[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 20

Index Number : 102550/2008

ZEKRY, NICOLE LAWI

VS

ZEKRY, PINHAS

Sequence Number : 026

VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION(S) AND CROSS-MOTION(S) DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION/ORDER OF EVEN DATE.

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/10/12

Deborah A. Kaplan

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

At the Matrimonial Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 10th day of January, 2012

PRESENT: HON. DEBORAH A. KAPLAN

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NICOLE LAWI ZEKRY

Plaintiff,

-against-

PINHAS ZEKRY and
DAVID BEN BAROUCK, CORP.,

Defendants.

----------x

Decision and Order
Motion Seq.: 025 and 026
Index No. 102550/2008

DEBORAH A. KAPLAN, J.:

Motion sequence nos. 025 and 026 are consolidated for disposition. In motion sequence no. 025, plaintiff Nicole Lawi Zekry (Lawi) moves for an order: (1) pursuant to CPLR 3212, granting summary judgment in her favor as to liability and compensatory damages on the first, second, third and fourth causes of action; (2) directing an immediate trial as to the amount and extent of punitive damages for the third and fourth causes of action; and (3) dismissing the counterclaims asserted by defendants Pinhas Zekry (Zekry) and R. David Ben Barouck, Corp. (Barouck Corp). Defendants cross-move for an order: (1) pursuant to CPLR 3212 (d), denying Lawi's motion for summary judgment on the basis that facts essential to justify opposition may exist but cannot be stated until the completion of discovery; (2) pursuant to CPLR 3124, compelling Lawi to answer questions set forth at her deposition held on April 29, 2010, and produce the documents requested therein; and (3) pursuant to CPLR 603, severing defendants

counterclaims, in the event that this court determines that they cannot maintain their counterclaims at this time. In motion sequence no. 026, defendants move for an order, pursuant to 22 NYCRR § 202.21, vacating Lawi's note of issue on the ground that discovery is not complete.

The parties executed an agreement on April 20, 2004, wherein they created a partnership for the purpose of operating a hair salon, spa and cosmetology business at 428 Columbus Avenue, New York, NY (the Shareholders Agreement), under Barouck Corp. Pursuant to the Shareholders Agreement, the shares, and the net profits and losses were to be divided 40% to Lawi and 60% to Zekry.

In February 2008, Lawi commenced this action against Barouck Corp. and Zekry, as its President, Treasurer and 60% shareholder, asserting the following causes of action: reformation of the Shareholder Agreement (first); breach of contract (second); breach of Zekry's fiduciary duties (third); conversion (fourth); and fraud in the inducement (fifth). Lawi essentially alleges that she did not receive her proper share of the corporation's profits as a result of Zekry's manipulation of the corporation's books and records, diversion of cash and other assets of the corporation and false claims of grossly inflated expenses incurred by the corporation.

She now seeks summary judgment on her first through fourth causes of action. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of

the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The drastic remedy of summary judgment should be granted only if there are no triable issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1979]). The court's function is not to assess credibility (*see Ferrante v American Lung Assn.*, 90 NY2d 623 [1997]), or resolve issues of fact, but rather to determine whether material issues of fact exist (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Lawi seeks summary judgment on her first cause of action for equitable reformation of the Shareholders Agreement to provide her with 71.1% of shares of the Barouck Corp., instead of the 40% she currently owns thereunder. "Before reformation of a contract may be granted, a party must establish his [or her] right to such relief by clear, positive and convincing evidence" (*Ribacoff v Chubb Group of Ins. Cos.*, 2 AD3d 153, 154 [1st Dept 2003), "since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties" (*Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442-443 [1st Dept 2007]). A claim for reformation must be based on either mutual mistake or fraudulently induced unilateral mistake *(Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 44 AD3d 551 [1st Dept 2007]; *see also Chimart Assoc. v Paul*, 66 NY2d 570 [1986]), and the proponent "must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (*Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d at 443, quoting *South Fork Broadcasting Corp. v Fenton*, 141 AD2d 312, 315 [1st Dept], *lv dis* 73 NY2d 809 [1988]).

Lawi does not seek reformation based on mutual mistake. She instead urges reformation of the Shareholders Agreement on the ground of Zekry's purported fraudulently

induced unilateral mistake regarding his capital contribution of $472,800. With unilateral mistake, Lawi must demonstrate that she was fraudulently misled by Zekry, and that their agreement does not express the intended agreement (*see Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, *supra*).

In support of her application, Lawi claims that, pursuant to paragraph 13 of the Shareholders Agreement, the intent was to apportion ownership of the shares between her and Zekry in accordance with their respective initial capital contributions. She maintains that Zekry represented that he had paid $472,800 towards the startup costs of the business, and that she paid 40% of those expenses, i.e, $189,120, for a 40% share of the business, while he retained a 60% share based on his alleged net capital contribution of $283,680.

She contends that, during the parties' divorce proceedings, she learned that the true startup costs were $176,971, rather than the amount represented by Zekry, and that of the $176,971, $100,000 originated from a loan from RAV, a company owned by the parties. She thus argues that, Zekry fraudulently misrepresented his actual capital contribution, and that, accordingly, the Shareholders Agreement should be reformed to reflect her ownership as 71.1% of the stock.

The paragraph upon which Lawi rests her claim provides, in relevant part, as follows:

> Share Ownership
>
> a. The shares of [Barouck Corp.] shall be issued as follows:
>
> To [Zekry]: 60% for the payment of $283,680.00, as his and above set forth of the total shares in return for the consideration of the know-how and managerial experiences, and infrastructure of

> management and availability of selling and work force and personnel, which he has invested in the corporation and in facilitating the construction of the premises.
>
> To [Lawi]: 40% for the payment of $189,120.00 as hereinabove set forth.

(*id.*, ¶ 13 Share Ownership at 9).

The law is well-settled that the parties' intention should be determined from the language employed within the four corners of their agreement, and that where the language is clear and unequivocal, interpretation is a matter of law to be determined by the court (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169 [1973]; *see also American Express Bank v Uniroyal, Inc.*, 164 AD2d 275 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]).

Contrary to Lawi's contention, the language in the aforementioned paragraph does not provide for the distribution of the business's shares based solely on the parties' respective financial capital contributions. While the provision clearly and unambiguously provides for Lawi's receipt of 40% of the shares based solely on her financial contribution of $189,120, Zekry's receipt of 60% of the shares was based not only on his payment of $283,680, but also his personal investment in the business, including, *inter alia*, his knowledge and managerial experiences, his work force and personnel, and his facilitation of the construction of the premises. Therefore, even assuming, arguendo, that Lawi could demonstrate that Zekry misrepresented his actual initial capital contribution to the business, she fails to demonstrate, in no uncertain terms, that, the language of the Shareholders Agreement provided for the division of share ownership based solely on the parties' respective initial financial contribution (*South Fork Broadcasting Corp. v Fenton*, 141 AD2d at 314). Since Lawi fails to meet her initial burden as

the movant to establish a prima facie entitlement to summary judgment on her first cause of action for reformation, it is not necessary to consider whether Zekry's opposition papers were sufficient to raise a triable issue of fact regarding the amount of his purported investment in the business (*see Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Lawi also moves for summary judgment on her second cause of action for breach of contract based upon Zekry's purported failure to provide her fair share of the profits of the business from 2004 through 2008. Essentially, she claims that Zekry purportedly removed cash revenues from the business's safe, and did not deposit all these funds into the business's bank account, nor provide her with her distributive share of these funds, pursuant to the terms of the Shareholders Agreement. In support of her allegations, she explains the procedure purportedly followed by her, during the period she worked in the business, for keeping daily and weekly records of its cash and credits receipt for the services rendered by the stylists. She maintains that these records were handwritten by the receptionists of the business, including herself, and, also entered into the business's computer. She submits the report of her expert, Anthony P. Valenti, the managing director of Stroz Friedberg LLP's Global Business Intelligence and Investigations Division, who opines, based upon the business's computer generated printout of gross sales for 2004 of $841,856, and its federal tax return reporting total gross receipts of $599,697, that the business under reported income in the amount of $140,429, of which Lawi should have received a distributive share (Expert Report dated 5/16/11, at 4-5). He further opines that, "a reasonable estimate of future actual operational results for Barouck Corp. on a good faith/best effort basis would be at least consistent with their actual results for 2004, or $140,000, annualized for the period 2005 through May 31, 2008" (Report at 5).

Additionally, Lawi claims that the significant cash revenues generated by the business were placed into its safe and removed by Zekry, approximately once a week, ostensibly for deposit into the business's bank account. She contends that she later learned, from a review of the business's bank account records, that he rarely deposited cash therein (Exhibit 24, the business's bank accounts from Citibank dated 12/03 through 05/08). She thus argues that, Zekry's purported actions in, *inter alia*, wrongfully diverting the cash revenues of the business, without providing her with her distributive amount, entitles her to summary judgment on her breach of contract claim.

Zekry opposes Lawi's motion, arguing that there are questions of fact and credibility that preclude summary judgment. Referring to Lawi's deposition, he maintains that, as the person who collected the cash in the business, Lawi had the opportunity to access this money, and do whatever she wanted with it. He refers to those excerpts of her deposition, wherein she testified, among other things, that she collected the cash and credit card payments from clients in the business (Zekry's Exhibit 3, Lawi's deposition held on 4/28/11 at 19), that she had keys to the store (*id.* at 10) and to the safe where the money was kept (*id.* at 24), and that she sometimes received cash, as a cash bonus and for certain services she performed in the business (*id.* at 59). He maintains that he did not "steal a penny from the income of the salon" (affidavit dated 7/6/11 at 15). He also disputes the accuracy of the weekly and daily records relied on by Lawi, arguing that she herself created these records to prove that there was a cash profit in the business. Additionally, he notes that her expert's report does not account for the payment of the business's expenses, including salaries of the stylists, some of which she acknowledged were sometimes paid in cash (Lawi's deposition at 149-150). Zekry further submits documentation,

which he claims reflect Lawi's receipt of cash from the business, that she has not acknowledged in this action.

In reply, Lawi contends, *inter alia*, that Zekry fails to raise a triable issue of fact, arguing that some of the documentation he submits are either precluded, irrelevant or not previously produced.

Here, Lawi fails to make a prima facie showing of entitlement to judgment as a matter of law on her second cause of action for breach of contract (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The elements of a cause of action to recover damages for breach of contract are the existence of a contract, plaintiff's performance under the contract, defendant's breach of his obligations under the contract, and damages resulting from that breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425 [1st Dept 2010]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). While Lawi demonstrates that the Shareholders Agreement provides for, *inter alia*, the distribution of profits 40% to Lawi and 60% to Zekry, after the deduction of all expenses (Lawi's Exhibit 4, Shareholders' Agreement, ¶ 6 at 2), she fails to demonstrate as a matter of law that he breached this provision. Her claim is primarily reliant upon her recitation of the purported facts regarding the manner that cash and credit payments for services were recorded, and her claim that Zekry removed the cash revenues that were in the business's safe, without distributing her proportionate share of the profits to her. This court notes that Lawi submits a copy of a computer printout, which reflect total "Service Sales" of $841,856 in 2004 for the business. While Lawi alleges that this amount was calculated from the sums entered by her into the business's computer, and that this amount also conforms with the daily and weekly records she created, the record is notably absent of the daily and weekly records supporting such

calculations for that period. Thus, there is a question of fact as to the accuracy of such calculations, which Zekry is entitled to challenge and question. Accordingly, the expert's opinions, which are based on matters that are strictly factual, and still in dispute, should best be left for the trier of fact to determine whether to accept or reject them (*see Nelson v Schwartz*, ___ AD3d ___, 933 NYS2d 880 [2d Dept 2011]).

Further, Lawi relies on her own assertions that Zekry removed cash from the business's safe. However, her deposition reflects that keys to the safe were not only held by Zekry, but also Zekry's sister, Jackie, and herself (Lawi's deposition at 144-145). Therefore, others beside Zekry had access to the contents of the safe, thus raising a question of fact as to whether it was Zekry who removed cash therefrom, as claimed by Lawi. Additionally, while Lawi acknowledges that the Shareholders Agreement provides for the distribution of net profits (*id.* at 106-107), she admitted that her daily and weekly records did not include operating expenses of the business (*id.* at 91), and that she occasionally received cash from the business (*id.* at 59, 113). She also stated that, while the weekly records produced reflect payments to the stylists, they do not indicate whether they were paid in cash or otherwise (*id.* at 191-192), but she, however acknowledged that some stylists were at times paid in cash (*id.* at 58, 149-150). Thus, there are also questions of fact as to what, if any, expenses were paid in cash, and the amount of net profits, if any, that are due and owing to Lawi under the Shareholders Agreement.

Since Lawi's own deposition and exhibits raise questions of fact that preclude summary judgment on her claim for breach of contract, this court need not consider the documentation submitted by Zekry, some of which he acknowledges would be excluded at trial, but were submitted for the purpose of denying summary judgment (see *Rubencamp v Arrow*

Exterminating Co., 79 AD3d 509 [1st Dept 2010]).

Lawi also moves for summary judgment on her third and fourth causes of action for breach of fiduciary duty and conversion, essentially based on the same allegations supporting her breach of contract claim. A breach of fiduciary duty claim requires the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by such misconduct (*Burry v Madison Park Owner LLC*, 84 AD3d 699 [1st Dept 2011]; *Guarino v North Country Mtge. Banking Corp.*, 79 AD3d 805 [2d Dept 2010]). It is well settled that a majority shareholder in a closely held corporation owes a fiduciary duty to minority shareholders (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269 [2011]; *see also Brunetti v Musallam*, 11 AD3d 280 [1st Dept 2004], *affd as modified* 59 AD3d 220 [1st Dept 2009]). As for conversion, it requires "an unauthorized assumption and exercise of the right of ownership over good belonging to another to the exclusion of the owner's rights" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982]). Goods may include "[m]oney, if specifically identifiable" (*id.* at 883).

Since the basis of these claims rests on Zekry's purported failure to provide her with the net profits from 2004 through 2008, arising from the cash revenues he purportedly removed from the business, and, as previously discussed, there are factual issues regarding these allegations, Lawi's application for summary judgment on her claims for breach of fiduciary duty and conversion is denied.

That branch of Lawi's application for punitive damages is also denied. In view of the numerous issues of fact present in this action, a determination cannot be made, as a matter of law, as to whether Zekry engaged in any "willful, wanton and reckless misconduct" (*see Giblin v*

Murphy, 73 NY2d 769, 772 [1988]).

Lawi also moves for summary judgment dismissing the thirteen counterclaims asserted by Zekry and Barouck Corp. for: breach of fiduciary duty (first); breach of contract (second); conversion (third); unjust enrichment (fourth); reformation (fifth); fraud in the inducement (sixth); gross mismanagement (seventh); misappropriation (eighth); accounting (ninth); punitive damages (tenth); fraud (eleventh); slander (twelfth); and attorneys' fees (thirteenth) (Lawi's Exhibit 2, Verified Answer and Counterclaims dated 3/12/08). In support of her application, she argues that Zekry's invocation of his Fifth Amendment privilege during his deposition held on April 29, 2011 prevented her from obtaining discovery relevant to their claims.

Zekry opposes this branch of Lawi's motion, claiming that he properly submitted a CPLR 3116 errata sheet, within 60 days from the day of his deposition, which revokes his invocation of the Fifth Amendment with respect to certain questions related to his counterclaims. He, thus, requests that defendant's counterclaims not be dismissed, or alternately, the counterclaims be severed, pursuant to CPLR 603.

In reply, Lawi claims that the changes contained in Zekry's errata sheet are outside the scope of CPLR 3116, and, further that allowing the changes would unfairly prejudice her.

CPLR 3116 (a) provides, in relevant part, that:

> "the deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them.... No changes to the transcript may be

made by the witness more than sixty days after submission to the witness for examination."

It has been held that "a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor" (*Cillo v Resjefal Corp.*, 295 AD2d 257, 257 [1st Dept 2002]).

A review of Zekry's deposition discloses that he invoked his Fifth Amendment privilege as to every substantive question asked of him, including those addressing defendants' counterclaims (Lawi's Exhibit 26, Zekry's deposition held on 4/29/11). In his errata sheet, Zekry revokes his privilege to a limited scope of questions, and responds to certain questions, including those concerning the counterclaims. The reason provided is his purported belief that when he originally answered the questions, he "was properly utilizing [his] Fifth Amendment rights and would not be penalized for doing so"; he now believes that he "can answer the questions as [he has] done truthfully and still retain [his] Fifth Amendment rights in areas where [he has] asserted them" (Zekry's Ex. 21, the Errata Sheet dated 7/6/11 at 76). It is noted that, in Zekry's deposition, it was stated that he was invoking his privilege based upon advice given to him by his criminal attorney, which conflicted with the advice of his counsel in this action.

Here, Zekry's errata sheet was properly prepared in that the changes were made within 60 days of the submission of the deposition to him on May 20, 2011 (*see* Zekry's Exhibit 20, Correspondence from Lawi's counsel to Zekry's counsel dated May 20, 2011), and that it contains the requisite statement of the reasons for the charge (*Cillo v Resjefal Corp.*, 295 AD2d 257, *supra*). These corrections, however, raise issues that should best be left to the trier of facts, as to whether they are credible, and if they are not found credible, a determine as to the

inferences to be drawn from that finding (*see, id.*; Binh v Bagland USA., 286 AD2d 613 [1st Dept 2001]). Additionally, as previously discussed, there are numerous factual issues raised in the record that are related to defendants' counterclaims, thus warranting the denial of Lawi's motion for summary judgment dismissing defendant's counterclaims.

Accordingly, Lawi's motion, in motion sequence no. 025, is denied in its entirety.

In motion sequence no. 025, defendants cross-move for an order compelling Lawi to answer certain questions that she purportedly did not answer during her deposition held on April 29, 2010, and produce the documents requested therein.

Lawi opposes defendants' application, arguing that the history in this case regarding discovery demonstrates that defendants' discovery requests are invalid and improper, in that they seek to obtain discovery after having missed the court-ordered deadline for serving document requests and interrogatories, and, as a result, have waived any right to discovery. The relevant prior history referred to by Lawi, includes: (1) a Compliance Conference Order providing that defendant must serve any requests for discovery and inspection, as well as any interrogatories, by August 6, 2010 (Affirmation of Manvin Mayell dated 7/6/11, Exhibit A, Compliance Conference Order dated 7/21/10); (2) a Decision and Order denying defendants' request for an extension of the aforementioned deadline, wherein it held, *inter alia*, that "defendants have failed to demonstrate good cause for their most recent failure to comply with this court's compliance order and timely serve their requests upon [Lawi]" (*id.*, Exhibit B, Notice of Cross Motion dated 10/12/10; Exhibit C, Decision and Order dated 71/7/11) (the Prior Order); and (3) a second Compliance Order providing that party depositions and all other discovery was to be completed by April 30, 2011, and requiring Lawi to file a note of issue on or before May

30, 2011 (*id.*; Exhibit D, Compliance Order dated 2/16/11).

Pursuant to CPLR 3124, a party seeking disclosure may move to compel compliance or a response, "if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order." CPLR 3101 (a) requires "full disclosure of all evidence matter material and necessary" to prosecute or defend an action (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 257 [1st Dept 1994]). However, "[a] party is not entitled to unlimited, uncontrolled, unfettered disclosure, and the supervision of discovery is generally left to the trial court's broad discretion" (*Geffner v Mercy Med. Ctr.*, 83 AD3d 998 [2d Dept 2011]).

Here, the court properly set forth discovery deadlines, allowing defendants ample opportunity to serve documentation demands or interrogatories on Lawi. The record clearly reflects that defendants did not make any effort to comply with these deadlines, nor demonstrate any good reason for having failed to do so. As a result, this court, in it decision dated January 7, 2011, denied defendants' request for an extension of time in which to serve discovery demands on Lawi[1]. Despite the Prior Order, Zekry now seeks to obtain documents and more detailed responses, claiming that the transcript of Lawi's deposition "shows numerous requests for information which was withheld" (Zekry's affidavit dated 7/6/11 at 24). Defendants, however, do not point to page numbers therein, or make arguments about specific questions that were purportedly not answered, but merely provides the entire transcript of Lawi's deposition for the

[1]If defendants believed that such denial was improperly granted by this court, the remedy for such purported error was a timely motion for reargument, pursuant to CPLR 2221, or a timely appeal, pursuant to CPLR 5513 (*see Benitez v City of New York*, 2 AD3d 285 [1st Dept 2003]), which was not done. Thus, this order is final (*id.*).

court to sift through. Nonetheless, this court has reviewed the transcript. The transcript discloses: (1) one instance where defendants' counsel sought the production of the daily records from the business that were in Lawi's possession (Zekry's Exhibit 3, Lawi's deposition taken at 29), and (2) six instances where defendants' counsel asked Lawi questions, to which she could not recall the answers to (*id.* at 31, 43, 48, 52-53, 62-63, and 153), and that he requested that a space be left in the transcript so that she could "fill it in after she's had an opportunity to ascertain the answer to [the] question[s]" (*id.* at 31). As argued by Lawi, defendants sought to transform her deposition into (1) a de facto interrogatory, by asking her to later provide information for those questions that went beyond Lawi's knowledge at the time of the deposition, and (2) an opportunity for general document discovery, by making a new request for the production of documents. In light of the defendants' failure to avail itself of the opportunities previously provided in the compliance orders, and the resulting determination in the Prior Order, defendants waived any right they had to additional discovery (*Colon v Yen Ru Jin*, 45 AD3d 359 [1st Dept 2007]; *Rosenberg & Estis, P.C. v Bergos*, 18 AD3d 218 [1st Dept 2005]). Therefore, defendants' cross-motion to compel is denied.

In motion sequence no. 026, defendants move for an order, pursuant to 22 NYCRR § 202.21 (e), vacating Lawi's note of issue on the ground that discovery is not complete. The section relied on by defendants, provides in relevant part, as follows:

> "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action . . . may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

(22 NYCRR § 202.21 [e]).

In support of defendants' claim that discovery has not been completed, they rely on: (1) Lawi's purported failure to produce documents and answers to certain questions during her deposition; and (2) the failure of the temporary receiver, appointed, in connection with the operation of Barouck Corp., to file an accounting. As previously discussed, discovery is not outstanding with respect to defendants' first basis. With respect to the second basis, defendants allege, in a conclusory fashion, that the receiver's accounting is relevant to the issues in this case regarding the value of Barouck Corp. This court notes that CPLR 6404 requires a temporary receiver to keep written accounts, *inter alia*, itemizing receipts and expenditures, "which shall be open to inspection by any person having an apparent interest in the property" and "upon motion ... of any person having an apparent interest in the property, the court may require ... presentation of a temporary receiver's accounts ...." Here the failure to inspect the accounts does not justify the vacatur of the note of issue *(Rosenberg & Estis, P.C. v Bergos*, 18 AD3d 218, *supra*). Further, defendants fail to indicate in what manner such accounts are relevant to any facts currently in dispute. Therefore, defendants fail to demonstrate a basis for vacating Lawi's note of issue. Thus, the motion is denied.

All matters not specifically addressed are denied.

Accordingly, it is

ORDERED that the parties' respective motion and cross-motion, in motion sequence no. 025, are denied; and it is further

ORDERED that defendants' motion, in motion sequence no. 026, for an order vacating the note of issue is also denied, and it is further

ORDERED, that the parties are directed to appear on February 13, 2012, in Part 40, 60 Centre Street, New York, NY 10007, at 9:30 A.M. for trial, and it is further

ORDERED that counsel for Plaintiff is directed to serve the within order, with Notice of Entry, within ten days of entry, upon counsel for Defendant.

This constitutes the Decision and Order of the Court.

ENTER:

HON. DEBORAH A. KAPLAN
J.S.C.

DEBORAH A. KAPLAN
J.S.C.

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE