

Cupcake & Boomboom, LLC v Aslani

2016 NY Slip Op 32310(U)

November 22, 2016

Supreme Court, Kings County

Docket Number: 515757/15

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of November, 2016.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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CUPCAKE & BOOMBOOM, LLC,
JULIAN VIGOUROUX, INDIVIDUALLY AND AS PRESIDENT
OF THE BOARD OF DIRECTORS OF CUPCAKE &
BOOMBOOM, LLC,

Plaintiffs,

- against -

Index No. 515757/15

POOYAN ASLANI, INDIVIDUALLY AND AS FORMER PRESIDENT
OF THE BOARD OF DIRECTORS OF CUPCAKE & BOOMBOOM,
LLC,

Defendant.

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>5-23</u>
Opposing Affidavits (Affirmations) _____	<u>26-43</u>
Reply Affidavits (Affirmations) _____	<u>44</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, in this action by plaintiffs Cupcake & Boomboom, LLC (CCBB) and Julian Vigouroux (Vigouroux), individually and as president of the board of directors of CCBB (collectively, plaintiffs) against defendant Pooyan Aslani (Aslani),

individually and as former president of the board of directors of CCBB, alleging claims of breach of fiduciary duty and breach of CCBB's Operating Agreement, and seeking a declaratory judgment, a permanent injunction, an accounting, and damages, Aslani moves, under motion sequence number one, for an order: (1) dismissing this action as against him, pursuant to CPLR 3211 (a) (1), based upon the ground that he has a defense founded upon documentary evidence, (2) dismissing this action as against him, pursuant to CPLR 3211 (a) (3), based upon the ground that plaintiffs lack the legal capacity to sue him in this action, (3) dismissing this action as against him, pursuant to CPLR 3211 (a) (4), based upon the ground that there is another action pending between the same parties for the same cause of action, (4) dismissing this action as against him, pursuant to CPLR 3211 (a) (7), based upon the ground that the complaint fails to state a cause of action against him, (5) sanctioning plaintiffs' counsel for allegedly intentionally asserting false statements within plaintiffs' verified complaint for the purposes of deceiving and/or misleading the court, and for fraudulent misrepresentations, and (6) awarding him the costs, disbursements, and legal fees, which have been allegedly incurred by him in defending this action, in an amount of not less than \$10,000.

FACTS AND PROCEDURAL BACKGROUND

In 2011, Vigouroux, who, since 1999, had worked in the New York City nightlife and hospitality industry, sought to realize his idea of operating a concert hall combined with a bar. In order to accomplish this, Vigouroux, on June 6, 2011, formed CCBB, a New York

Limited Liability Company for the purpose of hosting independent music shows in Bushwick, Brooklyn, and to combine these independent music shows with boutique beverage service. Vigouroux, acting on CCBB's behalf, found a space which he believed would be suitable for this purpose, which was located on the ground floor of 1031 Grand Street in Bushwick (the premises). This space was part of larger premises, which were leased by LK and Sons Woodworking, LLC (LK & Sons), whose members are Lulzim Kupi a/k/a Louis Kupi (Kupi) and his wife, Fatbardha Kupi (Fatbardha), from Grand Morgan Realty Corp., the landlord. On August 18, 2011, CCBB executed a sublease with LK & Sons for the premises.

Vigouroux initially held a 100% interest in CCBB, and solely paid the rent for the premises. In 2011, Stephen Saverance (Saverance) received a 6% interest in CCBB in exchange for work performed by him on behalf of CCBB, and William Nichols (Nichols) received a 10% interest in CCBB in exchange for a capital contribution of \$37,500. Also in 2011, Vigouroux, on CCBB's behalf, hired an architect, Kevin Bell (Bell), for the premises in order to assist him in obtaining approval from the Department of Buildings for the planned alternative music concert venue combined with a bar (the concert venue). In late 2011, Community Board #1 gave its approval to CCBB for it to obtain a liquor license. At that time, the concert venue was operating under the name Delinquency.

On July 23, 2012, CCBB applied to the New York State Liquor Authority (the SLA) for a full liquor license. CCBB's attorney at that time, Elke A. Hofmann, Esq. (Hofmann),

submitted this application on CCBB's behalf, and Vigouroux, Nichols, and Saverance's names were included on this application. A full scale build-out of the space at the premises was undertaken, and CCBB, through its members, allegedly invested over \$200,000 in the project from that time forward. In 2012, CCBB learned that Bell was not a New York licensed architect and had not filed plans with the Department of Buildings. As a result, Vigouroux immediately terminated Bell's employment and replaced him with Cosmo Venezial. The delay in filing the documents with the Department of Buildings resulted in a setback for CCBB since the SLA required a certificate of occupancy to be finalized before it would grant CCBB a full liquor license.

While the build-out of the premises continued during 2012, CCBB and its members sought to create promotional activity for the planned concert venue. Since the liquor license had not yet been obtained from the SLA, alcohol could not be legally served by CCBB at the concert venue and it could not charge money for the sale of alcohol. The members of CCBB, therefore, began hosting "Bring Your Own Beer" parties at the concert venue, and did not charge admission, but advised patrons to pay an \$8 donation to whatever band was playing at the premises. Third-party promoters often provided their own alcohol to the patrons who attended these parties. These parties took place from July 2012 up until October 2012, at which time the SLA stopped a party that was being hosted at the premises.

In December 2012, Vigouroux issued Douglas Calderone (Calderone), who had provided work as a contractor for the premises, an 8% interest in CCBB, which came out of

Vigouroux's own percentage interest in CCBB. On December 7, 2012, the SLA granted CCBB a Conditional Letter of Approval for a liquor license, pending the acquisition of a certificate of occupancy from the Department of Buildings. The members anticipated an opening of CCBB's concert venue sometime in early 2013. However, CCBB received an Application Disapproval, dated January 9, 2013, from the SLA, which disapproved and denied CCBB's application for a liquor license on the basis that the conditions for approval were not met. Specifically, the SLA explained, in this Application Disapproval, that on January 9, 2013, it came to its attention that on October 13, 2012 (when the SLA had stopped CCBB's Bring Your Own Beer party), an SLA investigator had visited the premises as part of a MARCH operation with the New York Police Department and other city agencies, and observed extensive bottles of hard liquor available for sale and took photographs of them. The SLA further stated, in this Application Disapproval, that its investigator disclosed his identity to the owner, Vigouroux, and told him that he could not store or consume alcoholic beverages at the premises, and that Vigouroux offered no valid explanation for the presence of alcohol at the premises without a liquor license. The SLA advised CCBB that it could seek reconsideration of the disapproval of its application for a liquor license. Hofmann sent a reconsideration letter dated January 30, 2013, along with a reconsideration letter from Vigouroux, dated January 28, 2013, in which Vigouroux humbly apologized. However, the SLA denied reconsideration of the disapproval.

Hofmann then informed CCBB's members that they would need to reapply for a liquor license, and that a different attorney should be used for the next SLA application in order to "start fresh." As a result, CCBB hired Richard Merz, Esq. (Merz) for this purpose. At about that same time, Kotaro Tsukada (Tsukada) invested in CCBB by making contributions, paid over several months, totaling \$90,000, in exchange for which he was given a 20% interest in CCBB. In addition, Tsukada, as additional collateralization for his capital contributions to CCBB, demanded and received a personal guarantee by Vigouroux, by way of a mortgage lien on his personal home in the amount of \$65,000.

According to Vigouroux, Merz believed that CCBB would not receive a liquor license from the SLA as long as Vigouroux was listed as an owner of it since it had found him to be the one who was responsible for the denial of the liquor license. Vigouroux claims that Merz, therefore, devised a plan whereby he would falsely make it appear to the SLA that Vigouroux was removed from ownership of CCBB in order to mislead it with respect to a new application by CCBB for a liquor license. To this end, Merz, in an April 16, 2013 email, stated that "it seems to make sense to try for a 'reconsideration' by the SLA based on your separation from [CCBB]. We will document your exit and conversion to a creditor and substitute the guys . . ."

Merz then drafted four "Registration Certificates," which appear to be back-dated to January 2, 2013 (which was prior to the Application Disapproval and before Calderone and Tsukada obtained their respective interests in CCBB). Registration Certificate No. 1 stated

that Vigouroux held a 100% membership interest in CCBB. Registration Certificate No. 2 stated that Vigouroux was assigning 40% of his 100% membership interest in CCBB to Tsukada. Registration Certificate No. 3 stated that Vigouroux was assigning 33% of his 60% membership interest in CCBB to Calderone. Registration Certificate No. 4 stated that Vigouroux was assigning 27% of his 27% membership interest in CCBB to Timothy Pioppo (Pioppo) (who held a 4% membership interest in CCBB). None of these Registration Certificates were executed by Vigouroux or by Tsukada, Calderone, or Pioppo. Vigouroux, Tsukada, and Calderone, in affidavits by them, attest that these Registration Certificates were inaccurate and never acted upon or enforced, and that they were drafted by Merz in order for them to be presented to the SLA for the purpose of obtaining a liquor license for CCBB.

In addition to the Registration Certificates, Merz drafted a Promissory Note dated April 30, 2013. This Promissory Note provided that CCBB promised to pay Vigouroux \$90,000 plus 6% interest per annum by the maturity date of May 1, 2018. The Promissory Note was not executed by CCBB. According to Vigouroux, the Promissory Note was never acted upon, and was drafted solely to falsely represent to the SLA that he was paid by this \$90,000 Promissory Note in consideration for transferring his interest in CCBB to Tsukada, Calderone, and Pioppo, and that he no longer had an equity interest in CCBB. Vigouroux claims that he was never paid any money in connection with the Promissory Note¹ or for any purported "sale" of his interest in CCBB.

¹The Promissory Note did not provide for any monthly payments.

On May 2, 2013, Merz, as legal counsel for CCBB, in a letter to the SLA, advised it that “the existing partners of [CCBB] and certain additional individual investors ha[ve] now acquired all of the interests of . . . Vigouroux in [CCBB] and its business operations.” He further stated that Vigouroux, “who was the sole offending party from the perspective of [the SLA], has now completely withdrawn from the operations and business of [CCBB].” He also set forth that “[w]ith the withdrawal of . . . Vigouroux, his partnership position has been acquired by . . . Tsukada (26% as a passive investor), and . . . Pioppo (13%) and . . . Calderone (13%),” and that “[a]ll other partners (except . . . Vigouroux himself who is no longer a partner) of [CCBB] retain their respective interests as noted in the license application.” He additionally stated that “[t]he acquisition of the Vigouroux interests has been funded by the issuance of a promissory note to . . . Vigouroux in the amount of his cash investment in the business,” and that Vigouroux would “have no ownership interest and no control over any aspect of business operations.” He urged that the “aspirations, investments and efforts of the investor/applicant group . . . should not be barred for the mistaken actions of one, now former, participant in the application.”

As demonstrated by emails from Merz to Vigouroux, through the second half of 2013 and into 2014, Vigouroux continued acting as the manager of CCBB and the owner of the construction project for the build-out of the premises. CCBB, with Calderone as its spokesperson, applied in January 2014 to the Community Board to reinstate the process of obtaining a liquor license. This application was rejected, but when the business name was

changed from Delinquency to the Calderone Hotel, a re-application was approved by the Community Board in February 2014.

In January 2014, Vigouroux met Aslani while Vigouroux was working for Café Nadery, which was owned by Aslani. Aslani became interested in the CCBB project and wished to obtain an interest in CCBB. Aslani drafted a Limited Liability Operating Agreement for CCBB, which was executed by Aslani and Vigouroux on April 24, 2014 (the 2014 Operating Agreement). Exhibit 1 of the 2014 Operating Agreement sets forth that a majority vote of the members elected Aslani as CCBB's chief executive officer, Calderone as CCBB's treasurer, and Tsukada as CCBB's secretary, and that Aslani, Calderone, and Tsukada were the members of the board of directors of CCBB who were elected pursuant to article 4 of the 2014 Operating Agreement to operate CCBB. Exhibit 2 of the 2014 Operating Agreement, which was separately executed by all of the members of CCBB, lists the members and their respective interests in CCBB as follows: (1) Aslani - 10%, (2) Vigouroux - 39%, (3) Tsukada - 20%, (4) Nichols - 10%, (5) Calderone - 8%, (6) Saverance - 6%, (7) Pioppo - 4%, and (8) Kenny Sehgal (Sehgal) - 3%. Exhibit 3 of the 2014 Operating Agreement, which is separately executed by all of the members of CCBB, lists the capital contributions of the members, which total \$440,000, and included contributions by Vigouroux in the amount of \$272,500, contributions by Aslani in the amount of \$40,000, contributions by Tsukada in the amount of \$90,000, and contributions by Nichols in the amount of \$37,500. Aslani, pursuant to section 5.4 of the 2014 Operating Agreement, was

elected as the president of the board of directors of CCBB and given primary responsibility for managing the operations of CCBB and for effectuating the decisions of the board of directors.

In a March 31, 2014 letter, Merz informed the SLA Review Committee that “the ownership of [CCBB] was revised in 2013 to effectuate the removal therefrom of the former principal . . . Vigouroux who had been held responsible by the [SLA] for premature sale of alcoholic beverages prior to the effective . . . date of the license for [CCBB].” He stated that Vigouroux surrendered his interest in [CCBB] as of January 1, 2013 to Tsukada, Calderone, and Pioppo, and that, thereafter, Tsukada transferred his 40% interest in [CCBB] to Calderone, and that he was “preparing to file a new application with the SLA for a license for the newly constituted entity.”

In an email dated April 24, 2014, Merz, upon receiving a copy of the 2014 Operating Agreement, stated to Vigouroux: “I gather you have made an internal determination that this is the structure you wish to have,” and inquired if this was “the structure to be presented to the SLA.” In another April 24, 2014 email to Vigouroux, Merz stated: “On closer inspection this is not a document to be shown to the SLA, you have a 39% interest and we cannot show that – is this a private side deal? If so it can’t be the ‘record’ operating agreement of [CCBB] . . . Please advise how this should be treated.” Vigouroux responded “not to be shown to the SLA no absolutely not, inside deal yes.” After Vigouroux forwarded this email exchange to Aslani, Aslani stated to Vigouroux: We should take your name out of the SLA. Increase my

share then I show the \$100,000 loan plus 40k I am going to pay . . . so that's for 140k right there. Explain this to [Merz] . . . ask him that do we have to show SLA a document that you have sold your share to me. Or just names on the documents are enough.” Vigouroux responded: “Me, [Saverance] and [Nichols] can't have our name[s] show for the SLA [be]cause [they] were on the previous application. New application is [Calderone], [Pioppo], [Tsukada], and now you.” Aslani responded: “OK great and we have to be explicit about the source of funding . . . now the question for [Merz] is ‘do we have to show that you guys have sold your share to us’ since the LLC is still the same or not.”

After Aslani became the president of the board of directors of CCBB, he brought a lender into CCBB, namely, Nahzi Mahnaz, who made a \$100,000 loan to CCBB. In an April 29, 2014 email, Merz stated that this loan should be used to show that Vigouroux was no longer a creditor on the SLA application.

Vigouroux asserts that he and Aslani worked together as co-owners of CCBB in late 2014. An October 30, 2014 email shows that Vigouroux was included in discussions between Merz and Aslani regarding a rental arrears dispute with LK & Sons. Aslani, on the other hand, claims that Vigouroux left CCBB permanently after April 2014. However, this is belied by Aslani's own email dated December 19, 2014, in which Aslani referred to Vigouroux as his “partner.”

On September 2, 2014, Tsukada decided to leave CCBB and sought to transfer his 20% interest in CCBB to Vigouroux in order “to keep the project going.” As stated by

Tsukada, in his affidavit, he transferred his shares to Vigouroux, in part, based on the fact that he held liens on Vigouroux's home. This 20% transfer of Tsukada's membership interest (together with Vigouroux's 39% membership interest) gave Vigouroux a 59% total membership interest in CCBB.

In February 2015, the members of CCBB decided to apply again to the SLA for a liquor license. In a February 25, 2015 email, Merz asked Aslani and Vigouroux to confirm the percentages of ownership for each member for "the record documentation," and questioned whether Vigouroux "transferred the business for \$90,000," or if they "upp[ed] this number." In a February 26, 2015 email, Aslani responded that the ownership was that Vigouroux had a 30% interest and he had a 30% interest, and he listed the interests of the other members "for SLA purposes." He further stated, in this email, that "we can show that [Vigouroux] got 90k from us to be bought out," and that since "[Pioppo] and [Calderone] went to the community board and [he] and John [Conor Brooke] [we]re new members that have put in cash," he "could have us four for SLA purpose."

In a March 2, 2015 email to Merz, Aslani stated that he would sent him a copy of the signed LLC operating agreement with the signatures of him, Pioppo, Calderone, and John Conor Brooke (Brooke) (who Aslani had unilaterally added as a member of CCBB). These four names listed in this email were persons who had not been part of the rejected application to the SLA. Later that day, Aslani sent Merz a follow-up email, which stated: "As promised, please find an operating agreement signed by the four members for the SLA."

This February/March 2015 Operating Agreement (the 2015 Operating Agreement), which was drafted by Aslani, stated that it was executed and agreed to by Aslani and Pioppo on February 28, 2015 and by Calderone and Brooke on March 2, 2015. The 2015 Operating Agreement set forth that the members and their membership interests in CCBB were as follows: Aslani - 50%, Brooke - 10%, Calderone - 25%, and Pioppo - 15%. It stated that the initial contributions of the members were \$75,000 in cash by Aslani, \$10,000 in cash by Brooke, construction of the venue valued at \$40,000 by Calderone, sound equipment and consulting valued at \$20,000 by Pioppo. Vigouroux did not sign the 2015 Operating Agreement and was not listed as a member of CCBB therein. According to Vigouroux, the 2015 Operating Agreement was created for the sole purpose of deceiving the SLA into believing that the original members, Vigouroux, Saverance, and Nichols, whose names were on the rejected SLA application, were no longer members of CCBB, and that the 2015 Operating Agreement did not represent the actual members or membership interests in CCBB. Calderone, in his affidavit, attests that the 2015 Operating Agreement did not represent the actual ownership of the members in CCBB, but was created only for the purpose of showing it to the SLA in connection with CCBB's application for a liquor license.

In a March 10, 2015 email sent to Vigouroux and Merz, Aslani discussed what he was thinking about filing with the SLA, which included that there were "four new owners that have 'purchased' [CCBB]." He listed as "evidence of purchase" to be shown to the SLA as including, among other things: Vigouroux being taken out of the lease by striking a new

sublease with LK & Sons, that there is a “new LLC Operating Agreement showing the evidence of new owners,” and that “the new owners have put [in] new money by means of work and cash.” According to Aslani, a new conditional liquor license was issued to CCBB on May 22, 2015.

In the early summer of 2015, major conflicts developed between Vigouroux and Aslani. In a June 19, 2015 email to Vigouroux, Calderone, Pioppo, Brooke, and Saverance, Aslani purported to fire Vigouroux as his general manager. Aslani acknowledged that Vigouroux “is our partner in the LLC,” but stated that CCBB was “not [Vigouroux’s] bar” and the members should not act as though it was. In August 2015, Aslani began questioning Vigouroux’s position in the business, claiming that he was a former general manager with no ownership interest in CCBB. On September 3, 2015, Aslani challenged Calderone’s role in CCBB and demanded that he accept a 1% stake in it instead of his 8% membership interest.

According to Vigouroux, Aslani assumed control over CCBB, dominated it, cut him, Calderone, Saverance, and Nichols out of all of CCBB’s accounts, and took unilateral steps to modify CCBB’s business. On October 11, 2015, Aslani attempted to forcefully remove Vigouroux from the premises, and, later in the day, Vigouroux discovered that Aslani had changed the locks to the premises.

A temporary certificate of occupancy was issued by the Department of Buildings for the premises in September 2015. Approval by the SLA for a liquor license for CCBB has

15] not yet been obtained since the Department of Buildings has not yet granted the premises a full certificate of occupancy. No annual meeting to elect a board of directors was called by Aslani in September 2015 as required under section 4.2 of the 2014 Operating Agreement. Vigouroux asserts that this was because Aslani sought to retain control of CCBB, along with Pioppo and Brooke.

On November 2, 2015, Vigouroux, Calderone, Saverance, and Nichols, as cumulative holders of 83% of the membership interest in CCBB, which constituted a majority of the members entitled to vote, passed a Resolution at a special meeting held, pursuant to section 4.4 of the 2014 Operating Agreement, in lieu of the annual meeting to be held in September of every year which Aslani refused to hold. This Resolution disbanded the previous board of directors, elected Vigouroux, Calderone, Saverance, Nichols, and Sehgal as the board of directors of CCBB, and fired Aslani as the president of the board of directors. As the new board of directors, Vigouroux, Calderone, Saverance, Nichols, and Sehgal then passed a second Resolution which elected Vigouroux as the president of the board of directors of CCBB to replace Aslani. By a letter dated November 3, 2015, Neil L. Postrygacz, Esq., as the attorney for CCBB, informed Aslani that pursuant to a Resolution of the majority of the members issued on November 2, 2015, a new board of directors had been elected, which consisted of Vigouroux, Calderone, Saverance, Nichols, and Sehgal, and that, pursuant to a Resolution of the board of directors issued on November 2, 2015, Aslani was to take no part whatsoever in "the control, management, direction or operation of [CCBB's] affairs," and

16] “shall have no power to bind [CCBB].” Aslani refused to recognize this Resolution and would not turn over the keys, bank account information, or other powers that he held as the president of the board of directors of CCBB.

On December 2, 2015, Aslani filed an action against Vigouroux, Calderone, Saverance, Nichols, Sehgal, and Tsukada (*Aslani v Vigouroux*, Sup Ct, Kings County, index No. 514666/15) (the declaratory judgment action). Aslani’s first cause of action sought a declaratory judgment that CCBB is owned as follows: Aslani - 50%, Brooke - 10%, Calderone - 25%, and Pioppo - 15% (as set forth in the 2015 Operating Agreement), that Vigouroux, Saverance, Nichols, and Sehgal have no beneficial ownership interest in CCBB, and that the Resolution of the members and the Resolution of the board of directors issued on November 2, 2015 were void. Aslani’s second cause of action sought a declaratory judgment finding that Vigouroux sold his interest in CCBB for \$90,000, as evidenced by the Promissory Note.

Aslani’s third cause of action in the declaratory judgment action requests a judgment in the amount of \$40,000, plus interest from June 20, 2014 against Vigouroux and Calderone based upon an alleged misappropriation of funds from CCBB by them. Aslani’s fourth cause of action for fraud alleges that Vigouroux misrepresented to him that he was the majority owner of CCBB and that CCBB was in the process of obtaining a liquor license, that CCBB did not have any debt, that all of the work performed in the premises was in compliance with the building code, and that the business required approximately \$40,000 to open for

operations. Aslani's fifth cause of action for unjust enrichment alleges that Vigouroux, Calderone, Saverance, Nichols, Sehgal, and Tsukada have failed to contribute sufficient funds to CCBB in order to satisfy its monetary obligations, and that, as a result, he has been forced to contribute \$375,000 on their behalf.

Vigouroux interposed an answer, filed on January 19, 2016, in the declaratory judgment action, which asserted affirmative defenses and counterclaims. Vigouroux's third counterclaim sought a declaratory judgment that the 2014 Operating Agreement was valid and the respective interests of the members were as stated in exhibit 2 therein, that the capital contributions in capital and in-kind of each member were as stated in exhibit 3 of the 2014 Operating Agreement, that Tsukada transferred his 20% interest in CCBB to him, and that the 2015 Operating Agreement is void and unenforceable and does not control the affairs of CCBB.

On March 18, 2016, Vigouroux moved, in the declaratory judgment action, for partial summary judgment denying Aslani the declaratory judgment sought by him in his first and second causes of action, and granting him a declaratory judgment as asserted in his third counterclaim.² By a decision and order decided herewith, the court granted Vigouroux's motion to the extent that it declared that: (1) the 2014 Operating Agreement is valid and the

²While Aslani, in his opposition papers in the declaratory judgment action, argued that the Resolutions were invalid and void, Vigouroux, in his motion, did not address or seek a declaratory judgment with respect to the validity of the Resolutions. Thus, since the issue of the validity of the Resolutions was not argued by Vigouroux and were not before the court on Vigouroux's motion, the court did not determine that issue.

18] respective interests of the members are as stated in exhibit 2 of the 2014 Operating Agreement, to wit: (a) Aslani - 10%, (b) Vigouroux - 39%, (c) Tsukada - 20%, (d) Nichols - 10%, (e) Calderone - 8%, (f) Saverance - 6%, (g) Pioppo - 4%, and (h) Sehgal - 3%, (2) the capital contributions of each member are as stated in exhibit 3 of the 2014 Operating Agreement, (3) Tsukada transferred his 20% interest in CCBB to Vigouroux, thereby raising Vigouroux's membership interest in CCBB to 59%, and (4) the 2015 Operating Agreement is void and unenforceable and does not control the affairs of CCBB.

On December 29, 2015, CCBB and Vigouroux, individually and as president of the board of directors of CCBB, filed the instant action against Aslani, individually and as former president of the board of directors of CCBB. This action seeks a declaratory judgment regarding the Resolutions, a permanent injunction, damages for an alleged breach of fiduciary duty and breach of the 2014 Operating Agreement by Aslani, and an accounting. On February 24, 2016, Aslani filed his instant motion.

DISCUSSION

Aslani, in his motion, seeks dismissal of this action, pursuant to CPLR 3211 (a) (1), which provides that a party "may move for judgment dismissing one or more causes of action against [it] on the ground that . . . a defense is founded upon documentary evidence." "To succeed on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1), the documentary evidence relied upon by the defendant must 'conclusively establish[] a defense to the

asserted claims as a matter of law” (*Guayara v Harry I. Katz, P.C.*, 83 AD3d 661, 662-663 [2d Dept 2011], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Aslani argues that Vigouroux cannot maintain this action based upon the documentary evidence, which, he claims, demonstrates that Vigouroux has no interest in CCBB. Aslani asserts that if not for his own hard work and financial contributions to CCBB, it would have no liquor license or lease, and, therefore, would have no value. Aslani further asserts that Vigouroux’s only contributions to CCBB were its creation, the filing of a liquor license application which was denied, and the initial procurement of the sublease agreement with LK & Sons which was later the subject of a non-payment proceeding, which was settled by him (Aslani) personally guaranteeing the performance of a new sublease, in which CCBB agreed to pay outstanding rent and additional rent. He claims that Vigouroux “devised a scheme to continue to bankroll his own lifestyle by soliciting money and work from unsophisticated investors based on lies and misrepresentations.” He further claims that after Vigouroux was unable to obtain a liquor license for CCBB and was facing a personal judgment for rent arrears under the sublease for the premises, he defrauded him and the SLA in 2014 by agreeing to give up his interest in CCBB and then “stealing whatever cash was available and fleeing only to come back a year later to allege that he is still a majority owner” of CCBB. He contends that Vigouroux can have no interest in CCBB because he is “legally banned” from participating in its business of operating a bar.

*20]

This contention is devoid of merit. There is no showing that Vigouroux is legally unable to own a membership interest in a business which operates a bar due to the initial denial of his SLA application, on behalf of CCBB, for a liquor license. Moreover, the documentary evidence relied upon by Aslani does not show that Vigouroux ever relinquished or transferred his membership interest in CCBB. The Registration Certificates were never signed and were, therefore, patently insufficient to show a transfer of Vigouroux's interest in CCBB (*see* Limited Liability Company Law § 603). Moreover, subsequent to the January 2, 2013 date of these Registration Certificates, Aslani executed the 2014 Operating Agreement,³ in which he certified, by his signature, that the 2014 Operating Agreement was adopted and approved by each member. As discussed above, the 2014 Operating Agreement set forth that Vigouroux's interest in CCBB was 39%. There is no evidence of any subsequent written consent by a majority of the members of CCBB to a transfer of Vigouroux's interest in CCBB (*see* Limited Liability Company Law §§ 603, 604; *Gartner v Cardio Ventures, LLC*, 121 AD3d 609, 609 [1st Dept 2014]). There is also no showing that any consideration was ever paid to Vigouroux for any transfer of his interest in CCBB since the Promissory Note relied upon by Aslani was not signed by CCBB and, as such, was unenforceable (*see* Uniform Commercial Code § 3-104 [1] [a]).

While Aslani relies upon the 2015 Operating Agreement as documentary evidence, such reliance is misplaced since changes to an operating agreement that adversely affect a

³Limited Liability Company Law § 417 (a) provides that the members of a limited liability company "shall adopt a written operating agreement."

member's right to distributions require the consent of that member in writing (*see* Limited Liability Company Law § 417 [b]). Here, Vigouroux did not sign the 2015 Operating Agreement, and did not provide his consent to this agreement, which purported to eliminate his membership interest in CCBB. Thus, since the 2015 Operating Agreement contravenes statutory requirements, it is ineffective to deprive Vigouroux of his membership interest in CCBB.

In addition, while Aslani relies upon submissions to the SLA, his own emails demonstrate that he was involved in a scheme to misrepresent who the actual members of CCBB were to the SLA and that the representations as to Vigouroux's lack of a membership interest in CCBB were being made solely for "SLA purposes" so that CCBB would be able to obtain a liquor license. Aslani has previously admitted Vigouroux's membership interest by his certification of the 2014 Operating Agreement, and such a previous admission regarding a membership interest in a limited liability company is binding (*see East Quogue Jet, LLC v East Quogue Members, LLC*, 50 AD3d 1089, 1091 [2d Dept 2008]; *Bobrow v Liebman*, 15 Misc 3d 1121[A], 2007 NY Slip Op 50795[U], *9 [Sup Ct, NY County 2007]). Notably, Aslani, in his emails, held Vigouroux out as his partner and as having a membership interest in CCBB.

Additionally, as discussed above, the court, in its decision and order in the declaratory judgment action decided herewith, has granted a motion by Vigouroux for partial summary judgment declaring, among other things, that the 2014 Operating Agreement, which sets forth

that Vigouroux has a 39% membership interest in CCBB and made a capital contribution of \$272,500 to CCBB, is valid, that Tsukada transferred his 20% interest in CCBB to Vigouroux, thereby raising Vigouroux's membership interest in CCBB to 59%, and that the 2015 Operating Agreement is void and unenforceable and does not control the affairs of CCBB. Consequently, Aslani's motion, insofar as it seeks dismissal of plaintiffs' complaint based upon documentary evidence, must be denied.

Aslani further contends that this action must be dismissed, pursuant to CPLR 3211 (a) (3), based upon the ground that Vigouroux does not have standing to maintain this action. He attempts to argue that Vigouroux has a negative 1.12 percentage membership interest in CCBB by attributing 14.28% interests to Landon Webb, Fatbardha Kupi, Tomoyo Tanaka Lee, and David Teller, whose names were merely listed on the original application to the SLA for a liquor license. This argument is devoid of merit since there is no showing that these persons ever had any membership interest in CCBB. Aslani also argues that Vigouroux surrendered his entire interest in CCBB, and that this is shown by the Registration Certificates. He also claims that the 2015 Operating Agreement, which does not reflect any membership interest in CCBB held by Vigouroux, is the only valid operating agreement for CCBB. As previously noted, however, the court, in its decision and order in the declaratory judgment action, has found that Aslani did not surrender his membership interest and that the 2015 Operating Agreement is void and unenforceable. Thus, Aslani's motion, insofar as it seeks to dismiss plaintiffs' complaint based upon a lack of capacity to sue, must be denied.

Aslani also argues that this action should be dismissed, pursuant to CPLR 3211 (a) (4), based upon the ground that there is another action pending between the same parties for the same cause of action, namely, the declaratory judgment action. He contends that the declaratory judgment action which he commenced and the instant action both include the same parties and arise from the same cause of action, and that plaintiffs' claims against him in this action can be adjudicated in the declaratory judgment action.

CPLR 3211 (a) (4) provides that an action may be dismissed where "there is another action pending between the same parties for the same cause of action." Here, the parties are not the same since Aslani is the plaintiff and Calderone, Saverance, Nichols, Sehgal, and Tsukada are named as the defendants in the declaratory judgment action, and, in the instant action, CCBB and Vigouroux are the plaintiffs and Aslani is the sole defendant. In addition, the causes of action and the relief sought are not the same. The declaratory judgment action asserts claims by Aslani against Vigouroux, Calderone, Saverance, Nichols, Sehgal, and Tsukada, and concerns the membership interests in CCBB. It sought a declaration regarding these interests (which were the basis of Vigouroux's summary judgment motion therein), and also alleges claims of misappropriation of funds, fraud, and unjust enrichment. This action, on the other hand, seeks a declaration regarding the validity of the Resolutions, alleges claims of breach of fiduciary duty and breach of the 2014 Operating Agreement, and demands an accounting. It alleges that Aslani has mismanaged CCBB and continues to assert

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complete dominion over it despite having been removed from control of it by the Resolutions. Thus, dismissal of this action, pursuant to CPLR 3211 (a) (4), must be denied.

Aslani further contends that plaintiffs' complaint must be dismissed pursuant to CPLR 3211 (a) (7). "When determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), 'the standard is whether the pleading states a cause of action,' and 'the court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (Guayara, 83 AD3d at 663, quoting *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010], quoting *Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon*, 84 NY2d at 87-88; see also *Nilazra, Inc. v Karakus, Inc.*, 136 AD3d 994, 995 [2d Dept 2016]).

Aslani contends that the first cause of action, which seeks a declaratory judgment finding the Resolutions enforceable and a permanent injunction ordering him to comply with the Resolutions and turn over all control of CCBB's assets and powers to Vigouroux as the current president of the board of directors, fails to state a viable cause of action. He argues that Vigouroux has no interest in CCBB and that this renders the Resolutions void. This argument, as noted above, must be rejected since the court has found that Vigouroux possesses a 59% membership interest in CCBB.

Aslani argues that he, Pioppo, Sehgal, and Nichols were not given notice of the November 2, 2015 special meeting at which the Resolutions were passed, and that Calderone

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disavowed the Resolutions. Calderone, however, in his sworn affidavit, denies that he, in any way, repudiated the Resolutions. Sehgal, in his affidavit, does not address the issue of notice of the special meeting, but states that he did not authorize Vigouroux to take any action on his behalf with respect to his interest in CCBB, and that he tenders any interest he may have in CCBB to Aslani.

Aslani additionally submits an affidavit by Nichols, in which Nichols states that he never received a notice nor waived notice of the November 2, 2015 special meeting at which the Resolutions were passed. Nichols asserts that he never attended that meeting, but, instead, met Vigouroux in a bar in October or November 2015, and that, at that time, Vigouroux told him that Aslani had shut him out of CCBB's business and needed his help. He claims that Vigouroux told him that if he signed the Resolution, it would help him collect money that Aslani owed him, and that Vigouroux, thereafter, promised to pay him the money owed if he collected it from Aslani. He asserts that he did not carefully review the contents of the Resolution, and that it was never his intention to participate in the ownership or management of CCBB or to remove anyone from ownership or management of CCBB. He claims that the Resolution is a product of a misrepresentation to him by Vigouroux, and that he has agreed to tender any ownership interest he may have in CCBB to Aslani.

Vigouroux asserts that Nichols voluntarily signed the Resolutions. He claims that Aslani intimidated or paid him into recanting his involvement in passing the Resolutions, but that this should not vitiate his prior consent to the Resolutions. Furthermore, Sehgal, who

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has only a 3% membership interest in CCBB, did not sign the Resolutions, and Nichols has only a 10% membership interest in CCBB. Vigouroux, Calderone, and Saverance, who are cumulative holders of 73% of the membership interest in CCBB, assert that they passed the Resolutions. Thus, the court does not find that plaintiffs' first cause of action fails to state a claim upon which relief can be granted, and dismissal of this cause of action is not warranted.

Aslani further argues that the second and third causes of action, which both allege that he breached his fiduciary duty to CCBB, fail to state a viable claim against him. He asserts that prior to his participation in CCBB, it had no money, no liquor license, no certificate of occupancy, was in arrears in rental payments, and had no operating agreement. He claims that after he took over the management of CCBB, a liquor license and certificate of occupancy have been issued, the outstanding rent has been paid, and the premises are legally open for business.⁴

However, plaintiffs, in their second cause of action, allege that Aslani, as a member and former president of the board of directors of CCBB, breached his fiduciary duty to CCBB and its members by, among other things, filing a false Operating Agreement with the SLA (i.e., the 2015 Operating Agreement), issuing shares of CCBB without authorization, encumbering CCBB with debt, preventing members from having access to CCBB's management and assets, refusing to pay rent for the premises, and refusing to relinquish his

⁴Aslani has not submitted a copy of the liquor license or the certificate of occupancy, nor does he state when they were obtained.

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powers after the passage of the Resolutions. Plaintiffs' third cause of action alleges that Aslani breached his fiduciary duty to Vigouroux by, among other things, preventing Vigouroux from having access to the business, claiming that Vigouroux was not a member of CCBB, filing a false Operating Agreement with the SLA which does not show Vigouroux's interest in CCBB, destroying items that Vigouroux loaned or donated to CCBB, and refusing to acknowledge Vigouroux's capital contributions to CCBB.

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct” (*Stortini v Pollis*, 138 AD3d 977, 978-979 [2d Dept 2016], quoting *Deblinger v Sani-Pine Prods. Co., Inc.*, 107 AD3d 659, 660 [2d Dept 2013]). “A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)” (*Deblinger*, 107 AD3d at 660, quoting *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]). “The members of an LLC may stand in a fiduciary relationship to each other and the LLC” (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]; *see also Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Aslani, as the president of the board of directors and a member of CCBB, owed plaintiffs a fiduciary duty. Plaintiffs allege misconduct by Aslani and damages caused by such alleged misconduct. Thus, the facts alleged adequately support plaintiffs' claims for breach of fiduciary duty and are set forth with sufficient particularity to survive Aslani's motion to dismiss (*see* CPLR 3016 [b]; *Jones*, 125 AD3d at 533).

Therefore, the court finds that these causes of actions state viable claims for breach of fiduciary duty and dismissal of them must be denied.

Aslani contends that plaintiffs' fourth and fifth causes of action fail to state cognizable claims. Plaintiffs' fourth cause of action alleges that Aslani breached the 2014 Operating Agreement by not holding an annual meeting to elect a new board of directors in September 2014 or September 2015, which resulted in his alleged continued mismanagement of CCBB and his abuse of CCBB's other members while he maintained power. It also alleges that Aslani further breached the 2014 Operating Agreement by acting outside his scope of authority by issuing interests in CCBB and accepting debt obligations from other individuals. Plaintiffs' fifth cause of action demands an accounting from Aslani of the books and records of CCBB from April 2014 to date.

Aslani asserts that Vigouroux has not shown that he had the right to demand annual meetings or an accounting. He states that no other member has disputed the issue of annual meetings or demanded an accounting.

Section 4.2 of the 2014 Operating Agreement, however, expressly provided that "the annual meeting of the shareholders for the election of directors and for the transaction of such other business as may properly come before the meeting shall be held each year on the first Sunday in September or an alternative date within the same month proposed by the Board of Directors." It is undisputed that Aslani, who was the president of the board of directors, did not hold an annual meeting in September 2014 or September 2015. Aslani also

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has not shown that there was compliance with the bookkeeping requirements of article VII of the 2014 Operating Agreement. Furthermore, there is a “right to an accounting . . . premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Center for Rehabilitation & Nursing at Birchwood, LLC v. S & L Birchwood, LLC*, 92 AD3d 711, 713 [2d Dept 2012], quoting *Palazzo v Palazzo*, 121 AD2d 261, 265 [2d Dept 1986]). Therefore, dismissal of plaintiffs’ fourth and fifth causes of action must be denied.

Aslani also seeks an order imposing sanctions in the amount of \$10,000 upon plaintiffs’ counsel, pursuant to 22 NYCRR 130-1.1, for allegedly intentionally asserting false statements within plaintiffs’ verified complaint for the purposes of deceiving and/or misleading the court, and for fraudulent misrepresentations. He cites to 22 NYCRR 130-1.1 (a), which authorizes the court, in its discretion, to impose financial sanctions upon an attorney who has engaged in frivolous conduct. He points out that 22 NYCRR 130-1.1 (c) defines frivolous conduct as including where “material factual statements that are false” are asserted. He asserts that paragraph 113 of the complaint contains the language that “[o]n November 2, 2015, having retained this firm, Messrs. Vigouroux, Calderone, Saverance, and Nichols (cumulative holders of 83% holder of equity in CCB).” He contends that this is a material factual statement that is false and which warrants sanctions because Nichols, in

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his affidavit, has denied retaining either Neil L. Postrygacz or “Jan Margolis.”⁵ However, this paragraph refers to Vigouroux, Calderone, Saverance, and Nichols’ passing of the Resolution, which they signed, and does not claim that they retained the law firm of Neil L. Postrygacz in this action. Notably, Calderone, Saverance, and Nichols are not named as parties to this action. Thus, contrary to Aslani’s contention, this paragraph of the complaint does not assert any material factual statement that is false so as to warrant any sanction under 22 NYCRR 130-1.1.

Aslani further contends that plaintiffs’ counsel has frivolously commenced this action while knowing that the declaratory judgment is pending and there was no rational basis for the commencement of this action except to harass him and waste judicial time and resources (*see* 22 NYCRR 130-1.1 [c] [2]). He asserts that since this action is frivolous, he is entitled to recover the costs, disbursements, and attorney’s fees incurred by him, which, he claims, are in excess of \$10,000. He cites to 22 NYCRR 130-1.1 (a), which provides that “[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in . . . Part [130].”

As discussed above, however, this action and the declaratory judgment action allege different claims and seek different relief. Therefore, the court does not find that the

⁵Plaintiffs’ counsel in this action is Neil L. Postrygacz, Attorney at Law, P.C., and Yan Margolin is of-counsel to Neil L. Postrygacz, Attorney at Law, P.C.

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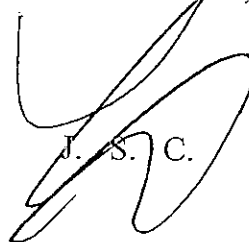
commencement of this action was frivolous. Consequently, there is no basis for the imposition of sanctions upon plaintiffs' counsel, and Aslani is not entitled to an award of costs, disbursements, or legal fees.

CONCLUSION

Accordingly, Aslani's motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'L. Knipel', written over the text 'J. S. C.'.

J. S. C.

HON. LAWRENCE KNIPEL