SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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JOHN R. MACARTHUR, individually and as a member of BOOK CULTURE ON COLUMBUS LLC, suing derivatively in the name of BOOK CULTURE ON COLUMBUS LLC,

Plaintiffs,

- v -

CHRISTOPHER DOEBLIN,

Defendant.

INDEX NO. 656694/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 98, 104, 105, 109

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 106, 110

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In motion 001, plaintiff John R. MacArthur moves pursuant to CPLR 3212 for partial summary judgment with respect to liability plaintiff's' causes of action for (1) waste; (2) breach of fiduciary duty; (3) conversion; (4) breach of contract; and, in the alternative, (6) equitable accounting.

In motion 002, defendant Christopher Doeblin moves pursuant to CPLR 3212 for dismissal of the complaint in its entirety.

Background

Book Culture on Columbus (Columbus Bookstore), located at 450 Columbus Avenue, New York, NY, was a bookstore serving the Upper West Side community between 2014 to January 2020. (*See* NYSCEF Doc. No. [NYSCEF] 27, Joint Statement

of Undisputed Facts [JSUF] ¶¶ 6-7, 17.) The Columbus Bookstore was owned by Book Culture on Columbus LLC (BCC), consisting of three members: MacArthur owns 40% of membership interests in BCC, Doeblin owns 45.96% of membership interests in BCC, and nonparty Annie Hedrick[1] owns $14.04% of membership interests in BCC. (NYSCEF 27, JSUF ¶¶ 1-3.) Doeblin is BCC's member-manager. (NYSCEF 5, verified answer ¶ 1.)

Doeblin, who has been in the bookstore business since 1985 (NYSCEF 80, Doeblin aff ¶ 13), owned an 85.96% share of nonparty Book Culture Inc. (BCI) between 2014 through 2019; Hedrick owned a 14.04% share of BCI.[2] (NYSCEF 27, JSUF ¶ 8.) BCI operates three bookstores, two located near Columbia University in Manhattan and one in Long Island City in Queens,[3] and like the Columbus Bookstore, operated under the name "Book Culture". (NYSCEF 27, JSUF ¶¶ 9-11.)

In 2014, Doeblin signed a lease for 450 Columbus Avenue on behalf of BCI with the intent of opening another bookstore at that location. (NYSCEF 27, JSUF ¶ 13.) In 2014, MacArthur expressed an interest in investing in a bookstore but did not want to invest in the existing company BCI. (*Id.* ¶¶ 14-16.) "Doeblin agreed to establish a new company—which became BCC—that would own the Columbus [Bookstore]." (*Id.* ¶ 17.)

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[1] There is a discrepancy between the spelling of nonparty Hedrick's last name. Doeblin's affidavit spells her last name as "Hendricks" while MacArthur spells it as "Hedricks." Additionally, other docket entries have employed the spelling "Hedricks." (*See, e.g.*, NYSCEF 36, Joint Exhibit 9, Book Culture Presentation.) For consistency purposes, the court adopts the spelling as used in the verified complaint, i.e., Hedricks.

[2] As of May 2021, Doeblin is the 100% owner of BCI (NYSCEF 80, Doeblin aff ¶ 2), and serves as its president. (*Id.*)

[3] The Long Island City location opened in 2017. (NYSCEF 27, JSUF ¶ 11.)

To that end, MacArthur made a short-term loan of $100,000 to BCC for start-up costs, which was ultimately repaid in full. (*Id.* ¶¶ 20, 23.)

On November 6, 2014, MacArthur signed a Subscription Agreement with BCC and Doeblin (Subscription Agreement) and, in turn, MacArthur invested $500,000 for 40% of BCC. (*Id.* ¶ 22; NYSCEF 32, Subscription Agreement.) The BCC Operating Agreement was amended and restated to reflect the Subscription Agreement and added MacArthur as a member (BCC AOA). (NYSCEF 27, JSUF ¶ 24; NYSCEF 33, Joint Exhibit 6, BCC AOA at 2.[4]) The BCC AOA referenced two agreements, entered into between BCC and BCI on October 17, 2014, one titled "Service Mark License Agreement" and the other titled "Services Agreement." (*Id.* ¶¶ 18-19.) Under the Service Mark License Agreement, BCI granted a license to use the name "Book Culture" to BCC. (NYSCEF 30, Joint Exhibit 3, Service Mark License Agreement at 2.) Under the Services Agreement, BCI agreed to provide services, such as events, marketing, and website support, web sales, buying, accounting and bookkeeping, and employee training to BCC for a monthly fee. (NYSCEF 31, Joint Exhibit 4, Services Agreement at 4.) According to Doeblin, pursuant to the Services Agreement, BCI "effectively handled the back-office operations" for BCC and most importantly to Doeblin, would establish BCC's credit with vendors by using BCI's relationships with vendors to obtain inventory. (NYSCEF 80, Doeblin aff ¶¶ 10-11.)

Doeblin's authority as the managing member is set forth in Section 7.01 of the BCC AOA. (NYSCEF 33, BCC AOA at 8 [section 7.01].) Section 7.02 and Section 7.03 set forth certain actions requiring unanimous approval of members and actions requiring

[4] Pages refer to NYSCEF generated pagination.

approval of a supermajority of members, respectively. (*Id.* at 8-10.) In September 2015, MacArthur loaned BCC $100,000, which was ultimately repaid in full. (NYSCEF 27, JSUF ¶ 26; NYSCEF 34, Joint Exhibit 7, Promissory Note.)

In January 2016, Doeblin, as President of both BCI and BCC, entered into an agreement a loan with nonparty American Express Bank, FSB (AMEX) $750,000 (AMEX Loan Agreement) to be repaid within a year from the disbursement of the loan. (NYSCEF 27, JSUF ¶¶ 30-31; NYSCEF 35, Joint Exhibit 8, Business Loan and Security Agreement at 2, 14 [signing as President of both BCI and BCC]; *id.* at 2 [section 2].) The AMEX Loan Agreement provides, among other things, that AMEX would be repaid using a percentage of proceeds from bank cards and other forms of electronic transactions that the borrowers—BCI and BCC—receive. (*See id.* at 3 [section 7. Method of Repayment].) Those proceeds, as required by the AMEX Loan Agreement, would be transferred to an account with Wells Fargo Bank, N.A., titled in AMEX's name, for repayment (AMEX lockbox). (*See id.* at 4-5 [section 7.6, section 7.7, section 7.7 (d)].) AMEX then took their agreed-upon percentage of the proceeds and the balance was then wired back to BCI's bank account at Chase Bank at which time the "stores' accountants then analyzed the daily sales for [BCC] and the two BCI-owned Book Culture stores to determine what BCC's share of the repayment should be and then wired the balance to BCC's bank account at Chase." (NYSCEF 80, Doeblin aff ¶¶ 23-24.) According to Doeblin, this system worked for months without issue. (*Id.* ¶ 24.) It is at this point where MacArthur and Doeblin's business relationship begin to deteriorate.

MacArthur's Contentions

MacArthur claims that he was not aware that both BCI and BCC were obligated on the AMEX loan until January 2017, a year after the loan was taken out, and discovered as early as April 2017 that BCC's revenues were being transferred to the AMEX lockbox. (NYSCEF 52, MacArthur aff ¶¶ 45-47.) MacArthur's personal accountant, Michelle Prosecky, received an email from Doeblin regarding the return of BCC's funds from the AMEX lockbox, which Doeblin refers to as "untransferred" funds, that purportedly could not be repaid back at the time of Doeblin's email:

> "On 6/30 [of 2016] we had about $250k untransferred. We had caught up and brought it down to zero by September but in November and December the untransferred funds grew back up and the end of the year will show substantial untransferred funds again. Due to my own lack of planning we no longer have the cash to distribute and we are in the slow period for all our stores."

(NYSCEF 77, May 8, 2017 Email at 2; NYSCEF 52, MacArthur aff ¶ 48.) Doeblin provided MacArthur with BCI's 2016 financial statement which showed an outstanding amount of $543,278.70 in "untransferred receipts." (NYSCEF 53, BCI Balance Sheet at 2; NYSCEF 52, Doeblin aff ¶ 51.)

On June 23, 2017, Peter Porcino, MacArthur's counsel, emailed Doeblin questioning, among other things, the "$532K of advance to affiliates" and the "amount owed to 'BBacker'". (*See* NYSCEF 54, June 27, 2017 email thread at 3; NYSCEF 52, MacArthur aff ¶ 54.) Doeblin responded on June 27, 2017, Doeblin stated that BCI was using the advance to "pay down our accounts and purchase inventory primarily" and that the loan from "BBacker" was a "high interest lender that we borrow from and pay off in less than 12 months." (*Id.*) On June 30, 2017, Porcino emailed Doeblin and stated

that "monies borrowed by BCI from American Express, but repaid from sales by BCC, and used by BCI to pay expenses and accumulate inventory, constituted a debt owed by BCI to BCC" and asked for the debt to be memorized by promissory note. (NYSCEF 55, July 5, 2017 email thread at 3-4.) Doeblin replied on July 5, 2017 and proposed a repayment of the then-remaining balance of $435,000 by using his and Hedrick's profits to pay down BCC's loan over four years with 4% interest. (*Id.* at 2; NYSCEF 52, MacArthur aff ¶ 59.) MacArthur contends that this agreement was never consummated. (NYSCEF 52, MacArthur aff ¶ 61.)

MacArthur states that, through these emails, he learned for the first time that the BCI and BCC vendor accounts were intermingled and that BCC and BCI's vendors viewed the company as one entity. (*Id.* ¶¶ 65-68.) Further, MacArthur discovered that BCC's name and funds were used to open a Book Culture store in Long Island City sometime in December 2017, which MacArthur objected to and asked Doeblin to change the tenant on the lease to BCI. (*Id.* ¶¶ 69-71.)

In April 2018, MacArthur visited the Columbus Bookstore and saw that the stock had been "visibly depleted, with empty shelves." (*Id.* ¶ 72). In April 2018, MacArthur "made a proposal to buy out Doeblin's interest in BCC" and offered $200,000 for Doeblin's interest. (*Id.* ¶ 81; NYSCEF 57, April 4, 2018 Email.) Doeblin did not agree to these terms (*id.*), and while the parties continued to have buyout negotiations until the summer of 2019, no agreement was ever reached. (NYSCEF 52, MacArthur aff ¶¶ 97, 102.)

MacArthur claims that "BCI's losses and cash flow problems were disrupting BCC's credit with its vendors." (NYSCEF 52, MacArthur aff ¶ 77.) MacArthur believes

that because BCI "fell further behind in its obligations to its vendors" and that "Doeblin had been combining the purchases of BCI with BCC" the vendors also cut off BCC. (*Id.*) MacArthur believes that the Book Culture location in Long Island City, which had opened in 2017, was the one of the causes of the credit line issues. (*See id.* ¶¶ 78, 80.)

In February 2019, an accountant, Sam Bronsky, who performed accounting services for BCC and BCI, sent MacArthur a 2018 financial statement for BCC and the accountant's Compilation Report. (*Id.* ¶ 89; NYSCEF 64, Independent Accountant's Compilation Report [Compilation Report].) The Compilation Report had noted that BCC did not record a provision for potential uncollectible amounts due from an "affiliate," which according to MacArthur, refers to BCI. (NYSCEF 52, MacArthur aff ¶ 91; NYSCEF 64, Compilation Report at 4.)

In May 2019, MacArthur brought up discussion again to buy out Doeblin's interest but ultimately did not reach an agreement. (NYSCEF 52, MacArthur aff ¶¶ 99-100.) In June 2019, MacArthur learned that "Doeblin stopped paying BCCs rent" and "failed to pay rent in July and August as well." (*Id.* ¶ 101.) While MacArthur's offer to purchase Doeblin's interest in BCC was purportedly still on the table, unbeknownst to MacArthur, Doeblin began a public crowdfunding fundraising campaign for Book Culture (Community Lender Program). (*Id.* ¶ 103; NYSCEF 74, Website Update; NYSCEF 94, Post on Facebook [describing the "Community Lender Program" and providing the terms and conditions along with contact information]; NYSCEF 73, Community Lender Program signage.) The Community Lender Program was apparently done without MacArthur's consent or knowledge, and he asked Doeblin to cease the campaign because he was "concerned it was an unlawful public offering, a misrepresentation to

the public that BCC did not have access to funding . . . and that the campaign failed to distinguish between the two companies." (NYSCEF 52, MacArthur aff ¶ 110.) MacArthur then informed the SEC and the New York State Attorney General of BCC's public fundraising while failing to register as an offeror of a security. (*Id.*)

MacArthur initiated this action against Doeblin in November 2019. The Columbus Bookstore shut down on January 7, 2020 when BCC failed to pay its rent.[5] (*Id.* ¶ 113.) MacArthur attempted to keep the store open and learned that the landlord would need $140,000 to reopen. (*Id.* ¶ 114.)

Doeblin's Contentions

Approximately six months after the loan was taken out, Doeblin discovered that BCC was not receiving all credit card proceeds it was owed and that the accounting team deducted a larger share from BCC than it was obligated to pay. (NYSCEF 80, Doeblin aff ¶ 25.) Doeblin states that he did not realize how this error occurred but brought the error to MacArthur and Hedrick's attention. (*Id.* ¶ 27.) Doeblin states that the three individuals "eventually agreed that Hedrick and [Doeblin], both of whom were shareholders of BCI, would forgo all distributions from BCC until BCC was fully repaid for the monies that Kraft had failed to wire BCC."[6] (*Id.* ¶ 28.) Moreover, Doeblin

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[5] In October 2019, landlord for the Columbus Bookstore commenced an eviction proceeding against BCC. (NYSCEF 48, Notice of Petition.)

[6] Doeblin identifies this individual responsible for the accounting error only by "Kraft" in his affidavit. "Kraft" is mentioned only once in Doeblin's affidavit despite the outsized role he appears to play in Doeblin's arguments. Doeblin mentioned "Kraft" once in his deposition and explained: "One of the accountant staff members was on the staff salaries from when he came on, a guy name Dave Kraft. So he did work that was sometimes doing accounting that was for BCI. But, basically, all of these people spent their time -- all of the people, there, at management, spent the time on the sales floor of Book Culture on Columbus." (NYSCEF 37, Doeblin depo tr at 18:6-13.)

"booked the underpayment to BCC as a loan from BCC to BCI" after speaking to MacArthur and MacArthur's counsel. (*Id.* ¶ 29.) According to Doeblin, by January 2020, the "'loan' was repaid in full, but BCC was indebted to BCI for over $250,000 . . . . due to BCI providing working capital to BCC such that it could pay its vendors, rent, and payroll." (*Id.* ¶ 30.)

In 2018, Doeblin informed MacArthur BCC was experiencing significant financial hardships and Doeblin was "searching for sources of capital contribution for both BCC and BCI" and "MacArthur was on notice of these efforts." (*Id.* ¶¶ 32-34; *see also* NYSCEF 84, March 12, 2018 Email.) According to Doeblin, MacArthur saw this as an opportunity to push Doeblin out. (NYSCEF 88, July 20, 2018 Letter.) A buyout was not consummated despite MacArthur's repeated attempts to purchase Doeblin and Hedrick's interests, and BCC's financial decline continued into 2019. (NYSCEF 80, Doeblin aff ¶ 33.)

In the summer of 2019, Doeblin published an open letter to New York government officials and leaders in local newspaper, *West Side Rag*.[7] The call for government assistance was unsuccessful, and thus, Doeblin stated that his last chance to save Book Culture was through the Community Lender Program.

Doeblin began the crowdfunding efforts to raise $750,000 for all four Book Culture Stores (NYSCEF 80, Doeblin aff ¶ 40), and ultimately raised $300,000 by September 2020. The Community Lender Program was publicized through a Facebook

[7] An incorrect copy of the open letter to government officials is appended to the motion. (See NYSCEF 93.) NYSCEF 93 is a duplicate e-filing of the challenged West Side Rag interview of MacArthur and Doeblin over the crowdfunding, published in September 2019. (NYSCEF 97.) Therefore, there is no copy of the open letter to government officials before the court.

post (NYSCEF 94, Post on Facebook [describing the "Community Lender Program" and providing the terms and conditions along with contact information]), and by a sign outside of a Book Culture store. (*See* NYSCEF 73, Community Lender Program signage.) Doeblin wrote to MacArthur stating that the Community Lender Program was having a "significant impact on BCC." (NYSCEF 95, Aug. 29, 2019 Email.)

Doeblin claims that MacArthur accused him of fraud and deceptive fundraising in an article published in the *West Side Rag*, which effectively halted the crowdfunding efforts. (NYSCEF 80, Doeblin aff ¶ 42.) As a result of the *West Side Rag* publication, in August 2020, Doeblin filed a related action against MacArthur alleging, among other causes of action, defamation, captioned *Doeblin v MacArthur*, index No. 156356/2020.

Legal Standard

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Where this showing is made, the burden shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action. (*Id.*) The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), however, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

"A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there

are issues of credibility." (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citations omitted].) Witness credibility issues are generally inappropriate for resolution in a summary judgment motion. (*Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013].) "The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned." (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [citation omitted].)

Discussion[8]

MacArthur moves for partial summary on the issue of liability on his claims for waste, conversion, breach of fiduciary duty, and breach of contract. Alternatively, MacArthur moves for summary judgment on his claim for an equitable accounting.

Standing

At the outset, Doeblin argues that MacArthur's waste claim[9] should be dismissed because he has no standing to bring this derivative action, specifically that MacArthur is not an adequate representative of BCC. However, and the court agrees with MacArthur, Doeblin has waived his right to challenge MacArthur's standing as Doeblin did not raise this issue by motion to dismiss or in his answer. (CPLR 3211 [e].) Doeblin's answer asserted various defenses, none of which asserted a defense of lack of standing. (*Cf. Meissner v Yun*, 150 AD3d 455, 455 [1st Dept 2017] [finding no waiver

[8] MacArthur does not seek dismissal of Doeblin's defenses or otherwise challenge any asserted defense. Likewise, Doeblin's opposition and moving papers do not raise or rely upon his asserted defenses.

[9] Doeblin challenges MacArthur's standing in relation to the waste claim, which for the reasons stated below, is dismissed.

of right to challenge plaintiff's lack of standing to assert derivative claims as defendants asserted defense in their answer].)

Fourth Cause of Action: Breach of Contract

"The elements for a cause of action for breach of contract are 'the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages.'" (*Lebedev v Blavatnik*, 193 AD3d 175, 182-83 [1st Dept 2021] [citation omitted].) The parties dispute whether Doeblin breached the BCC AOA and whether MacArthur suffered any damages.

Breach of Section 7.02(h)

Section 7.02 provides that BCC shall not enter into any commitment to "[i]ncur indebtedness for borrowed money of [BCC], in an amount, outstanding at any one time, in excess of $50,000 in the aggregate[ ]" without unanimous written consent by the members. (NYSCEF 33, Joint Exhibit 6, BCC AOA at 9 [Section 7.02(h)].) MacArthur argues that Doeblin violated this provision, first when Doeblin entered BCC into loans exceeding $50,000[10] without unanimous written approval, and second when Doeblin indebted BCC under the crowdfunding campaign, which collected $300,000, without unanimous written consent.[11]

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[10] These loans exceeding $50,000 include the AMEX loan and unidentified loan(s) that have accrued $61,138 in interest costs in 2018. MacArthur points to BCC's financial statement (NYSCEF 39 at 5) to show that BCC paid over $61,000 in interest costs and deduces that BCC must be borrowing sums of money well into the six figures to garner that amount in interest, constituting a breach of the BCC AOA's section 7.02(h).

[11] Doeblin argues in opposition that MacArthur abandoned these theories of liability under section 7.02(h) by failing to address them in his opening brief. The court rejects this argument as out of hand as MacArthur clearly addresses these theories in his opening brief.

Here, Doeblin conceded that he did not obtain unanimous written consent from the members of BCC prior to entering the AMEX loan, constituting admission of Doeblin's breach of section 7.02(h). (NYSCEF 37, Doeblin depo tr at 26:15-17.) As discussed below, an issue of fact regarding causation under the damage's element remains and MacArthur's motion for summary judgment on the breach of contract under this theory is denied.

Regarding the Community Lender Program, MacArthur stated that he "was not aware of the program prior to its start, nor did [he] ever approve of it" (NYSCEF 52, MacArthur aff ¶ 103), a fact Doeblin fails to address in his affidavit in opposition to summary judgment. (*114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 761-62 [2d Dept 2019] ["Where a party fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists."] [citations omitted]; *see also Barbour v Knecht*, 296 AD2d 218, 227 [1st Dept 2002] [reversing grant of summary judgment, due to, in part, failure to challenge the opposing affidavit].) Thus, Doeblin fails to raise an issue of fact regarding consent for the fundraiser. However, while there is no question of fact that MacArthur did not approve the Community Lending Program, MacArthur has not made a prima facie case as to Doeblin's breach of the BCC AOA, specifically if BCC is indebted to BCI for the loans under the Community Lending Program.[12] MacArthur concedes that the promissory note, issued in connection to the Community Lending Program, obligates

[12] Doeblin fails to raise this issue in his opposition but as this is MacArthur's motion for summary judgment on his breach of contract claim, the court must determine first whether MacArthur has made a prima facie showing of a breach of contract.

only BCI. (NYSCEF 72, Standard Promissory Note.) Doeblin confirms this, testifying at his deposition that BCI was obligated on the loan, but that he transferred some of those crowdfunding monies to BCC anticipating that "BCC was going to pay back to BCI the money that it received." (NYSCEF 37, Doeblin depo tr at 80:5-25.) Doeblin also states that there is documentation that reflect these "intercompany loans," but that documentation was not submitted on this motion.

Doeblin inartfully challenges whether there are damages, and the court agrees that the question of damages further precludes an award of summary judgment on MacArthur's breach of contract claim on either theory for breach of contract. On the question of damages, MacArthur fails to discuss the issue of damages in his opening brief, which, in any event, warrants denial of summary judgment. In opposition to Doeblin's motion, however, MacArthur, in a sweeping manner, asserts that Doeblin's conduct in borrowing without approval, using BCC funds to support BCI and intermingling accounts, and engaging in the Community Lender Program caused BCC to borrow money at high interest rates, to be unable to purchase inventory due to credit freezes despite having positive cash flows, failing to pay rent causing the store to close, and exposing BCC to potential claims of unwanted debt from the Community Lender Program, among other harms. However, there are issues of fact as to causation, which warrant denial of MacArthur's summary judgment motion on the breach of contract under either theory of liability.[13] (*Suffolk County Water Auth. v J.D. Posillico, Inc.*, 267 AD2d 301, 302 [2d Dept 1999] ["This order clearly states that there are issues of fact as

[13] MacArthur's argument that the store closed due to a number of improper actions, including borrowing without unanimous consent, necessarily supports the court's finding that there are issues of fact regarding causation.

to causation which preclude the granting of partial summary judgment as to liability."], citing *19 W. 45th St. Realty Co. v Darom Elec. Corp*., 233 AD2d 184, 184 [1st Dept 1996][In a breach of contract and property damage case, "[t]here are distinct issues of fact as to whether the water main damage could have occurred because of the age of the water mains, improper installation, or any number of other causes apart from the alleged breaches of contract allegedly committed by the defendant contractor."]) In essence, MacArthur traces the closure of the Columbus Bookstore, BCC's inability to purchase books and other inventory, and BCC borrowing money at higher interest rates due to Doeblin's unauthorized borrowing and intermingling of BCI's and BCC's accounts. And, regarding, Doeblin's breach of the BCC AOA due to his failure to obtain consent prior to engaging in public fundraising, MacArthur states that BCC is now at risk of being liable to those 100 or so individuals who lent money under the Community Lending Program. In addition to the issues of fact concerning causation, MacArthur has not provided any documentation showing that BCC was borrowing at lower interest rates prior to Doeblin's breach or that the Columbus Bookstore closure arose out of this breach to support his assertion. Furthermore, it appears that the promissory note in connection to the Community Lending Program obligates BCI for repayment and not BCC. (NYSCEF 72, Standard Promissory Note.) In any event, MacArthur has not proffered any evidence showing that the community lenders have sought repayment.

MacArthur asserts that his motion is only for liability and need not establish damages. CPLR 3213 (c) provides that if it "appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, . . . the court may, when appropriate for the expeditious disposition of the controversy,

order an immediate trial of such issues of fact raised by the motion." Thus, bifurcation may be appropriate where an issue of fact concerning the amount or extent of damages remains. That is not the case here because causation questions remain concerning whether the breach of section 7.02(h) caused BCC harm.

Breach of Section 7.03(e)

Section 7.03 requires written approval of a supermajority (at least 70%) when entering into an obligation "with any Person related to or affiliated with" another member. (NYSCEF 33, BCC AOA at 10 [section 7.03 (e)].) MacArthur contends that Doeblin violated section 7.03(e) when he failed to disclose or obtain consent before entering BCC into extensive dealings with BCI. Such dealings, for example, include Doeblin obligating BCC for BCI debts, intermingling BCI and BCC accounts, causing BCC to be liable for BCI debts, and using BCC's financial position to obtain loans and capital investments to benefit BCI. In opposition, Doeblin does not challenge whether these actions constitute a breach of 7.02(e), thus, Doeblin fails to raise an issue of fact that he breached section 7.03(e).

Doeblin lists a number of meritless arguments, including his argument that there was no breach of section 7.03(e) because the $300,000 raised as a result of the Community Lending Program, divided by the four Book Culture stores, amounts to less than $50,000 per store (which the court adds, is incorrect math).

However, Doeblin, in an inartful manner, challenges whether there are any damages. Thus, for all the reasons above, MacArthur's summary judgment motion for breach of contract under this theory is likewise denied.

Second Cause of Action: Breach of Fiduciary Duty

MacArthur contends that Doeblin breached his fiduciary duty in numerous ways: (1) Doeblin repeatedly used BCC's credit and healthy finances to support BCI's; (2) Doeblin had been intermingling vendor accounts from the very beginning of BCC's existence, and claimed such intermingling was necessary to jumpstart the operations of BCC; (3) Doeblin was shopping BCI to investors, using BCC financial data to embellish BCI's financial picture. Thus, if capital were being raised using BCC's financial profile, any money should have been offered to BCC; (4) Doeblin showed where his loyalties lay when in April 2018 he offered to sell his BCC interests to MacArthur in exchange for a loan or guaranteed loans to BCI so that he could pursue opportunities for BCI; and (5) withholding BCC's revenues from the AMEX lockbox and using them for BCI purposes without authorization.

The first three contentions are duplicative of the breach of contract claim arising from section 7.03(e) and are dismissed as duplicative. MacArthur's fourth contention, that Doeblin expressed his desire to protect BCI's interests over BCC's, is part of the fifth contention and addressed below.

AMEX Lockbox

At the outset, the first and third causes of action, waste and conversion, respectively, are predicated upon the same allegations alleging that Doeblin breached his fiduciary duty when he diverted BCC funds from the AMEX lockbox to BCI resulting in an underpayment to BCC. The conversion and corporate waste claims are therefore duplicative of MacArthur's breach of fiduciary duty claim and dismissed despite Doeblin's failure to raise this issue. (*ABL Advisor LLC v Peck*, 147 AD3d 689 [1st Dept

2017] [dismissing conversion claim as duplicative]; *Yuan San Shih v Ji Yong Kim*, 54 Misc 3d 1223[A] [Sup Ct, Queens County] [noting that "waste is merely one potential component of breach of fiduciary duty" and dismissing waste as duplicative], citing *770 Owners Corp v Spitzer*, 25 Misc 3d 1204[A], 2009 NY Slip Op 51968[U] [Sup Ct, Kings County 2009].)

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's conduct." (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [citation omitted].) Managing members of LLCs owe non-managing members a fiduciary duty and require managing members to "avoid[ ] situations in which a fiduciary's personal interest possibly conflicts with the interests of those owed a fiduciary duty." (*Id*. [internal quotation marks and citation omitted].) Here, there is no question that Doeblin, as managing member, owed MacArthur, a non-managing member, a fiduciary duty.

MacArthur contends that Doeblin wasted BCC's revenues, those flowing to the AMEX lockbox pursuant to the AMEX Loan Agreement, to pay down a separate entity's (BCI's) accounts and purchase inventory, constituting a breach of his fiduciary duties. Moreover, MacArthur contends that Doeblin admits to his conduct in various email communications. (*See, e.g.,* NYSCEF 54, June 27, 2017 Email at 2.)

"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], citing *Aronoff v Albanese*, 85 AD2d 3, 5 [2d Dept 1982].) "Corporate waste occurs when assets are used in a manner 'so far opposed to the true interests [of the corporation so] as to lead to the clear inference that no one thus acting could have been

influenced by any honest desire to secure such interests.'" (*Patrick v Allen*, 355 F Supp 2d 704, 714-15 [SD NY 2005], citing *Meredith v Camp Hill Estates, Inc.*, 77 AD2d 649 [2d Dept 1980].) It is settled law that waste or a gift of corporate assets are void acts and cannot be ratified by a majority of stakeholders. (*Aronoff*, 85 AD2d at 4.)

Here, the court finds that MacArthur has established, prima facie, that Doeblin breached his fiduciary duty based on corporate waste when Doeblin, who admitted to being in charge of the accounting and who is the majority member of the corporation receiving the benefit of the use of BCC's revenues, returned the incorrect amount back to BCC and then used the funds for BCI purposes. (*Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], 2018 NY Slip Op 50180[U], *12 [Sup Ct, NY County, 2018] [finding corporate waste where corporate monies were diverted to other companies defendants owned an interest in, but not plaintiff], citing *Aronoff*, 85 AD2d at 5.) Moreover, MacArthur demonstrates that damages are at least $145,371 because BCC's tax returns showed an "advance to affiliate" in that amount and MacArthur argues was never repaid. (NYSCEF 56, BCC tax return at 4.) Doeblin has failed to raise a triable issue of fact that this amount has been fully repaid, and instead, argues in a conclusory manner without any showing of documentary evidence, that BCC was paid back entirely and owes BCI at least $250,000.

Doeblin's substantive arguments in opposition essentially assert that no waste claim has been "pleaded"[14] because there has been no diversion of corporate assets

[14] Throughout the opposition brief, Doeblin's counsel repeatedly references and argues under both a motion to dismiss standard and a summary judgment standard. (*See, e.g.*, NYSCEF 104, opp brief at 4 ["…no waste claim has been pled."]; *id.* at 3 ["…the waste claim nevertheless fails because MacArthur has neither alleged nor proven the affirmative diversion of corporate assets on which such claim is based.") Although the

constituting affirmative waste, rather an accounting mistake occurred, and BCC suffered no losses despite the accounting mistake. Doeblin urges the court to accept—without citation to supporting law—that an accounting error does not rise to the level of affirmative corporate waste, but the court rejects this invitation as this is controverted by the law. "It is and has always been general law that a director may be held accountable for the waste of corporate assets whether intentional or negligent without limitation to transactions from which he benefits." (*See Rapoport v Schneider*, 29 NY2d 396, 403 [1972] [citations omitted]; *see also Shapiro v Rockville Country Club, Inc.*, 22 AD3d 657, 658-59 [2d Dept 2005].) The record amply establishes that Doeblin benefitted from the challenged conduct as he was a majority owner of BCI at the time of the underpayment and that MacArthur had no equity interest in BCI. The record suggests at least negligence on Doeblin's part as he admitted to being the person overseeing the proper return of revenues to each company. (NYSCEF 56, Doeblin depo tr at 56:8-13.)

As discussed above, Doeblin claims that BCC owes BCI over $250,000 as BCI provided working capital to BCC to pay its vendors, rent, and payroll when BCC ceased operations in January 2020.[15] (*See also* NYSCEF 30, Doeblin aff ¶ 30.) Doeblin proffers no evidence showing repayment to BCC of the underpayment and proffers no evidence showing that BCC is indebted to BCI for that amount.

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opposition brief incorporates all arguments, terms, and definitions set forth in Doeblin's brief in support of his motion for summary judgment, notably absent from this opposition brief is the applicable legal standard. This is inartful and unclear and the court is only able to ascertain Doeblin's arguments by reading this opposition brief in conjunction with Doeblin's brief in support of summary judgment dismissing all claims.

[15] Curiously, however, Doeblin does not assert a counterclaim or a defense for offset in his answer.

Doeblin further argues in a one-off manner that his decision to enter a short-term loan with AMEX on behalf of BCC was reasonable and thus protected by the business judgment rule. Again, this assertion is contradicted by controlling law. (*See Amfesco Industries, Inc. v Greenblatt*, 172 AD2d 261, 264 [1st Dept 1991] [holding that the business judgment rule may not be invoked to insulate directors were tainted by a conflict of interest, bad faith, or fraud].) Doeblin's remaining contentions, that Doeblin did not personally receive a payment from BCC and that Doeblin was the first person to alert the parties of the accounting error, have been considered and are meritless.

Fifth Cause of Action: Fraud

Doeblin's contentions that the fraud claim should be dismissed are rejected for several reasons. Doeblin argues that, as a matter of law, fraud is inapposite in this action, but fails to cite applicable law. Second, Doeblin fails to challenge or address MacArthur's bases of liability and instead, as Doeblin does throughout these papers, raises issues not actually argued. Third, there are no citations to the record supporting any of Doeblin's factual contentions, and thus, they are conclusory.

Accordingly, it is

ORDERED that motion sequence number 001, plaintiff's motion for summary judgment, is granted in part only as to the cause of action for breach of fiduciary duty arising out of the diverted AMEX lockbox funds and otherwise denied; and it is further

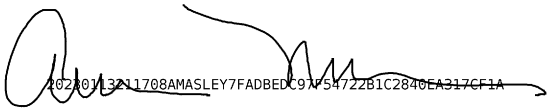
ORDERED that motion sequence number 002, defendant's motion for summary judgment is granted, in part, as to (1) the cause of action for waste which is dismissed; (2) the cause of action for conversion which is dismissed; (3) the cause of action for

breach of fiduciary duty only as to the claims not arising out of the AMEX lockbox which is dismissed; otherwise, motion sequence number 002 is denied; and it is further

ORDERED those motions in limine shall be filed within 30 days of the date of this decision and order. Otherwise waived; and it is further

ORDERED that the parties are to appear for a remote pretrial conference on February 15, 2023 at 3:30 pm, virtually; and it is further

ORDERED that plaintiff's motion for summary judgment on the second cause of action for breach of fiduciary duty is granted on liability arising out of the diverted AMEX lockbox funds and the issue of the amount of damages shall be determined at the trial.



1/13/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE