New York Budget Inn LLC v Averbuch
2017 NY Slip Op 31296(U)
June 13, 2017
Supreme Court, New York County
Docket Number: 652130/2016
Judge: O. Peter Sherwood

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

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NEW YORK BUDGET INN LLC, and
JBJB ASSOCIATES LLC and
1850 ARON LLC, Suing Derivatively on Behalf of
NEW YORK BUDGET INN, LLC,

Plaintiffs,

-against-

YESHAYA AVERBUCH,

Defendant.

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DECISION AND ORDER

Index No.: 652130/2016
Motion Sequence No.: 001

Action No. 1

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YESHAYA AVERBUCH
Suing Individually and Derivatively on behalf of
NEW YORK BUDGET INN LLC and
LAYINN HOSPITALITY GROUP, INC.,

Plaintiffs,

-against-

NEW YORK BUDGET INN LLC,
JBJB ASSOCIATES LLC,
1850 ARON LLC, ISRAEL JERRY POLLAK,
JOSHUA KLAPPER and ARON WALEWITSCH,

Defendants.

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Index No.: 653343/2016
Motion Sequence Nos.: 001-002

Action No. 2

O. PETER SHERWOOD, J.:

I. BACKGROUND

These are two related actions stemming from the relationship between Yeshaya Averbuch and New York Budget Inn LLC (NYBI). NYBI operated the New York Budget Inn (the Inn), a hostel located in New York City. NYBI has three members: (1) JBJB Associates LLC (JBJB), (2) 1850 Aron LLC (Aron), and (3) LayInn Hospitality (LayInn). Each member owns a 33.33% interest in NYBI. Averbuch owns a 51% interest in LayInn giving him an indirect 17% interest in NYBI. Averbuch served as manager of NYBI during construction from January 2012 until July 2015. He contends that he continues to be a manager of NYBI and is being frozen out. The Inn has been run as a successful business since opening.

In the first-filed action (Index No. 652130/2016, Action One), NYBI, JBJB, and Aron (with JBJB and Aron suing derivatively on behalf of NYBI) seek to recover $233,936 allegedly misappropriated by Averbuch while working at NYBI. In Action Two (Index No. 653343/2016), Averbuch sues individually and derivatively on behalf of NYBI and LayInn against NYBI, JBJB, Aron, and the individual owners of JBJB (Israel Jerry Pollak and Joshua Klapper) and Aron (Aron Walewitsch).

II. ACTION TWO- MOTION 001- The Entities' Motion to Dismiss

A. Arguments

In Action Two, NYBI, JBJB, and Aron (the Entities) objected to Averbuch's original complaint on several grounds, including failure to meet the requirements of a derivative suit, because Averbuch also is not a member of NYBI and did not allege either that he made a demand for NYBI to sue or that such a demand would be futile (Memo at 3-5). Further, the Entities argue that Averbuch has not met the standard for a derivative suit on behalf of LayInn, as he failed to allege having made a demand or that a demand would be futile (*id.*). The Entities also object to Averbuch's co-mingling individual and derivative claims. They also argue that the accounting claim is barred by documentary evidence and a lack of standing.

Along with his opposition to the motion to dismiss, Averbuch filed an amended complaint as of right in an effort to moot most of the above objections. In the amended complaint, Averbuch, suing individually and derivatively, asserted the following claims:

1) for an accounting (brought derivatively on behalf of LayInn);
2) to require NYBI to make distributions to LayInn (brought derivatively on behalf of LayInn);
3) conversion of funds (also derivatively on behalf of LayInn);
4) for advancement and indemnification of legal expenses pursuant to the Operating Agreement (an individual claim);
5) for reimbursement of other expenses incurred while acting as manager (an individual claim);
6) to require NYBI to return domain names to Averbuch;
7) breach of fiduciary duty/fraud (brought derivatively on behalf of LayInn) for NYBI's actions in making distributions to the other members, and not to LayInn;

8) breach of fiduciary duty/fraud (brought individually) for defendants' inviting Averbuch to move to New York, when they intended to fire him and freeze him out of the business; and

9) for injunctive relief, seeking an order directing NYBI to issue a corrected IRS K-1 tax form which does not overstate distributions to LayInn, and requiring NYBI to pay both the additional tax burden associated with the over-reporting, and the difference between the original and corrected K-1 reports (brought on behalf of LayInn).

In an attorney affirmation in opposition to the motion, Averbuck's attorney, David Schorr, affirms that the amended complaint 1) removes derivative claims brought on behalf of NYBI; 2) includes allegations that Averbuch made demand of LayInn; 3) separates individual and derivative claims; and 4) asserts a claim for an independent accounting derivatively on behalf of LayInn (Schorr aff at 2 NYSCEF Doc. No. 13).

In reply, the Entities seek dismissal of derivative claims 1, 2, 3, and 9.[1] Preliminarily, the Entities urge that the attorney affirmation be disregarded, as lacking in personal knowledge of the facts (Reply at 2). The Entities also contend that Averbuch's derivative claims should be dismissed for lack of standing to sue on LayInn's behalf. In the amended complaint, Averbuch alleges he wrote to his partners in LayInn in September 2015, demanding the company sue NYBI. The Entities argue that Averbuch failed to allege the other shareholders had control of the entity and had an interest in the challenged transaction (*id.* at 3-4, citing *Najjar Group, LLC v W 56th Hotel LLC,* 110 AD3d 638, 639 [1st Dept 2013]).

As to Averbuch's claim for an accounting, the Entities argue that the September 2015 letter does not demand that LayInn seek an accounting, and that since no accounting was demanded, a derivative action cannot go forward based in that claim (Reply at 4). The Entities also contend that the claim lacks merit as the allegations in the Schorr affirmation criticizing the work of NYBI's CPA are not supported by personal knowledge, include errors, and are contradicted by the affidavit of Joshua Klapper (NYSCEF Doc. No. 15) (Reply at 5-6). The

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[1] The Entities specify the 8th cause of action, but reference the claim concerning the K-1 which is Count 9 of the amended complaint).

Entities also argue, without citation, that Averbuch should have his own accountant review the books and records and make a report, at his expense (*id.* at 6-7).

As to claim 3, the Entities argue that it is actually a derivative claim brought on behalf of NYBI against the other members for conversion and "unauthorized spending". Accordingly, the cause of action belongs to NYBI, as to which Averbuch admits he lacks the authority to sue (Reply at 5).

Averbuch contends that the amended complaint resolves all of the Entities' objections, as it alleges the sending of a demand letter, removes derivative claims brought on behalf of NYBI, and separates individual and derivative claims (Opp at 2). Averbuch also argues that he and LayInn never had access to NYBI's financial records, instead receiving only "draft" financial statements and lacking access to tax returns, books, and records (*id.* at 2-3). Averbuch questions the reliability of the accountant preparing the financial documents and the validity of his work product (*id.* at 3). As to standing, Averbuch explains that, for LayInn to sue, the consent of all three owners is needed, and given the opposition of Gilded Enterprises, Inc., an 18% owner, such consent was not possible (Reply at 2 NYSCEF Doc. No. 38, ¶ 7 citing Averbuch aff dated Sept. 21, 2016, NYSCEF Doc. No. 35, ¶ 41).

B. Discussion

On a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

As far as the Entities argue that the demand letter to LayInn was insufficient to give Averbuch standing to bring this derivative suit, such allegations of control and intent are unnecessary. The Entities cite a requirement for such allegations in *Najjar Group, LLC v W. 56th Hotel LLC*, but, in that case, the plaintiff had not made a demand (110 AD3d at 639). The entity's action and allegations of interest were necessary to show that demand would have been futile (*id.*). Here, the demand letter to LayInn is adequate, as far as it goes, and it covers Count 2 concerning NYBI's alleged failure to make distributions to LayInn.

As the Entities argue, the September 2015 demand letter (attached as Exhibit A to the amended complaint, NYSCEF Doc. No. 12) does not demand that LayInn seek an accounting and the amended complaint does not allege an accounting was demanded of NYBI. Accordingly, the claim for an accounting (Count 1) must be dismissed. "[A] court of equity will not intervene to vindicate a partner's right to an accounting in the absence of a showing that a demand for one was made and rejected by the partner in possession of the books, records, profits or other assets of the partnership" (*Kaufman v Cohen*, 307 AD2d 113, 124 [1st Dept 2003]).

As to Count 3, for conversion, Averbuch alleges that JBJB and Aron took money from NYBI for their personal use, spent NYBI's money without authorization, made improper distributions of NYBI funds, and violated the NYBI Operating Agreement. The amended complaint seeks an order requiring those entities to return funds to NYBI. This claim asserts the conversion of NYBI funds. It belongs to NYBI, not LayInn, and must be dismissed for lack of standing.

As to Count 9, regarding the allegedly false K-1, the Entities argue that Averbuch's objections to the K-1 are due to a misreading of the document (Reply at 6). They refer the court to the affidavit of Joshua Klapper (at ¶¶ 18-20). This portion of the motion is based less on an alleged failure to state a claim, and is more based on documentary evidence, namely, the K-1 (*see* NYSCEF Doc. No. 30).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of the defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A

motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

As noted, the Entities rely on the affidavit of Joshua Klapper, NYBI's accountant (*see* NYSCEF Doc. No. 73). The affidavit and its attachments consisting of emails and an account analysis, are not the type of "essentially undeniable" documents which can support a motion to dismiss and they do not flatly contradict Averbuch's assertions. Accordingly, the portion of the motion seeking dismissal of Count 9 is denied.

III. ACTION TWO-Motion 002, Averbuch Motion for Reimbursement and Accounting

In motion sequence number 002, Averbuch seeks (1) a money judgment in the amount of $280,096 and the September 2016 distribution amount; (2) an order directing NYBI to pay distributions to LayInn going forward, (3) an order requiring NYBI to comply with the requirements of the Operating Agreement, (4) an order requiring NYBI to amend the 2015 K-1; (5) an order directing NYBI to reimburse Averbuch's litigation expenses; and (6) the appointment of a forensic accountant to conduct an independent accounting. The motion

effectively seeks summary judgment on Counts 1 (accounting); 2 (distribution); 4 (indemnification); 7 (breach of fiduciary duty); and 9 (falsified K-1). Items 1 through 4 of the motion were subsequently withdrawn, leaving only the requests for the reimbursement of litigation expenses and an accounting (NYSCEF Doc. No. 32).

A. Arguments

Averbuch seeks reimbursement of his legal expenses, past and future, for bringing this claim, pursuant to section 11.2 of the Operating Agreement (NYSCEF Doc. No. 27 ¶¶ 18-22). Averbuch also seeks summary judgment on the independent accounting claim on the grounds that "an action at law may not be maintained by one partner against another for any claim arising out of the partnership until there has been a full accounting" (*id.* at ¶ 26, quoting *Stark v Goldberg*, 297 AD2d 203, 204 [1st Dept 2002]).

As to the first item, NYBI contends that Averbuch is really seeking advancement of legal fees, rather than indemnification, and the Operating Agreement does not provide for the advancement of legal fees (Opp at 1 [NYSCEF Doc. No. 33] quoting *Crossroads ABL LLC v Caneres Capital Mgt., LLC*, 105 AD3d 645 [1st Dept 2013]["indemnification and advancement of legal fees are two distinct corporate obligations"]. While section 11.2 of the Operating Agreement allows for indemnification of a person who is, was or is threatened to be made a party to a proceeding because of his/her status as a manager or member of the company, it does not promise advancement of fees and expenses (*see id*). NYBI argues that the language of the Operating Agreement ("no indemnification shall be granted where it has been determined that the party . . . has engaged in fraud . . .") supports its position that the Operating Agreement contemplates after - the - fact reimbursement, and not advancement of legal expenses (*see id.* at 2, quoting Operating Agreement, §11.2). While the Operating Agreement refers to "threatened, *pending*, completed" litigation (emphasis added), NYBI colors that as a reference to phases of litigation which will be indemnified after the fact (*see id.* at 2). NYBI also argues the indemnification clause is applicable only to third-party claims against a member or manager, and not a first party claim between parties to the Operating Agreement (*see id.* at 3). NYBI relies on *Hooper Assoc, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 (1989), in which the New York Court of Appeals held that similar language covered third-party claims, but did not allow recovery for

expenses incurred in a suit between the parties to the agreement absent clear language to that effect (*see id.* at 492). NYBI argues the Operating Agreement lacks the required "unmistakable intention" (NYSCEF Doc. No. 33 at 4, quoting *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010], lv. denied 17 NY3d 713 [2011]). Accordingly, if Averbuch, who NYBI argues has admitted taking more than $98,000 from NYBI, establishes that he is not liable to NYBI, the company will indemnify him. However, if NYBI prevails, Averbuch will not be entitled to recover his legal fees. Averbuch argues that the *Hooper* decision has been limited to its facts, which are distinct from those here (NYSCEF Doc. No. 38, ¶ 7, citing *Crossroads ABL*).

As to the accounting, NYBI argues that this is effectively a pre-answer motion for summary judgment, which is barred by CPLR 3212 (*see id.* at 5, citing *Lindbergh v SHLO 54, LLC*, 128 AD3d 642, 644 [2nd Dept 2015]["A motion for summary judgment may not be made before issue is joined . . . and the requirement is strictly adhered to"]). Finally, NYBI argues an accounting is not granted as a matter of course, and there are issues at fact as to whether there is a need for an accounting (*see id.* at 6 citing Klapper affs. dated Aug. 23, 2016, and Sept. 9, 2016). In his reply papers, Averbuch argues that the issue has been fully briefed, and an independent accounting is necessary.

B. Discussion

As discussed above in the Entities' motion to dismiss, the claim for an accounting must dismissed for Averbuch's failure to demand that LayInn seek an accounting. Averbuch states the making of such demand would be futile because it is not possible to get all of LayInn's other owners to agree to take action, and any action by LayInn requires unanimous consent. The court notes, however, that a demand letter was sent but it does not include a request for seeking an accounting (*see* NYSCEF Doc. No. 12).

As to the advancement of legal fees, under the well-settled American Rule, the parties are responsible for their own attorney's fees and "the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*Hooper Assoc.*, 74 NY2d at 492). In *Hooper*, the claim for indemnification was rejected because "the language of the clause did not make it "unmistakably clear" that the winning

side should be awarded such fees (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010]). There, the indemnification clause contained a list of possible grounds for claims. The *Hooper* court noted that the covered claims were all "susceptible to third-party claims and none were exclusively or unequivocally referable to claims between the parties themselves. Therefore, the *Hooper* court held, the indemnification clause could not properly be interpreted to cover costs arising out of the litigation between the parties" (*Gotham Partners*, 76 AD3d at 206–07, internal quotations *omitted*).

"[T]he strict standard imposed by *Hooper* requires [that f]or an indemnification clause to serve as an attorney's fees provision with respect to disputes between the parties to the contract, the provision must *unequivocally* be meant to cover claims between the contracting parties rather than third party claims" (*id.* [emphasis in original]). Averbuch argues that the *Hooper* decision has been limited by *Crossroads ABL, LLC v Canaras Capital Management., LLC. (*35 Misc 3d 1238(A) [Sup Ct 2012], affd, 105 AD3d 645 [1st Dept 2013]). However, *Crossroads* merely distinguished the facts of the two cases.[2] As the *Crossroads* court restated, a court should not "infer a party's intention to waive the benefit of the [American Rule] unless the intention to do so is unmistakably clear from the language of the promise" (35 Misc3d 1238[A] at *3). The *Crossroads* court reviewed the indemnification language in the case before it and held that "[s]ince the language is unambiguous, clear and complete, it is to be enforced according to its own terms" *(*35 Misc 3d 1238[A] at *4). Here, the question is whether the language in section 11.2 of the Operating Agreement shows NYBI's unmistakably clear intention to advance fees an indemnify its managers, directors, members for its own claims against them.

Section 11.2 of the Operating Agreement reads:

> "11.2 Indemnification. The Company shall indemnify any Person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding by reason of the fact that such Person is or was a Member, Manager, officer, employee or other agent of the Company or that, being or having been such a Member, Manager, officer, employee or agent, such Person is or was serving at the request of the Company as a manager, director, officer, employee or other agent of another limited liability company, corporation, partnership, joint venture, trust or

[2]At oral argument, counsel conceded the point. Of course, the Appellate Division lacks authority to limit rules declared by the New York Court of Appeals.

> other enterprise (all such persons referred to hereinafetr as an "agent"), to the fullest extent permitted by applicable law in effect on the date hereof and to such greater extent as applicable law may hereinafter from time to time permit. The Manager shall be authorized, on behalf of the Company to enter into indemnity agreements from time to time with any Person entitled to be indemnified by the Company hereunder, upon such terms and conditions as the Managers deem appropriate in their business judgment; provided, however, that no indemnification shall be granted where it has been determined by a court of competent jurisdiction not subject to appeal that the party to be indemnified has engaged in fraud, willful misconduct or bad faith in connection with acts for which indemnification is sought."

The section contemplates indemnification for "any . . . action . . . by reason of the fact that such Person is or was a Member, Manager, officer, employee or other agent of the Company" (Operating Agreement, § 11.2). Unlike *Hooper*, there are no enumerated circumstances listed as qualifying for indemnification, thereby providing additional insight into the intentions of the drafters (*see Hooper,* 74 NY2d at 492).

The Operating Agreement is broadly inclusive. It offers indemnification "to the fullest extend permitted by applicable law" (Operating Agreement, § 11.2). However, it does not extend to all manner of suit. Indemnification is offered only where the "Person" is a party to a suit "by reason of the fact that such Person is . . . a Member, manager, officer, employee or other agent of the Company". The language does not cover this dispute because plaintiff is not a party to the case" by reason of the fact that he . . . was a Manager" of NYBI.

Even if the court were to find that section 11.2 of the Operating Agreement provides for indemnification to Avebuch, the request for advancement of Averbuch's attorney fees must be denied because the section which bears the caption "Indemnification," is just that; it provides that the company will *indemnify* eligible persons, not advance them their legal fees.[3]

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[3]According to Black's Law Dictionary, "indemnity" is defined as

> 1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

IV. ACTION ONE- Motion 001

In the first - filed action, NYBI, JBJB and Aron (the latter two suing derivatively on behalf of NYBI) seek to recover $233,936, which the Entities claim Averbuch embezzled. The Entities allege that Averbuch was a manager of NYBI starting in January 2012, around the time construction of the facility began. Averbuch had exclusive management responsibilities for NYBI, and exclusive responsibility for handling and accounting for its cash. The Entities allege that, between 2012 and 2015, Averbuch took $233,936 from NYBI. The Entities allege further that Averbuch admitted taking the funds without authorization, but characterized the taking as a loan. No documentation for any loan exists. In an attempt to recoup this money, NYBI deposited distributions to LayInn in a segregated account, thus preventing Averbuch from getting his percentage of the distributions.

The Entities assert two claims: breach of fiduciary duty and breach of the duty of loyalty for his actions in taking the money. The Entities seek return of the funds, an accounting and legal expenses, and return of all compensation provided Averbuch for his work.

Averbuch seeks to consolidate the two actions and to dismiss NYBI as a plaintiff. He also moves to dismiss NYBI's claims for legal and accounting costs, and to dismiss the entire case for lack of an independent accounting. He argues that the case is premature and should be barred until after the accounting is completed. (See NYSCEF Doc. No. 4).

A. Arguments

The Entities do not object to consolidation. Regarding Averbuch's defense that plaintiffs' claims be dismissed until after an accounting has been conducted, NYBI states that the defendant, Averbuch, is sued in his personal capacity. He is not a member of NYBI (Opp at 2). Accordingly, this is not a dispute between partners and the accounting prerequisite does not apply. NYBI also contends that an accounting has already been performed, pointing to the Fruchter affidavit and its attachments (*id.* at 4, citing Affidavit of Alan Fruchter, NYSCEF Docs. No. 10-23).

By this definition, indemnity does not imply the advancement of legal fees.

As far as Averbuch argues NYBI must be dismissed as a plaintiff, NYBI contends this is a derivative action and JBJB and Aron have established the futility of a demand on NYBI. As to the claim for accounting and legal fees, the Entities argue that New York Partnership Law (§ 121-1002[e]) and NY Business Corporation Law (§ 626[e]) provide for the recovery of expenses, including attorney's fees, and that it is too early in the litigation to make a decision on this claim.

In his reply, Averbuch claims never to have admitted misappropriating money (Reply at 2 NYSCEF Doc No. 29 and 54). He argues that an accounting is needed in conjunction with the petition for judicial dissolution of NYBI (which was raised twice in this action first by motion sequence number 001 and then by order to show cause [motion sequence number 002, NYSCEF Doc. No. 42]).[4] Averbuch also claims to have seen 'draft' financial documents only, and to have been denied access to NYBI's books and records. He questions the credibility and accuracy of the provided financials (*id.* at 5).

As to the motion to dismiss NYBI as a plaintiff, Averbuch clarifies that he does not object to the derivative actions by JBJB and Aron, only to NYBI as a party, since NYBI cannot act without LayInn's consent, which it did not have (*see* NYSCEF Doc. No. 29 at p. 8).

