

**Greenman v Miller**

2022 NY Slip Op 33355(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 650304/2017

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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JANE GREENMAN,	INDEX NO.	<u>650304/2017</u>
Plaintiff,	MOTION DATE	<u>09/07/2022,</u> <u>09/07/2022</u>
- v -	MOTION SEQ. NO.	<u>006 007</u>
LARRY MILLER, MILLMAN LLC, 392 COLUMBUS AVENUE LLC, SDMJD NEXT GENERATION LLC		
Defendants.	<b>DECISION + ORDER ON MOTION</b>	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505

were read on this motion for SUMMARY JUDGMENT DISMISSING COUNTERCLAIMS.

For approximately forty years, Larry Miller (“Defendant” or “Miller”) and Charles Greenman (“Charles”) were close friends and successful business partners. Charles, a partner at the Troutman Sanders, LLP law firm, and Miller, an entrepreneur and investor, joined in numerous business ventures which they conducted through Millman LLC (“Millman”), 392 Columbus Avenue LLC (“392 Columbus”), and SDMJD Next Generation LLC (“SDMJD”) (the

“Entities”) and other vehicles. In 2014, Charles passed away, and his spouse, Jane Greenman (“Plaintiff” or “Jane”) was left to sort out and manage Charles’ estate and her family’s finances. Miller assumed control of all three entities.

In this action, Jane alleges that Miller began almost immediately to ignore or trample her rights as a passive minority investor with no management powers and disregarded the restrictions imposed on him by the entities’ operating agreements and his fiduciary duties by looting the entities for his own benefit to the detriment of both the entities and Jane. The counterclaims filed by Miller allege, among other things, that Jane, as Executrix of Charles’ estate, engaged in misconduct as a fiduciary and avoided honoring the deals that Miller made with Charles for the benefit of the Greenman family to the tune of millions of dollars. Both parties now seek summary judgment in their favor. For the following reasons, the motions are granted in part and denied in part.

### **DISCUSSION**

It is well settled that “[t]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

#### **I. Motion 006: Defendant’s Motion for Partial Summary Judgment.<sup>1</sup>**

##### *A. Breach of Contract and Breach of Fiduciary Duty Claims Relating to Millman (First through Fourth Cause of Action).*

The first two claims of Plaintiff’s Amended Complaint are breach of the Millman Agreement and breach of fiduciary duty brought derivatively on behalf of Millman. The third

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<sup>1</sup> Miller does not move to dismiss Plaintiff’s Fifth, Sixth, or Seventh Causes of Action.

and fourth claims are breach of the Millman Agreement and breach of fiduciary duty brought individually on behalf of Plaintiff.

As an initial matter, Miller is the Entities' managing member and he has the exclusive authority to manage the Entities. "As a result, his decisions are subject to significant deference under the business judgment rule" (*Barry v Clermont York Assoc. LLC*, 50 Misc 3d 1203(A) [Sup Ct, NY County 2015], *affd as mod*, 144 AD3d 607 [1st Dept 2016]; *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537–38 [1990]), unless he engages in fraud or self-dealing (*Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]; *see also Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]). Here, the business judgment rule precludes Jane's allegations relating to Miller's decision to cancel swap agreements to which the entity had been a party. Miller submits that this was justified because of future cost savings which exceeded the up-front penalty. While this may or may not have been a good decision, Jane does not allege Miller engaged in fraud or self-dealing as related to this claim. Thus, summary judgment in favor of Miller is granted on this claim.

Summary judgment is also granted in favor of Miller on Jane's claim regarding salary payments Miller made to himself in 2015 and 2016 purportedly in violation of the Millman Agreement. Jane's expert's report acknowledges that Miller repaid the \$325,000 in full on November 1, 2016, approximately one month after he received the last salary payment (NYSCEF 430 at Exhibit 13C [page 69]). Jane thus only seeks interest on these amounts, which does not state a viable claim for relief (*Ajdler v Province of Mendoza*, 33 NY3d 120, 126 [2019] ["[A]bsent contractual language to the contrary, 'the receipt of the principal bars a subsequent claim for the interest for the reason that in such cases interest being a mere incident, cannot exist without the debt, and the debt being extinguished the interest must necessarily be

extinguished”]; *see also Fed. Natl. Mtge. Assn. ( Fannie Mae ) v Tortora*, 188 AD3d 70, 77 [4th Dept 2020]). As Jane points to no contractual language supporting her claim of interest, summary judgment on this claim in favor of Miller is granted.

The remaining issues on the breach of contract and breach of fiduciary duty claims raise fact issues that cannot be resolved on summary judgment.<sup>2</sup>

*B. Breach of Contract relating to SDMJD (derivatively on behalf of SDMJD) (Eighth Cause of Action).*

It is undisputed that section 4.3(b) of the SDMJD operating agreement does not provide a deadline for distributing monies received by 90 Hudson LLC derived from a sale or refinancing. Further, Miller made distributions when requested by Jane. Although Jane argues that Miller improperly delayed distribution, and seeks interest based on the delay, Jane provides no support for what the appropriate window of time might have been. Furthermore, as stated above, unless a contract provides otherwise, a claim for interest only fails as a matter of law. Thus, summary judgment in favor of Miller is granted on this claim as well.

*C. Judicial Dissolution Pursuant to LLC Law § 702 (Ninth Cause of Action).*

Summary judgment in favor of Miller is granted as Jane is unable to show that Miller has acted contrary to the purpose of Millman, which is needed to pursue a derivative claim for dissolution against a manager (*In re 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]; *Goldstein v Pikus*, 2015 NY Slip Op 31483[U] [Sup Ct, NY County 2015]). Further, Jane failed to show that the Company is presently unable to fulfill its stated purpose simply because Miller, in his discretion as the sole manager, decided to discontinue Millman’s loan business. Millman

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<sup>2</sup> Plaintiff will need to streamline these issues and clearly identify which claims she is pursuing derivatively and which she is pursuing directly, and which claims are a breach of contract and which are breach of fiduciary duty in her pre-trial memorandum.

continues to invest in “real estate, private equity, and/or hedge fund investments” (Pl.’s Am. Compl. ¶ 100). Further, “[d]isputes between members are not sufficient to warrant the exercise of judicial discretion to dissolve an LLC that is operated in a manner within the contemplation of it[s] purposes and objections as defined in its articles of organization and/or operating agreement” (*Huggins v Scott*, 2019 NY Slip Op 33506[U], 4-5 [Sup Ct, NY County 2019]).

Because Jane is unable to show that Miller has acted contrary to the purpose of Millman, her allegations of breach of contract, even if proved at trial, are insufficient to establish grounds for dissolution of Millman.

## **II. Motion 007: Plaintiff’s Motion for Summary Judgment on Defendant’s Counterclaims I-V.**

### *A. Breach of Contract and Breach of Fiduciary Duty Relating to 392 Columbus (First and Second Counterclaims).*

Jane has met her prima facie burden for summary judgment on Miller’s first and second counterclaim for breach of 392 Columbus Operating Agreement and Breach of Fiduciary Duty regarding 392 Columbus for distributions under the 392 Columbus operating agreement. Jane has submitted a copy of the notarized amended 392 Columbus operating agreement (NYSCEF 253), executed by both herself and by Miller. Schedule A in this agreement amended the original agreement, which split ownership two-thirds to Miller and one-third to Charles (NYSCEF 230). In the amended agreement, Miller’s percentage interest is 50% and Jane’s percentage interest is 25% and Jane’s children’s collective interest is 25% (8-1/3% each). The operating agreement was signed February 29, 2012, and states that it is “dated **as of** August 28, 1998, by and among each of [its] parties” (NYSCEF 253).

While Miller argues that it is unclear when the amended operating agreement was to go into effect and whether it was to apply to the distribution at issue, which occurred earlier in

February 2012 before the signing of the amended agreement, the parties indicated that it was dated “as of” August 1998. “It is fundamental that where parties to an agreement expressly provide that a written contract be entered into ‘as of’ an earlier date than that on which it was executed, the agreement is effective retroactively ‘as of’ the earlier date and the parties are bound thereby accordingly” (*Colello v Colello*, 9 AD3d 855, 857 [4th Dept 2004]).

Moreover, Jane submitted correspondence from Millman’s accountant, Block, from June 2012 and August 2012, which indicates that the distributions from 392 Columbus were intended to be 50/50 (NYSCEF 447, 448). Miller fails to present any communications or documentation that indicate an intention to the contrary. Thus, Miller fails to raise any issues of material fact. Accordingly, summary judgment is granted in favor of Plaintiff on this claim.

*B. Legal Fees (First, Second, and Fourth Counterclaims).*

Fact issues preclude summary judgment on the issue of Charles’ legal fees in the First, Second, and Fourth Counterclaims. Jane’s argument that the statute of limitations bars these claims raises factual issues as to when Miller discovered the purported fraud or when he was on notice of it (*Epiphany Community Nursery School v Levey*, 171 AD3d 1, 7 [1st Dept 2019] [citations omitted] [“The issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud . . . involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact”]).

*C. Conversion (Third Counterclaim).*

Fact issues also preclude summary judgment on the Third Counterclaim for Conversion of Books and Records and Legal Files Against Jane Individually. The record presented has not

established summary judgment in favor of Jane as there remains a question of what files Jane possesses, and whether Miller has established his possessory right or interest in the documents not related to Miller-managed entities (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

*D. Breach of Contract Relating to 12000 Biscayne (Fifth Counterclaim).*

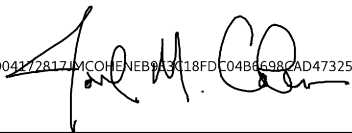
Finally, fact issues preclude summary judgment on the Fifth Counterclaim for Breach of Contract against Jane as Executrix relating to the 12000 Biscayne investment. Miller has not conclusively established the existence of an oral agreement between himself and Charles to split the income from Miller’s loan and Charles’ profits from this investment, nor has he established his own performance under this alleged agreement. Even if he could, Jane also raises issues of fact as to whether there was any breach of this alleged agreement or whether Miller repudiated the agreement before Jane’s obligation under the alleged deal arose.

Accordingly, it is

**ORDERED** that Miller’s Motion for Partial Summary Judgment (Mot. Seq. 006) is **granted in part and denied in part**; and it is further

**ORDERED** that Jane’s Motion for Summary Judgment Dismissing the Counterclaims (Mot. Seq. 007) is **granted in part**.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

<u>10/4/2022</u> DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE