

**Rozof v D. Karnofsky, Inc.**

2025 NY Slip Op 31383(U)

April 7, 2025

Supreme Court, New York County

Docket Number: Index No. 657124/2017

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X

ARTHUR ROZOF,

Plaintiff,

- v -

D. KARNOFSKY, INC.,

Defendant.

INDEX NO. 657124/2017

MOTION DATE 03/22/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

-----X

D. KARNOFSKY, INC.

Plaintiff,

-against-

ARTHUR ROZOFF AS EXECUTOR OF THE ESTATE OF  
EDNA ROZOF DECEASED

Defendant.

Third-Party  
Index No. 595075/2018

-----X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

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

This is an action by plaintiff Arthur Rozof (Arthur) to recover from defendant D. Karnofsky, Inc. (DKI) the balance due to Arthur under certain promissory notes issued by his deceased mother, Edna Rozof, on behalf of DKI (NYSCEF # 39 – compl ¶ 1, 9-14; NYSCEF # 43 – Deft 19-a ¶¶ 14-15). Defendant moves to dismiss the complaint, which plaintiff opposes and cross claims for summary judgment on his breach of contract claim against defendant. For the following reasons, and after oral arguments held on March 11, 2025, defendant’s motion is granted, and plaintiff’s cross claim is denied.

DKI is a New York corporation that is the owner of several rent-controlled walk-up buildings in Manhattan and a parcel of unimproved property in upstate New York (Deft 19-a ¶ 4; NYSCEF # 44 – Mark aff ¶ 2; NYSCEF # 56 – Arthur aff ¶7). DKI was incorporated in 1953 by David Karnofsky, the father of Edna, as well as Edna and Martha Hindin (Mark aff ¶ 2; Arthur aff ¶¶ 5, 8). DKI has a Certificate of Incorporation, but it has no known bylaws (Deft 19-a ¶¶ 5-

7; Mark aff ¶ 2). Although there is some dispute as to when certain interests in the company were transferred to the Rozof family, there is no apparent dispute that, since 1985, Arthur and his three siblings, Linda Rozof-Guber (Linda), Judith Teitell (Judith), and Mark Rozof (Mark, and together with Arthur, Linda, and Judith, the Siblings), as well as Edna or her Estate, have been the sole shareholders of DKI (Deft 19-a ¶¶ 1, 3, 9-10; NYSCEF # 76 – Pltf 19-a ¶ 9-10; Mark aff ¶¶ 1, 3; Arthur aff ¶ 7). Linda, Judith, and Mark each own collectively 65.38 percent of DKI's issued and outstanding shares, while Arthur and Edna/Edna's Estate own the remaining balance (Deft 19-a ¶ 10; Mark aff ¶ 3; Arthur aff ¶ 6). As of May 16, 2016, Arthur, Linda, Judith, and Mark serve on DKI's Board of Directors (the Board), and as of September 16, 2016, Mark holds the role of President of DKI, Linda holds the role of Secretary of DKI, and Judith holds the role of Treasurer of DKI (Deft 19-a ¶¶ 11-12; Mark aff ¶ 4)

There are two promissory notes purportedly issued by DKI to Arthur that are relevant to the parties' motions (*see* Deft 19-a ¶¶ 14-15). The first is a promissory note that was executed on December 16, 2010, by Edna on behalf of DKI (*id.* ¶¶ 15, 28; Mark aff ¶ 6; Arthur aff ¶ 23, 26; NYSCEF # 62 – the 2010 Note). Edna signed the 2010 Note as Vice President of DKI (Deft 19-a ¶ 29; 2010 Note at ARTHUR-001438). As set forth in the 2010 Note, which was prepared by attorney Craig Meltzer, DKI promised to pay Arthur \$400,000, payable in ten equal annual payments of \$40,000 per annum, together with interest (2010 Note at ARTHUR-001437; Arthur aff ¶¶ 23, 26).<sup>1</sup> Arthur maintains that the 2010 Note was his mother's idea and intended to compensate him for unpaid wages and work he had performed for DKI from 1981 to 1994 (Arthur aff ¶¶ 13-25; Deft 19-a ¶ 41; NYSCEF # 58 at ARTHUR-006594; NYSCEF #s 59-60).<sup>2</sup>

The second promissory note was executed on September 17, 2011, by Edna on behalf of DKI and superseded and replaced the 2010 Note (Deft 19-a ¶ 14; Pltf 19-a ¶ 1; Mark aff ¶ 6; Arthur aff ¶ 27; NYSCEF # 63 – the 2011 Note, and together with the 2010 Note, the Notes). As she did for the 2010 Note, Edna signed the 2011 note as Vice President of DKI (Deft 19-a ¶¶ 14, 29; Pltf 19-a ¶ 1; 2011 Note at ARTHUR-001440). Pursuant to the 2011 Note, which was again prepared by Meltzer, DKI promised to pay Arthur \$1,500,000, payable in ten equal annual payments of \$115,000 per annum, together with interest (Deft 19-a ¶ 14; Pltf 19-a ¶¶ 1, 9-10; 2011 Note at ARTHUR-001439; Arthur aff ¶ 28). In making this payment promise, DKI “acknowledged its obligation to [Arthur] with respect to all compensation due [to Arthur] from 1981 up to May 18, 1994 . . . [that] had not been paid and had been ‘deferred’ and that the same remained due and owing to [Arthur]” (Pltf 19-a ¶ 2; 2011 Note at ARTHUR-001439). The 2011 Note also indicated that DKI “affirm[ed] [Arthur's] right to accrued interest from January 1, 1981,” and that “[Arthur] agreed to limit his claim for compensation past due to [\$1,500,000]

<sup>1</sup> The parties dispute whether it was Arthur or Edna who retained Meltzer to prepare the 2010 Note (*compare* Deft 19-a ¶ 20 *and* Mark aff ¶ 10, *with* Pltf 19-a ¶ 20, *and* Arthur aff ¶¶ 23-24). DKI maintains that Arthur procured Meltzer's legal services, relying largely on a Surrogate Court decision that denied Arthur's motion for summary judgment dismissing an undue influence claim asserted against him (the Surrogate Court Opinion) (NYSCEF # 48 at 5-6). DKI specifically points to certain testimony by Meltzer that was cited in the Surrogate Court Opinion in which he “testified that Arthur contacted an attorney he knew to request the name of an attorney to prepare his mother's will on a rush basis” (*see* Deft 19-a ¶ 20; NYSCEF # 48 at 5-6, 9). For his part Arthur affirms that Edna retained Meltzer and he had no role in that process (*see* Arthur aff ¶¶ 23-24).

<sup>2</sup> Arthur maintains that, in 1994, he executed an employment agreement with DKI, with his mother signing as president (Arthur aff ¶¶ 17-18; NYSCEF # 61).

including interest deemed accrued retroactively to January 1, 1981 (2011 Note at ARTHUR-001439-440). As he did with the 2010 Note, Arthur maintains that he did not convince Edna to sign the 2011 Note (Arthur aff ¶ 27).

Although there is no dispute that, to date, no payments have been made on the 2011 Note (or, alternatively, the 2010 Note) (*see* Pltf 19-a ¶ 12; Arthur aff ¶ 28), there is significant dispute between the parties as to Arthur's entitlement to any payment from DKI in connection with these Notes. At the outset, as he testified, Arthur did not give Linda, Judith, or Mark advance notice of the Notes, and he was not aware if (1) they were notified of Edna's intentions about the Notes, (2) there were documents in which they consented to the Notes, or (3) there were any resolutions or discussions of a resolution to authorize the Notes (Deft 19-a ¶¶ 31-34, 36-37; NYSCEF # 42 – Arthur tr 153:8-154:5, 156:19-22, 173:3-25, 174:2-10, 177:10-13, 179:13-19). Instead, Mark, Linda, and Judith were first notified of the 2011 Note in October 2011—i.e., a month after its execution—when Arthur sent an email to DKI's accountant, Neal Guber (Guber), to ask him to record the 2011 Note on DKI's financial books and records (Deft 19-a ¶ 16; Mark aff ¶ 7).<sup>3</sup> Arthur has conceded that his siblings may want to know about the 2011 Note, but he maintains that they did not have a reasonable expectation about learning of the 2011 Note prior to its execution (Arthur tr 178:7-179:1).

According to Mark, the 2011 Note came as a “shock” (Mark aff ¶ 7). As Mark explains, in the two years prior to her death, Edna's health was in decline, resulting in multiple hospitalization and her apparent confusion (*id.* ¶5; Deft 19-a ¶ 13). Mark, in turn, essentially insinuates that Arthur took advantage of Edna during this time (*see* Mark aff ¶¶ 10-14). For example, relying on the Surrogate Court Opinion, Mark asserts that it was around this time Arthur enlisted Meltzer to prepare, on a “rush basis,” a will to replace Edna's original will executed on December 18, 2006 (*id.* ¶ 10; NYSCEF # 48 at 5-6; NYSCEF # 47 – 2006 Will). Although the 2006 Will directed for Edna's DKI stock and certain interest in one of Edna's property to be distributed amongst all of the Siblings (*see* Deft 19-a ¶ 24; Mark aff ¶ 11), the 2010 Will provided that Arthur would receive all of Edna's DKI stock and all of her interest in her property (*see* Deft 19-a ¶ 25; Mark aff ¶ 12; NYSCEF # 46 – 2010 Will). This meant that, as compared to the 2006 Will, Arthur was to receive a greater share of Edna's assets (*see* Deft 19-a ¶ 27; Mark aff ¶ 12; Arthur tr 141:2-5). Mark notes that it was during this same time that Edna executed the 2010 Note, which he discovered during Edna's probate proceedings (Mark aff ¶ 9).

Pointing to Arthur's testimony, DKI also challenges Arthur's awareness of the authority or capacity of Edna to enter the Notes, as well as the fairness of the compensation contemplated by the Note (*see* Deft 19-a ¶¶ 39-49). To start, DKI asserts that Arthur testified that he did not review any documents before the Notes were signed to determine whether Edna was authorized by DKI to execute the Notes (*id.* ¶ 39; Arthur tr 155:9-21). DKI also points to testimony that suggests that Arthur was not aware if Edna reviewed any documents before executing the Notes to determine whether she was authorized to do so, or if there was any written consent authorizing Edna to take actions on behalf of DKI (Deft 19-a ¶¶ 40-41; Arthur tr 154:6-155:21, 174:2-10). There is also no dispute that Arthur did not (1) cause DKI to engage a compensation consultant to determine the reasonable value of his services provided to DKI during the period of his employment with the company, (2) consult anyone about whether the Notes were fair and

<sup>3</sup> Guber ultimately rejected this request (Deft 19-a ¶ 17; Arthur tr 156:3-18).  
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Motion No. 001

reasonable to DKI, (3) provide any support to substantiate that the compensation addressed by the Notes, or (4) discuss the issue of whether his purported claims against DKI for unpaid wages were barred by any applicable statute of limitations (*see* Deft 19-a ¶¶ 43-44, 46-49; Arthur tr 52:20-53:2, 157:4-21, 162:5-7, 175:6-17; *see also* NYSCEF # 78 – Guber aff ¶¶ 3-6). For his part, Mark maintains that, despite signing the Notes as Vice President of DKI, Edna was never elected or appointed Vice President by the Board, nor did the DKI give Edna authority to execute the Notes (Mark aff ¶ 14).

Arthur unsurprisingly disputes DKI's position regarding Edna's mental capacity, her authority to act on behalf of DKI, or the circumstances underlying the Notes. As an initial matter, Arthur points to deposition testimony adduced in both Edna's probate proceedings and the instant proceeding that none of his siblings were aware of who was in control of DKI based on their general lack of involvement in the business prior to their appointment to the Board (*see* Pltf 19-a ¶ 5; NYSCEF # 71 – Linda tr 19:20-24, 57:21-58:4, 59:5-60:7, 98:7-99:6, 161:12-21; NYSCEF # 72 – Judith Probate tr 21:19-22:5; NYSCEF # 73 – Judith tr 34:19-37:23, 80:15-92:14; NYSCEF # 74 – Mark Probate tr 40:13-41:15, 44:16-45:6). By contrast, Arthur attests, based on his knowledge as a shareholder of DKI and his role running DKI's day-to-day operations, Edna has served as DKI's President from 1967 to 1995 after the death of David Karnofsky, and in 1995, she appointed Arthur as President of DKI and transitioned to her role as DKI's Vice President (*see* Arthur aff ¶¶ 8-12, 21; *see also* NYSCEF # 57 at ARTHUR-001373).