C. Discussion

As to the motion to consolidate, that motion is unopposed. CPLR 602 provides:

> "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

These cases involve the same entities and many of the same facts. The cases shall be consolidated.

As to the motion to dismiss NYBI as a plaintiff, NYBI is not a proper plaintiff, as it lacks the necessary consent of all its members to sue. The plaintiffs are JBJB and Aron on NYBI's behalf. Accordingly, NYBI shall be dismissed.

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[4]The order to show cause seeks a dissolution of NYBI, appointment of a receiver and an order enjoining NYBI from transferring its funds except in the ordinary course of the business (*see* NYSCEF Doc. No. 42).

As to the motion to dismiss claims for legal and accounting costs, Averbuch claims NYBI had no authority, without LayInn's consent, to incur those costs, and so they should be denied and the claim dismissed. JBJB and Aron seek their costs pursuant to Partnership Law § 121-1002(e), which allows the court to "award the [successful] plaintiff or plaintiffs, claimant or claimants reasonable expenses, including reasonable attorneys' fees." The consent of NYBI and LayInn is irrelevant. Accordingly, this portion of the motion shall be denied.

As to the motion to dismiss the action for lack of an independent accounting, Averbuch relies on *Stark v Goldberg*, which states that an "action may not be maintained by one partner against another for any claim arising out of partnership until there has been full accounting" (297 AD2d 203 [1st Dept 2002]). As the Entities point out, Averbuch is not a partner in NYBI. Accordingly, this prerequisite does not apply here.

V. CONCLUSION AND ORDER

For the reasons discussed, the motion to dismiss Action Two (motion sequence number 001) shall be granted as to Counts 1 and 3 and denied as to Counts 2 and 9. That portion of the motion to dismiss the claim of Averbuch in Action Two for reimbursement of expenses and an independent accounting (motion sequence number 002) shall be denied.

That portion of Averbuch's motion in Action One seeking to consolidate the two cases and to dismiss NYBI as party plaintiff in Action One (motion sequence number 001) shall be granted. That portion of Averbuch's motion to dismiss Action One as premature and to dismiss the plaintiffs' claim in that action for legal and accounting expenses (motion sequence number 001) is denied. The application of Averbuch brought on by order to show cause in Action One (motion sequence number 002) and seeking certain injunctive relief against NYBI "pending the hearing" on motion sequence number 001 (NYSCEF Doc. No. 42) expired by its own terms as of the time of the hearing and has no further force or effect. Further injunctive relief was denied (NYSCEF Doc. No. 61).

Accordingly, it is hereby

ORDERED that the motion in Action One (Index No.: 452130/2016) motion sequence number 001 is DENIED except to the extent it seeks dismissal of NYBI as a plaintiff and consolidation of Action One with Action Two; and it is further

ORDERED that NYBI is dismissed as a party plaintiff in Action One; and it is further

ORDERED that the motion in Action One (Index No.: 652130/2016) is also granted to the extent that Action One is hereby consolidated in this Court with *Yeshaya Averbuch, et al., v New York Budget Inn LLC, et al.,* Index No.: 653343/2016, under Index No.: 653343/2016, and the consolidated action shall bear the following caption:

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YESHAYA AVERBUCH
Suing Individually and Derivatively on behalf of
NEW YORK BUDGET INN LLC and
LAYINN HOSPITALITY GROUP, INC.,

Plaintiffs,

-against- **Index No.: 653343/2016**

NEW YORK BUDGET INN LLC,
JBJB ASSOCIATES LLC,
1850 ARON LLC, ISRAEL JERRY POLLAK,
JOSHUA KLAPPER and ARON WALEWITSCH,

Defendants.

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and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant, Averbuch, is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant, Averbuch, is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the motion of defendants, New York Budget Inn LLC et al. in Action Two (motion sequence number 001), is GRANTED to the extent that Counts 1 (accounting) and 3 (conversion) are DISMISSED and is otherwise DENIED; and it is further

ORDERED that the motion of plaintiff, Yeshaya Averbuch in Action Two (motion sequence number 002) for advancement of fees and expenses and for an independent accounting is DENIED in its entirety; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on Tuesday, July 11 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: June 13, 2017

E N T E R,

O. PETER SHERWOOD
J.S.C.