

Aslani v Vigouroux

2016 NY Slip Op 32309(U)

November 22, 2016

Supreme Court, Kings County

Docket Number: 514666/15

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.
-----X

POOYAN ASLANI,
Plaintiff,

- against -

Index No. 514666/15

JULIAN VIGOUROUX, DOUGLAS CALDERONE,
STEPHEN SAVERANCE, WILLIAM NICHOLS,
KENNY SEHAL AND KOTARO TSUKADA,
Defendants.
-----X

The following e-filed papers read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	54, 56-80
Opposing Affidavits (Affirmations) _____	86-87
Reply Affidavits (Affirmations) _____	92
_____ Affidavit (Affirmation) _____	_____
Memorandum of Law _____	55 85

Upon the foregoing papers, in this action by plaintiff Pooyan Aslani (Aslani) against defendants Julian Vigouroux (Vigouroux), Douglas Calderone (Calderone), Stephen Saverance (Saverance), William Nichols (Nichols), Kenai Sehgal s/h/a Kenny Sehgal (Sehgal), and Kotaro Tsukada (Tsukada) (collectively, defendants) alleging claims of fraud,

a misappropriation of funds, and unjust enrichment and seeking a declaratory judgment and damages, Vigouroux moves, under motion sequence number one, for an order granting him summary judgment, pursuant to CPLR 3212, in his favor: (1) on the first and second causes of action of Aslani's complaint, which seek a declaratory judgment in this action, and (2) on his third counterclaim¹ for a declaratory judgment as asserted in his answer.²

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 Cupcake & BoomBoom LLC (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

¹While Vigouroux's notice of motion erroneously refers to his third affirmative defense, rather than his third counterclaim, he clearly sets forth in his supporting papers that he is seeking such relief with respect to his third counterclaim. Since this is an obvious inadvertent error and there is no prejudice to Aslani resulting from it, it will be disregarded by the court (*see* CPLR 2001).

²Aslani's cross motion, under motion sequence number two, for an order, pursuant to CPLR 3215, directing that a default judgment be entered against Calderone, Saverance, and Tsukada, was withdrawn by a stipulation dated and filed on June 24, 2016 (Document No. 101). Calderone, Saverance, and Tsukada's motion, under motion sequence number three, for an order, pursuant to CPLR 3012 (d), granting them leave to serve and file a late answer or a motion to dismiss with respect to Aslani's complaint, was also resolved by this stipulation since it extended Calderone, Saverance, and Tsukada's time to answer Aslani's complaint to July 1, 2016. In addition, Calderone, Saverance, and Tsukada, in this stipulation, waived any and all jurisdictional defenses.

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, Saverance received a 6% interest in CCBB in exchange for work performed by him on behalf of CCBB, and 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 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, 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 Note³ or for any purported "sale" of his interest in CCBB.

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

³The Promissory Note did not provide for any monthly payments.

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) 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 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 "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 the instant action against Vigouroux, Calderone, Saverance, Nichols, Sehgal, and Tsukada. Aslani's first cause of action seeks 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 are void. Aslani's second cause of action seeks 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 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 has interposed an answer with affirmative defenses and counterclaims, which was filed on January 19, 2016. Vigouroux's third counterclaim seeks a declaratory judgment that the 2014 Operating Agreement is valid and the respective interests of the members are as stated in exhibit 2 of the 2014 Operating Agreement, that the capital contributions in capital and in-kind of each member are 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 December 29, 2015, CCBB and Vigouroux, individually and as president of the board of directors of CCBB, filed an action against Aslani, individually and as former president of the board of directors of CCBB (*Cupcake & Brromboom, LLC v Aslani*, Sup Ct, Kings County, index No. 515757/15) (the derivative action). The first cause of action seeks a declaratory judgment finding the Resolutions enforceable and a permanent injunction ordering Aslani 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. The second cause of action alleges 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 powers after the passage of the Resolutions. The 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 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, and by acting outside his scope of authority by issuing interests in CCBB and accepting debt obligations from other individuals. The fifth cause of action demands an accounting of the books and records of CCBB from April 2014 to date.

On March 18, 2016, Vigouroux filed his instant motion for summary judgment in this action, denying Aslani the declaratory judgment which he seeks in his first and second causes

of action,⁴ and, instead, granting him a declaratory judgment in his favor as sought in his third counterclaim. Aslani opposes Vigouroux's motion.⁵

DISCUSSION

Vigouroux, in support of his motion, argues that the 2015 Operating Agreement was created and used solely to mislead the SLA into believing that he and several other members were no longer part of CCBB so that CCBB could obtain a liquor license from the SLA, and that the 2015 Operating Agreement has no validity. He contends that the 2014 Operating Agreement is valid and controlling. He also contends that the Registration Certificates and the Promissory Note, which were never signed, were also created solely to mislead the SLA into believing that he no longer had an interest in CCBB. He has presented evidence, including his affidavit, Calderone's affidavit, and Tsukada's affidavit, which attest that he had not actually transferred his interest in CCBB. He also has submitted numerous emails, as discussed in detail above, which show that the 2015 Operating Agreement was created solely for the purpose of showing it to the SLA.

⁴While Aslani, in his opposition papers, argues that the Resolutions are invalid and void, Vigouroux, in his motion, does not address or seek a declaratory judgment with respect to the validity of the Resolutions, and this issue has not been argued by him. Thus, that issue is not presently before the court and the court will not determine the validity of the Resolutions at this juncture.

⁵Aslani also has moved, in the derivative action, to dismiss the complaint against him. That motion, which involves the same underlying facts as those in the present action, has been decided by a separate decision and order.

In opposition, Aslani relies upon the Registration Certificates to assert that Vigouroux transferred his interest in CCBB. However, as previously noted, these Registration Certificates were not signed, and they are, 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,⁶ 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]).

Moreover, changes to an operating agreement that adversely affect a 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, the 2015 Operating Agreement contravenes statutory requirements.

⁶Limited Liability Company Law § 417 (a) provides that the members of a limited liability company "shall adopt a written operating agreement."

In addition, previous admissions regarding a membership interest in a limited liability company which are made by the non-movant are 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]). Here, Aslani admitted Vigouroux's membership interest by his certification of the 2014 Operating Agreement. He further held Vigouroux out as his partner and as having a membership interest in CCBB in his emails. Indeed, Aslani's various emails demonstrate that 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 argues, however, that Vigouroux has not shown that his membership interest in CCBB, as set forth in the 2014 Operating Agreement, is valid. Aslani asserts that since at the time that CCBB entered into its lease for the premises, CCBB's performance under the lease was personally guaranteed by Vigouroux and Landon Webb (Webb), it must be presumed that ownership of CCBB was shared between Vigouroux and Webb at that time. Aslani also points to the fact that CCBB's July 23, 2012 application to the SLA listed the names of Fatbardha, Webb, Tomoyo Tanaka Lee, and David Teller, along with Vigouroux, Saverance, and Nichols. He claims that this shows that these persons were members of CCBB and Vigouroux has not explained the departures of these members from the ownership of CCBB. He further asserts that Vigouroux has not explained how Tsukada, Pioppo, and

*22]

Calderone came to replace these other members and that there is nothing in writing which shows Vigouroux's transfer to and from Tsukada, Calderone, Nichols, Sehgal, or Saverance.

This argument is unavailing. The 2014 Operating Agreement, which is executed by Vigouroux, Tsukada, Calderone, Saverance, Nichols, Sehgal, and Aslani, sets forth the respective membership interests of these parties in CCBB. By signing the 2014 Operating Agreement, Aslani acknowledged these membership interests in CCBB. There is no evidence whatsoever that Webb, Tomoyo Tanaka Lee, or David Teller has ever claimed to have any membership interest in CCBB. As to Fatbardha, Kupi, in an affidavit by him (which has been submitted by Aslani), states that Vigouroux promised to give a 10% membership interest in CCBB to his wife, Fatbardha, in exchange for his building the bar and stage within the premises along with various other woodworking services. Vigouroux, in response, points to the fact that the 2015 Operating Agreement, which Aslani claims is the valid one, also does not reflect any interest held by Fatbardha. Furthermore, Fatbardha has never previously claimed any membership interest in CCBB and has not sought to join as a party in this action.

Aslani further argues that Vigouroux has not presented any stock certificate or bank statements verifying his contributions to CCBB. He contends that the only documents that should be relied upon are the applications to the SLA, which, following the SLA's initial denial of the liquor license, do not confirm that Vigouroux had an interest in CCBB. Aslani, however, admits that on June 6, 2011, Vigouroux caused the creation of CCBB, and that

Vigouroux initially had an interest in it. He only argues that Vigouroux transferred his interests based upon the submissions to the SLA, the Registration Certificates which were never signed, and the 2015 Operating Agreement. As demonstrated by Aslani's emails, though, he acknowledged that these documents were created for SLA purposes only.

Aslani additionally asserts that Vigouroux knew and agreed with Merz's plan to submit a fraudulent application to the SLA. However, the emails by Aslani demonstrate that he also actively participated in this plan. Thus, Aslani seeks to benefit from a fraud in which he was actively involved in order to deny Vigouroux his membership interest in CCBB.

Aslani also asserts Vigouroux has not shown that Tsukada transferred his 20% interest in CCBB to him because he has not submitted a written document evidencing this transfer. He claims that Tsukada sold his 20% interest in CCBB to Calderone. However, the Registration Certificate, relied upon by Aslani (i.e., Registration Certificate No. 5) in asserting that Tsukada sold his interest in CCBB to Calderone, is unsigned. Moreover, Tsudaka, in a sworn affidavit, attests that he transferred his 20% interest in CCBB to Vigouroux and did not sell it to Calderone, and Calderone, in a sworn affidavit, attests that he never paid for or received Tsudaka's 20% membership interest in CCBB. Thus, the affidavits by Tsukada and Calderone demonstrate that Tsukada transferred his membership interest to Vigouroux.

Aslani argues that Tsukada and Calderone's affidavits should be given no weight. He contends that they are unreliable because they participated in perpetrating a fraud on the SLA

*24]

by allowing false applications to be filed. However, as noted above, Aslani was also involved in perpetrating this fraud, as evidenced by his own emails.

Aslani, in claiming that Vigouroux relinquished his interest in CCBB, further points to a March 19, 2013 email from Merz to Kupi, in which, following Kupi's threat to terminate the sublease from the premises, he stated that he was "trying to restructure the business situation to move [Vigouroux] totally away from day-to-day operations and to try to arrange a new capital plan." Aslani argues that Vigouroux promised Kupi in late 2014 that he would leave the business in exchange for a reduction in arrears. He has submitted Kupi's affidavit, in which Kupi states that he (as a member of LK & Sons) had commenced a non-payment proceeding in the Civil Court, Kings County, against CCBB and Vigouroux and Webb, as guarantors, on August 13, 2014, and that on November 2014, he agreed to meet to settle the non-payment proceeding. Kupi further states that at this meeting, Vigouroux introduced Aslani as the new owner of CCBB, and that he agreed to reduce the arrears in rent to \$100,000 so long as Vigouroux agreed to surrender his sublease agreement and to have no further involvement with CCBB and the premises. Kupi asserts that he then agreed to give a new sublease to CCBB to be guaranteed by Aslani.

Kupi's argument that Vigouroux agreed to leave CCBB as part of the settlement of the non-payment proceeding, however, is belied by the Stipulation of Settlement dated November 12, 2014, signed by Merz, on behalf of CCBB, and by LK & Sons' attorney (who is now the attorney for Aslani), which settled the non-payment proceeding in the Civil Court,

*25]
Kings County. Specifically, this Stipulation of Settlement did not include any reference to Vigouroux and was not signed by Vigouroux, but only provided that Aslani must personally guarantee performance of a new sublease agreement, in which CCBB agreed to pay outstanding rent and additional rent.

Thus, the court finds that Vigouroux has demonstrated his prima facie entitlement to judgment as a matter of law with respect to his third counterclaim for a declaratory judgment and has shown the lack of merit to Aslani's first and second causes of action insofar as they seek a declaratory judgment regarding the same issues set forth in that third counterclaim. It further finds that Aslani has failed to raise a genuine triable issue of fact. Consequently, Vigouroux's motion for summary judgment must be granted (*see* CPLR 3212 [b], [e]).

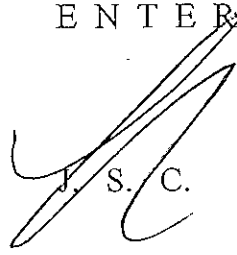
CONCLUSION

Accordingly, Vigouroux's motion for partial summary judgment in his favor is granted with respect to his third counterclaim for a declaratory judgment and Aslani's first and second causes of action to the extent that it is declared that: (1) the 2014 Operating Agreement is valid and the respective interests of the members are as stated in exhibit 2 therein, 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.

This constitutes the decision and order of the court.

ENTER



J. S. C.

HON. LAWRENCE KNIPEL