Troffa v Troffa
2022 NY Slip Op 32599(U)
August 2, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 16/609510
Judge: Jerry Garguilo

E-FILE

SHORT FORM ORDER

INDEX NO. 16/609510

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

ORIG. RETURN DATE: 3/2/22
FINAL SUBMITTED DATE: 6/15/22
MOTION SEQ# 010, 011
MOTION: 010-MD; 011-MD

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPING AND MASON SUPPLY, INC.,

Plaintiffs,

-against-

JOSEPH M. TROFFA, LAURA J. TROFFA, JOS. M. TROFFA MATERIALS CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT ENTERPRISES, INC., and JOS. M. TROFFA LANSCAPE AND MASON SUPPLY, INC.,

Defendants.

PLAINTIFFS' ATTORNEY:
MARGOLIN BESUNDER LLP
3750 EXPRESS DRIVE SOUTH, STE 200
ISLANDIA, NY 11749

DEFENDANTS' ATTORNEY:
FARRELL FRITZ, P.C.
622 THIRD AVENUE, STE 37200
NEW YORK, NY 10017

The Court has considered the following in consideration of its determination:

1. Notice of Motion and exhibits (Doc. 270 – 286)
2. Memorandum of Law in Support, Statement of Facts (Doc. 287, 288)
3. Notice of Cross Motion and exhibits (Doc. 291 – 307)
4. Affirmation in Opposition and exhibits (Doc. 308 – 324)
5. Memorandum of Law in Opposition to Motion and In Support of Cross Motion, Statement of Facts (Doc. 325, 326)
6. Memorandum of Law in Opposition to Cross Motion, Affidavit in Opposition to Cross Motion, and Further Support of Motion, and exhibits (Doc. 329 – 334)
7. Memorandum of Law in Reply in Further Support of Cross Motion, Affidavit in Reply (Doc. 335, 336)

It is:

ORDERED that the Plaintiffs' motion for partial summary judgment is denied and Jonathan Troffa's request to set a procedure for determining the amount of attorney's fees to be awarded to him pursuant to BCL 626 (e) is denied without prejudice until after trial; and it is further

ORDERED that the Defendants' motion for summary judgment seeking to dismiss the fourth cause of action is denied; and it is further

ORDERED that Plaintiffs are directed to provide the Defendants with a list of outstanding discovery regarding rents paid by the Corporation to NIMT Enterprises, LLC as rent for the Compost Yard within twenty days of this order's Notice of Entry. The parties are directed to meet and confer and devise a plan for the production of outstanding discovery according to the Commercial Division Rules prior to the next conference; and it is further

ORDERED that the parties are directed to appear at a virtual conference with the undersigned on August 24 2022 at 10:30 am.

In this long and contentious action, Plaintiff Jonathan Troffa, (hereinafter "Jonathan"), who is a 50% shareholder in the nominal defendant Joseph M. Troffa Landscape and Mason Supply, Inc. (hereinafter "the Corporation") alleges that his father, defendant Joseph Troffa (hereinafter "Joseph") also a 50% shareholder in the Corporation, breached his fiduciary duties to Jonathan and the Corporation and usurped corporate opportunities by purchasing a 1.78 acre parcel of real property called the Compost Yard in his name only in 2013 by paying the balance of the purchase price in the amount of $39,628. Jonathan further alleges that Joseph misappropriated an asset from the Corporation in violation of his fiduciary duties to the Corporation and Jonathan, thereby wasting the $355,372 already paid by the Corporation in rent to the prior owners, and that Defendants Joseph and Laura Troffa, Joseph's second wife, breached their fiduciary duties by accepting rent to be paid to NIMT from the Corporation after Joseph purchased the Compost Yard.

This action was commenced on June 17, 2016. The complaint alleged three causes of action in Jonathan's individual capacity and capacity as an individual shareholder: (1) breach of fiduciary duty and the duty of loyalty, (2) for a constructive trust, and (3) to quiet title. Plaintiff served an amended complaint on August 16, 2016 and alleged a fourth cause

of action, a shareholder's derivative cause of action on behalf of the corporation to recover under all of the aforementioned theories.

The Defendants moved to dismiss the amended complaint as time-barred and, in an order dated January 11, 2017 (Garjuilo, J.), the court granted only those branches of the Defendants' motion which were to dismiss the first three causes of action. By Order dated July 21, 2017 (Garguilo, J.), this court directed that the JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC. be dissolved.

In July 2018, Jonathan served three subpoenas duces tecum upon three nonparties seeking information regarding Joseph's acquisition of the Compost Yard. In an order dated September 25, 2018 (Garguilo, J.), this court granted the Defendants' motion to quash the subpoenas and for a protective order. Jonathan appealed the order, and by order dated March 3, 2021, the Appellate Division, Second Department, reversed the prior order, finding that this Court erred in granting the Defendants' motion and further held that pursuant to CPLR 213 (7) the six-year limitations period applied to the Plaintiffs' claims in the fourth cause of action.

This matter was delayed by the onset of COVID-19 and subsequent closing of the courts from March, 2020 until June, 2021 and later, the undersigned presided over the Opioid Trial through 2021. The instant motion and cross motion were submitted in April, 2022.

In their Notice of Motion, the Plaintiffs now move for partial summary judgment (1) adjudging Defendant Joseph Troffa liable to JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC. and its shareholders for breach of fiduciary duty, waste, self-dealing and usurpation of a corporate opportunity in connection with Defendant Joseph Troffa's acquisition in his own name of a 1.78 acre parcel of land located at 70A Comseqogue Road (a/k/a Parsonage Road) in East Setauket, New York, described in the Amended Complaint as the Compost Yard; (2) awarding judgment in favor of JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC. against Joseph Troffa in the amount of $355,372 plus interest; (3) determining that Defendants Joseph M. Troffa, Laura Troffa and NIMT Enterprises, LLC are liable to JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC. for all rents paid to NIMT Enterprises, LLC as rent for the Compost Yard out of funds belonging to JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC., directing Defendants to supply discovery already requested by Plaintiff with respect to such rents, and setting a hearing pursuant to CPLR 3212 c to determine the

damages due to JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC. as a consequence; and (4) setting a procedure for determining the amount of attorney's fees to be awarded to Plaintiff pursuant to NY Business Corporation Law § 626 (e).

In their Notice of Cross Motion, the Defendants now cross-move for an order pursuant to CPLR 3212 awarding Defendants summary judgment dismissing the one remaining claim in the Verified Amended Complaint, the Fourth Cause of Action, styled as a "Derivative Action," in its entirety with prejudice.

In support of the motion, the Plaintiffs submit, *inter alia*, Jonathan's personal affidavit, counsel's affirmation, and documents. Jonathan submits a copy of the Certificate of Amendment of Incorporation, filed on July 11, 1994, which changed the name of the Corporation from Jos. M. Troffa Excavating Corporation to Jos. M. Troffa Landscape and Mason Supply, Inc., and did not alter the original purpose of the Corporation. Jonathan explains that he and Joseph each own a 50% interest in the Corporation and each are entitled to vote at the annual meeting for the election of directors. In addition, Joseph is the President and Laura is the Secretary of the Corporation.

Jonathan states that sometime in 1999, Joseph told him that the Corporation would be leasing the Compost Yard from Ronald and Laurence Schreiber, the owners of the property. Jonathan states that he was unaware that the rent would be applied to pay down the purchase price of the Compost Yard, or that Joseph was actually leasing the land from the Schreibers and charging rent to the Corporation. However, sometime in 2013, Jonathan searched the Corporation's records and found a letter, dated May 3, 2004, entitled "Schreiber to Troffa Lease Purchase 1.78 Acres," written by Joseph M. Troffa Pres. to Jim Winkler, which memorialized the terms of a purchase agreement and shows that the Corporation planned to purchase the property. The letter confirms the arrangements for the ultimate purchase of the Compost Yard, that the purchase price was $390,000 and that the balance due of $257,000 would be paid monthly in the amount of $2,254. Jonathan states that Joseph never consulted with him, his equal shareholder, and never asked for his consent to purchase the Compost Yard in Joseph's name only.

Plaintiffs contend that Joseph usurped a corporate opportunity and that the right to become the titled owner of the Compost Yard was an asset of the Corporation, as were the installment payments made by the Corporation to the Schreibers from the beginning of the lease term. Plaintiffs concede that when Joseph was the only shareholder, prior to 1995, he could choose to take title to properties used by the Corporation in its business without violating his fiduciary duty, since his duty ran only to himself. If he decided that it was

more advantageous to own the properties in his own name, he was free to do so, assuming that he actually paid for them. However, the situation was different once Jonathan became a shareholder in 1995, and Joseph's apparent decisions to continue this course of conduct after 1995 stands on a different footing. He now had a co-shareholder and he owed both Jonathan and the Corporation a fiduciary duty with respect to such decision.

Plaintiffs further argue that a corporate fiduciary such as Joseph may not purchase property which the corporation needs or has resolved to acquire, citing ***Blake v Buffalo C. R. Co.***, 56 NY 485, 56 NY (NYS) 485 (1874), or which it is contemplating acquiring, citing ***New York Trust Co. v American Realty Co.***, 244 NY 209, 219, 244 NY (NYS) 209 (1926). Jonathan contends that the Corporation needed the Compost Yard since over the next 14 years, the Corporation produced and stored its own organic compost and also stored mulch and sand for sale. The Corporation realized additional revenues from the use of this property.

Jonathan states that since the Corporation made multiple payments over time to the owners of the Compost Yard and occupied and used the Compost Yard for at least 14 years before Joseph took title to it in his own name that the Corporation had the right to continue making payments until all was paid and take title. However, Joseph took advantage of this corporate opportunity. Plaintiffs rely upon ***Ault v Soutter***, 167 AD2d 38, 43, 570 NYS2d 280 (1st Dept 1991), which held that "if there is a corporate opportunity that would be financially advantageous to the corporation, a fiduciary cannot take the opportunity for himself." Plaintiffs also cite ***Alexander & Alexander, Inc. v Fritzen***, 147 AD2d 241, 246, 542 NYS2d 530 (1st Dept 1989), which determined that corporate fiduciaries cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation. Jonathan contends that Joseph never asked him for his consent and never disclosed the circumstances that resulted in Joseph taking title to the Compost Yard in his own name.

Plaintiffs further claim that upon purchasing the Compost Yard for approximately $39,000 of his own money, Joseph caused the Corporation to pay rent for the Compost Yard to NIMT, owned 99% by his wife Laura, which was at least $37,758, essentially defraying Joseph's investment of his personal funds. Laura, as Secretary of the Corporation, knew that NIMT had no right to receive rent payments for the Compost Yard, since it did not own the property. Plaintiff contends that Laura should be also charged with the knowledge that the Corporation itself was entitled to ownership of the Compost Yard and should not be charged rent after it had supplied 90%, or $355,372, of the purchase

price. Plaintiff further contends that he is entitled to attorney fees, pursuant to NY Business Corporations Law ("BCL") § 626 (e), for successfully prosecuting his derivative claim as well as other costs. Plaintiffs also claim that discovery regarding rents paid by the Corporation to NIMT Enterprises, LLC as rent for the Compost Yard is outstanding and seek an order directing the Defendants to produce outstanding disclosures.

In opposition and in support of the cross motion, Defendant Joseph submits, *inter alia*, his personal affidavit, the affidavit of James E. Danowski, a copy of the closing statement for the Compost Yard, dated March 12, 2013, a copy of a Draft Lease between himself and the Schreibers, and documents related to the other properties he purchased. In his affidavit, Joseph disputes Jonathan's contention that the Compost Yard was a corporate opportunity, inasmuch as the Corporation had no tangible expectancy of owning property and had always been a tenant. The Corporation operated on six parcels of real property, each and every one of which the Corporation rented. Joseph states that he and Laura purchased the properties with their own money, and transferred the land to two holding companies, LJT, solely owned by Laura, and NIMT, owned 99% by Laura and 1% owned by Jonathan. His financial advisors encouraged him and Laura to acquire these properties through separate companies other than through the operating company for reasons including liability and other business reasons to protect the operating company.

Joseph states that Jonathan knew since the late 1990's that Joseph planned to and eventually would endeavor to purchase the Compost Yard in his own name. Joseph submits a "Draft" copy of a lease which is undated and unexecuted which Joseph states shows that Joseph was the tenant, not the Corporation, for a term of 15 years and provided a lease/purchase clause. Joseph states that he and Jonathan discussed it several times, that Jonathan was personally aware of the Lease and that he always knew Joseph, personally, rather than the Corporation, was the lessee. Joseph further states that, pursuant to a sublease between himself and the Corporation, the Corporation paid rent directly to the Schreibers. He states that the Amended Certificate of Incorporation which was submitted by the Plaintiff does not reveal that the Corporation's purpose is to own land.

Joseph states that on December 7, 2006, he entered into a contract of sale in his name individually to purchase the Compost Yard for the amount of $184,876, or the amount of remaining rent. NIMT paid the down payment of $10,000. However, the sale was delayed until 2013 because the property was designated as a Superfund Site and needed remediation by the owners, and in addition, the property was in foreclosure. On March 12, 2013, after the defects were corrected, Joseph closed on the purchase of the

Compost Yard and paid the balance of $39,628 from his own personal funds. The closing statement for the Compost Yard reveals that Joseph received credit for prepayments from November 1, 1998 through February 12, 2012 and a down payment of $10,000.00 in the total amount of $355,372.00.

Joseph states that in the meantime he paid one-half the rent to the Schreibers, while the Corporation paid the other half. Joseph claims to have paid $67,000 in rent under the lease, NIMT paid the $10,000 down payment, and Joseph paid the balance of $39,628, equaling a total of $116,628 which Defendants purportedly paid toward the purchase of the Compost Yard. Joseph submits a copy of the deed which reveals that Joseph is the sole owner of the Compost Yard. After the sale was complete the Corporation paid rent to NIMT. Contrary to Jonathan's denial of knowledge or consent to this transaction, Joseph states that once a receiver was appointed by the court, Jonathan consented and signed the rent checks.

Defendants contend that Plaintiff failed to prove that the purchase of the Compost Yard was a corporate opportunity since the corporation never owned property. Defendants rely upon ***Lee v Manchester Real Estate and Constr., LLC***, 118 AD3d 627, 628, 988 NYS2d 620 (1st Dept 2014), which holds that New York courts have developed two tests to determine whether a venture constitutes a corporate opportunity: (1) the tangible expectancy test; and (2) the line of business test. Defendants claim that the Corporation never had a tangible expectancy of owning the Compost Yard. Defendants also rely upon ***Samantha Enters. v Elizabeth Street, Inc.***, 5 AD3d 280, 280, 774 NS2d 681 (1st Dept 2004), which held that there was no evidence that the general partnership had a 'tangible expectancy' of purchasing the subject realty or that such purchase would have been consistent with its appropriately defined purchase.

James E. Danowski states in his affidavit that he is a certified public accountant and he and his firm have been the accountants and financial advisors for Defendant Joseph Troffa and his related entities including Defendants L.J.T. Development Enterprises, Inc. and NIMT Enterprises, LLC. He states that it is standard practice in the business world for a real estate holding company to own the land upon which a corporation operates its business inasmuch as potential landowner liability could jeopardize the assets of the operating company and for other business and tax reasons. Some of the parcels were rented to unrelated third-party businesses, making it imprudent for the Corporation to be in the commercial landlord business. The Corporation received a tax-deductible business expense, Joseph obtained the tax burden of the lease-purchase arrangement and Jonathan

received 50% of the tax benefit. Danowski states that this practice was consistent with prudent business and tax planning, as was the lease-purchase transaction leading to Joseph's purchase of the Compost Yard.

In reply, Jonathan acknowledges that the original Certificate was omitted from the submissions with the Notice of Motion and submits it now. The Certificate of Incorporation of Jos. M. Troffa Excavating Corp., filed with the NY Secretary of State on August 12, 1975, reveals that the purpose or purposes for which the Corporation was formed are, in part,

> To purchase, receive, lease or otherwise acquire and to manage, hold, own, use, improve, convey, sell, mortgage, or otherwise deal in and with lands, buildings and real property of every description, or any interest therein.

Plaintiffs contend that the purpose was not changed upon the filing of the Amended Certificate of Incorporation, dated July 11, 1994 which reveals that

> "The Certificate of Incorporation is amended to change the name of the Corporation. Paragraph 1 of the Certificate of Incorporation is amended to read as follows:
>
> 1.the name of the corporation is: Jos. M. Troffa Landscape and Mason Supply, Inc."

In reply to Joseph's contention that Jonathan knew about rental payments to NIMT once a receiver was appointed, Jonathan states that the three checks referenced by Joseph were not signed personally by him, but that the signature was made with a stamp. In addition, in reply to Joseph's claim that he subleased the Compost Yard to the Corporation for the first time in his cross motion papers, Jonathan states that he never saw any sublease for this property and never heard Joseph mention a sublease.

In opposition to Defendants' cross motion, the Plaintiffs dispute the admissibility of the Draft Lease and contend that it violates the Best Evidence Rule which requires the production of an original writing where its contents are in dispute and are sought to be proven (see ***Stathis v Estate of Karas***, 130 AD3d 1008, 14 NYS3d 446 [2d Dept 2015]). "The rule serves mainly to protect against fraud, perjury and inaccuracies . . . which derive from faulty memory" (***Id.*** at 1010). Under an exception to the Best Evidence Rule, "secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith: (see ***Schozer v William Penn Life Ins. Co.***, 84 NY2d 639, 643, 620 NYS2d 797 [1994]). "Loss may be established upon a showing of a diligent

search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original" (***Id.*** at 644). Plaintiffs contend that the Defendants have failed to show compliance with the Best Evidence Rule.

In his reply affidavit, Joseph details the search he and Laura undertook to find the original lease in the Corporation's office, and relays the responses to Plaintiffs' subpoenas upon the nonparties who attended the closing of the Compost Yard, as well as the accountants and the original Lease has not been found.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues (***Van Noy v Corinth Cent. School Dist.***, 111 AD2d 592, 489 NYS2d 658 [3d Dept 1985]). Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (See ***Barr v County of Albany***, 50 NY2d 247, 428 NYS2d 665 [1980]; ***Miceli v. Purex Corp.***, 84 AD2d 562, 443 NYS2d 269 [2d Dept 1981]; ***Bronson v. March***, 127 AD2d 810, 512 NYS2d 5 [2d Dept 1987]). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]).

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (***Rut v Young Adult Institute, Inc.***, 74 AD3d 776, 901 NYS2d 715 [2d Dept 2010]). It is true that directors of a corporation owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly (see ***Armentano v Paraco Gas Corp.***, 90 AD3d 683, 684-685, 935 N.Y.S.2d 304 [2d Dept 2011]).

The doctrine of usurpation of corporate opportunity generally forbids fiduciaries from diverting "any opportunity that should be deemed as asset of the corporation" without board approval (see, ***Alexander & Alexander of NY Inc. v. Fritzen***, 147 AD2d 241, 246, 542 NYS2d 530 [1st Dept 1989]). The claim is only applicable if the corporation has a "tangible expectation" in the opportunity (***American Federal Group Ltd., v. Rothenberq***, 136 F3d 897 [2d Cir. 2008]).

"A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to its existence or logically and naturally adaptable to its business" (***Schacter v Kulik***, 96 AD2d 1038, 466 NYS2d 444 [2d Dept 1983]). An officer or director is not permitted to derive a personal profit at the expense of the corporation (see ***Foley v D'Agostino***, 21 AD2d 60, 248 NYS2d 121 [1st Dept 1964]). The scope of a director's duty to offer opportunities he has found to his corporation must be measured by the facts of each case (see ***Burg v Horn***, 380 F2d 897 [2d Cir NY 1967]).

Applying these principles, Plaintiffs have demonstrated, *prima facie*, that Joseph did not disclose to Jonathan his intentions to purchase the Compost Yard in his own name. The record reveals that there is no evidence that Joseph shared any of the submitted documents with Jonathan. While Joseph had numerous opportunities to obtain his co-shareholder's consent for the transaction, according to Jonathan, Joseph merely discussed the rental of the property by the Corporation to the Schreibers. In opposition, Joseph raised triable issues of fact and credibility with his affidavit, stating that he and Jonathan spoke several times about renting the Compost Yard, and that Jonathan knew for many years that Joseph intended to purchase the Compost Yard.

The Plaintiffs have shown, *prima facie*, that the purchase of the Compost Yard was a corporate opportunity and that the Defendants breached their fiduciary duty to the Corporation. Jonathan stated that the Corporation needed a property like the Compost Yard to store and produce organic compost, as well as other materials like mulch and sand, and that the Compost Yard fit within the Corporation's line of business. In addition, the Compost Yard boosted the Corporation's profits.

In opposition, Joseph raised a triable issue of fact by his affidavit wherein he states that the Corporation was not the tenant or the contract vendee of the Compost Yard and had no right of ownership. In addition, the Corporation has never purchased any of the five properties on which it does business. Pursuant to the Lease, the Corporation paid rent for the use and occupancy of the Compost Yard prior to the closing. Therefore, there was no expectation that the Corporation would purchase the Compost Yard. In addition, Danowski, the accountant, averred in his affidavit that it was prudent business practice for the operating corporation to rent land from a real estate holding company for tax and liability purposes.

The Plaintiffs have demonstrated their *prima facie* entitlement to judgment as a matter of law that Joseph and Laura breached their fiduciary duties to the Corporation by

wasting corporate assets in the payment of rent to NIMT, a third party with no ownership interest in the Compost Yard. Defendants in opposition have not proffered any justification for this purported waste, however, they raise a triable issue of fact regarding whether Jonathan consented to the arrangement after the receiver was appointed. Therefore, the motion for summary judgment is denied.

The Defendants have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law. As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof but must affirmatively demonstrate the merit of its claim or defense (***Mennerich v Esposito***, 4 AD3d 399, 400, 772 NYS2d 91 [2d Dept 2004]). The Defendants have failed to submit the original Lease between Joseph and the Schreibers which would show that Joseph was the tenant. Considering the importance of the Lease in this action, the Court declines to rely solely upon Joseph's affidavit which states that the unsigned and undated Draft Lease is a true copy of the Lease, to determine whether secondary evidence will suffice (***Schozer v William Penn Life Ins. Co. of N.Y.***, *supra*).

In addition, the Defendants have failed to submit admissible evidence of the sublease between Joseph and the Corporation which Joseph states was in effect during the lease term (see ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). Without a writing, the transaction violates NY General Obligations Law § 5-703 (2), which provides that a [sub]lease of property for a period longer than one year is void unless the [sub]lease was in writing to bind the Corporation to its terms. The Defendants have also failed to demonstrate with admissible evidence that Joseph paid one-half the rent to the Schreibers. The Defendants' requests for dismissal as against Jos. M. Troffa Materials Corporation and to limit the damages for rental payments to NIMT to six years are denied inasmuch as they were not specified in the Notice of Cross Motion pursuant to CPLR 2214 (a) and may be renewed at trial. Therefore, the cross motion for summary judgment is denied.

Under these circumstances, Jonathan's request for a procedure to determine attorney fees pursuant to BCL 626 (e) is premature until after trial and may be renewed at the appropriate time. BCL 626 (e) provides that if the Plaintiffs prevail at trial, the Court shall award Jonathan a sum payable out of the award made to the Corporation (see ***Motherway v Cartisano***, 2014 NY Misc. LEXIS 2145, *13-14, 2014 NY Slip Op 31215(U), 5-6 [NY Sup Ct, April 2, 2014]).

Accordingly, the Plaintiffs' motion for partial summary judgment is denied and Jonathan Troffa's request to set a procedure for determining the amount of attorney's fees to be awarded to him pursuant to BCL 626 (e) is denied without prejudice until after trial. Defendants' motion for summary judgment seeking to dismiss the amended complaint is denied.

Plaintiffs are directed to provide the Defendants with a list of outstanding discovery regarding rents paid by the Corporation to NIMT Enterprises, LLC as rent for the Compost Yard within twenty days of this order's Notice of Entry. The parties are directed to meet and confer and devise a plan for the production of outstanding discovery according to the Commercial Division Rules prior to the next conference.

The Parties are directed to appear at a virtual conference with the undersigned on August 24th, 2022 at 10:30 am.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: August 2nd, 2022

HON. JERRY GARGUILO, JSC