SUPPORT OF THEIR MOTION

In support of their motion, Defendants submit an affidavit from Tunick, an affirmation from their counsel, Jeffrey N. Levy, Esq., and a memorandum of law.

In the Affidavit of Nicholas Tunick sworn to February 26, 2016 ("Tunick Aff."), Tunick avers that he is a defendant both individually and in his capacity as trustee for the benefit of Nicholas Tunick under agreement dated November 27, 2012, and he is the Operating Manager of Pedani (Tunick Aff. at ¶¶ 1, 6). He avers that he has personal knowledge of the facts underlying this action, and attaches copies of the Amended Complaint and the original Complaint to his affidavit (*id.* at ¶¶ 1-2 and Exs. A, J).

Tunick avers that Plaintiff owns a 20 percent membership interest in Pedani, and that the remaining 80 percent is owned by Tunick, with 20 percent owned individually and 60 percent in his capacity as a trustee (*id.* at ¶ 3). He further avers that Pedani owns the Property (*id.*). Tunick also avers that prior to November 30, 2013, he owned an 80 percent interest in Ceres, and that on that date Plaintiff redeemed his 20 percent ownership interest therein (*id.* at ¶ 4). As such, Tunick has owned 100 percent of Ceres since November 30, 2013 (*id.*). He further avers that the Property contains two buildings, one of which was rented by Ceres from Pedani from October 1, 2007 through September 2012 (*id.* at ¶ 5). He states that Ceres leased the second building on the Property from June 1, 2009 through December 31, 2012, and that Ceres vacated the Property entirely in May 2014 (*id.*). Attached to the Tunick Affidavit are copies of the aforementioned lease documents (*id.* at Ex. B).

Tunick states that Plaintiff's first cause of action for a judicial dissolution of Pedani is an attempt to compel a sale of the Property when Plaintiff has no such right under Pedani's Operating Agreement (*id.* at ¶ 6). He further avers that neither the Operating Agreement nor Pedani's Articles of Organization require dissolution of Pedani upon the expiration of the leases with Ceres at the Property (*id.*). Tunick states that he continues to operate Pedani as its Operating Manager (*id.*). Copies of the Operating Agreement and Articles of Organization are attached to the Tunick Affidavit (see Exs. C, D).

Regarding Plaintiff's second cause of action for the examination of books and records, Tunick states that such records were offered to Plaintiff by letter from counsel dated December 30, 2015 (*id.* at ¶ 13 and Ex. I).

¹ The Wherefore clause of the Amended Complaint reflects that in connection with this breach of contract claim, Plaintiff also seeks a declaration that Plaintiff's 20 percent ownership interest in Pedani is not subject to dilution based upon his failure to make any capital contribution to Pedani. However, Plaintiff has not asserted a separate cause of action for declaratory judgment and this relief is not requested or referenced in the body of the Amended Complaint.

Tunick avers that Plaintiff's third cause of action for breach of fiduciary duty, which is based upon Tunick's allowing Ceres to stay on the Property after its lease expired, lacks merit because Plaintiff received the benefit of that occupancy as a shareholder of Ceres (*id.* at ¶¶ 7-8). He states that Plaintiff never complained about this situation prior to the filing of the Amended Complaint (*id.* at ¶ 8). Tunick also avers that during the few months in which Ceres remained on the Property after Plaintiff sold his shares in Ceres, Ceres paid the Property's real estate taxes and insurance. Because Pedani was saved from having to make these payments, Plaintiff as a 20 percent owner in Pedani benefitted from Ceres' payments (*id.*). Tunick further avers that he leased the Property to a new tenant on behalf of Pedani in an arms-length transaction, which lease dated June 9, 2015 is attached to his Affidavit (*id.* at ¶ 10 and Ex. E).

With respect to Plaintiff's fourth cause of action for breach of contract, Tunick states that he had the right as Pedani's Operating Manager and a majority owner to initiate an equity offering to raise funds for the entity (*id.* at ¶ 11). He further states that this was an offering of equity to the members on a pro rata basis, and that Plaintiff and Tunick individually and in his capacity as trustee all exercised their respective rights by purchasing \$5,000 worth of equity for each 20 percent interest in Pedani (*id.*). Attached to Tunick's Affidavit are copies of the Notice of Meeting and Notice of Offer, as well as Plaintiff's check for \$5,000 and the relevant subscription agreements executed by the three owners (*id.* at Exs. F, G, H). Tunick also avers that even if this offering were deemed a "capital call," which it is not, it was not a mandatory capital call as is prohibited by the Operating Agreement (*id.* at ¶ 12).

In the Affirmation of Jeffrey N. Levy, Esq. dated March 1, 2016 ("Levy Aff."), counsel reiterates the factual allegations set forth in the Tunick Affidavit, and summarizes certain of Defendants' legal arguments as set forth in their memorandum of law.

With respect to the first cause of action for a judicial dissolution of Pedani, Mr. Levy avers that Plaintiff is attempting to compel a sale of the Property without a right to do so under LLCL § 702 or Pedani's Operating Agreement (Levy Aff. at ¶¶ 6-8). He notes that Section 3.3 provides that "No Member will have the right to . . . compel any sale or appraisal of the Company's assets", and that Section 5.4 states that "the conduct and control of the Company's business shall be controlled and conducted solely and exclusively by the Operating Managers in accordance with" the Operating Agreement (*id.* at ¶ 8). Mr. Levy further states that Section 5.5B of the Operating Agreement requires that the Operating Managers obtain the consent of the members holding a majority of Pedani's ownership interests prior to selling, acquiring or otherwise transferring any interest in property (*id.*). Because Tunick owns 80 percent of Pedani, Plaintiff as a minority owner cannot compel a sale of the Property (*id.*).

With respect to the second cause of action for an examination of books and records, Mr. Levy avers that he sent a letter to Plaintiff's counsel dated December 30, 2015 in which he "offered" such records to Plaintiff (*id.* at ¶ 16). He further states that Plaintiff's counsel never responded to the letter, and as such, this cause of action is moot (*id.*).

Mr. Levy contends that the third cause of action for breach of fiduciary duty is

without merit, as any claim for a holdover should be brought against Ceres, which is the entity that held over on the Property after its lease expired (*id.* at ¶ 10). He further argues that Plaintiff was aware of Ceres' holding over on the Property when he sold his ownership interest in Ceres, and that Plaintiff did not complain about this arrangement until he filed the Amended Complaint (*id.*). Mr. Levy further argues that Plaintiff in the original Complaint asserted a breach of fiduciary duty claim based on Tunick's failure to compel Ceres to remain on the Property, and that his "change of theory" in the Amended Complaint regarding the nature of the alleged breach of fiduciary duty "speaks volumes" as to the merits of this claim (*id.* at ¶¶ 11-12).

Mr. Levy reiterates the argument set forth in the Tunick Affidavit that Tunick did not breach the Operating Agreement by initiating an equity offering to raise funds for Pedani, as alleged in the fourth cause of action (*id.* at ¶ 14). By contrast, Tunick had an explicit right as Operating Manager under Section 5.4 of the Operating Agreement to take this action (*id.*). Levy further avers that even if this equity offering were deemed a "capital call" it was not a mandatory capital call as is prohibited by the Operating Agreement (*id.* at ¶ 15).

As their legal argument set forth in their memorandum of law, Defendants argue that the Amended Complaint should be dismissed under CPLR 3211(a)(7) for failure to state a cause of action. Defendants further argue that the Pedani Operating Agreement and Articles of Organization as well as the Notice of Meeting and Notice of Offer constitute documentary evidence that collectively requires the dismissal of the first, third and fourth causes of action pursuant to CPLR 3211(a)(1).

Regarding the first cause of action for a judicial dissolution of Pedani, Defendants contend that Plaintiff has failed to state a claim upon which relief can be granted. They argue that Pedani is carrying on its business in accordance with the Operating Agreement's very broadly stated purpose of "conduct[ing] any lawful business for which limited liability companies may be formed." They further contend that Plaintiff's claim of Pedani being formed to purchase and hold the Property for use as Ceres' headquarters has no basis in fact. As such, they contend that Plaintiff cannot show that "it is not reasonably practicable to carry on the business" pursuant to LLCL § 702. By contrast, Pedani is being managed by its Operating Manager (Tunick) exactly as contemplated in Section 5.4 of the Operating Agreement, and Tunick has leased the Property to a third party in an arms length transaction. Defendants further argue that the Operating Agreement does not make the failure to lease the Property to Ceres an event requiring dissolution, and that Plaintiff's dissatisfaction with the leasing of the Property does not make it reasonably impracticable to continue carrying on Pedani's business. Moreover, Defendants argue that Plaintiff cannot unilaterally compel the sale of the Property under Section 3.3 of the Operating Agreement. Defendants also assert that Plaintiff cannot satisfy any of the criteria set forth in LLCL § 701(a), as: (1) Pedani has a perpetual existence absent a time specified for dissolution in the Operating Agreement or Articles of Organization; (2) none of the criteria specified in Article 10 of the Operating Agreement have been met, and there accordingly can be no cause for dissolution under LLCL § 701(a)(2); (3) a majority in interest of Pedani have not voted or consented to its dissolution and therefore no cause for dissolution is present under LLCL § 701(a)(3); and (4) as there are still members of Pedani, there is no cause for dissolution under LLCL § 701(a)(4).

With respect to the second cause of action for the inspection of Pedani's books and records, Defendants argue that they have made such books and records available to Plaintiff. Accordingly, Defendants contend that Plaintiff fails to state a claim upon which relief can be granted as this request is now moot. As such, they argue that the Court should dismiss this claim where the relief sought is "academic."

Concerning the third cause of action for breach of fiduciary duty, Defendants contend that Plaintiff's claim is undercut by the fact that Plaintiff initially deemed Ceres' holding over at the Property acceptable. They argue that there is no obligation in the Operating Agreement or in the law requiring Tunick to remove Ceres from the Property despite Plaintiff's consent and despite Ceres' paying the Property's expenses. They further argue that if Plaintiff believed the sole purpose of Pedani to be the continued lease of the Property to Ceres, he could have negotiated such a provision in the Operating Agreement, but failed to do so. Defendants contend that Plaintiff is asserting this cause of action as a "backdoor mechanism" to force a sale of the Property in contravention of the Operating Agreement. Defendants further argue that this cause of action should be dismissed under CPLR 3211(a)(7) because Plaintiff has not established the existence of a fiduciary duty where Plaintiff sought to force Tunick to act on Ceres' behalf for Plaintiff's benefit. They also contend that dismissal is required where Plaintiff acknowledges that he suffered no damages and in fact received the benefits of Ceres' tenancy through his ownership of Ceres, and thereafter benefitted by way of his interest in Pedani when Ceres - and not Pedani - paid the Property's operating expenses.

Regarding the fourth cause of action for breach of contract, Defendants argue that Tunick acted in compliance with Section 5.4 of the Operating Agreement by making an equity offering to raise funds for Pedani to pay operating expenses. Accordingly, the Operating Agreement, Notice of Offer, and Subscription Agreements constitute documentary evidence that render this claim fatally deficient. Defendants further argue that because this was an optional equity offering and not a mandatory capital call that is prohibited by the Operating Agreement, Plaintiff has failed to assert that the Operating Agreement was breached and this claim should therefore be dismissed pursuant to CPLR 3211(a)(7).

PLAINTIFF'S CONTENTIONS IN OPPOSITION

In opposition to Defendants' motion, Plaintiff submits a memorandum of law. He first argues that the Tunick Affidavit and the Levy Affirmation do not constitute "documentary evidence" pursuant to CPLR 3211(a)(1), and that this testimony should accordingly be disregarded by the Court. However, Plaintiff does not argue that the exhibits attached to the Tunick Affidavit should be similarly disregarded.

With respect to the First Cause of Action for judicial dissolution of Pedani, Plaintiff contends that he can establish the requirements of LLCL § 702 that Pedani's management is unable or unwilling to reasonably permit the entity's stated purpose to be realized, and that continuing Pedani is financially unfeasible. Plaintiff also contends that Pedani's purpose no longer exists. He argues that its Articles of Organization are silent as to its purpose, and the generic statement in Section 2.1 of the Operating Agreement that Pedani's purpose is to conduct "lawful business" does not preclude a finding that Pedani was

formed for a more limited purpose. Plaintiff contends that a factual finding beyond the scope of this motion will demonstrate that Pedani was formed for the sole purpose of purchasing and holding the Property to serve as Ceres' headquarters. Plaintiff also notes that Tunick does not deny this purpose in his Affidavit. Plaintiff further argues that, setting aside the issue of Pedani's purpose, the documentary evidence furnished by Defendants does not conclusively establish a defense to the asserted cause of action, and that discovery in this action will demonstrate that Pedani should be dissolved. He contends that Tunick's management of Pedani and Pedani's finances are unsound, and that documents in the sole possession of Defendants will demonstrate that the disagreement between Plaintiff and Tunick regarding the means, methods and finances of Pedani's operations are so fundamental and intractable as to make it unfeasible for Pedani to carry on its business as originally intended. Accordingly, Plaintiff argues that the motion to dismiss this cause of action should be denied.

With regard to the Second Cause of Action, Plaintiff contends that as a member with a 20 percent ownership interest in Pedani, he is entitled to examine its books and records pursuant to LLCL § 1102(b) and Section 11.1(C) of Pedani's Operating Agreement, as stated in the second cause of action. He argues that the December 30, 2015 letter from Defendants' counsel was a "proposal" in which Defendants offered to furnish certain books and records in exchange for Plaintiff's withdrawal of his second cause of action. Plaintiff contends that in prior discussions with Defendants' counsel, Plaintiff's counsel indicated that Plaintiff would not agree to withdraw his claim as a pre-condition to being permitted to review Pedani's books and records. Plaintiff further states that, as discussed at the February 5, 2016 Preliminary Conference, the documents cited in the December 30, 2015 letter do not constitute all of the books and records which Plaintiff seeks to review. While balance sheets and tax returns are "summaries" of Pedani's books and records, Plaintiff contends that he desires - as he claims is his right - to examine the underlying books and records, including bank statements. Therefore, Plaintiff argues that this cause of action is not "moot" as claimed by Defendants, and should not be dismissed.

With respect to the Third Cause of Action for breach of fiduciary duty, Plaintiff argues that Defendants in their motion have misconstrued this claim. Plaintiff asserts that this cause of action is based upon the allegation that Tunick, both individually and as a trustee, breached his fiduciary duty by terminating a lease or other agreement between Pedani and Ceres at the time Ceres vacated the Property, which benefitted Ceres to Pedani's detriment. Plaintiff argues that the series of leases attached to the Tunick Affidavit (see Ex. B) appear to have a term ending on December 31, 2012. However, Plaintiff contends that this documentary evidence does not prove that there was no agreement in effect at the time of Ceres' vacature from the Property, and as such does not require dismissal of the claim under CPLR 3211(a)(1). Plaintiff further states that it is undisputed that Tunick permitted Ceres to remain on the Property "rent free" after October 31, 2013, which benefitted Tunick and Ceres and harmed Pedani. Plaintiff argues that Tunick has not performed his duties as Operating Manager of Pedani "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances" as is required by LLCL § 409(a). He contends that the Amended Complaint has sufficiently stated a cause of action for breach of fiduciary duty by alleging that Tunick: (a) permitted Ceres to occupy the Property rent free after October 31, 2013; (b) unilaterally terminated the Ceres tenancy at the Property for the benefit of Ceres and to Pedani's detriment; and (c) leased the Property to a new tenant

in June 2015 for inadequate rent.

Regarding the Fourth Cause of Action for breach of contract, Plaintiff argues that the November 2014 equity offering was a “capital call” and was referred to as such by Defendants’ counsel in a November 14, 2014 letter that is attached to the memorandum of law. Plaintiff contends that, regardless of the semantics, the Operating Agreement does not authorize the Operating Manager to create additional membership interests, and that Section 9.1 thereof even requires unanimous consent for a member’s transfer of his existing interest. Plaintiff also argues that Tunick had no authority under the Operating Agreement to require Plaintiff to contribute additional capital or have his interest diluted. He notes that Section 6.3 of the Operating Agreement states that “no Member shall be required to make any additional contributions to the capital of the Company,” which provision Tunick breached. Plaintiff argues that if Tunick is permitted to take this type of action in the future, he can force Plaintiff to pay whatever sum Tunick demands or risk having Plaintiff’s interest in Pedani “reduced to extinction.”

DEFENDANTS’ REPLY

In their reply memorandum of law, Defendants first argue that their motion to dismiss under CPLR 3211(a)(1) is based upon the exhibits attached to the Tunick Affidavit, and that they never asserted that the Tunick Affidavit or the Levy Affirmation constituted “documentary evidence.”

Defendants further argue that the First Cause of Action for judicial dissolution of Pedani under LLCL § 702 must be dismissed because Section 2.1 of the Operating Agreement sets forth the broad purpose of Pedani. They contend that Plaintiff’s unsubstantiated allegation that Pedani was formed for the purpose of purchasing and holding the Property as Ceres’ headquarters is contradicted by the Operating Agreement and Articles of Organization, which contain no limitation on the conduct of Pedani’s business. Accordingly, this claim should be dismissed.

As to the Second Cause of Action, Defendants contend that their counsel’s December 30, 2015 letter offered Plaintiff access to the very books and records that he is entitled to examine under LLCL § 1102(b), other than the organizational documents which are already in Plaintiff’s possession. Defendants argue that Plaintiff’s request for bank account statements are not authorized by statute. Because Plaintiff’s claim is “moot,” Defendants reiterate that the second cause of action should be dismissed.

Defendants assert that the Third Cause of Action for breach of fiduciary duty is premised upon two theories: that Tunick allowed Ceres to repudiate the lease for the Property, and that Ceres was permitted to remain on the Property rent free. Defendants state that as to the first theory, the lease documents attached to their moving papers demonstrate that the lease expired on December 31, 2012. Concerning the second theory, Defendants contend that Ceres did not remain rent free on the Property, but in fact paid expenses such as real estate taxes and insurance, to the benefit of Pedani and Plaintiff. Defendants reiterate that no fiduciary duty was breached by Tunick, and that this third cause of action is belied by

documentary evidence and fails to state a claim upon which relief can be granted.

Regarding the Fourth Cause of Action for breach of contract, Defendants again state that the equity offering orchestrated by Tunick was not a mandatory capital call and was therefore not prohibited by the Operating Agreement. Absent a viable allegation of a breach of the Operating Agreement, this claim must be dismissed. Defendants also assert that Plaintiff improperly attached to his opposition memorandum of law the November 14, 2014 letter from counsel, which has no foundation and should be disregarded by the Court. In any event, Defendants argue that this letter merely states that a non-mandatory capital call is permissible, and thus does not change the character of the equity offering.

LEGAL ANALYSIS **STANDARD OF REVIEW ON A MOTION TO DISMISS**

The legal standards to be applied in evaluating a motion to dismiss are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359 [2d Dept 1997], citing *Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*id.*, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp.*, *supra*).

A plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; see also *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).²

²Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello, supra*; *Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; see *Kempf, supra*; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]).

To the extent that a plaintiff's claims turn on a contract, the actual provisions of the contract – rather than plaintiff's characterization of the terms in its pleading – are controlling (see *805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Marosu Realty Corp. v Community Preserv. Corp.*, 26 AD3d 74, 82 [1st Dept 2005]). Therefore, “[w]here a written contract ... unambiguously contradicts the allegations supporting the breach of contract, the contract itself constitutes the documentary evidence warranting the dismissal of the complaint under CPLR 3211(a)(1)” (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]; see also *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [on a CPLR 3211(a)(1) motion to dismiss, “[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint”]).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Cap. Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys – Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as “documentary,” the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary (*Fontanetta v Doe, supra*).

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]).

PLAINTIFF'S FIRST CAUSE OF ACTION FOR JUDICIAL DISSOLUTION

LLCL § 702 provides for judicial dissolution of a limited liability company as

Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

follows:

On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

The court must first examine the limited liability company's operating agreement to determine, in light of the circumstances presented, whether it is or is not "reasonably practicable" for the limited liability company to continue to carry on its business in conformity with the operating agreement (*see Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 128-129 [2d Dept 2010]); *see Matter of Spires v Lighthouse Solutions, LLC*, 4 Misc 3d 432,433 [Sup Ct Monroe County 2004]. Thus, the analysis, in the first instance, is contract-based.

The Second Department has ruled that, to state a cause of action for judicial dissolution of a limited liability company, the plaintiff must present allegations which, if true, would establish that "the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" (*Kassab v. Kassab*, 137 AD3d 1135 [2d Dept 2016], *quoting Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131; *see Barone v. Sowers*, 128 A.D.3d 484 [2d Dept 2015], *Doyle v. Icon, LLC*, 103 A.D.3d 440 [1st Dept 2013]).

Here, Pedani has no stated purpose. Rather, Section 2.1 of the Operation Agreement contains broad, boiler-plate language that the purpose of the Company is to conduct any lawful business for which a limited liability company may be organized and to do all things necessary or useful in such regard. Defendants' argument is, essentially, that because Pedani's stated purpose is to do any lawful business, it is impossible to conclude that the management of the entity is unable or unwilling to permit or promote any lawful business from being achieved. This argument is far too facile as, if accepted, it would preclude judicial dissolution on every occasion in which such common, boiler-plate purpose language is used in an Operating Agreement. Indeed, such broad language may be invoked, not because the company lacks a specific purpose, but to avoid hamstringing company operations, or shifts in business, through more restrictive language.

More important, the Court cannot ignore the fact, as alleged (and which must be assumed true), that Pedani was formed on July 9, 2007 and, by deed dated September 26, 2007, Pedani took title to the Property. Hence, the contemporaneous real estate documents, read together with the Operating Agreement, indicate that the initial purpose of Pedani was to acquire title to, and manage, the Property. However, Plaintiff has failed to allege facts which, if proven true, would establish either that the purpose of Pedani changed or that the management of Pedani is unable or unwilling to reasonably permit or promote Pedani's achievement of its purpose to acquire and maintain the Property.

He alleges that Ceres' departure from the Property ended Pedani's purpose. That allegation is insufficient since Pedani could surely continue to manage the Property without Ceres' presence. Indeed, Plaintiff alleges that Pedani entered into a lease with

another tenant in June 2015 and that fact is shown through the lease submitted by Defendants (the Lease of June 9, 2015 to Joseph S. Levering). While Plaintiff claims that such lease is below market, the fact remains that Pedani was authorized to retain title to the Property and to continue to manage it, notwithstanding Ceres' alleged departure. Indeed, Plaintiff in no way alleges that Tunick failed to take reasonable steps to seek replacement tenants.

The real object of the dissolution claim is to achieve for Mace what he cannot achieve under the Operating Agreement. Under Section 3.3, no member has the right to require partition of any Company Property or to compel the sale of the Company's assets. Rather, a sale of Pedani's interest in any property requires the consent of a majority interest of the Members (Operating Agreement, § 5.5). As Plaintiff alleges, he requested that Tunick sell the Property and dissolve Pedani but Pedani refused.

Since the clear purpose of Pedani was to acquire and manage the Property and Plaintiff has failed to allege that the management of Pedani is unwilling or unable to take reasonable steps to manage the Property, the only other possible basis for sustaining Mace's cause of action is whether continuation of the business is economically unfeasible. Here, too, the First Cause of Action fails.

All that Mace alleges is that in November 2015, Tunick initiated an effort to raise \$25,000 from the members to fund operations. The amount of capital to be raised pales in comparison to the \$1.25 million purchase price paid for the Property. Putting aside whether Tunick improperly sought to dilute Plaintiff's interest, Mace does not allege that the Company needed more than \$25,000 or that the rent being paid as of June 2015 (even if below market) is insufficient to pay the expenses on the Property. Hence, Plaintiff has not alleged facts that would, if proven, show that continuation of the business is economically unfeasible.

At bottom, all that Mace asserts is that Pedani should be dissolved because he wants the Property sold and Tunick does not. Since the Operating Agreement does not permit a sale of Company property without consent of a majority of the interest, this Court should not permit Mace to detour around that contractual provision through a claim for dissolution, at least where he has not alleged that Tunick is unwilling to take reasonable steps to manage the Property or that continued management of the Property would be economically unfeasible for Pedani.

Accordingly, Defendants' motion to dismiss the First Cause of Action pursuant to CPLR 3211(a)(1) and (a)(7) shall be granted.

PLAINTIFF'S SECOND CAUSE OF ACTION FOR EXAMINATION OF BOOKS AND RECORDS

Plaintiff alleges in his Second Cause of Action that despite Plaintiff's right as a member of Pedani to examine its books and records pursuant to LLCL § 1102 and Section 11.1 of Pedani's Operating Agreement, Tunick has "ignored" Plaintiff's requests to examine Pedani's books and records (Amended Complaint at ¶¶ 33, 38-42).

LLCL § 1102 provides that a limited liability company must maintain the following records for inspection by a member:

- (1) If an LLC is managed by a manager or managers, a current alphabetical list of the names and addresses of the managers,
- (2) A current list in alphabetical order of the full names and addresses of the members together with the contribution and the share of profits and losses of each member or information from which such share can be derived.
- (3) A copy of the articles of organization, including any amendments to or restatements thereof, and any executed copies of powers of attorney pursuant to which any certificate has been executed.
- (4) A copy of the operating agreement and any amendments thereto any amendment and restated operating agreement.
- (5) A copy of the LLC's federal, state and local income tax or information returns and reports, if any, for the three most recent fiscal years (LLCL § 1102[a]).

Section 11.1 of Pedani's Operating Agreement provides that the Operating Managers shall cause Pedani to maintain "[c]omplete and accurate books of account, in which shall be entered, fully and accurately, each and every transaction of the Company" as well as a list of members and their respective ownership interests, copies of the Operating Agreement and Articles of Organization, and tax returns for the three most recent fiscal years (see Tunick Aff., Ex. D at 11.1[A] and [B]). Moreover, Section 11.1(C) provides:

Any Member shall have the right from time to time at his expense to have his accountants and representatives examine and/or audit the books and records of the Company and the information referred to in this Section, and the Operating Managers will make such books and records and information available for such examinations and/or audits (*id.* at 11.1[C]).

Defendants argue that the Second Cause of Action is "moot" because counsel for Defendants sent a letter to counsel for Plaintiff dated December 30, 2015 offering to provide certain records in exchange for the withdrawal of the Second Cause of Action. Defendant's argument is without merit.

Plaintiff did not accept Defendants' offer. Defendants do not claim to have provided any documents. Hence, Plaintiff's Cause of Action for access to books and records has not been settled or satisfied.

Moreover, Defendants' counsel offered to provide "balance sheets" for three years, tax turns for the same three years, and copies of the expired Ceres lease and the new lease for the Property. There is no claim that the documents that were offered constitute the complete books and records which Pedani is obligated to maintain and make available for inspection.

Defendants' motion to dismiss the Second Cause of action pursuant to CPLR 3211(a)(7) shall be denied.

PLAINTIFF'S THIRD CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

Any member of a limited liability company who engages in management activities takes on the duties and liabilities of a manager (LLCL § 401). A manager of a limited liability company owes a fiduciary duty to the other members of the company (*Nathanson v Nathanson*, 20 AD3d 403 [2d Dept 2005]). Each member owes a fiduciary duty to the others (*Salm v Feldstein*, 20 AD3d 469 [2d Dept 2005]; *Anthoulis v Mastoros*, 2008 WL 8005420 [Sup Ct, Westchester County 2008] [Scheinkman, J.]). "The acts of working in concert and managing a limited liability company clearly gives rise to a relationship among the members which is analogous to that of partners who, as fiduciaries of one another, owe a duty of undivided loyalty to the partnership's interests" (*Willoughby Rehabilitation and Care Center, LLC v Webster*, 2006 NY Slip Op 52067[U], 13 Misc 3d 1230[A] [Sup Ct, Nassau County 2006], *affd* 46 AD3d 801 [2d Dept 2007]; *accord Matter of Marciano v Champion Motor Group, Inc.*, 2007 NY Slip Op 34071[U], 2007 WL 4473342 [Sup Ct, Nassau County 2007]; *Out of the Box Promotions LLC v Koschitzki*, 2007 NY Slip Op 50973[U], 15 Misc 3d 1134[A] [Sup Kings County 2007], *affd* 55 AD3d 575 [2d Dept 2008]). Thus, liability has been imposed upon a member who misused or misappropriated funds of the company (*Finkelman v Greenbaum*, 2007 NY Slip Op 50063[U], 14 Misc 3d 1217[A] at * 4 [Sup Ct, Nassau County 2007] [Austin, J.]). Acts of self-dealing may give rise to liability as well (*Nathanson v Nathanson, supra*). As with officers and directors of a corporation, LLC members "must subordinate their individual and private interests to their duty to the corporation whenever the two conflict. For the violation of such duty, resulting in loss and waste of the corporate assets, they may be made to account in equity to the corporation or to its representatives" (*Winter v Anderson*, 242 AD 430, 431 [4th Dept 1934]; *see also Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568 [1984] ["Directors and majority shareholders of a corporation are 'guardians of the corporate welfare'"]).

The elements of a cause of action for a breach of fiduciary are (a) a breach by a fiduciary of obligations to another; (b) that the defendant knowingly induced or participated in the breach; and (c) that the plaintiff suffered damages³ as a result of the breach (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]; *Gupta v Rubin*, 2001 WL 59237 at * 7 [SD NY 2001]).

The Court holds that Plaintiff has stated a valid cause of action for breach of fiduciary duty. In the Amended Complaint, Plaintiff alleges that Tunick, as a member of Pedani and its Operating Manager, knowingly breached his fiduciary obligations to Plaintiff (a fellow member of Pedani) by, *inter alia*, (a) permitting Ceres to occupy the Property rent free after October 31, 2013; (b) unilaterally terminating the Ceres tenancy at the Property for the

³"The measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit by reason of the faithless fiduciary's conduct" (*105 East Second Street Assoc. v Bobrow*, 175 AD2d 746, 746 [1st Dept 1991]).

benefit of Ceres and to Pedani's detriment; and (c) leasing the Property to a new tenant in June 2015 for inadequate rent (Amended Complaint at ¶¶ 34, 43-44). Plaintiff further alleges that he suffered \$250,000 in monetary damages as a result of Tunick's breach. Because Plaintiff has pleaded all of the required elements of this claim, Defendants' motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) is denied.

In support of the portion of their motion that seeks to dismiss this cause of action based upon documentary evidence pursuant to CPLR 3211(a)(1), Defendants assert that the Third Cause of Action for breach of fiduciary duty is premised upon two theories: (1) that Tunick allowed Ceres to repudiate the lease for the Property and (2) that Ceres was permitted to remain on the Property rent free. Defendants state that as to the first theory, the lease documents attached to their moving papers demonstrate that the lease expired on December 31, 2012. Concerning the second theory, Defendants contend that Ceres did not remain rent free on the Property, but in fact paid expenses such as real estate taxes and insurance, to the benefit of Pedani and Plaintiff.

The documentary evidence that forms the basis of this defense is not such that it resolves all factual issues as a matter of law, and conclusively disposes of the Plaintiff's claim. Indeed, the lease documents attached to the Tunick Affidavit reflect that Pedani's original lease to Ceres dated September 28, 2007 for a portion of the Property had a term ending on September 30, 2012, and by amendment dated September 1, 2011, the parties extended the term through December 31, 2012 (Tunick Aff. at Ex. B). An additional lease dated June 1, 2009 reflects that Pedani leased another portion of the Property to Ceres for a term concluding on December 31, 2010 (*id.*). However, as contended by Plaintiff, this documentary evidence does not prove that there was no agreement in effect at the time of Ceres' vacature from the Property. As such, this evidence does not require dismissal of the Third Cause of action under CPLR 3211(a)(1).

Moreover, to the extent Defendants' argument is based upon the Operating Agreement as documentary evidence pursuant to CPLR 3211(a)(1), the documents do not resolve all factual issues as a matter of law and conclusively disposes of the Plaintiff's claim.

Defendants are correct that there is no obligation in the Operating Agreement affirmatively requiring Tunick to remove Ceres from the Property after its lease ended. However, the lack of a clause in the Operating Agreement imposing this highly specific obligation upon Tunick does not render it impossible for Tunick to have breached his fiduciary duty in connection with Ceres' presence on the Property after the expiration of its written lease. If, as Defendants contend, Plaintiff consented to Ceres' presence on the Property absent a lease, such fact would undercut Plaintiff's breach of fiduciary duty claim. For purposes of this motion and without the benefit of discovery, however, this contention and the Operating Agreement's lack of a specific provision on point do not warrant the dismissal of this claim under CPLR 3211(a)(1).

Indeed, Defendants concede that Ceres remained on the Property until it vacated in or about May, 2014. Surely, Tunick had an obligation to assure that Ceres paid fair market rent or fair market use and occupancy for the period that it was in occupancy of the Premises. Further, Tunick, if not consenting to a sale, had an obligation to re-let the Premises

or, at least, to use reasonable efforts to do so. It is specifically alleged that a new tenant was not brought in until June 2015 and that the rent is below market.

Defendants' motion to dismiss the Third Cause of Action pursuant to CPLR 3211(a)(1) and (a)(7) shall be denied.

PLAINTIFF'S FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

Plaintiff's Fourth Cause of Action alleges that Tunick and Pedani breached Pedani's operating agreement when Tunick sent the Notice of Offer on November 26, 2014, requiring that Plaintiff contribute \$5,000 or his membership interest would have been diluted from 20 percent to 18.67 percent (Amended Complaint at ¶¶ 22; Tunick Aff. at Ex. F). Plaintiff alleges that Tunick lacked authority to authorize this capital call, and that such action was in breach of Section 6.3 of the Operating Agreement, which provides in relevant part that "no Member shall be required to make any additional contributions to the capital of the Company" (Amended Complaint at ¶¶ 23-26; Tunick Aff. at Ex. D). Plaintiff further alleges that even if the capital call had been authorized, the offer price vastly undervalued the Property, and that Plaintiff paid the \$5,000 "under protest" to avoid the dilution of his interest in Pedani and prevent Tunick from increasing his ownership at a discounted rate (Amended Complaint at ¶¶ 27-29). Plaintiff alleges that he suffered \$5,000 in monetary damages as a result of this breach (*id.* at ¶¶ 45-46).

To establish a claim for breach of contract, a plaintiff must prove (1) the existence of a contract, (2) due performance of the contract by plaintiff, (3) breach of the contract by defendant, and (4) damages resulting from the breach (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Coastal Aviation, Inc. v Commander Aircraft Co.*, 937 F Supp 1051, 1060 [SD NY 1996], *affd* 108 F3d 1369 [2d Cir 1997]).

First, with respect to Defendants' motion to dismiss this claim pursuant to CPLR 3211(a)(7), the Court concludes that Plaintiff has stated a valid cause of action for breach of contract. He alleges that the Operating Agreement is a contract among Pedani's members, and that he performed under the contract by, *inter alia*, making a \$5,000 capital contribution as requested by Tunick. Plaintiff alleges that Tunick and Pedani breached Section 6.3 of that agreement by requiring Plaintiff to make the additional capital contribution, which \$5,000 in damages directly resulted from the breach. As such, Defendants' motion to dismiss the fourth cause of action pursuant to CPLR 3211(a)(7) is denied.⁴

As to the documentary evidence argument, Defendants argue that in making the equity offering to raise funds for Pedani's operating expenses, Tunick acted in compliance with his broad authority under Section 5.4 of the Operating Agreement to exercise "all powers and rights necessary, proper, convenient or advisable to effectuate and carry out the purposes, business and objectives of the Company, and to maximize Company profits" (Tunick Aff. at

⁴ Although Defendants did not raise this issue, the Court is skeptical as to whether Plaintiff will ultimately prevail on his breach of contract cause of action as against Pedani, a corporate entity for which Tunick acted as its representative.

Ex. D). Defendants further contend that the Notice of Offer was an optional equity offering and not the type of mandatory capital call that is prohibited by Section 6.3 of the Operating Agreement. Accordingly, Defendants assert that the Operating Agreement, Notice of Offer, and Subscription Agreements constitute documentary evidence that render this claim fatally deficient under CPLR 3211(a)(1) (*id.* at Exs. D, F, G, H).

Although the Court has doubts as to whether this cause of action would survive a post-disclosure motion for summary judgment, the Court cannot now conclude that Defendants' documentary evidence entirely resolves all factual issues as a matter of law and conclusively disposes of Plaintiff's breach of contract claim. As asserted by Plaintiff, Section 6.3 of the Operating Agreement states that "no Member shall be required to make any additional contributions to the capital of the Company," and there are questions of fact as to whether the Notice of Offer effectively required capital contributions from Pedani's members on the threat of dilution of membership interests. Moreover, Plaintiff correctly points out that the Operating Agreement in numerous provisions strictly limits the Operating Manager's authority, such that he or she may not create additional membership interests, and cannot authorize any member's transfer of his or her existing interest absent unanimous member consent (see, e.g., Tunick Aff., Ex. D at 9.1). Furthermore, there is no evidence as to whether the \$25,000 capital infusion was required or that it was a reasonable exercise of business judgment to require it.⁵

Accordingly, the Fourth Cause of Action shall not be dismissed.

CONCLUSION

The Court has considered the following papers in connection with this motion:

- 1) Notice of Motion to Dismiss dated March 1, 2016; Affirmation of Jeffrey N. Levy, Esq. dated March 1, 2016; Affidavit of Nicholas Tunick, sworn to on February 26, 2016, together with the exhibits annexed thereto;
- 2) Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint dated March 1, 2016;
- 3) Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss dated March 17, 2016, together with the attached exhibit; and
- 4) Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Complaint dated March 24, 2016.

Based on the foregoing papers and for the reasons stated, it is hereby

⁵ The Court notes that it has disregarded the purported November 24, 2014 letter from defense counsel referencing a "capital call" that was improperly attached to Plaintiff's memorandum of law and which therefore lacks evidentiary foundation.

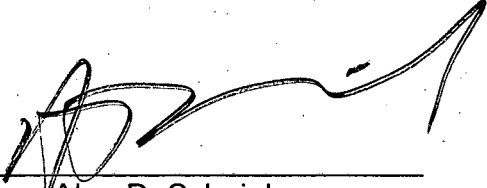
ORDERED that the motion by Defendants Nicholas Tunick, Nicholas Tunick as trustee for the benefit of Nicholas Tunick under agreement dated November 27, 2012, and Pedani Realty Services, LLC, pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the Amended Complaint of Plaintiff David J. Mace shall be, and is hereby, granted to the extent that the First Cause of Action shall be, and hereby is dismissed, and is otherwise denied; and it is further

ORDERED that counsel for the parties shall appear for a Preliminary Conference, one of the purposes of which shall be to establish a schedule for the completion of discovery, to be held on June 3, 2016 at 9:30 a.m., which conference may not be adjourned except upon the prior order of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 23, 2016

ENTER:



Alan D. Scheinkman
Justice of the Supreme Court

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