

**Greenman v Miller**

2023 NY Slip Op 34227(U)

December 5, 2023

Supreme Court, New York County

Docket Number: Index No. 650304/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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JANE GREENMAN,	INDEX NO. <u>650304/2017</u>
Plaintiff,	MOTION DATE <u>09/05/2023</u>
- v -	MOTION SEQ. NO. <u>010</u>
LARRY MILLER, MILLMAN LLC, 392 COLUMBUS AVENUE LLC, SDMJD NEXT GENERATION LLC	<b>DECISION + ORDER ON      MOTION</b>
Defendants.	
-----X	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 566, 567, 568, 569, 570, 571, 572, 574, 575, 576, 578

were read on this motion for JUDGMENT.

Plaintiff/Counterclaim-Defendant Jane Greenman (“Mrs. Greenman”) moves for an Order pursuant to CPLR 5001 and 5016 (i) to enter a judgment in accordance with the Court’s Decision and Order dated July 21, 2023 (NYSCEF 564) (the “Decision”), (ii) to fix dates for calculating prejudgment interest, and (iii) for an attorneys’ fees award.

Mrs. Greenman submitted a proposed judgment filed at NYSCEF 570, as well as the Affidavit of her expert, James J. Donohue (NYSCEF 567), in support of her calculations of prejudgment interest. Defendant/Counterclaim-Plaintiff Larry Miller (“Mr. Miller”) submitted a competing proposed judgment (NYSCEF 575) and objects to three specific requests by Mrs. Greenman as discussed below:

***I. The Claim Related to the Capital Accounts was a Claim for Declaratory Relief, Not Damages.***

As an initial matter, the parties dispute whether Mrs. Greenman was awarded any damages on her claim relating to the capital accounts. While the sentence “[t]herefore, Mr.

Miller must adjust the Millman capital account balances to their amounts prior to the 2016 adjustments and return the \$530,452 to Millman,” (NYSCEF 564 at 48) may have caused some confusion, earlier in the post-trial decision, the Court acknowledged that Mrs. Greenman amended her claim relating to the Millman capital account adjustments from one seeking damages to one for declaratory relief. The Court decided the claim as amended by determining that the 2016 adjustments to the capital accounts must be undone (NYSCEF 564 at 46–48). Consistent with the Court’s determination that “Mr. Miller must correct Millman’s Capital Accounts,” (NYSCEF 564 at 46), the decretal paragraph provides that “Miller is directed to (i) increase Ms. Greenman’s capital account by \$760,104 and decrease Mr. Miller’s capital account by \$229,652.” (NYSCEF 564 at 59). Thus, no damages are owed by Mr. Miller on this claim.

***II. Plaintiff’s Proposed Prejudgment Interest is Granted in Part.***

Mrs. Greenman is entitled to prejudgment interest on her breach of contract claims and breach of fiduciary duty claims (CPLR § 5001 [“Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.”]; *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 [1st Dept 2007] [noting that an award of prejudgment interest “is ‘virtually mandate’” in situations where fiduciaries failed to properly account for many years, during which time the fiduciary ‘enjoyed the benefit of the injured partner's money’”]).

To determine the specific date for computing interest, New York law provides that in circumstances where, as here, the “damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single

reasonable intermediate date.” (CPLR § 5001[b]). Mrs. Greenman submits a supplemental affidavit from her expert, Mr. Donohue (NYSCEF 567), which calculates, based on the various payment dates, the calendar midpoint date between the first and last payment for the five of the six categories of damages awarded by the Court where damages were incurred on more than one date (Donohue Aff., ¶¶ 4-9).

Mr. Miller does not challenge Mrs. Greenman’s use of the “reasonable intermediate date” method under CPLR 5001(b) for the purpose of calculating prejudgment interest, with one exception relating to the damages awarded for the 392 Columbus distributions.

Mr. Donohue states in his affidavit in support of Mrs. Greenman’s motion that the 392 Columbus distributions at issue “occur[ed] during the period from January 1, 2014 through December 31, 2019” and that he “believe[s] that the midpoint of that period, December 31, 2016, is a reasonable intermediate date from which to calculate prejudgment interest for the entire \$659,931.” (NYSCEF 567 ¶ 9). Mrs. Greenman submits that her use of 2014 as a starting point is appropriate because, in 2014, 392 Columbus began receiving income from W2 Labs, the source of all the 392 Columbus income at issue, citing Exhibit 14B-R of Mr. Donohue’s trial testimony affidavit (NYSCEF 544 [PX-130 at Exhibit 14B-R]). However, as Mr. Miller points out, there is no evidence that any of the distributions at issue occurred before 2016. Specifically, Exhibit 14B-R shows that neither Mrs. Greenman nor Mr. Miller received any distributions from 392 Columbus in 2014, that they received equal distributions of \$2,474 in 2015, and that the disparate distributions that were the subject of Mrs. Greenman’s claim against Mr. Miller did not begin until 2016 (*id.*).

Thus, based on Mr. Donohue’s own testimony and supporting calculations, the range of recoverable damages for the 392 Columbus distributions occurred between December 31, 2016,

and December 31, 2019. The midpoint of that range is July 1, 2018, and that is the date upon which prejudgment interest should be calculated.

***III. Plaintiff is Entitled to Attorney's Fees.***

Mrs. Greenman also requests the Court award her reasonable attorneys' fees, to be paid by Millman and 392 Columbus, for certain portions of her successful claims and defenses in this litigation, based on the indemnification provisions in the operating agreement and New York law. Mrs. Greenman requests that attorneys' fees be determined in a separate fee application to be made on a schedule to be fixed by the Court.

The indemnification provision in Millman's operating agreement states that "[Millman] shall indemnify each Member and Manager, and their legal representatives, successors and assigns...in the course of serving in any office of, or otherwise representing (within the scope of his authority) or acting for or on behalf of [Millman]." (NYSCEF 228, § 6.6, admitted at trial as JX-219). Here, Mrs. Greenman brought several successful claims on Millman's behalf against Mr. Miller for his diversion of corporate assets to benefit himself, rather than the shared benefit of Millman and its members (*see* Decision at 58). Under the Millman operating agreement, Mrs. Greenman thus is entitled to indemnification for those claims.

Likewise, Mrs. Greenman is entitled to indemnification as the "legal representative" and "successor" of Charles Greenman as Manager of Millman and 392 Columbus (*see* NYSCEF 253, § 6.7, admitted at trial as JX-217). Mrs. Greenman, as executor of Mr. Greenman's estate, successfully opposed the various counterclaims asserted by Mr. Miller and denied by this Court at various stages, against Mr. Greenman as manager (*see* Decision at 4-5).

Mr. Miller contends that because the agreements limit the indemnification to "the net assets of the Company" and the Court ordered, among the relief awarded to Mrs. Greenman, that

Mr. Miller must distribute all of Millman’s liquid assets, there will be no funds available to pay Mrs. Greenman her fees. However, Millman must satisfy its obligations to Mrs. Greenman under the Court’s judgment *before* distributing its “net assets” to its members.

Because Mrs. Greenman is contractually entitled to attorneys’ fees, the Court need not address her right to attorneys’ fees under common law.

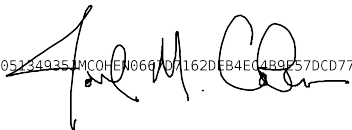
Accordingly, it is

**ORDERED** that Plaintiff’s Motion is **GRANTED IN PART**; it is further

**ORDERED** that Plaintiff submit a revised proposed judgment (by efilng and by sending a Word version to [SFC-Part3@nycourts.gov](mailto:SFC-Part3@nycourts.gov)) consistent with this Court’s decision within five (5) days of the date of this Order; it is further

**ORDERED** that Plaintiff’s claim for her reasonable costs and attorneys’ fees is hereby severed and shall continue, and within fourteen days of this Decision and Order, Plaintiff shall submit her application with supporting evidence with respect to its reasonable attorneys’ fees and costs. Defendant shall have fourteen days thereafter to submit any objections to Plaintiff’s application. The Court will then determine whether to decide the matter on the papers or schedule oral argument or an evidentiary hearing or refer the matter to a Referee, as appropriate.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

12/5/2023  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE