Austin v Gould
2017 NY Slip Op 31494(U)
July 13, 2017
Supreme Court, New York County
Docket Number: 655506/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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EMMET AUSTIN, individually and derivatively on behalf of: STONEMAR MM JACKSON, LLC, STONEMAR MANAGING MEMBER, LLC, STONEMAR MM WEST DES MOINES, LLC, STONEMAR MM JONESBORO, LLC, STONEMAR MM COOKEVILLE, LLC, and STONEMAR MM MILFORD. LLC,

Plaintiffs,

- against -

JONATHAN GOULD, STONIEMAR MM JACKSION, LLC, STONEMAR MANAGING MEMBER, LLC, STONEMAR MM WEST DES MOINES, LLC, STONEMAR MM JONESBORO, LLC, STONEMAR MM COOKEVILLE, LLC, STONEMAR MM MILFORD, LLC, JACKSON RETAIL PARTNIIRS, LLC, OWENSBORO RETAIL HOLDINGS, LLC, STONEMAR WEST DES MOINES PARTNERS, LLC, STONEMAR JONESBORO PARTNERS, LLC, STONEMAR COOKEVILLE PARTNERS, LLC, STONEMAR MILFORD PLAZA, LLC and MELINDA GOULD a/k/a MELINDA SCHNEIDER,

Defendants.

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DECISION AND ORDER
Index No. 655506/2016

Motion Seq. No.: 001

O. PETER SHERWOOD, J.:

For reasons discussed herein, defendants' motion will be granted except for counts one, two, and five as they relate to the entities Stonemar MM Jackson, LLC and Jackson Retail Partners, LLC ("Remaining Claims"). As to the Remaining Claims, defendants' motion will be denied without prejudice to defendants bringing a renewed motion that includes the necessary documentary evidence.

I. BACKGROUND

This action marks the third lawsuit between Emmet Austin ("Austin") and Jonathan Gould ("Gould") arising out of the same facts and circumstances. On this motion to dismiss (motion sequence number 001), defendants seek dismissal of the complaint in its entirety. The first action was commenced before this court on or about September 15, 2010, when Austin filed

a complaint against Gould under the caption *Emmet Austin v. Jonathan Gould,* Index No. 651515/2010 (the "2010 Action") (*see* NYSCEF Doc. No. 8 [summons and complaint]). The complaint alleged that Austin and Gould formed a number of LLCs to manage investments in commercial real estate acquired between 2005 and 2008, and that Gould, who was the Managing Member of all of the entities, wrongfully failed to pay Austin certain Management and Acquisition Fees (*see id.* ¶¶ 2, 5-14). On August 23, 2012, this court granted Gould's motion to dismiss the complaint after finding that the complaint failed to present "allegations sufficient to pierce the corporate veil of the LLCs" (NYSCEF Doc. No. 9 [decision and order dated August 23, 2012]). Austin took no further action in that case.

On November 11, 2013, Austin commenced a second suit making the same allegations (the "2013 Action"), this time individually and derivatively on behalf of Stonemar MM Jackson, LLC, Stonemar Managing Member, LLC, Stonemar MM West Des Moines, LLC, Stonemar MM Jonesboro, LLC, Stonemar MM Cookeville, LLC, and Stonemar MM Milford, LLC (collectively, the "Managing LLCs") (*see* NYSCEF Doc. No. 10 [summons and complaint]). In a decision and order dated July 9, 2014, Justice Schweitzer dismissed most of the claims asserted in the complaint, including the portion of the claims that sought "recovery of the Acquisition Fees and Equity Management Fees under the parties' agreements" (NYSCEF Doc. No. 11 [decision and order dated July 9, 2014] at 22). On October 9, 2014, that court denied plaintiffs' motion for reargument (NYSCEF Doc. No. 12), and on March 8, 2016, the First Department affirmed (NYSCEF Doc. No. 13). After the plaintiffs sent document demands seeking disclosure relating to these same claims, this court issued a protective order pursuant to CPLR 3103 (a), dated October 6, 2015 preventing plaintiffs from:

> "seeking and/or obtaining any documents, information or other disclosure . . . that pertains to (i) acquisition fees or equity management fees; (ii) the causes of action asserted by plaintiffs in the Complaint seeking the recovery of acquisition fees and/or equity management fees which have already been dismissed by the Court; or (iii) pertaining to any other cause of action or claim for relief that was dismissed by the Court"

(NYSCEF Doc. No. 24 ["Protective Order"]). Subsequently, by order dated January 19, 2017, this court granted the defendants' motion to dismiss for lack of prosecution (*see* NYSCEF Doc. No. 62 ["Decision and Order dated January 19, 2017"]). By order dated June 21, 2017, this court denied the plaintiffs' motion for reargument (*see* NYSCEF Index No. 653921/2013, Doc. No. 162).

This latest suit was commenced on October 18, 2016. The complaint alleges five causes of action (*see* NYSCEF Doc. No. 1 [verified complaint]). In the first cause of action Austin seeks "unfettered and unlimited access to all books and records" of the Managing LLCs (*see id.* ¶¶ 5, 59-62). The second cause of action, brought on behalf of the Managing LLCs, seeks the same relief against defendant entities, Jackson Retail Partners, LLC, Owensboro Retail Holdings, LLC, Stonemar West Des Moines Partners, LLC, Stonemar Jonesboro Partners, LLC, Stonemar Cookeville Partners, LLC, and Stonemar Milford Plaza, LLC (collectively, the "Retail Partners") (*see id.* ¶¶ 2, 63-66). Each of the Managing LLCs was formed as a special purpose entity to acquire and own a managing membership interest in one of the Retail Partners, which were in turn used to acquire a commercial development property (*see id.* ¶¶ 8-9, 14-15, 21-22, 27-28, 34-35, 41-42). As alleged in the verified complaint, plaintiffs' bases for seeking access relate to the same claims to Fees that the court dismissed in the previous actions (*see id.* ¶¶ 10-12, 17-19, 24-26, 30-33, 37-40, 44-47). In its opposition to this motion (sequence number 001), plaintiffs have provided an affidavit from Austin which states additional reasons for access to books and records: (1) to determine how Austin's capital account in Cookeville has grown to a substantial deficit, (2) to examine the sale of Owensboro Retail Holdings, (3) to verify various K-1s Austin has received, and (4) to document various incidents of misconduct by Gould which plaintiffs suspect have occurred (*see* NYSCEF Doc. No. 30 ["Austin aff"] ¶¶ 16-20). Plaintiffs' memorandum in opposition also provides additional justifications, as noted below.

The third cause of action alleges breach of fiduciary duty against Gould, specifically that "in the course of negotiating for a replacement 'Preferred Investor' [in Stonemar Owensboro Partners], Gould . . . created and substituted a wholly-owned entity into a position of preferential distribution" so as to circumvent that entity's "waterfall" distribution structure for liquidation proceeds (*see* verified complaint ¶¶ 53-58, 67-72). In the fourth cause of action, plaintiffs assert simply that that Gould transferred Austin's interest in Stonemar MM Jackson, LLC to his wife in an "intentional, deliberate and deceitful" manner, that Austin was never compensated for the transfer, and that Austin's interest "was stolen from him" (*id.* ¶¶ 3, 13, 74-76). Finally, in the fifth cause of action plaintiffs seek fees and expenses, alleging that the "Operating Agreements specifically provide for the reimbursement of all legal, accounting, expert and related fees which the Member has incurred, upon Austin [and the Managing LLCs] prevailing and receiving access to the books and records of the Member Managers" (*id.* ¶ 82).

II. ARGUMENTS

A. *First Cause of Action (access to the books and records of Managing LLCs) & Second Cause of Action (derivatively for access to the books and records of Retail Partners)*

1. Defendants' Memorandum in Support

Defendants note that under Delaware law, which applies here, a plaintiff seeking to inspect books and records must demonstrate a "proper purpose" for the inspection (NYSCEF Doc. No. 26 ["defs' mem"] at 9-10, citing Del Code 6 § 18-305 [a] and *Bizzari v Suburban Waste Services, Inc.*, CV 10709-JL, 2016 WL 4540292, at *5 [Del Ch Aug. 30, 2016]). Defendants argue that plaintiffs' stated purpose of determining how much money is owed them in connection with Acquisition Fees and Equity Management Fees is not proper since claims relating to those fees were dismissed in the 2010 Action and the 2013 Action. Defendants contend any such claims are barred by *res judicata* and collateral estoppel, noting that "[u]nder New York's transactional approach to the doctrine of res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (Defendants Memorandum at 11, quoting *Parolisi v Slavin*, 98 AD3d 488, 489 [2d Dept 2012]; *see also id.* at 15-16 [advancing the same argument with respect to plaintiffs' second cause of action]).

Noting that under Delaware law, a demand for books and records must also "be sufficiently specific to permit the court (and the corporation) to evaluate its propriety," (*id.* at 12, quoting *Norfolk County Retirement Sys. v Jos. A. Bank Clothiers, Inc.*, CIV.A. 3443-VCP, 2009 WL 353746, at *11 [Del Ch Feb. 12, 2009], *affd* 977 A2d 899 [Del 2009]), defendants argue that counts one and two fail on the basis that the allegations relating to these claims are "vague and conclusory" (*id.* at 12, 16). Defendants note that the complaint specifies neither the books and records plaintiffs are requesting to inspect (other than requesting "unfettered and unlimited access to all books and records" (verified complaint ¶ 61), nor how those any specific record would relate to plaintiffs' stated purpose for inspection.

Finally, with respect to plaintiffs' second cause of action (seeking access to records of the Retail Partners on behalf of the Managing LLCs), defendants argue that Austin lacks both standing and authority to act on behalf of the Managing LLCs (defs' mem at 12-15). Noting that Delaware law provides a right of inspection for "[e]ach member of a limited liability company" (Del Code 6 § 18-305 [a]) and that plaintiffs do not allege that Austin is a member of the Retail

Partners, defendants argue that Austin lacks standing to inspect the books and records of the Retail Partners (defs' mem at 13). Although plaintiffs assert this claim "on behalf of each Member Manager," defendants additionally argue that Austin lacks the authority to act on behalf of them (*id.* at 13-15). In support, defendants provide the Operating Agreements for all Member Manager entities, with the exception of Stonemar MM Jackson, LLC (NYSCEF Doc. Nos. 15-19 ["Operating Agreements"]). Each agreement provided contains a uniform provisions stating that Gould is the "Managing Member" of that entity (*id.* ¶ 1.16),[1] and that, except as provided in the Operating Agreement, no Member of that entity has authority to act on behalf of the entity (*id.* ¶ 2.8) or vote on any matter (*id.* ¶ 4.2). Each Operating Agreement also provides that it "shall be managed exclusively by the Managing Member" and that the powers of the entity "shall be exercised exclusively by or under the exclusive authority of" the Managing member and that "any matters to be voted on by the Members. . . shall require the approval of the Managing Member" (*id.* ¶ 4.1). Defendants conclude that this claim should be dismissed because Austin is not authorized to make a valid written demand, to inspect the books and records of a Delaware LLC which is a precondition to suit (defs' mem at 15, citing Del Code 6 § 18-305 [a], [e]).

2. Plaintiffs' Memorandum in Opposition

Plaintiffs contend they have a number of valid purposes to inspect the books and records. With respect to the Managing Members, they are entitled to inspection to verify: (1) the accuracy of K-1s reflecting deficits in Austin's capital accounts, (2) that Gould, as Managing Member, has not uniquely benefited himself, and (3) "the appropriateness of the [unspecified] transactions" which may relate to the disputed Acquisition and Management Fees (NYSCEF Doc. No. 50 ["pls' opp"] at 10-11). Plaintiffs also contend they are entitled to "a complete inspection of the books of each Retail Partner" in light of the fact that "Owensboro Retail Partners, LLC, has apparently been recently sold" (*id.* at 11-12).

Separately, plaintiffs add that:

- "In the present action, both Austin and the Managing Members are seeking access to the books and records to determine the value of their membership interests"
- "In Stonemar MM Jackson, [Austin] seeks to understand how Gould could have a capital account . . . not in proportion to their membership interest"
- And that "in Stonemar Cookeville Partners, Stonemar MM Cookeville and Austin need further detail on the $23,200,000 sale of Stonemar MM Cookeville"

[1] That same provision in the Stonemar MM Milford, LLC's Operating Agreement is found in ¶ 1.15.

(*id.* at 17).

Plaintiffs also cite to New York Limited Liability Company Law § 1102 (b), which states that a member of an LLC may inspect:

> "for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable."

Without further explanation, plaintiffs argue that "since 2016 tax returns have not been provided to date, this would permit Austin access to the records for 2013, 2014 and 2015" and that, "should irregularities appear, this would justify extending the inspection into prior years" (pls' opp at 13).

Citing to Del Code 6 § 18-305, plaintiffs contend that they are also entitled to inspection under Delaware law. Plaintiffs also argue that *DFG Wine Co., LLC v Eight Estates Wine Holdings, LLC* (CIV.A. 6110-VCN, 2011 WL 4056371, at *1 [Del Ch Aug. 31, 2011]) is both "legally on point and factually similar" to this case (pls' opp at 14-16).

With respect to res judicata and collateral estoppel, plaintiffs argue that the doctrines do not apply because the only matter previously decided was that plaintiffs' demand for payment of Acquisition and Management Fees was time barred (pls' opp at 17). Plaintiffs claim that the above discussed purposes are all issues that were not previously decided.

Plaintiffs maintain that res judicata is not applicable here. Citing *Statter v Statter*, 2 AD2d 81, 84 (1st Dept 1956), revd, 2 NY2d 668 (1957), a First Department case, reversed by the Court of Appeals, where the court discussed the rule of "collateral estoppel by judgment" or "*[r]es judicata*, in its strict and proper sense, sometimes called direct estoppel," in which "a judgment has been recovered between the same parties on an identical cause of action" and where any issue that might have been litigated is barred, as distinct from "[c]ollateral estoppel by judgment, often referred to as *res judicata*" wherein "the former adjudication is between the same parties, but does not involve the same cause of action". In the latter instance, "the only issues conclusively determined are those which have been actually litigated and judicially determined" and the " 'might have been litigated' test is not applied" (*id.*). In reversing, the Court of Appeals stated that it saw "no real conflict between the rule of 'collateral estoppel by judgment' . . . adopted by the court below, and the conclusion here reached" but declined to reach a decision as to the validity of that rule (*Statter v Statter*, 2 NY2d 668, 674 [1957]).

3. Defendants' Reply

In reply, defendants note that the Operating Agreement for Stonemar Managing Member LLC provides that the books and records of that entity "shall be available for inspection . . . following reasonable advance notice to the company for valid business purposes as determined *in the sole discretion of the Managing Member*" (NYSCEF Doc. No. 15 ¶ 9.1 at 13 [quoted in reply brief with emphasis added therein at 6]). Defendants argue that Gould was "well within his discretion in denying such access" (NYSCEF Doc. No. 63 ["defs' reply"] at 7).

Defendants also seek to distinguish *DFG Wine Co., LLC* (2011 WL 4056371) on the basis that the "plaintiff in that case had legitimate purposes for seeking information and was not seeking to inspect the company's books to determine whether the fees it was not owed were reflected in a capital account" (defs' reply at 7) Defendants also note that the LLC agreement in that case did not include a provision giving the Managing Member sole discretion to determine if the requesting party has a valid business purpose for the request (*see DFG Wine Co., LLC*, 2011 WL 4056371, at *4).

Defendants also note that plaintiffs concede that they are not entitled to the payment of the Fees, and question "what valid business purpose could they have to inspect the books to see if these 'fees have been properly recorded' (defs' reply at 8, quoting pls' opp at 6).

Finally, defendants argue that plaintiffs incorrectly claim that the Fees would go to plaintiffs' capital account (*id.*). Defendants note that the Operating Agreement for Stonemar Managing Member, LLC does not state that management fees will be recorded in capital accounts, but rather that capital accounts track the initial members' contributions to the capital of the LLC, as adjusted over time for additional contributions (*id.* citing NYSCEF Doc. No. 15 ¶ 3.6 at 6-7).

B. *Plaintiffs' Third Cause of Action (by Austin and Stonemar Managing Member, LLC for breach of fiduciary duty)*

Defendants note first that a "cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b)," (defs' mem at 17, quoting *Swartz v Swartz*, 145 AD3d 818, 823 [2d Dept 2016]) and that "in order to survive a motion to dismiss, each element of a cause of action for breach of fiduciary duty must be supported by particularized factual allegations, as opposed to mere legal or factual conclusions (*id.* at 17-18, quoting *Singh v PGA Tour, Inc.*, 42 Misc 3d 1225(A) [NY Sup 2014]). Defendants contend the allegations of the

complaint fail to meet this standard because the third cause of action "is made collectively against all Defendants" and because defendants "are unable to discern from the allegations . . . against which Defendants the breach of fiduciary duty claim is – and is not – asserted" (*id.* at 18, citing complaint ¶¶ 67-72).

Defendants also argue that the third cause of action should be dismissed because plaintiffs have "failed to plead how, if at all, the alleged breach of fiduciary duty . . . is separate and distinct from any duty that the parties may have to each other under the Operating Agreements" (*id.* at 18-19, citing *Janklowicz v Landa*, 41 Misc 3d 1220(A) [Sup Ct 2013] [noting that plaintiffs had not alleged facts detailing how the allegedly breached duty was a "fiduciary duty of the managing members separate and distinct from any contractual duty of the companies under the relevant operating agreement" and dismissing claim on basis that it "confuse[d] a shareholder's derivative and individual rights"]).

Defendants additionally contend that plaintiffs have asserted an impermissible theory of damages by seeking to have Gould surrender misdirected fees "to Austin the Member Manager and, if appropriate, all the individual investors in Stonemar Owensboro Partners" (complaint ¶ 71; defs' mem at 19). Defendants note that plaintiffs do not purport to bring suit on behalf of Stonemar Owensboro Partners, and have not made that entity a party to the suit. To the extent Austin seeks to have damages awarded to him individually, such damages are inappropriate as plaintiffs have alleged a derivative, not individual, claim (*id.* at 19, citing *Janklowicz*, 41 Misc 3d 1220[A] at *4 [Sup Ct 2013] [noting that "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" and that a "complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed, though leave to replead may be granted in an appropriate case"]).

Finally, defendants argue that this claim should be dismissed because plaintiffs have failed to allege either demand or demand futility prior to bringing a derivative suit (*id.* at 19-20, citing *Najjar Group, LLC v W. 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013] ["A pre-suit demand is similarly required in a derivative acti n involving a limited liability company"]).

Plaintiffs' memorandum does not raise any arguments in opposition.

C. ***Plaintiffs' Fourth Cause of Action (conversion claims against Jonathan Gould and Melinda Gould)***

Although the complaint does not label this claim as such, defendants posit that "the fourth cause of action is apparently one sounding in conversion" for Melinda Gould and Jonathan Gould's alleged transfer of Austin's interest in Stonemar MM Jackson, LLC (defs' mem at 20). Defendants contend that this claim should be dismissed because, under New York law, "conversion of intangible property is not actionable" (*id.* at 21, quoting *Sun Gold, Corp. v Stillman*, 95 AD3d 668, 670 [1st Dept 2012]).

Plaintiffs' opposition also refers to this claim as one of conversion (pls' opp at 19). Although defendants raise no such argument in their own memorandum, plaintiffs respond by arguing only that the conversion claim is timely since, "it was not until late 2014 or into 2015 that Plaintiff first learned of the transfer" (*id.*).

In reply, defendants note that in dismissing the 2013 Action for failure to prosecute, this court found that plaintiffs made an insufficient showing of merit with respect to plaintiffs' identical claim in that action (*see* Decision and Order dated January 19, 2017).[2]

D. ***Plaintiffs' Fifth Cause of Action (for accounting, expert and legal fees)***

With respect to the fifth cause of action, defendants posit that "it appears Plaintiffs purport to be asserting a breach of contract claim" (defs' mem at 22). Accordingly, defendants argue that this claim fails because plaintiffs have not alleged "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (*id.* at 22-23, quoting *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Additionally, defendants note that section 9.1 of the Operating Agreements provides that the books and records "shall be available for inspection by the Members at such Member's expense." Thus, defendants argue that the documentary evidence demonstrated that Austin is not entitled to reimbursement of fees incurred while attempting to gain access to these records (defs' mem at 23-24).

Plaintiffs raise no arguments in opposition.

III. DISCUSSION

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7), as well as CPLR 3016 (b) and CPLR 3013

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[2] Although this claim was raised as part of plaintiffs' opposition to defendants' motion to dismiss for want of prosecution, it was not part of the complaint in the second case.

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a 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 [2d 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). Here, the documentary evidence is the provided Operating Agreements (NYSCEF Doc. Nos. 15-19).

A. *Plaintiffs' Claims for Access to Books and Records (Counts 1 and 2)*

1. Delaware Law

Section 18–305 of the Delaware Limited Liability Company Act grants members of a limited liability company the right to demand certain books and records of that entity. Subsection (c) of that same provision requires that "[a]ny demand under this section shall be in writing and shall state the purpose of such demand." Furthermore, under subsection (a), a member's right to demand books and records is "subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense)" (*see also Norfolk County Retirement Sys.*, 2009 WL 353746, at

*11 [noting that "to warrant relief from this court, a demand for books and records must be sufficiently specific to permit the court (and the corporation) to evaluate its propriety"]).

Although the verified complaint alleges plaintiffs made a written demand for books and records, the complaint does not state the purpose for the demand, nor that the written demand stated such a purpose. As alleged in the verified complaint, plaintiffs' purpose for inspection is related to Fee claims which claims were dismissed by the court (*see e.g.* verified complaint ¶¶ 17-19). The purpose pleaded does not constitute a proper purpose.

As described above, plaintiffs provide additional purposes for the demands in their memorandum in opposition and in Austin's affidavit. Although some reasons offered may arguably constitute a proper purpose under Delaware law (*see e.g. DFG Wine Co., LLC*, 2011 WL 4056371, at *5 [holding that plaintiff's stated purpose of valuing its interest in defendant was proper under Delaware law]), because plaintiffs present no evidence that these purposes were given with their written demand, as required by Del Code 6 § 18-305 (e), at best these establish an *ex post facto* justification for inspection. Furthermore, even if these reasons constituted proper purposes, and were given as part of a valid written demand, they would not justify plaintiffs' demand for "unfettered and unlimited access to all books and records" (*see* Del Code 6 § 18-305 [a]; *see also DFG Wine Co., LLC*, 2011 WL 4056371, at *4 ["If valuation is the purpose for which inspection is sought . . . our courts consistently have limited the extent of that inspection to those records which are essential and sufficient to accomplish the stated purpose"]).

The Operating Agreements for Stonemar MM West Des Moines, LLC, Stonemar MM Jonesboro, LLC, Stonemar MM Cookeville, LLC, and Stonemar MM Milford, LLC all contain governing law provisions selecting the laws of the State of Delaware (NYSCEF Doc. Nos. 9-12 § 10.6). Accordingly, plaintiffs' demands relating to these entities must fail.

Additionally, since Gould is neither a member of the Retail Partners, nor authorized to act on behalf of the Managing LLCs, plaintiffs' claim fails with respect to the Retail Partners associated with these entities (i.e. Stonemar West Des Moines Partners, LLC, Stonemar Jonesboro Partners, LLC, Stonemar Cookeville Partners, LLC, and Stonemar Milford Plaza, LLC). While plaintiffs are correct that, "Delaware courts have recognized that the statute provides a right to inspect the records of such subsidiaries where the facts at least suggested the absence, in reality, of separate entities" (*DFG Wine Co., LLC*, 2011 WL 4056371, at *5), to the

extent plaintiffs wish to inspect the books and records of subsidiaries of Delaware entities, plaintiffs would still have to establish valid demand under Delaware law.

2. New York Law

New York, like Delaware, creates "an independent statutory right to conduct an inspection" for members of LLCs (*Gartner v Cardio Ventures, LLC*, 121 AD3d 609, 610 [1st Dept 2014], citing Limited Liability Company § 1102). Under Limited Liability Company § 1102 (b), any member of an LLC may:

> "subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable."

The New York statute does not contain a written demand requirement as its Delaware equivalent. Nonetheless, as subsection (b) specifies, the right to inspect is subject to the standards set forth in the governing operating agreement.

The Operating Agreement of Stonemar Managing Member, LLC contains a governing law provision selecting the laws of the State of New York (NYSCEF Doc. No. 8 ¶ 10.6). Additionally, as defendants note, that same agreement provides that its books and records will be available for inspection by the Members "following reasonable advance notice to the Company, for valid business purposes as determined in the sole discretion of the Managing Member" (*id.* ¶ 9.1). As discussed above, plaintiffs' allegations only establish prior notice relating to inspection demands for their Fee claims. Plaintiffs fail to establish that Gould's determination that this did not constitute a "valid business purpose" was an improper exercise of his discretion. Accordingly, count one fails with respect to this entity as well. Since Austin is neither a member of the Retail Partners, nor authorized to act on behalf of the Managing LLCs, count two fails with respect to the related Retail Partner, Stonemar Owensboro Partners, LLC.

3. Remaining Entities: Stonemar MM Jackson, LLC and Jackson Retail Partners, LLC

Defendants did not provide the Operating Agreement for Stonemar MM Jackson, LLC. Whether such an agreement exists with respect to this entity does not appear in the papers submitted, though paragraph 8 of the verified complaint states that "[b]y agreement, Gould holds a 66.67%, membership interest and Austin holds a 33.33% membership interest" in this entity.

Accordingly, it is unclear what states' laws applies to this entity – New York's, Delaware's, or some other state. Paragraph 8 of the verified complaint states that "Stonemar MM Jackson, LLC . . . is a Delaware limited liability company." However, paragraph 2 of the affidavit submitted by Austin, states that Stonemar MM Jackson, LLC is "believed to have been created under New York law." Accordingly, defendants have not met their burden for dismissal of count one with respect to this entity. The same applies to count two with respect to Jackson Retail Partners, LLC, since without the Operating Agreement for Stonemar MM Jackson, LLC, defendants have not established that Austin lacks the authority to act on behalf of that entity. Accordingly, the motion is denied with respect to these claims without prejudice to defendants bringing a renewed motion that includes a copy of the relevant operating agreement or agreements.

B. ***The Third, Fourth and Fifth Causes of Action***

As noted above, plaintiffs fail to oppose any of the arguments defendants present relating to dismissal of counts three, four, and five.

With respect to count three, plaintiffs allege Austin breached his fiduciary duty "to Austin, [Stonemar Managing Member, LLC], and the Investors in Stonemar Owensboro Partners" by improperly altering the "waterfall" distribution scheme to insert himself into a preferred level of distribution (verified complaint ¶¶ 55-58, 69). This claim must be dismissed for failure to distinguish between Austin's individual rights and derivative rights asserted on behalf of Stonemar Managing Member, LLC[3] (*see Abrams v Donati*, 66 NY2d 951, 953 [1985] ["allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually . . . A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed"]).

With respect to count four, plaintiffs assent in their brief and at oral argument to defendants' description of this claim as one for conversion. Accordingly, this claim shall be dismissed because it relates to Austin's alleged ownership interest in Stonemar MM Jackson,

[3] The complaint alleges that Stonemar Managing Member LLC owns a managing membership interest in "Defendant Stonemar Owensboro Partnership LLC" (Compl. ¶ 27) but "Stonemar Owensboro Partnership LLC" is not named in the caption.

LLC (*see* compl. ¶ 13), and a claim for "conversion of intangible property is not actionable" (*Sun Gold, Corp.*, 95 AD3d at 670).

Finally, as to count five, the court rejects defendants' assertion that plaintiffs have failed to assert the essential terms of an agreement that would entitle plaintiffs to the claimed fees. Paragraph 82 of the verified complaint alleges that the "Operating Agreements specifically provide for the reimbursement of all legal, accounting, expert and related fees which the Member has incurred, upon Austin [and the Managing LLCs] prevailing and receiving access to the books and records of the [Managing LLCs]" (*id.* ¶ 82). However, as discussed above, plaintiffs' claims for access to books and records of the Managing LLCs fails for all such LLCs other than Stonemar MM Jackson, LLC. Accordingly, this count must be dismissed as moot with respect to all entities other than Stonemar MM Jackson, LLC. With respect to the portion of this count that remains, defendants' motion is denied without prejudice, for the same reasons stated above with respect to counts one and two.

Accordingly, it is hereby

ORDERED that defendants' motion is GRANTED in all respects except counts one, two, and five as those counts relate to the entities Stonemar MM Jackson, LLC and Jackson Retail Partners, LLC; and it is further

ORDERED that with respect to plaintiffs' remaining claims, defendants' motion is DENIED without prejudice to defendants making a timely renewed motion that includes the necessary documentary evidence relating to those entities, as needed.

This constitutes the decision and order of the court.

DATED: July 13, 2017

ENTER

O. PETER SHERWOOD
J.S.C.