International Communications Assn., Inc. v 258 St. Nicholas Ave. LLC
2018 NY Slip Op 30252(U)
February 15, 2018
Supreme Court, New York County
Docket Number: 162812/2014
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

INTERNATIONAL COMMUNICATIONS ASSOCIATION, INC.,

Index No.: 162812/2014

DECISION & ORDER

Plaintiff,

-against-

258 SAINT NICHOLAS AVENUE LLC, JOHN CROSS, CROSS CONSTRUCTION CO., INC., 123RD STREET PARTNERS LLC, and BANK OF AMERICA, N.A.,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Defendants John Cross (Cross), Cross Construction Co., Inc. (Construction), and 123rd Street Partners LLC (Partners) (the Cross Parties), along with nominal defendant 258 Saint Nicholas Avenue LLC (the Company),[1] move, pursuant to CPLR 3212, for summary judgment against plaintiff International Communications Association, Inc. (ICA).[2] ICA opposes the motion. For the reasons that follow, defendants' motion is granted in part and denied in part.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.

ICA, a New York not-for-profit corporation, is the former owner of real property located at 258 St. Nicholas Avenue, which is on West 123rd Street in Manhattan (the Property). In

[1] Though listed in the caption as a defendant, as discussed herein, the Company is only a nominal defendant on what are really derivative claims for corporate waste. Below, and as addressed at oral argument, ICA is granted leave to amend its pleadings to conform to the proof and to assert the proper causes of action. A new caption to be used in that amended pleading also is provided below.

[2] ICA does not assert any causes of action against Construction or Bank of America, N.A. (the latter of which apparently was never validly served). For this reason, the action is dismissed as against these two defendants.

2002, ICA sought to replace an abandoned warehouse on the Property with a residential building. However, due to a restrictive covenant encumbering the Property, a portion of the new building had to be used by a non-profit to benefit the Harlem community. In February 2002, ICA entered into a contract with Construction to develop the property into a residential building that would have commercial and not-for-profit space. *See* Dkt. 137.[3] In April 2002, during construction, the warehouse roof collapsed. This incident, without getting into irrelevant detail, exposed ICA to significant liability that resulted in ICA filing for bankruptcy in December 2003. In January 2004, Cross, the principal of Construction, formed the Company, a New York LLC, for the purpose of acquiring ICA's assets in the bankruptcy proceedings. In February 2004, the bankruptcy court approved the sale of ICA's assets, including the Property, to the Company for approximately $3.6 million.

The Company is governed by an operating agreement dated February 12, 2004. *See* Dkt. 142 (the Operating Agreement). The Company's purpose, set forth in section 3 of the Operating Agreement, was to "acquire, rehabilitate and develop" the Property (which the Operating Agreement defines as the "Project"). *See id.* at 2. Partners, an LLC also owned by Cross, was the Company's managing member and Manager; it owns 70% of the Company's membership interests. *See id.* at 3.[4] Section 7 of the Operating Agreement provides that Partners "shall determine when distributions shall be made and the amount thereof" and that "[a]ny such

[3] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

[4] The scope of Partners' duties as Manager is set forth in section 8. *See* Dkt. 142 at 5-7. It should be noted that section 8.9 contains a classic exculpatory clause limiting Partners' liability to the Company and its members to acts amounting "to gross negligence, willful misconduct or fraud." *See id.* at 7.

amounts **shall be distributed** to the Members **in accordance with their respective interests** as set forth in Section 5.1." *See id.* at 5 (emphasis added).[5]

The remaining 30% of the Company originally was owned by non-party Harlem Institute of Culture and Art, Inc. (HICA), a not-for-profit corporation controlled by the same individuals as ICA. Under section 8.6, HICA was to operate the community space in the Property's cellar as a not-for-profit to comply with the discussed restrictive covenant. *See id.* at 6. Section 8.6 also grants HICA the right to purchase the cellar for $1 if the Project is developed as a condominium. *See id.* Similarly, in section 8.7, Partners is given the right to purchase a 900-square-foot penthouse condominium unit. *See id.*

Section 5.2 sets forth the members' obligations that would serve as their capital contributions. Partners' obligations are listed in section 5.2(a):

> Partners shall provide its expertise as a developer of residential housing in the community in which the [Property] is located. Partners (i) agrees to make available to the Company the loan described in Section 5.7 below; (ii) draft a proposed budget for the pre-construction phase of the Project; (iii) provide equity to close a construction mortgage loan for the Project; and (iv) provide letters of credit as required by any lender or other participant in the Project.

Dkt. 142 at 3.

HICA's obligations are set forth in section 5.2(b):

> HICA shall within two (2) months of [Partners'] loan of seed money described in Section 5.7 below: (i) cause the reinstatement and assumption by the Company of a certain Member Item Grant in the amount of $250,000 previously made available to [ICA] through the New York State Assembly and known as the "Keith Wright Grant"; (ii) cause the reinstatement and assumption by the Company of a certain loan commitment made by the Empire State Development Corporation to I.C.A./Cross, LLC for below market interest rate financing of the Project in the amount of $1,290,000; and (iii) assume and solely guaranty a

[5] While this section gives Partners direction about the timing and amount of distributions, it requires all distributions to be made to all members on a *pari passu* basis. Nothing in section 7 permits distributions to be made to non-members.

> certain loan commitment made to ICA by Upper Manhattan Empowerment Zone in the principal amount of $450,000 for the development of the Community Facility Space described in Section 8.6 hereof.

Id.[6] Section 11 provides that if HICA does not comply with section 5.2(b)(i) or (ii), "the Company shall cancel HICA's Membership Interest ... and issue [it] to a not-for-profit entity which the Members holding a majority of the Interests believe could obtain such grant and/or financing." *Id.* at 8.

Five months after the Operating Agreement was executed, on July 15, 2004, Cross, HICA, and ICA executed a written consent pursuant to which Partners' replaced HICA with ICA as the "not-for-profit" member of the Company that would "assume all of the rights, privileges and obligations of HICA under the [Operating Agreement.]" *See id.* at 11. In December 2004, when the Company obtained new financing, Partners and ICA executed an amendment to the Operating Agreement. *See* Dkt. 143 (the Amendment).[7]

Section 8 of the Amendment provides that "[e]xcept as otherwise provided herein, the [Operating] Agreement remains in full force and effect, unmodified." *See id.* at 2. The

---

[6] Section 5.7, referenced in section 5.2, provides:

> Partners shall lend to the Company "seed money" for the development of the [Property], which loan shall be repaid with interest at the rate of two (2%) percent above the prime rate of interest charged from time to time by the Chase Manhattan Bank, such interest to begin to accrue twelve months after the loan is made. Such loan, together with accrued interest. shall be repaid prior to the distribution of any profits hereunder. Each Member may loan additional funds to the Company on such terms as the Members shall unanimously approve, it being the intention of the Members that any such loans shall only be made to the extent reasonably necessary.

Id. at 4.

[7] As set forth in the Amendment's whereas clauses, the Company obtained a $16.29 million construction loan from Bank of America and a loan of approximately $3.7 million from the Enterprise Social Investment Corporation.

Amendment, however, contains two relevant modifications of the Operating Agreement, the first of which is in section 2:

> Since the Upper Manhattan Empowerment Zone loan of $450,000 referenced in Section 5.2(b) of the [Operating] Agreement is not being made available to the Company, and, *inter alia*, not being guaranteed by ICA, the first $450,000 of distributions which would otherwise be made to ICA shall be made to Partners.

Id. at 1. The second change is in section 3, which provides:

> In the event the Member Item Grant of $250,000 referenced in Section 5.2(b) of the [Operating] Agreement is at any time withdrawn or otherwise not available to the Company, the first $250,000 of distributions after those referred to in paragraph 2 above which would otherwise be made to ICA shall be made to Partners.

Id.

Cross then proceeded to develop the Property, which included 52 residential condominium units. Most of these units were either sold or rented by 2008. Pursuant to section 8.6 of the Operating Agreement, ICA exercised its option to purchase the cellar. Partners also purported to exercise its option under section 8.7, but, as the record reflects, instead of taking possession of the 900-square-foot unit permitted by section 8.7, Partners took possession of a 1,954-square-foot penthouse unit and did not pay for it. Cross has been living in that unit without paying any rent. ICA also claims that since 2008, Cross has caused Partners to be paid distributions from the Company that far exceed its share. ICA has submitted evidence that it received far less than its 30% share of the sale proceeds on the sale of the condominium units. *See* Dkt. 167 at 9. Additionally, ICA submits evidence that Cross has been stealing from the Company, for instance, by paying his wife and affiliated businesses distributions, although they provided no services to the Company. *See id.* at 14.

ICA commenced this action on December 30, 2014 and filed an amended complaint on March 18, 2016. *See* Dkt. 64 (the AC). The AC asserts five direct causes of action: (1) conversion;[8] (2) an accounting of the Company from Cross;[9] (3) injunctive relief; (4) unjust enrichment against Cross; and (5) partition.[10] On April 7, 2016, defendants filed an answer to

---

[8] As discussed herein, this claim (along with the fourth cause of action) requires repleading breach of contract and breach of fiduciary duty as derivative claims. The Company, which ICA now concedes should not have been named as an actual defendant on its claims (and which is omitted from the above list), shall be named as a nominal defendant on ICA's derivative claims (which presumably should also include Partners as a defendant). Thus, the plaintiff will bring both direct claims on its own behalf and derivative claims on behalf of the Company. ICA is reminded about the requirement of pleading demand futility with particularity, though that should not be difficult in this case. *See Bansbach v Zinn*, 1 NY3d 1, 9 (2003); *Marx v Akers*, 88 NY2d 189, 193 (1996); *In re Comverse Tech., Inc.*, 56 AD3d 49, 53 (1st Dept 2008) ("The complaint must allege with particularity that '(1) a majority of the directors [here, the managing member] are interested in the transaction, or (2) the directors [here, the managing member] failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors [here, the managing member] failed to exercise their business judgment in approving the transaction.'"). ICA also must also be mindful of pleading a non-exculpated claim pursuant to section 8.9 of the Operating Agreement. That said, ICA's most important claim is not actually pleaded – a direct claim against Partners for breach of the Operating Agreement for improper allocation of distributions. This also should be fixed. These amendments, as discussed at oral argument, are being permitted in the interest of justice and due to the lack of prejudice to defendants given the clear record of their wrongdoing. Defendants cannot claim surprise as all of the claims have been the subject of discovery. ICA will not be permitted to serve a further expert report, as that request was denied by order dated June 9, 2017. *See* Dkt. 127 (breakdown of relationship with expert not valid basis for serving new report with new opinions, but new expert witness may be called at trial, who will be limited to testifying to opinions in original report). The new pleading will not affect the scope of fact or expert discovery, but will merely permit the pleading to set forth the proper direct and derivative causes action. The case will promptly proceed to trial after such pleadings are filed.

[9] By order dated January 27, 2016, the court held that the time period for the accounting would begin on December 30, 2008. *See* Dkt. 50 at 2. ICA was permitted to seek an accounting from an earlier dated only if it provided proof, by February 19, 2016, that it made a demand for an accounting earlier than December 30, 2014 (i.e., due to the applicable six-year statute of limitations). It never did so and no such earlier date of a specific demand for an accounting is alleged in the AC. In June 2016, ICA was provided with an accounting for the period January 2009 through May 2016. *See* Dkt. 155. ICA served objections. *See* Dkts. 73 & 84.

[10] By order dated June 9, 2016, the court dismissed the partition claim. *See* Dkt. 70.

the AC that asserts the following counterclaims against ICA: (1) myriad breaches of the Operating Agreement; (2) failure to make the required capital contributions under section 5.2(b); and (3) conversion. *See* Dkt. 66. As a remedy for the second counterclaim, defendants seek to terminate ICA's membership interest in the Company under section 11 of the Operating Agreement. *See id.* at 11.[11] After the completion of discovery and the filing of a Note of Issue, defendants filed the instant motion for summary judgment on June 28, 2017.[12] The court reserved on the motion after oral argument. *See* Dkt. 184 (12/5/17 Tr.)

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated*

[11] As discussed herein, while there are questions of fact regarding whether section 11 still governs, there is no question that ICA's membership interest had not been terminated at the time defendants allegedly failed to pay ICA its full share of the condominium sale profits. Therefore, the possible termination of ICA's membership interest in this action will not affect its right to seek to recover that money by way of a direct claim for breach of contract. However, the termination of ICA's membership interest may deprive ICA of standing to prosecute its derivative claims for waste. *See Rubinstein v Catacosinos*, 91 AD2d 445, 446 (1st Dept 1983) ("It is settled law that a plaintiff stockholder in a stockholder's derivative action loses his right to continue to prosecute the action if he ceases to be a stockholder."), *aff'd* 60 NY2d 890 (1983); *see also People v Grasso*, 54 AD3d 180, 192 (1st Dept 2008).

[12] While ICA did not cross-move for summary judgment, it requests to be granted partial summary judgment on some of its claims in its papers. Although the court can overlook certain procedural irregularities [*see Washington Realty Owners, LLC v 260 Washington St., LLC*, 105 AD3d 675 (1st Dept 2013)], here, where ICA neither pleaded the correct causes of action (a direct claim for breach of contract and derivative claims for breach of contract and breach of fiduciary duty) and failed to affirmatively move for summary judgment, the court will not consider ICA's informal request for summary judgment. The court has reservations about granting summary judgment on an unpleaded derivative claim, especially where neither demand futility nor the exculpatory clause are addressed in the AC.

Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The Cross Parties argue they should be granted summary judgment on their second counterclaim because ICA did not provide the Company with the $250,000 Keith Wright Grant, as required by section 5.2(b)(i) the Operating Agreement.[13] There is no question of fact that ICA did not do so. Indeed, "when ICA finally did obtain the grant funds … it did not provide those funds to [the Company], and appears to have instead pocketed the money for itself." *See* Dkt. 132 at 24. The Cross Parties, consequently, seek to cancel ICA's membership interest under section 11. ICA admits that section 11, on its face, permits cancellation under these circumstances. *See* Dkt. 166 at 10. However, ICA argues that the Amendment "resolved all issues with regard to [ICA's] capital contribution obligation." *See id.* at 9. Paragraph 3 of the

[13] While the parties' briefs tangentially address section 5.2(b)(ii) & (iii), the Cross Parties' reply brief clarifies they are not seeking summary judgment based on such sections. *See* Dkt. 181 at 7.

Amendment addresses what would happen if the $250,000 "is at any time withdrawn or otherwise not available to the Company" – namely, that Partners would get an additional $250,000 in distribution priority. *See* Dkt. 143 at 1. ICA avers that section 3 of the Amendment governs the ramifications of its breach of section 5.2(b)(i) of the Operating Agreement, and, thus, it amended section 11 of the Operating Agreement. The Cross Parties respond that the Amendment does not expressly state that it was displacing section 11 and note section 8 of the Amendment states that "[e]xcept as otherwise provided herein, the [Operating] Agreement remains in full force and effect, unmodified." *See id.* at 2.

The parties' dispute centers on whether they intended section 3 of the Amendment to be the sole remedy for ICA's breach or whether it created an additional remedy on top of section 11. To resolve this dispute, this court must first determine if the parties' intent can be ascertained from the plain meaning of the Operating Agreement and the Amendment. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002). These agreements must be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003).

If, as the Cross Parties contend, ICA's breach of section 5.2(b)(i) would result in forfeiture of ICA's interest in the Company, one might wonder why the parties would also agree that such breach would entitle Partners to additional distribution priority. If section 11 left Partners as the sole remaining member of the Company, then section 3 would be superfluous (i.e., why care about priority if there is only one member?). But, section 11 does not simply provide for ICA to lose its membership interest, but rather section 11 also requires that interest to

be issued to another "not-for-profit entity ... [that] could obtain such grant and/or financing." *See* Dkt. 142 at 8. Hence, section 11 of the Operating Agreement and section 3 of the Amendment can be reconciled, as the replacement member would be subject to Partners' distribution priority under section 3.

Nonetheless, that such sections can be reconciled does not mean the parties did not actually intend, as ICA avers, to replace section 11 with section 3. *See* Dkt. 166 at 11. It is plausible that they intended to do so because both sections seemingly address the consequences of ICA's breach of section 5.2(b)(i). "It is well settled that where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement." *Northville Indus. Corp. v Fort Neck Oil Terminals Corp.*, 100 AD2d 865, 867 (2d Dept 1984) (citation and quotation marks omitted), *aff'd*, 64 NY2d 930 (1985). This principle, however, is not obviously applicable here, as it is not clear if section 3 was meant to replace or to supplement section 11. The court cannot ignore the fact that the Amendment does not mention section 11, let alone provide that it no longer applies.

Hence, the court concludes that section 3 is ambiguous. *See Ellington v EMI Music, Inc.*, 24 NY3d 239, 250 (2014) ("[a]mbiguity exists when, looking within the four corners of the document, the terms are reasonably susceptible of more than one interpretation."). Ambiguous contracts usually cannot be construed as a matter of law on a motion for summary judgment. *NFL Enterprises LLC v Comcast Cable Commc'ns, LLC*, 51 AD3d 52, 61 (1st Dept 2008); *see LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307 (1st Dept 2007) ("Since [the] agreement is reasonably susceptible to more than one interpretation, and the difficulty is not resolved by

reading the agreement as a whole, the provision is ambiguous and neither side is entitled to summary judgment construing it as a matter of law."). However, the court may grant summary judgment if the extrinsic evidence "resolve[s] the ambiguity." *Kolbe v Tibbetts*, 22 NY3d 344, 355 (2013). Here, the parties have not pointed to any evidence that clearly reveals the parties' intent regarding section 3. As a result, summary judgment is denied. That said, as noted earlier, since there is no question of fact that the Cross Parties never purported to cancel ICA's membership interest under section 11 prior to this action, the only ramifications in this action of ICA losing its membership interest will be the loss of its standing to prosecute its derivative claims. ICA, no matter what, will be permitted to seek recovery on its direct claim for breach of the Operating Agreement based on underpayment on the sale of the condominium units.

Next, the Cross Parties seek summary judgment on ICA's conversion claim. Summary judgment is granted. This claim is based on the Cross Parties' theft from the Company, a classically derivative claim which should have been styled as one for breach of fiduciary duty or breach of the Operating Agreement.[14] Unlike conversion, such a claim would not be time-barred

---

[14] The First Department has adopted Delaware's *Tooley* test for determining whether a claim is direct or derivative. *Yudell v Gilbert*, 99 AD3d 108, 114 (1st Dept 2012); *see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004). For a claim to be direct, "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder ***and that he or she can prevail without showing an injury to the corporation***." *Id.* (emphasis added). "Thus, under *Tooley*, a court should consider '(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).'" *Id.*; *see NAF Holdings, LLC v Li & Fung (Trading) Ltd.*, 118 A3d 175, 180 (Del 2015) (an "important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?"). "[E]ven where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand." *Serino v Lipper*, 123 AD3d 34, 40 (1st Dept 2014). A claim based on theft from a company, which makes the company less valuable, cannot be maintained as a direct cause of action because "[t]he lost value of an investment in a corporation is quintessentially a derivative claim." *Id.* at 41.

because "the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role." *Access Point Med., LLC v Mandell*, 106 AD3d 40, 45 (1st Dept 2013), citing *In re Barabash's Estate*, 31 NY2d 76, 80 (1972); *see Herman v 36 Gramercy Park Realty Assocs., LLC*, 131 AD3d 422 (1st Dept 2015).[15] Partners, which remains the Company's managing member, continues to owe ICA and the Company fiduciary duties. *See Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). ICA may replead to assert the proper causes of action. While Partners' conduct might amount to a breach of fiduciary duty, since Partners' right to some of the assets taken are expressly governed by the Operating Agreement (e.g., the penthouse), a derivative claim for breach of contract is the proper cause of action with respect to these defalcations. *See Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004). Likewise, as the Operating Agreement and Amendment govern the parties' rights, ICA cannot maintain a claim for unjust enrichment. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

The Cross Parties, however, are not entitled to summary judgment on their accounting claim because they have not shown that all of ICA's objections lack merit.[16] There is evidence

---

[15] While academic, the court notes that the portion of the conversion claim concerning real property (i.e., the penthouse) is infirm. *See B & C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 656 (1st Dept 2013).

[16] The court notes that the December 2008 starting point for the accounting is not ultimately all that relevant since any breaches of fiduciary duty at issue in this action that may have accrued prior to that month are still actionable and timely by virtue of Partners' continued status as the fiduciary of the Company and ICA (which, as noted, tolls the statute of limitations). Although, the court will not require the Cross Parties to further account, they are not absolved of liability merely because an established breach of fiduciary duty may not be within the scope of the accounting. The claims in ICA's forthcoming amended pleading will be timely under the relation back rule, as the prior pleadings put the Cross Parties on fair notice of the transactions giving rise to the claims. CPLR 203(f); *see Giambrone v Kings Harbor Multicare Center*, 104 AD3d 546, 547 (1st Dept 2013).

that Cross caused the Company to make many payments that appear improper and for which he provides no justification that could pass muster under either business judgment or entire fairness review, the latter of which applies to payments to his wife and related companies and his living rent free in a penthouse different from that permitted by section 8.7. *See Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 570 (1984); *SantiEsteban v Crowder*, 92 AD3d 544, 546 (1st Dept 2012). Moreover, ICA disputes the Cross Parties' contention that the amount paid to ICA based on the profit on the condominium sales was accurate. ICA explains that the sales generated more than $36 million, resulting in approximately $12.6 million in net revenue booked by the Company. *See* Dkt. 166 at 24. A 30% share for ICA would be approximately $3.8 million. It is undisputed that only $1.5 million was distributed to ICA. *See* Dkt. 133. One of ICA's shareholders also contends that Cross told him that this was only a "partial payment." *See* Dkt. 167 at 9. ICA claims it is owed the balance of approximately $2.3 million. Partners does not meaningfully address these arguments in reply. *See* Dkt. 181 at 17. Summary judgment on these issues is denied. The court also will not address the parties' experts' competing opinions on whether the Company's accounting of its profits was accurate and consistent with the Operating Agreement, as such disputes must be resolved by the finder of fact. *Mazella v Beals*, 27 NY3d 694, 708 (2016); *see Manswell v Montefiore Med. Ctr.*, 144 AD3d 564, 565 (1st Dept 2016) ("Defendant's remaining criticisms of plaintiff's expert opinion are likewise unavailing, as they merely highlight issues of fact and credibility for the jury to resolve.").

Finally, ICA's claim for permanent injunctive relief regarding Partners' governance of the Company is denied because ICA has not made any showing that it lacks "an adequate remedy at law." *Lemle v Lemle*, 92 AD3d 494, 500 (1st Dept 2012). All of the possible wrongdoing

about which ICA professes concern could be remedied with monetary relief. *See Borress & Borress LLC v CSJ LLC*, 27 AD3d 287, 288 (1st Dept 2006). Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted only to the extent that ICA's first (conversion), third (injunctive relief), and fourth (unjust enrichment) causes of action are dismissed, and their motion is otherwise denied; and it is further

ORDERED that this action is dismissed as against defendants Cross Construction Co., Inc. and Bank of America, N.A.; and it is further

ORDERED that that within two weeks of the entry of this order on NYSCEF, ICA shall file an second amended complaint consistent with this opinion that asserts the following causes of action: (1) a direct claim for an accounting; (2) a direct claim for breach of the Operating Agreement (failure to properly make *pari passu* distributions); (3) a derivative claim for breach of the Operating Agreement (e.g., takings inconsistent with the contract, such as the penthouse); and (4) a derivative claim for breach of fiduciary duty (waste, such as improper payments to Cross' wife); and it is further

ORDERED that defendants shall file an answer to the second amended complaint within two weeks thereafter; and it is further

ORDERED that this action shall now bear the following caption:

----------X

INTERNATIONAL COMMUNICATIONS ASSOCIATION, INC., on its own behalf and on behalf of 258 Saint Nicholas Avenue LLC,

Index No.: 162812/2014

Plaintiff,

-against-

JOHN CROSS and 123RD STREET PARTNERS LLC,

Defendants,

-and-

258 SAINT NICHOLAS AVENUE LLC,

Nominal Defendant.

----------X

And it is further

ORDERED that a telephone conference will be held on March 29, 2018, at 3:00 pm, to discuss the scheduling of a pre-trial conference.

Dated: February 15, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C