Arthur separately maintains that, contrary to DKI's current insinuations about Edna's health, none of his siblings had previously observed any declines in Edna's mental acuity as of 2010 (*see* NYSCEF # 70 – Linda Probate tr 34:11-18 ["I would say she was the same person she was before mentally"]; Judith Probate tr 17:2-7, 27:19-25 ["She was sharp, she was talkative, she was my mom"]; Mark Probate tr 14:15-18 ["She was a sharp old lady"]). And with regard to the claims that Arthur exercised "undue influence" or procured the Notes on a "rush basis," Arthur denies any wrongdoing and otherwise disputes DKI's purported "mischaracterization" of the Surrogate Court Opinion on the grounds that the purported "finding" upon which it relies was merely testimony identified by that court to conclude that an issue of fact existed to preclude any dismissal of the undue influence claim against him (*see* NYSCEF # 48 at 9; *see also* Arthur tr 134:12-138:23; NYSCEF # 69 – Arthur Probate tr 35:14-36:13).

### Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Although summary judgment is "considered a drastic remedy," "when there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]).

Here, in moving for summary judgment to dismiss Arthur's claim for payment under either the 2011 Note or the 2010 Note, DKI advances two primary arguments: (1) the Notes are void and unenforceable because they are the product of Arthur and Edna's breach of the fiduciary duties of candor, loyalty, and good faith/due care owed to DKI and its shareholders (NYSCEF # 51 – 2017 MOL at 7-16; NYSCEF # 102 – 2017 Reply at 2-6); and (2) the Notes are void and unenforceable because Edna did not have either actual or apparent authority to execute the Notes on DKI's behalf (2017 MOL at 17-21; 2017 Reply at 7-11).

In opposition, Arthur retorts that Edna had authority to execute the Notes because she had served as an officer of DKI for more than 40 years and, at the time the Notes were executed, Edna was DKI's only director (NYSCEF # 77 – 2017 Opp at 17-20). Arthur further explains that DKI's claims on Edna and Arthur's breach of their fiduciary duties are baseless because (1) neither Edna nor Arthur entered into an agreement on behalf of DKI for their own interests, (2) Mark, Judith, and Linda were aware of the 2011 Note in or about October 2011, shortly after it was executed, and (3) any contention that Arthur and Edna did not exercise good faith and due care in assessing Arthur's salary is belied by the fact that DKI now pays Mark, Linda, Judith, and a third-party managing agent far more in compensation than anything Arthur ever received for his work between 1981 and 1994 (*id.* at 20-22).

Arthur separately cross moves for summary judgment on his claim for payment under the Notes. In support, Arthur contends that there is unrebutted evidence in the record that establishes that the Notes are enforceable and contain explicit commitments for payments on specific dates, and that DKI has failed to pay Arthur in accordance with their terms (2017 Opp at 16-17).

#### (1) *Breach of Fiduciary Duty Claims*

In general, directors and majority shareholders of a corporation have an obligation to all shareholders to adhere to fiduciary standards of conduct and to exercise their responsibilities in good faith when undertaking any corporate action (*Alpert v 28 Williams Street Corp.*, 63 NY2d 557, 568 [1984]; *Collins v Telcoa Inter. Corp.*, 283 AD2d 128 [2d Dept. 2001]). The fiduciary's obligations include fairness and candor as well as good and prudent management of the corporation (*Alpert*, 63 NY2d at 568; *see also EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 19-20 [holding that plaintiff had sufficiently alleged that Goldman Sachs breached its fiduciary duty by failing to disclose that it had a financial incentive to set a lower price for its client's IPO]). They also involve "a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect" and to avoid "conflicts of interest" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]).

As is relevant to the below analysis, it is in those circumstances when an agreement or transaction is procured as a result of a breach of one of these duties—particularly, the duty of candor/disclosure—that it will be deemed void and unenforceable (*see Commander Terminals Holdings, LLC v Poznanski*, 84 AD3d 1005, 1008 [2d Dept 2011] [holding that where fiduciary failed to disclose all material facts about an agreement, the agreement was rendered voidable and unenforceable]; *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278, 279, 280 [1st Dept 2002], *abrogated on other grounds Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269 [2011] [holding that absent "full disclosure" by a fiduciary, transaction was deemed voidable]; *see also Cordaro v Advantage Physicians, P.C.*, 208 AD3d

1090, 1092 [1st Dept 2022] [“Transactions between a fiduciary and beneficiary are voidable if the fiduciary acts in its own interest and does not fully disclose all material facts”]; *Alizio v Perpignano*, 176 AD2d 279, 281 [2d Dept 1991] [voiding a fee-share agreement where partner failed to obtain consent from remaining partners and finding breach of fiduciary duty by partner who attempted to enforce agreement]). Here, DKI maintains that the Notes are void because Arthur and/or Edna breached three independent fiduciary duties owed to DKI and its shareholders: the duty of good faith/due care, the duty of loyalty, and the duty of candor.

DKI maintains that the Arthur and Edna failed to discharge their fiduciary duties by not determining whether the Notes were fair or reasonable or if Edna was even authorized or otherwise in proper state of mind to execute the Notes. In support, DKI argues, and the record largely confirms, that Arthur neither consulted anyone about the existence or fairness of the Notes nor is aware if Edna did so (*see* Arthur tr 153:8-154:5, 156:19-22, 173:3-25, 174:2-10, 177:10-13, 179:13-19). There is further confirmation from the record that Arthur did not take any steps to assess for himself whether Edna had authority to execute the Notes and did not broach issues such as statute of limitations on his unpaid wage claims when negotiating the terms of Notes (*see* Deft 19-a ¶¶ 43-44, 46-49; Arthur tr 52:20-53:2, 155:18-21, 161:25-162:22, 175:6-17). Arthur, however, has adduced both his own testimony and documents in the record—including his 1994 Employment Agreement with DKI and prior acknowledgments by both Edna and his siblings of Arthur’s contributions to DKI—that provide a factual basis and justification for the Notes (Arthur aff ¶¶ 17-18; NYSCEF #s 58-61). That his siblings have received similar levels of compensations by DKI in more recent years further supports this point (*see* Arthur aff ¶ 31; NYSCEF #s 64-67). Consequently, if armed with these facts, a trier of fact could determine that, although the Notes were not disclosed to Arthur’s siblings prior to their execution, there was nevertheless a good faith basis to execute them.<sup>4</sup> As a result, even if DKI has made a prima facie showing of a breach of Arthur and/or Edna’s duty of good faith, Arthur has adduced sufficient evidence to rebut that showing.

DKI’s insinuation that Arthur somehow took advantage of Edna’s declining health should not alter this conclusion. To start, the only real support for DKI’s challenge to Edna’s mental capacity in the year prior to her death comes from Mark’s affirmation. Mark, however, relies solely on his say-so to make this assertion. And his contention is also largely at odds with prior testimony by him, Judith, and Linda that recognized that Edna as both sharp in her final years and unimpacted by the medical issues and hospitalizations that plagued her during this period of time (*see* Linda Probate tr 34:11-18 [“I would say she was the same person she was before mentally”]; Judith Probate tr 17:2-7, 27:19-25 [“She was sharp, she was talkative, she was my mom”]; Mark Probate tr 14:15-18 [“She was a sharp old lady”]). Separately, insofar as DKI relies on the Surrogate Court Opinion’s quotation from Meltzer’s probate deposition that the 2010 Note was prepared on a “rush basis,” it bears noting that the Surrogate Court only cited this testimony to establish that an issue of fact exists on the remaining “undue influence” claim at

<sup>4</sup> To challenge Arthur’s claim that he had not been compensated for work performed for DKI, DKI notes that, for a period of years between 1998 to 2012, Arthur received total compensation for \$1,765,770 (*see* NYSCEF #s 79-98). But even if Arthur was paid this amount during this period, DKI has at most presented an issue of fact with regard to the appropriateness of any compensation Arthur may be entitled under the Notes. It does not necessarily speak to the issues of good faith and due care in connection with Edna’s execution of the Notes.

issue in those proceedings (NYSCEF # 48 at 9). This was not an ultimate finding of fact. Further, Meltzer's contention is, in any event, fiercely disputed by Arthur in his own sworn affirmation and prior deposition testimony (*see* Arthur tr 134:12-138:23; Arthur Probate tr 35:14-38:3).

The second fiduciary duty that DKI claims was breached by Arthur and Edna in executing the Notes was the duty of loyalty. DKI avers that Arthur had a financial self-interest in having the Notes executed, and thus the entire fairness of the transaction is in question (MOL at 12-13). To support this contention, DKI points to the fact that, although Arthur indisputably had a financial self-interest in the Notes, he did not, by his own admission, discuss with Edna certain key points underlying the fairness of the Notes. This included issues such as the impact of the statute of limitation on his unpaid wages claim and the reasonableness of the compensation sought by Arthur through the Notes. In response, Arthur notes that the amount set forth in 2011 Note directly comports with the salary that was otherwise contemplated by the 1994 Employment Agreement, inclusive of accrued interest (*compare* 2011 Note with NYSCEF # 61). When this fact is coupled with Arthur's contention that the statute of limitations was revived upon execution of the Note, it is again clear that issues of fact exist surrounding the entire fairness of the underlying transaction that culminated in Edna's execution of the Notes (*see* 2017 Opp at 23, citing *Toobian v Toobian*, 209 AD3d 907 [2d Dept 2022]; *see also* Gen. Obligation Law § 17-101 ["An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property"]).

The final fiduciary duty addressed by DKI in its motion is the duty of candor. At the outset, there is no meaningful dispute that neither Arthur nor Edna ever made Mark, Judith, or Linda aware that DKI would be issuing either the 2010 Note or 2011 Note to Arthur, and in turn impose a \$1.5 million obligation to DKI. There is also no meaningful dispute that this is a fact that DKI's shareholders would likely have wanted to know prior to the execution of the Notes (Arthur tr 178:7-179:1). Arthur's only response to this contention is to assert that he eventually disclosed the 2011 Note to Mark, Judith, and Linda in October 2011. But as Arthur necessarily must concede, this disclosure occurred *after* the relevant transactions took place (*compare* 2011 Note [dated September 27, 2011] with Arthur aff ¶ 29 [disclosure took place on October 2011]). Accordingly, given that Arthur was the only shareholder that stood to benefit from this \$1.5 million obligation that DKI would be incurring, Edna, and to the extent he served in an executive position, Arthur, ought to have disclosed that DKI would be executing the Notes and the basis for the Notes issuance. That they did not do so here would amount to a breach of their duty of candor to DKI's remaining shareholders and the Notes would be deemed void and unenforceable (*see Commander Terms. Holdings, LLC v Poznanski* (84 AD3d 1005, 1006-1008 [2d Dept 2011] [finding that defendant, as an officer for several of plaintiffs' affiliate companies, who entered into written agreements with an entity defendant formed to provide management services for these affiliate companies but without disclosing all material facts of the agreements to plaintiffs, was a breach of defendant's fiduciary duty and deemed the agreements void and unenforceable]).

In essence, the only person who stood to benefit from the Notes was Arthur, yet none of the Notes' key details were ever disclosed to any of DKI's other shareholders beyond Edna, who was executing the Notes on DKI's behalf for Arthur's sole benefit. Consequently, there is a sufficient basis to conclude from the record adduced by DKI that Arthur and Edna's lack of

disclosure amounted to a breach of their fiduciary duty to Mark, Linda, and Judith that, in turn, renders the Notes void and unenforceable.

In sum, DKI has made an un rebutted prima facie showing that Arthur and/or Edna breached their fiduciary duties upon executing the Notes benefiting only Arthur without disclosing to DKI's shareholders. As such, the Notes are deemed void and unenforceable. Defendant's motion to dismiss the complaint is therefore granted. Consequently, Arthur's cross motion for summary judgment on his breach of contract based on the Notes is denied.

*(2) Edna's Lack of Authority Claims*

Given the finding above on Edna and Arthur's breach of fiduciary duty by failing to disclose the Notes to defendant's shareholders, the issue as to whether Edna lacked the authority to have DKI issue the Notes is academic. In any event, as explained below, issues of fact preclude an entry of summary judgment in DKI's favor on the authority issue.

At the outset, DKI asserts that, in the absence of any known bylaws for the company, the court must ascertain under Business Corporation Law if Edna was properly appointed Vice President at the time she executed the Notes and, in turn, vested with the authority to execute the Notes. In support, DKI points to BCL § 715(a), which provides that "[a] board may elect or appoint a president, one or more vice-presidents, a secretary and a treasurer, and such other officers as it may determine," and BCL § 715(g), which provides that "[a]ll officers . . . shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws or, to the extent not so provided, by the board" (BCL §§ 715[a] & [g]).

Here, as the record establishes, Arthur did not review any documents before the Notes were signed to determine whether Edna was authorized by DKI to execute the Notes. Arthur is also not aware if Edna reviewed any documents before executing the Notes to determine whether she was authorized to do so, or if there was any written consent authorizing Edna to take actions on behalf of DKI. And, critically, there also does not appear to be any formal document submitted by either party that clearly establishes that, at the time she signed the Notes, Edna was Vice President of DKI and had the authority to act on its behalf.

That said, assuming DKI met its prima facie burden here, Arthur has more than sufficiently proffered evidence raising triable issues of fact concerning Edna's actual authority. To start, as Arthur affirms, based on his knowledge as a shareholder of DKI and his role running DKI's day-to-day operations, Edna has served as DKI's President from 1967 to 1995 after the death of David Karnofsky, and in 1995, she appointed Arthur as President of DKI and became Vice President from that point on. Arthur corroborates this assertion by pointing to a shareholder agreement that specifically identifies Edna as a member of DKI's board of directors and an officer of DKI as of 1954 (NYSCEF # 57 at ARTHUR-01373). Arthur also submits that, by the 1980s, Edna was the only remaining director and officer of DKI (*see* Arthur aff ¶¶ 8-12). When these points are coupled with testimony from Mark, Linda, and Judith that indicates a general lack of awareness of DKI's operations, there is sufficient evidence proffered by Arthur in opposition that establishes a triable issue of fact on Edna's authority to act on behalf of DKI and bind it to obligations.

There is also sufficient evidence to support Edna’s apparent authority to act on behalf of DKI. Under New York law, “[a]pparent authority must be based on words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction” (1230 Park Assoc. LLC v N. Source, LLC, 48 AD 3d 355, 355-56 [1st Dept 2008]). “[Apparent] authority may arise only from the conduct of the principal, not the agent” (Imburgio v Toby, 82 AD3d 653 [1st Dept 2011]). Put differently, implied authority must be based on a showing that the principal “performed verbal or other acts that gave [the agent] the reasonable impression that he had authority to enter into the [contract]” (Site Five Hous. Dev. Fund Corp. v Estate of Bullock, 112 AD3d 479, 480 [1st Dept 2013]).

As with the issue on Edna’s actual authority, beyond Arthur’s own say so, there is sufficient evidence that establishes that, at minimum, Edna had apparent authority to act based on the purported composition of DKI’s board at the time the Notes were executed and Arthur’s general involvement with the company beginning in the 1980s until Edna’s death.

In sum, defendant’s argument that Edna has no authority to issue to Notes and bound DKI fails. Nevertheless, defendant’s motion to dismiss is granted on the grounds that Edna and/or plaintiff breached the fiduciary duty by failing to disclose to DKI’s shareholders the Notes benefitting only Arthur. Accordingly, it is

ORDERED that defendant D. Karnofsky, Inc.’s motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiff Arthur Rozof’s cross motion for summary judgment is denied; and it is further

ORDERED that defendant’s counsel is to serve a copy of this Decision and Order, with Notice of Entry, on the Clerk of the Court and on plaintiff within 10 days of this order; and it is further

ORDERED that the Clerk of the Court is to enter judgment in favor of defendant D. Karnofsky, Inc.; and it is further

ORDERED that the third-party action is severed, and the parties are to appear for a status conference on June 18, 2025, at 10:30 a.m. on Microsoft Teams.

4/7/2025

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE