Miller v Suky
2018 NY Slip Op 31374(U)
June 27, 2018
Supreme Court, New York County
Docket Number: 652235/2014
Judge: Jennifer G. Schecter

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

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MILLER, HAVAZELET, derivatively on behalf of nominal defendants MADISON HOTEL OWNERS LLC and MADISON HOTEL LLC,

Index No.: 652235/2014

Plaintiff,

DECISION & ORDER

-against-

SUKY, BENZION and BEN MUHA, JOSEPH,

Defendants,

-and-

MADISON HOTEL OWNERS LLC and MADISON HOTEL LLC,

Nominal Defendants.

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JENNIFER G. SCHECTER, J.:

Motion sequence numbers 007 and 008 are consolidated for disposition. Defendant Benzion Suky moves, pursuant to CPLR 3211, to dismiss the claims asserted against him in plaintiff Havazelet Miller's second amended complaint (SAC) (seq. 007). Defendant Joseph Ben Muha (Benmoha,[1] with Suky, the Individual Defendants) separately moves, pursuant to CPLR 3211, to dismiss the claims asserted against him in the SAC (seq. 008). Plaintiff opposes both motions. For the reasons discussed below, defendants' motions are granted, with leave for plaintiff to file a third amended complaint.

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[1] According to defendant Joseph Benmoha, plaintiff has misspelled his last name as "Ben Muha" (*see* Dkt. 135 [Benmoha Aff.]). This decision adopts defendant's spelling. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the SAC (Dkt. 123), Miller's affidavit (Dkt. 139), documentary evidence submitted by the parties and public records.

This case arises from Miller's $375,000 investment in one or both nominal defendants, New York LLCs Madison Hotel LLC (Hotel) and Madison Hotel Owners LLC (Owners). Owners is a member of Hotel. According to operating agreements submitted by the Individual Defendants, Owners is member-managed by New York LLC 62 Madison Partners LLC (Partners), which is member-managed by defendants Benmoha and Suky. Articles of Organization were filed for Hotel on December 12, 2007 and for Owners on July 8, 2008 (*see* NYS Department of State Divisions of Corporations Corporation and Business Entity Database, *available at* https://appext20.dos.ny.gov/corp_public/corpsearch.entity_search_entry [accessed June 12, 2018]). From approximately mid-2008 to until at least 2011, Hotel owned property located at 26 Madison Avenue in Manhattan (the Property) that operated as a hotel. Neither Owner nor Hotel presently hold substantial assets or conduct substantial business.

On April 4, 2008, plaintiff issued a $375,000 check to Hotel (the $375,000 Payment), which posted on April 7, 2008 (SAC ¶ 9; Dkt. 151 [bank record and check]). The SAC alleges that this payment rendered Miller a member of Hotel (SAC ¶ 9). Thereafter, Miller was also made a "limited member" of Owners (SAC ¶ 10). The SAC identifies the Individual Defendants as members and/or managing members of Hotel and Owners, and Owners as Hotel's ***sole*** member (SAC ¶¶ 8, 34).

The SAC alleges monetary transfers by Hotel and Owners—including loans charging below-market interest, donations, fees and expenses—to the Individual Defendants, to entities affiliated with them and to vendors supplying goods and services to the Individual Defendants'

other real estate projects (SAC ¶¶ 11-32). Plaintiff also submits purported financial records from Hotel corroborating and clarifying certain details relating to the alleged transfers (Dkt. 145 [financial records]; Miller Aff. ¶ 11).[2] More specifically, plaintiff alleges:

- a $50,000 donation to Suky from Hotel and Owners on April 4, 2008 (SAC ¶ 11; Dkt. 145);
- a $50,000 donation to Benmoha from Hotel and Owners on April 4, 2008 (SAC ¶ 11; Dkt. 145);
- loans totaling up to[3] $425,000 from Hotel and/or Owners between April 9 and June 26, 2008 to East 81st LLC, in which Benmoha and Suky allegedly had a vested interest or an affiliation (SAC ¶¶ 12, 22, 24; Dkt. 145);
- a $600,000 "return of loan" to Benmoha from Hotel on April 30, 2008 (SAC ¶ 13; Dkt. 145);
- loans totaling $35,000 to Suky from Hotel and Owners between May 29 and June 10, 2008 (SAC ¶¶ 18-19; Dkt. 145);
- loans totaling $45,000 to Suky from Hotel between June 16 and July 11, 2008 (SAC ¶¶ 23, 25; Dkt. 145);
- loans totaling $35,000 to Suky between August 19 and August 22, 2008, recorded in Madison Hotel LLC's financial records (SAC ¶¶ 28-29; Dkt. 145);
- loans totaling $40,000 on May 2, 2008 (from Hotel) and June 13, 2008 (from Hotel and Owners) to Direct Realty LLC, an alleged affiliate of Benmoha [4] (SAC ¶¶ 14-15, 22; Dkt. 145);
- a $45,000 payment by Hotel to Wall Time Realty LLC on May 12, 2008, allegedly connected to a building located at East 81st Street in which Benmoha and Suky allegedly had a vested interest or an affiliation (SAC ¶¶ 16-17; Dkt. 145);

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[2] Plaintiff also submits, with minimal explanation (*see* Miller Aff. ¶ 20), "Further Financial Records" that include handwritten notes (Dkts. 146-149). The court will not address these.

[3] The SAC and Miller's affidavit state that $50,000 of these loans were provided on February 9 and 17 (i.e., before the $375,000 Payment), but the financial records submitted by plaintiff (Dkt. 145) specify April 2008 dates.

[4] Benmoha denies any relationship with East 81st LLC, Wall Time Realty LLC or Direct Realty LLC (Dkt. 134 [Benmoha Aff.] ¶ 14).

- loans totaling $13,400 from Hotel and Owners to Devora Klein on June 13, 2008, allegedly connected to an East 81st Street building in which Benmoha and Suky allegedly had a vested interest or an affiliation (SAC ¶¶ 20-21; Dkt. 145);
- a $1,000,000 transfer from Hotel on July 14, 2008 (SAC ¶ 26; Dkt. 145);
- a $625,000 transfer from Hotel on August 13, 2008 (SAC ¶ 27; Dkt. 145); and
- $3,000,000 in undated personal loans by the Individual Defendants "against the Hotel," $1,800,000 of which they were reportedly authorized to retain under the bankruptcy proceeding (SAC ¶ 30; Miller Aff. ¶ 19; Dkt. 145).

The Individual Defendants submit two operating agreements: an "Amended and Restated Limited Liability Operating Agreement of Madison Hotel Owners LLC," dated August 25, 2008 (Owners Agreement) (Dkt. 129 at 1-46; Dkt. 130 at 9-13);[5] and an "Amended and Restated Operating Agreement of Madison Hotel LLC" also dated August 25, 2008 (Hotel Agreement, with Owners Agreement Agreements) (Dkt. 130 at 1-8).[6] Both Agreements are governed by New York law (*see id.* at 6, 10) and were signed by Benmoha and Suky in their capacity as Partners' managing members (and in the Hotel Agreement, on Owners' behalf) (*id.* at 8, 13).[7]

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[5] Working copies of defendants' motion papers that were provided to Chambers attach Dkt. 129, consisting of 46 pages, to pages 9-14 of Dkt. 130.

[6] Plaintiff submits an undated and unexecuted "portion" of Hotel's operating agreement (Miller Aff. ¶ 10; Dkt. 144 [Miller Ex. 4]).

[7] Defendants also submit an undated document styled "Madison Hotel Owners LLC – Limited Member Signature Page" bearing the signature of "Chavi Miller," stating as follows:

> The undersigned acknowledges and agrees to the terms and conditions of this Operating Agreement of Madison Hotel Owners LLC, and is by execution hereof admitted as a Limited Member of said Company, credited with a capital contribution and holding a percentage membership as set forth on Exhibit A hereto. This signature page may be affixed to a duplicate copy of the Operating Agreement, along with all other signatures pages, to form a single fully executed agreement.

(Dkt. 130 at 14). This document's status and effect are not addressed by this decision because defendants refer to it only tangentially, in attorney argument and on reply (*see* Dkt. 165 [Ishimbayev Reply Aff.] ¶ 7 ["Plaintiff is precluded by the operating agreement from bringing this action, an agreement that Plaintiff has actually signed"]). "Exhibit A" was not provided.

The Hotel Agreement refers to, and purports to amend and restate, an original operating agreement effective as of February 22, 2008 (Dkt. 130 at 1). The Hotel Agreement states its purpose, among others, "to add and make Madison Hotel Owners LLC as the sole and only member of the Company" (*id.*). Under § 6, Hotel is managed by its Owners, its "sole member" and to whom the Hotel Agreement refers as the "Member" (*id.* at 2, 3). Section 12(a) states:

> None of the Member, any authorized person or any employee, representative, agent or Affiliate of the Company (collectively, the "Covered Persons") shall, to the fullest extent permitted by law, be liable to the Company or any other Person that is a party to or is otherwise bound by this Agreement for any loss, damage or claim incurred ***by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement.***

(Dkt. 130 at 4 (emphasis added)). Further, under § 12(e), "a Covered Person acting under this Agreement shall not be liable to the Company or to any other Covered Person for its good faith reliance on the provisions of this Agreement or any approval or authorization granted by the Company or any other Covered Person" and "[t]he provisions of this Agreement, to the extent that they restrict the duties and liabilities of a Covered Person otherwise existing at law or in equity, are agreed by the Member to replace such other duties and liabilities of such Covered Person" (*id.* at 5). An "Affiliate" of Hotel is defined as any person or entity "directly or indirectly Controlling or Controlled by or under direct or indirect common Control with" Hotel (*id.* at 2). "Control" is defined as the direct or indirect "ability … to direct or cause the direction of the management and policies" of a person or entity (*id.*).

The Owners Agreement acknowledges Owners as the "sole and only member" of Hotel, declaring that prior to the date of the agreement, Partners was sole member of Owners (Dkt. 129 at 1, 11). It appoints Partners as Owners' managing member (*id.* at 1, 7, 17). The Owners Agreement contemplated that, not later than August 29, 2008, Hotel would acquire title to the

Property (the Closing) and the individuals or entities listed in Exhibit A to the Agreement would become members of Owners, or else all initial capital contributions were to be returned, pursuant to § 2.7, to the (would-be) members (*id.* at 5, 11, 12).

Pursuant to § 6.1 of the Owners Agreement, Partners "shall have ***fiduciary responsibility for the safekeeping and use of all of the Company's funds and assets***, whether or not in its possession or control, and the Manager shall not employ, or permit another person to employ such funds or assets in any manner ***except for the exclusive benefit of the Company***" (Dkt. 129 at 17 (emphasis added)). Section 6.3(a)(x) permits Partners to take any action or task consistent with Owners' or Hotel's purpose and the terms of the Hotel Agreement (*id.* at 10, 19). Pursuant to § 6.3(b)(xxv), Partners is prohibited, unless approved to do so by each of limited members holding a membership interest of 12% or greater as of the date of the Owners Agreement, from

> caus[ing] or otherwise permit[ting] the Company or the Subsidiary LLC to enter into ***any transaction, business dealing, contract, loan or other arrangement with a Manager, any of its Affiliates, Josef Moha and/or Benzion Suki***, and any immediate family member of Josef Moha and/or Benzion Suki, except for any Capital Contribution made by the Manager pursuant to Section 4.3, the fee agreement with Livorno Properties described in Section 6.2 and Finance Guarantees described in Section 6.9[.]

(*id.* at 21 (emphasis added); *see id.* at 10, 19). Under § 6.6, however:

> ***No Manager*** or officer, representative, member or agent of Manager ***shall be liable***, responsible, or accountable, in damages or otherwise, to any Member or to the Company ***for any act*** performed by such Manager ***within the scope of the authority conferred*** on the Manager ***by this Agreement, except for fraud, bad faith, gross negligence, or an intentional breach*** of this Agreement.

(*id.* at 24 (emphasis added)).

In May 2011, Owners and Hotel filed for Chapter 11 bankruptcy (*In re Madison Hotel, LLC*, Case No. 11-12560 [Bankr SDNY May 27, 2011] (*Hotel Bankruptcy*); *In re Madison Hotel Owners, LLC*, Case No. 11-12334 [Bankr SDNY May 16, 2011] (*Owners Bankruptcy*, with

Hotel Bankruptcy, Bankruptcies)). Suky signed the petitions on behalf of Owners and Hotel as Partners' managing member. In October 2013, substantially all of Hotel's assets were sold pursuant to the bankruptcy court's May 8, 2013 plan in *Hotel Bankruptcy*, yielding nothing for Owners (Motion to Dismiss at 4, *Owners Bankruptcy* [Bankr SDNY Apr. 20, 2015], ECF No. 170). In May 2015, *Owners Bankruptcy* was dismissed because its interest in Hotel—a "defunct entity without assets"—was Owners' sole asset (*id.* at 3; Order Dismissing Chap. 11 Case, *Owners Bankruptcy* [Bankr SDNY May 14, 2015], ECF No. 173). *Hotel Bankruptcy* was closed in April 2016 (Final Decree, *Hotel Bankruptcy* [Bankr SDNY April 29, 2016], ECF No. 303).

On July 22, 2014, represented by prior counsel, plaintiff commenced the instant action, alleging causes of action against the Individual Defendants for breach of contract, quantum meruit, negligence, breach of fiduciary duty and fraud (Dkts. 1-2). Plaintiff's prior counsel purported to withdraw[8] on June 8, 2016 by an attorney affirmation that Miller never signed (Dkt. 20). On June 9, 2015, pursuant to a stipulation between the parties (Dkt. 19), plaintiff filed a *pro se* amended complaint (Dkt. 21). Following the court's prior grant of an unopposed motion to dismiss by Suky (Dkt. 75), the parties stipulated to vacate the order dismissing the complaint and to permit plaintiff to file a second amended complaint as a derivative action (Dkts. 120-121). Represented by new counsel as of March 8, 2016 (Dkt. 76 [notice of appearance]), plaintiff filed the SAC (Dkt. 123) on June 19, 2017.

The SAC alleges the following causes of action, numbered here as in the SAC, derivatively[9] on behalf of Owners and Hotel: (1) breach of fiduciary duty against the Individual

[8] The attorney never obtained the court approval required by CPLR 321(b)(2).

[9] The SAC implicitly asserts the Second, Third and Fifth Causes of Action derivatively.

Defendants; (2) breach of fiduciary duty against Owners;[10] (3) corporate waste against defendants; (4) unjust enrichment against the Individual Defendants; (5) mismanagement of funds against defendants; (6) self-dealing against defendants; (7) improper diversion of assets against defendants; and (8) for an accounting and for copies of books and records against defendants. The SAC seeks the following equitable relief: (a) declarations of defendants' wrongdoing; (b) an accounting and copies of the books and records of Hotel and Owners from April 4, 2008 to the present; (c) disgorgement of defendants' profits, benefits and compensation; and (d) costs and disbursements of this action, including expert and attorneys' fees.

The Individual Defendants move to dismiss the SAC (seq. 007, 008). Counsel for the Individual Defendants stipulated to withdraw their defense of lack of demand on Hotel and Owners' management in light of the Bankruptcies of those two entities and agreed that any demand "would indeed be futile" (Dkt. 169 [Jan. 10, 2018 stipulation]).

II. Discussion

A. Legal Standard – Motion to Dismiss

On a motion to dismiss a complaint, the court must accept as true the facts alleged in the pleading as well as all reasonable inferences that may be gleaned from those facts (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). Breach of fiduciary duty must be pleaded with specificity under CPLR 3016(b) (*see Retirement Plan for Gen. Empls. of City of N. Miami Beach v McGraw*, 158 AD3d 494, 496 [1st Dept 2018]; *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009];

[10] Suky suggests that the Second Cause of Action was also asserted against Hotel, but that cause of action asserts only that Owners breached its fiduciary duties, damaging Hotel (SAC ¶¶ 39-41).

CPLR 3016(b) ["Where a cause of action ... is based upon ... breach of trust ..., the circumstances constituting the wrong shall be stated in detail"]).

The court, on a motion to dismiss, is not permitted to assess the complaint's merits or factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*see Skillgames*, 1 AD3d at 250). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*id.*). Deficiencies in the complaint may be remedied by affidavits submitted by the party who filed the pleading (*see Amaro*, 60 AD3d at 491; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994] ["In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint"]).

Where dismissal is sought based upon documentary evidence under CPLR 3211(a)(1), the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88). "To qualify as 'documentary,' the paper's content must be 'essentially undeniable and ..., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR § 3211). Affidavits do not ordinarily qualify as documentary evidence (*id.* at 433).

B. Standing and Res Judicata (CPLR 3211(a)(3) and (5))

Plaintiff brings the SAC derivatively on behalf of Hotel and Owners; however, three of the eight causes of action—the Second, Third and Fifth—each fail to specify that they are

derivative claims. As these causes of action stem from alleged misuse of LLC assets and harm to the LLCs[11]—wherein the LLCs would receive the benefit of any monetary recovery—these causes of action are derivative[12] (*see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1037 [Del 2004] [corporate waste and mismanagement are derivative claims];[13] *Abrams v Donati*, 66 NY2d 951, 953 [1985] ["[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually"]). The Individual Defendants have stipulated to demand futility, paving the way for plaintiff's derivative claims (*see* Dkt. 169 [stipulation]).

1. Post-Bankruptcy Standing and Res Judicata */ Collateral Estoppel*

Suky summarily asserts that "the equity of Madison Owners was liquidated" during the Bankruptcies and "a liquidating trustee was appointed with sole authority to pursue claims on behalf of debtors" (Dkt. 128 [Suky Aff.] ¶ 3). The Individual Defendants also assert that plaintiff appeared in the Bankruptcies and "brought forth claims that were similar as she asserted in her

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[11] The Second Cause of Action alleges that Owners breached its fiduciary duties of "good faith, fair dealing, due care and loyalty" owed to Hotel, to "its member" and to plaintiff, damaging Hotel (SAC ¶¶ 39-41). The Third Cause of Action alleges that loans to the Individual Defendants and fees paid to entities controlled by them caused a "wasting of assets" of Owners and Hotel, damaging Owners and Hotel (SAC ¶ 44). The Fifth Cause of Action similarly alleges that the Individual Defendants' actions caused mismanagement of Owners' and Hotel's funds, damaging plaintiff (SAC ¶¶ 52-53). Allegations of wrongful monetary transfers from Owners or Hotel underlie all eight causes of action.

[12] Accordingly, dismissal of plaintiff's direct causes of action, as sought by the Individual Defendants—whether for failure to conform to prior court orders (i.e., Dkts. 120-121) or for failure to allege harms to plaintiff as an individual—would have no effect.

[13] The question of whether a claim is direct or derivative "must turn ***solely*** on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" (*Tooley*, 845 A2d at 1033; *accord Yudell v Gilbert*, 99 AD3d 108, 110 [1st Dept 2012] [adopting *Tooley* test]).

Verified Amended Complaint" (*id.* ¶ 4; Dkt. 135 [Benmoha Opening Br.] at 9). These unsupported arguments are insufficient to warrant dismissal.[14]

2. Derivative Standing – Dismissal of Second Cause of Action

To sue derivatively on behalf of an LLC, a plaintiff must be a member when the lawsuit is commenced (*Herman v Herman*, 122 AD3d 506, 507 [1st Dept 2014]; *see Ciullo v Orange & Rockland Util., Inc.*, 271 AD2d 369, 369 [1st Dept 2000] [former corporate shareholders lack standing to assert derivative claims on behalf of corporation]). In the SAC, plaintiff recognizes Owners as Hotel's ***sole*** member, which is incompatible with plaintiff's assertion that she, too, is a member of Hotel.[15] Moreover, Owners' ***present*** status as Hotel's ***sole*** member is conclusively established by uncontested documentary evidence—specifically, the Hotel Agreement and the

[14] If the Individual Defendants believe that one or both of the Bankruptcies adjudicated specific issues or causes of action, or deprived plaintiff of standing, they must provide supporting documentation, authority and legal precedent. Supporting authority may include statutory and case law (*see, e.g.*, 11 USC § 1141(b) [2012] ["Except as otherwise provided in the plan or the order confirming the [bankruptcy] plan, the confirmation of a plan vests all of the property of the estate in the debtor"]; *id.* § 541 [2012] [estate property includes causes of action that debtor could have asserted]; *In re Granite Partners, L.P.*, 194 BR 318, 324 [Bankr SDNY 1996], corrected [Apr. 16, 1996] ["If the cause of action belongs to the estate, the trustee has exclusive standing to assert it"]). Supporting documentation may include, for example, bankruptcy court orders (*see, e.g.*, Order Confirming Second Modified Third Amended Plan of Reorganization for Madison Hotel, LLC at 9, *Hotel Bankruptcy* [May 8, 2013], ECF. No. 218 ["Except as set forth in the Plan, upon Confirmation, the [Liquidation] Trust shall have, retain, reserve and be entitled to assert all such Claims, Causes of Action, rights of setoff and other legal or equitable defenses that the Debtor had immediately prior to the commencement of the Chapter 11 Case as if the Chapter 11 Case had not been commenced"]).

[15] No operating agreement for Hotel predating the $375,000 Payment has been submitted. Nor has plaintiff pled or attested to any circumstance giving rise to plaintiff's membership in Hotel ***apart*** from the $375,000 Payment, which is insufficient ***unless*** the operating agreement provided otherwise (*see, e.g.*, LLC Law § 602(b) ["After the effective date of a limited liability company's initial articles of organization, a person may be admitted as a member: (1) in the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the vote or written consent of a majority in interest of the members ..."]).

Owners Agreement.[16] Accordingly, while plaintiff may have standing to sue derivatively on behalf of Owners as a member of Owners, as a ***non***-member of Hotel, plaintiff has no standing, in her ***own*** capacity, to sue derivatively on Hotel's behalf (*see Herman*, 122 AD3d at 507). The Second Cause of Action for breach of fiduciary duty, asserted against Owner on behalf of Hotel, is therefore dismissed. The remaining causes of action—asserted on behalf of Hotel and Owners—are dismissed as to the allegations asserted on Hotel's behalf.

However, as a member of Owner—in turn Hotel's sole member—plaintiff has another means to bring a derivative action on Hotel's behalf. "[W]here the parent controls the subsidiary, a shareholder may bring a 'double' derivative action 'not only for wrongs inflicted directly on the corporation in which he holds stock, but for wrongs done to that corporation's subsidiaries which make indirect, but nonetheless real, impact upon the parent corporation and its stockholders.'" (*Pokoik v 575 Realties, Inc.*, 143 AD3d 487, 489 [1st Dept 2016], quoting *Kaufman v Wolfson*, 1 AD2d 555, 556-57 [1st Dept 1956]; *see Tzolis v Wolff*, 39 AD3d 138, 143-45 [1st Dept 2007] [applying to LLCs common law standards for derivative standing vis-à-vis corporations and limited partnerships], *aff'd*, 10 NY3d 100 [2008]). The court will therefore grant leave, *sua sponte*, for plaintiff to amend her complaint to plead, as a member of Owner, ***double*** derivative causes of action on behalf of Hotel.[17]

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[16] Plaintiff does not contest the authenticity or binding nature of these agreements; moreover, the operating agreement draft ***submitted by plaintiff*** also refers to Owners as Hotel's sole member.

[17] As plaintiff is a member of Owner and not Hotel, and her financial interest in Hotel flows solely through Owner, a double derivative claim on behalf of Hotel ***against Owner*** (e.g., for the conduct alleged in the Second Cause of Action) would be illogical, if not impossible (*cf. Hyman v NY Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007] [describing as a "confounding possibility" the idea "that a shareholder of a corporation could bring a derivative action on behalf of the corporation against the corporation itself"]). Should she wish to assert such a claim, however, she may move for leave to amend her future complaint authorized by this decision.

C. Statute of Limitations Defense

The Individual Defendants argue that plaintiff's claims are barred by the statue of limitations. They admit that CPLR § 213(7)—which applies a six-year statute of limitations to derivative actions—applies to the causes of action in the SAC, and afford plaintiff her earliest filing date in this action: July 22, 2014. Many of the alleged transactions occurred more than six years before this suit's filing (before July 22, 2008).[18] Plaintiff argues equitable estoppel.

1. Equitable Estoppel

Equitable estoppel precludes a statute of limitations defense where "plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli,* 44 NY2d 442, 448–449 [1978]). "The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action" (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003]). Plaintiff argues that the Individual Defendants are estopped from asserting a statute of limitations defense because of their "affirmative wrongdoing" (Dkt. 140 [Chaifetz Aff.] ¶¶ 6-8), but fails to identify any misrepresentation or concealment that induced plaintiff's reasonable reliance and prevented ***earlier commencement of this action*** (*see Duberstein v Nat'l Med. Health Card Sys., Inc.*, 37 AD3d 209, 210 [1st Dept 2007]). Accordingly, equitable estoppel cannot prevent dismissal.

[18] Indeed, as discussed below, the SAC fails to allege any misconduct following July 11, 2008 with the particularity required by CPLR 3016(b).

2. Fiduciary Tolling

Although plaintiff fails to establish equitable estoppel, the SAC sufficiently alleges a fiduciary relationship between plaintiff,[19] Hotel and Owners on the one hand and the Individual Defendants on the other, which persisted until at least May 2011 (initiation of the Bankruptcies). Under the "fiduciary tolling" doctrine, a fiduciary relationship tolls the statute of limitations on actions brought by the beneficiary of the relationship against the fiduciary until termination of that relationship (*see Otto v Otto*, 110 AD3d 620, 621 [1st Dept 2013]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131–32 [1st Dept 1999]; *196 Owners Corp. v Hampton Mgmt. Co.*, 227 AD2d 296, 296 [1st Dept 1996]). [20] As May 2011 was less than six years prior to the July 2014 filing of plaintiffs initial complaint, the SAC sufficiently supports fiduciary tolling.

D. *Breaches of Fiduciary Duty and Related Misconduct (First, Third, Fifth, Sixth and Seventh Causes of Action)*

The SAC's First, Third, Fifth, Sixth and Seventh Causes of Action, asserted against the Individual Defendants derivatively on behalf of Hotel and Owners, include breaches of fiduciary duties of good faith, fair dealing, due care and loyalty (First Cause of Action); wasting of assets[21]

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[19] *See Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [LLC managing member owes fiduciary duties to non-managing LLC members]; *Arfa v Zamir*, 75 AD3d 443, 444 [1st Dept 2010] [individual owner/fiduciary of LLC manager owes fiduciary duties to LLC members].

[20] The Appellate Division, First Department has held that fiduciary tolling applies to claims for accounting or equitable relief, but not monetary damages (*see Cusimano v Schnurr*, 137 AD3d 527, 530–31 [1st Dept 2016]). Disgorgement, even if framed as "equitable relief," may truly be categorized as monetary damages (*see Access Point Med., LLC v Mandell*, 106 AD3d 40, 43–46 [1st Dept 2013]). Because plaintiff seeks an accounting in addition to other purportedly equitable reliefs, the court will not opine further on the limits of fiduciary tolling, an issue which the parties have not briefed.

[21] "The essence of a waste claim is 'the diversion of corporate assets for improper or unnecessary purposes'" (*SantiEsteban v Crowder*, 92 AD3d 544, 546 [1st Dept 2012], quoting *Aronoff v Albanese*, 85 AD2d 3, 5 [2d Dept 1982]).

(Third Cause of Action); mismanagement of funds (Fifth Cause of Action);[22] self-dealing (Sixth Cause of Action);[23] and improper diversion of assets (Seventh Cause of Action).[24]

The SAC improperly asserts the Third, Fifth, Sixth and Seventh Causes of Action against Hotel and Owners. As a non-member of Hotel, plaintiff cannot bring derivative claims on Hotel's behalf (i.e., against Owner), as discussed above. Plaintiff also cannot assert claims against Hotel on Owners' behalf, because Hotel does not owe fiduciary duties to Owners, its member (*see Hyman v NY Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]).[25] These causes of action are, accordingly, dismissed as against Hotel and Owners.

Under CPLR § 3016(b), "where a cause of action or defense is based upon … breach of trust …, the circumstances constituting the wrong shall be stated in detail." This heightened pleading standard requires the allegation of basic facts to establish the cause of action sufficient to give rise to a reasonable inference of the alleged misconduct (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-60 [2009]). Breach of fiduciary duty requires "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Under NY LLC Law § 409(a), "[a] manager shall perform his or her duties as a manager … in good faith

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[22] Corporate mismanagement occurs when directors fail to discharge their duty to manage corporate property in good faith, according to their best judgment and skill and in the interest of the stockholders (*see Amfesco Indus., Inc. v Greenblatt*, 172 AD2d 261, 263 [1st Dept 1991]).

[23] "Self-dealing occurs when [a fiduciary] takes advantage of his position in a transaction and acts in his own interests rather than in the best interests of the client" (*In re Lawrence*, 24 NY3d 320, 344 [2014]).

[24] Counsel for both Suky and Benmoha argue that the SAC improperly claims fraud. The SAC does not assert fraud claims (improperly or otherwise).

[25] To the extent plaintiff also seeks to sue Owners derivatively on behalf of Owners, or to sue Owners double derivatively on behalf of Hotel (through Owners), any such cause of action would be illogical, if not impossible, as discussed supra footnote 17.

and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." Also, LLC Law § 411 prohibits LLC managers from engaging in self-interested transactions that are not fair and reasonable (*see Tzolis*, 39 AD3d at 145-46; *Wilcke v Seaport Lofts, LLC*, 45 AD3d 447, 447 [1st Dept 2007]). [26] Moreover, individuals (here, Benmoha and Suky) who manage LLC assets through another entity (here, Partners) may be held personally liable for their own acts that breached their fiduciary duties to the LLC (*see Arfa v Zamir*, 75 AD3d 443, 444 [1st Dept 2010] [complaint stated causes of action sounding in breach of fiduciary duty (for an accounting, waste and mismanagement) against individual owner and fiduciary of manager who allegedly used position to benefit manager at entity's expense]). [27]

The Individual Defendants seek dismissal on grounds that § 6.6 of the Owners Agreement purports to prohibit suit against them on all but fraud, bad faith, gross negligence or an intentional breach of Owners Agreement. This argument fails for at least three reasons. First, § 6.6 does not absolve defendants for acts taken ***outside*** the scope of the authority conferred by Owners Agreement. The acts alleged in the SAC may well fall outside such authority because under § 6.1, "the Manager shall not employ, or permit another person to employ [LLC] funds or assets in any manner except for the exclusive benefit of the Company" and under § 6.3(b)(xxv) self-dealing without authorization by all Limited Members holding at least a 12% membership

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[26] Also, under § 6.1 of the Owners Agreement (dated August 25, 2008), Partners "shall have ***fiduciary responsibility for the safekeeping and use of all of the Company's funds and assets***, whether or not in its possession or control, and the Manager shall not employ, or permit another person to employ such funds or assets in any manner ***except for the exclusive benefit of the Company***" (Dkt. 129 at 17 (emphasis added)).

[27] In seeking to absolve themselves of fiduciary responsibility, the Individual Defendants cite *Matias v Mondo Props. LLC*, 43 AD3d 367 [1st Dept 2007] and *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209 [1st Dept 2005], in which plaintiffs sought to pierce the corporate veil of an LLC to hold individual managers liable for causes of actions asserted ***against that LLC***. Here, however, plaintiff seeks to hold the individual defendants liable for breaching their ***own*** duties to Owners and Hotel in managing the LLCs' assets, rather than on a corporate veil-piercing theory.

interest in Owners is prohibited. LLC Law § 417(a)(1), moreover, prohibits operating agreements from limiting a manager's liability for receipt of personal gain to which the manager is not legally entitled. Second, the SAC alleges facts sufficient to give rise to a reasonable inference of bad faith or intentional misconduct, given the pervasiveness of the alleged self-dealing transactions and the nonnegligible amounts disbursed in each instance.[28] Finally, Owners Agreement was dated August 25, 2008, and all of the specifically alleged wrongful monetary transfers took place before that date, creating at least an issue of fact as to whether § 6.6 retroactively exonerated the Individual Defendants.[29]

Defendants argue that that SAC makes unsupported allegations using mere legal conclusions. To the contrary, SAC ¶¶ 8, 11-25 and 34 allege that the Individual Defendants managed Hotel and Owners and allege specific transactions—who, what and when—to support the causes of action sounding in breach of fiduciary duty, including specific monetary transfers to individuals and entities between April 4 and June 13, 2008 (by Hotel and Owners) and between June 16 and July 11, 2008 (by Hotel). However, the allegations of SAC ¶¶ 26-32 are not pled with the particularity required under CPLR 3211. SAC ¶¶ 26-27 allege monetary transfers by Hotel, but not an improper purpose. SAC ¶¶ 28-29 allege loans made to Suky, but not who provided those loans. SAC ¶¶ 30 alleges that Owners and Hotel made $3,000,000 in personal loans to the Individual Defendants, with no detail as to when. Finally, SAC ¶¶ 31-32 refer only generally to amounts disbursed to benefit the Individual Defendants, with no details.

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[28] *Banco Espirito Santo de Investimento, S.A. v Citibank, N.A.*, No. 03-cv-1537, 2003 WL 23018888, at *11-12 (SDNY Dec. 22, 2003), *aff'd*, 110 F Appx 191 (2d Cir. 2004), which Benmoha cites, is thereby distinguishable in that the *Banco* plaintiff failed to allege any specific ***act*** evincing the intent required to circumvent the limitation of liability clause (*see id.*).

[29] Notably, LLC Law § 417(a) prohibits operating agreements from retroactively eliminating personal liability for damages for breach of a manager's duty to the LLC or its members for acts or omissions committed prior to the adoption of the exculpating provision.

The First, Third, Fifth, Sixth and Seventh Causes of Action fail to state a cause of action as to Owners, as Owners ***did not legally exist*** before July 8, 2008, the date of the filing of its articles of organization with the New York State Department of State (*see* LLC Law § 203(d) ["A limited liability company is formed at the time of the filing of the initial articles of organization with the department of state or at any later time specified in the articles of organization, not to exceed sixty days from the date of such filing"]). Thus, to the extent the SAC alleges monetary diversions ***from Owners*** prior to July 8, 2008, such allegations are inherently incredible and are ***not*** assumed to be true (*see Skillgames*, 1 AD3d at 250). As no specific transactions are alleged ***as to Owners*** after July 8, 2008, the First, Third, Fifth, Sixth and Seventh Causes of Action are therefore dismissed. To the extent plaintiff seeks to allege later monetary transfers—such as the August 19 and August 22, 2008 loans to Suky—or other conduct concerning Owners' assets, leave is granted to plaintiff to replead these causes of action to credibly allege specific transactions as to Owners. As to the remaining specific transactions alleged by the SAC—and plausibly alleged as to Hotel only—plaintiff is granted leave to amend to allege double derivative claims.[30]

[30] In repleading, however, plaintiff should note that the "contemporaneous ownership" requirement—which statutorily applies to New York corporations and limited partnerships under Business Corporation Law § 626(b) and Partnership Law § 121-1002(b), respectively—requires "a[n] [LLC] member seeking derivative relief [to] have been a member ***at the time of the offending conduct***" (*see Billings v Bridgepoint Partners, LLC*, 21 Misc 3d 535, 541 [Sup Ct, Erie County 2008] (emphasis added); *but see Tzolis*, 39 AD3d at 143-45 [standing to assert a derivative action on behalf of LLC derives from common law]; *Quadrant Structured Prod. Co. v Vertin*, 102 A3d 155, 178 [Del Ch 2014] [noting that statutory "contemporaneous ownership" requirement wrests standing from "stockholders who ***otherwise would have standing to sue at common law***" (emphasis added)]).

E. Unjust Enrichment (Fourth Cause of Action)

The Fourth Cause of Action asserts that the Individual Defendants were unjustly enriched. This cause of action "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790–91 (2012)). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim," and "is not a catchall cause of action to be used when others fail" (*id.* at 790). As the Fourth Cause of Action for unjust enrichment is merely duplicative of the causes of action sounding in breach of fiduciary duty—indeed, the SAC alleges no specific facts to support the unjust enrichment claim as distinct from the other causes of action—it is therefore dismissed.

F. Accounting (Eighth Cause of Action)

The Eighth Cause of Action seeks an accounting and copies of books and records of Owners and Hotel from April 4, 2008 to the present (SAC at 8-10). LLC members may seek an equitable accounting under common law (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]). However, the cause of action cannot be maintained without alleging a demand for an accounting from the managers in possession of the LLC's books and records, or else the futility of such a demand (*see Kaufman*, 307 AD2d at 124; *Conroy v Cadillac Fairview Shopping Ctr. Props. (Md.), Inc.*, 143 AD2d 726, 726 [2d Dept 1988]).

The complaint fails to plead facts showing a demand for books and records (as of right under the Owners Agreement), much less for an accounting, and the eighth cause of action is therefore dismissed. However, as defendants stipulated that a demand of Owners or Hotel (i.e., to bring suit) would be futile (*see* Dkt. 169 [stipulation]), leave is therefore granted, *sua sponte*, for plaintiff to replead her cause of action for an accounting as to Owners' and Hotels' books and

records against the Individual Defendants as derivative and double derivative causes of action (*see 575 Realties*, 143 AD3d at 488-89). Plaintiff must allege a demand for and a rejection of the equitable relief she seeks, or else allege facts sufficient to establish the futility of such a demand. Accordingly, it is

ORDERED that the motions to dismiss of defendants Benzion Suky (Seq. 007) and Joseph Benmoha (Seq. 008) are granted and the second amended complaint (Dkt. 123) is dismissed; and it is further

ORDERED that within 10 days of entry of this order on NYSCEF, defendants Benzion Suky and Joseph Benmoha shall serve a copy of this order with notice of entry on plaintiff by overnight mail; and it is further

ORDERED that plaintiff is granted leave to serve and file a third amended complaint in accordance with the court's decision, which shall include one or more of the following causes of action discussed in the decision and shall assert no other causes of action: one or more derivative claims on behalf of Owner for breach of fiduciary duty, waste, mismanagement, self-dealing, improper diversion of assets, and/or for an accounting against Benzion Suky and Joseph Benmoha; and one or more double derivative claims, through Owner, on behalf of Hotel for breach of fiduciary duty, waste, mismanagement, self-dealing, improper diversion of assets, and/or for an accounting against Benzion Suky and Joseph Benmoha; and it is further

ORDERED that the third amended complaint shall be served and filed within 20 days after service on plaintiff of a copy of this order with notice of entry; and it is further

ORDERED that, if plaintiff fails to serve and file a third amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an

affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice and without costs; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with section J(1) of the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at https://www.nycourts.gov/courts/1jd/supctmanh/Efil-protocol.pdf).

Dated: June 27, 2018

ENTER:

HON. JENNIFER G. SCHECTER J.S.C.