SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CHRISTOPHER DOEBLIN and CHRISTOPHER DOEBLIN, DERIVATIVELY ON BEHALF OF BOOK CULTURE ON COLUMBUS, LLC,

Plaintiffs,

- v -

JOHN R MACARTHUR,

Defendant.

INDEX NO. 156356/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISMISS.

Defendant John R. MacArthur moves pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the amended complaint with prejudice.

In a related action, MacArthur commenced a derivative action (Derivative Action) against plaintiff Christopher Doeblin challenging certain actions Doeblin took as managing member of Book Culture on Columbus, LLC (BCC). (*MacArthur, derivatively on behalf of Book Culture on Columbus, LLC v Doeblin*, Index No. 656694/2019 [commenced November 12, 2019].) There, MacArthur claims breach of contract, conversion, fraud, breach of fiduciary duty, and corporate waste.

This action concerns an article, published on September 10, 2019, in local newspaper, *West Side Rag*, titled "Book Culture Owners Split on Lending Program, Raising New Questions" (Article). (NYSCEF Doc. No. [NYSCEF] 22, first amended

compl. [FAC] ¶ 3.) Doeblin claims MacArthur defamed Doeblin by making false accusations against Doeblin's public crowdfunding initiatives to obtain loans for the Book Culture stores and lying about BCC's economic health. (*See id.* ¶¶ 2-9.)

According to Doeblin, MacArthur's alleged defamatory statements harmed his professional reputation and harmed Book Culture stores because the stores stopped receiving public loans after the publication of the Article. (*See id.* ¶ 32.) Doeblin asserts four causes of action, generally arising out of the allegedly defamatory statements in the Article: (i) individually, for defamation; (ii) on behalf of BCC and individually, breach of fiduciary duty; (iii) on behalf of BCC and individually, intentional interference with prospective economic advantage; and (iv) on behalf of BCC, tortious interference with contract.

Plaintiff's Allegations

The relevant facts are set forth in detail in the court's decision and order on motion sequences number 001 and 002 in the Derivative Action. The court presumes familiarity with this action and the Derivative Action.[1]

BCC's Financial Distress and Doeblin's Crowdfunding Campaign

Doeblin alleges in the FAC alleges that beginning in early 2018, BCC suffered "significant financial hardship." (NYSCEF 22, FAC ¶ 48.) Doeblin alleges that beginning in March 2018, he and MacArthur discussed BCC's dire need of cash and to find outside investors. (*Id.* ¶ 50). Doeblin alleges that, not three months later, he informed MacArthur that BCC's credit situation and need for funding was affecting the

[1] Unless otherwise stated, the court incorporates all capitalized terms as used in the court's decision and order in the Derivative Action in this decision and order.

Columbus bookstore's performance. (*Id.* ¶¶ 51-53.) In a March 12, 2018 email, Doeblin expressed to MacArthur that he "needed to find outside investors or lenders to assist us or we will be in a crisis soon." (*Id.* ¶ 50; NYSCEF 24, March 12, 2018 Email at 1.) Doeblin further alleges that, against the backdrop of the parties' discussions about BCC's financial health, MacArthur proposed to purchase Doeblin's interest in BCC. (*See id.* ¶¶ 54, 63; NYSCEF 28, July 20, 2018 Letter [from MacArthur's counsel to Doeblin asking Doeblin to consider MacArthur's offer to buy out Doeblin's interest in BCC].)

BCC's financial crisis continued into 2019. (*See generally id*. ¶¶ 59-61, 66, 68, 70-71.) Doeblin alleges that MacArthur and his agents recognized the financial situation, and had been on notice of BCC's financial decline, yet MacArthur refused to sign off on a loan from nonparty Burnley Capital. (NYSCEF 22, FAC ¶¶ 59, 61-62.) Without financing from Burley Capital, Doeblin alleges that he spent the next "two months frantically trying to secure other avenues of financing to save BCC." (*Id.* ¶ 65.)

On April 24, 2019, Doeblin emailed MacArthur about Book Culture's need for at least $1 million in equity or long term low interest loans and provided alternatives to the cash flow problem, which included among other options, "seek[ing] new equity via a more public announcement of our situation." (*Id.* ¶¶ 66-67 [emphasis omitted].) Doeblin alleges that MacArthur "opened a new round of buyout negotiations" following this email. (*Id.* ¶ 68.) Doeblin alleges that, in May 2019, MacArthur believed that the attempts to "squeeze Doeblin out were succeeding, as BCC's financial situation was further deteriorating." (*Id.* ¶ 70; *see* NYSCEF 33, May 13, 2019 Email at 1.) And, between May 2019 and June 2019, MacArthur's accountants made statements such as

"It's going down very fast now[,]" "virtually deal in the water in terms of our capacity to purchase now[,]" "businesses are in extremis," and "fear that the condition of the store's balance sheet is deteriorating." (NYSCEF 22, FAC ¶¶ 71-74.)

In June 2019, Doeblin penned an open letter to then-Mayor DiBlasio and then-Governor Cuomo, which was published in the *West Side Rag*, asking local and state government authorities to financially assist Book Culture, Incorporated (BCI) and BCC stores. (*Id.* ¶¶ 78, 79, 81.) The letter was unsuccessful, and the stores did not receive government assistance. (*Id.* ¶ 83.) Doeblin alleges that "his last chance to save Book Culture and its sister stores" and to raise $750,000 "was a public crowdfunding program." (*Id.* ¶¶ 84-85.) Doeblin posted to Facebook on July 31, 2019, asking its customers to participate in its "Community Lender Program," a lending program where community members could loan money directly to Book Culture at a 4% interest rate and a 5-year term." (*Id.* ¶ 87; NYSCEF 40, Facebook post.) Doeblin claims that $200,000 was raised within a few weeks of the Facebook post and by September 2020 almost $300,000 was raised. (NYSCEF 22, FAC ¶ 88.)

The West Side Rag Article

The Article authored by Alex Israel and published on September 10, 2019 contains both statements from MacArthur and Doeblin. (NYSCEF 23, the Article.)

Doeblin alleges that MacArthur was trying to "force a lowball buyout of Doeblin and Hendrick's BCC shares, [but] neither Doeblin nor Hendricks were willing to agree to the purchase price MacArthur was offering." (NYSCEF 22, FAC ¶ 96.) Thus, Doeblin claims that MacArthur, "frustrated by [Doeblin and Hendrick's] refusal to acquiesce to his buyout position, and on notice that Doeblin's fundraising efforts for BCC would harm

his buyout chances, MacArthur contacted the *West Side Rag* and attempted to discredit Doeblin's fundraising activities and smear Doeblin personally." (*Id.* ¶ 97.) Doeblin alleges that "MacArthur was no doubt aware that accusing his business partner of fraud, deceptive practices, and raising money on a 'false premise' would not only bring a halt to Doeblin's fundraising efforts, but destroy Doeblin's reputation in the community." (*Id.* ¶ 103.)

Challenged Defamatory Statements in the Article

Doeblin alleges that the following defamatory statements, reproduced in their entirety, all of which concerning him were (1) false, (2) false at the time MacArthur made them, (3) made grossly negligently or, in the alternative, made with actual malice, (4) defamatory *per se* as the statements injured Doeblin in his business, occupation, or profession, and (5) that he has been irreparably injured as a result. (NYSCEF 22, FAC ¶¶ 116-130.)

> "a. 'Contrary to signage and social media posts, Book Culture on Columbus **is not in need of financial assistance** from the neighborhood, according to co-owner John R. MacArthur.'
>
> b. 'MacArthur believes Doeblin is **misleading potential lenders** by using the Columbus store to raise money for a separate business, and he wants to ensure that the public is aware of where lenders are sending their cash.'
>
> c. '"Nobody seems to know that these are two separate companies," said MacArthur during a phone interview with WSF [sic]. "And that **he's raising money on the false premise that Book Culture on Columbus is on the verge of failure when it's not.** I won't permit it to go bankrupt."'
>
> d. '"I want to halt the **deceptive fundraising**," said MacArthur.'

> e. "'I don't want ordinary, neighborhood people lending money to [Doeblin] on a **false premise**. In effect they are lending money to me, and I'm not asking for it – I don't want it!"'
>
> f. That, according to MacArthur: 'Book Culture on Columbus was until recently doing just fine – and **MacArthur is willing to contribute the funds himself to get it back to where it was**.'"

(NYSCEF 22, FAC ¶ 100 [brackets and emphasis in original] [herein, Alleged Defamatory Statements].) Specifically, Doeblin alleges that immediately upon publication of the Article, all fundraising through the crowdfunding program for the Book Culture stores immediately ceased. (*Id.* ¶ 105.) Doeblin seeks $5 million in damages and punitive damages as a result of the harm to his personal and business reputation, business interests and prospective business opportunities, as well as humiliation and emotional distress. (*Id.* ¶¶ 127, 130.)

Legal Standard

In motion sequence number 002, MacArthur moves to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(1) and (7).

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211 (a) (1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st

Dept 2017] [citation omitted].) Their content must be "'essentially undeniable.'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "'support the ground on which the motion is based.'" (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Discussion

Doeblin's Defamation Claim

To plead defamation, plaintiff must show a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [citation omitted].) "A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct." (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014] [citation omitted].)

"In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." (*Dillion*, 261 AD2d at 38 [citation omitted].)

Here, the Alleged Defamatory Statements suggest Doeblin engaged in fraudulent activities in raising money for his bookstores, and thus, constitute defamation per se, satisfying the last element. (*See Frechtman*, 115 AD3d at 104-105.) MacArthur contends that the defamation claim must be dismissed as a matter of law because the Alleged Defamatory Statements are textbook expressions of his opinions based upon fully revealed facts made in the context of the ongoing dispute between the parties.

"An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be." (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986] [citations omitted].) In *Steinhilber*, the Court of Appeals distinguished between non-actionable "pure opinion," a "statement of opinion which is accompanied by a recitation of the facts upon which it is based[ ]" and may nevertheless be "pure opinion" so long as it "does not imply that it is based upon undisclosed facts," to a "mixed opinion," which is actionable. (*Id.* [citations omitted].) A "mixed opinion" is a "statement of opinion impl[ying] that it is based upon facts which justify the opinion but are unknown to those reading or hearing it." (*Id.* at 289-90 [citations omitted].) A "mixed opinion" is actionable because there is the "implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." (*Id.*

at 290, citing *Rand v New York Times Co.*, 75 AD2d 417, 422 [1st Dept 1980].) The Court of Appeals adopted four guideposts in distinguishing between a nonactionable opinion or actionable assertions of fact:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.'"

(*Brian v Richardson*, 87 NY2d 46, 51 [1995] [internal quotation marks and citations omitted].) Importantly, the Court of Appeals has stressed the significance of the context factor and held that "courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. . . . [T]he court should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." (*Id.*, citing *Immuno AG v Moor-Jankowski*, 77 NY2d 235 [1991], *cert denied*, 500 US 954 [1991].)

Considering the broader context of the Article in which the Alleged Defamatory statements were published, the court finds that these statements are nonactionable opinions. (*Galasso v Saltzman*, 42 AD3d 310, 310-11 [1st Dept 2007] [finding defamatory statements to be nonactionable because, among other reasons, were made in the context of a heated dispute].) At bottom, the Article presents both sides of the parties' ongoing dispute over BCC and/or BCI's need for funds, providing not only the challenged statements from MacArthur but also comments from Doeblin. (*See, e.g.,* NYSCEF 23, Article at 3 ["Doeblin affirmed the Columbus store's initial profitability—

attributing it to the 'creative vision' of Book Culture Inc.,—as well as its recent downtown—attributing it to the city's hike in minimum wages."].) Thus, the average reader could not reasonably believe that the challenged statements were conveying facts. Rather, the average reader could only reasonably view the Article as a follow up to the continuing saga of Book Culture's public request for financial assistance in the form of loans, especially because the *West Side Rag* had published earlier that summer Doeblin's open letter to government officials seeking state financial aid.[2]

The immediate context of the Alleged Defamatory Statements supports the conclusion that the statements could not have been understood by the average reader as assertions of fact. The title of the Article signals a "split" between the Book Culture owners and the tone of the Article further supports the overall purpose of the Article, which was to present both sides of the disputed crowdfunding tactic and to let the readers of the *West Side Rag* to come to their own conclusions based on the comments made by both MacArthur and Doeblin. Further, the Article, as a whole, reads as a back-and-forth between MacArthur's statements and Doeblin's responses. There are at least four paragraphs in the Article providing both sides to the proverbial coin. (*See* NYSCEF 23, Article at 2; *see especially id.* at 3 [MacArthur commenting on the Columbus Bookstore's initial success but recent bad sales and Doeblin essentially affirming the trend but providing different reasons for trends].)

Moreover, MacArthur's statements reflect his own belief that the crowdfunding campaign did not accurately emphasize or notify the public that there were two separate

[2] Doeblin's open letter was not only referenced in the Article, but it appears that the Article directly linked readers to the open letter.

companies and which company would be in receipt of those loan monies. Not only are MacArthur's statements based upon his own, subjective reading of the crowdfunding campaign, but the Article provides the signage displaying the public crowdfunding objectives and provides undisputed facts.

Doeblin insists that MacArthur, as a BCC insider, was privy to financial information that the public could not access and are thus not opinions but assertions of fact. Having access to insider information is not the standard in asserting, essentially, that MacArthur's statement was a mixed opinion. An actionable mixed opinion requires an "implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." (*Steinhilber*, 68 NY2d at 290.) The Alleged Defamatory Statements do not suggest that MacArthur was basing his opinions on facts unknown to the public. Moreover, as discussed above, Doeblin actually confirms MacArthur's description of the upward and the then-current downward trend of the Columbus's store profitability. "'[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate . . . or other circumstances in which an 'audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.'" (*Id.* at 294 [citation omitted].)

Doeblin's arguments in opposition do not compel an alternate conclusion. Doeblin argues that MacArthur's statements that the Columbus Bookstore was not in financial distress, which is discussed above, and that MacArthur was ready and willing to lend money to BCC to keep afloat, are false and provable to the contrary. Doeblin asserts that this statement was false when MacArthur made it because he had not

offered to loan BCC money unconditionally. However, Doeblin attempts to frame his arguments using MacArthur's isolated statements and the court will not countenance such attempts to misconstrue what was actually printed in the Article. For example, Doeblin alleges that MacArthur's statement "MacArthur is willing to contribute the funds himself to get it back where it was" which the Article later quotes Doeblin admitting that "'[MacArthur] did offer to lend money but only on the condition that he take control of the store and that none of the money be used to support the other stores.'" (NYSCEF 23, Article at 3, 4.) That the Article provides Doeblin's comments and responses to MacArthur's statements, some which affirm MacArthur's statements, further strengthens the conclusion that the average reader would understand that the statements made therein to be the opinions of the respective parties based on these revealed facts of the parties' dispute.

Lastly, the court has considered Doeblin's remaining contentions and finds them to be without merit. For example, Doeblin argues that MacArthur's statements alleging fraud on Doeblin's part to raise money can be—and has been—proven true because the Columbus Bookstore in fact shut down after the Article was published. This contention is, to say the least, speculative. MacArthur has satisfied his burden dismissing the FAC with prejudice.

Doeblin's Remaining Tort Claims

MacArthur argues that Doeblin's claims for breach of fiduciary duty, tortious interference with prospective business advantage, and tortious interference with contract, all claims arising out of the defamation allegations, must be dismissed as duplicative. (See *Perez v Violence Intervention Program*, 116 AD3d 601 602 [1st Dept

2014] [dismissing tortious interference with prospective contractual/business relations claim as duplicative of defamation claim as no new facts and no distinct damages apart from the defamation claim were alleged].) Doeblin's claims in support of the tortious interference with prospective business advantage and contract claims are based upon the same facts. (NYSCEF 22, FAC ¶¶ 144-45, 148, 152-54, 160.) Therefore, the court finds Doeblin's tortious interference with prospective business advantage and tortious interference with contract claims duplicative of his defamation claim as all three claims are based on the same facts, i.e., the MacArthur's statements in the Article. Doeblin does not address this argument and does not offer support for why the court should depart from this principle of law.

To the extent that that Doeblin's breach of fiduciary duty claim is based upon allegations that MacArthur breached his duty, assuming that such a duty exists, when he issued the Alleged Defamatory Statements, the court agrees that the allegations are the same as those supporting Doeblin's defamation claim and is dismissed as duplicative. (NYSCEF 22, FAC ¶¶ 133-36.) The other branch of the breach of fiduciary duty claim asserts that MacArthur breached his duty to him and BCC when he attempted to negotiate a new lease for a different bookstore with the landlord of the Columbus Bookstore. (*Id.* ¶¶ 111-15.) This branch concerning the negotiation of the lease behind Doeblin's back is dismissed as MacArthur does not owe a fiduciary duty.

While managing members of an LLC owe non-managing members a fiduciary duty, (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [citations omitted]), it is not entirely clear, in this jurisdiction, whether a non-managing member, like MacArthur, owes a fiduciary duty to Doeblin, the managing member, and to BCC where it is alleged

that MacArthur acted in a "managerial capacity."[3] Doeblin cites *Jones v Voskresenskaya* for the proposition that members of an LLC may owe a fiduciary duty to the LLC and to other members. (125 AD3d 532, 533 [1st Dept 2015], citing *Pokoik*, 115 AD3d at 429.) The plaintiff and defendant in *Jones* were equal members of the LLC, but the court in *Jones* did not identify which litigant managed the LLC. (*Jones*, 125 AD3d at 533.) On the other hand, MacArthur cites to *Landes v Provident Realty Partners II, L.P.* and *Kalikow v Shalik* for the same proposition that a non-managing member owes no fiduciary duty to the LLC or the managing member unless the non-managing member participates in the management of the LLC. (2017 WL 413168, *13 [Sup Ct, NY County, 2017]; 43 Misc 3d 817 [Sup Ct, Nassau County, 2014].) The parties agree insofar that the motion to dismiss the breach of fiduciary duty claim turns on the issue of whether MacArthur, as non-managing member, owes a duty to BCC and Doeblin.

Subsequent cases that have applied the rule in *Jones* shed light to the matter. In *Verkhoglyad v Benimovich*, plaintiff and defendant were managing members and equal

[3] Doeblin argues that MacArthur "regularly injected himself into management activities" and was "acting in a managerial capacity"; specifically, MacArthur was "entrusted by Doeblin to contact the landlord for the purpose of exploring whether MacArthur could assume the role of personal guarantor of the lease if Doeblin sold MacArthur his BCC shares." (NYSCEF 54, opp br at 22.) These assertions are also included in Doeblin's sworn affidavit in support of his opposition brief, (NYSCEF 56, Doeblin aff ¶¶ 4-8), but these statements are not included within the FAC. However, "the court can consider[ ] sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim." (*Ray v Ray*, 108 AD3d 449, 452 [1st Dept 2013] [citation omitted].) "Further, facts submitted in opposition to a motion to dismiss are also accepted as true." (*Id.* [citation omitted].) Thus, for the purposes of this motion to dismiss, the court will consider Doeblin's statements in his affidavit in support of his opposition brief and accept them as true as required by the CPLR.

owners of the LLC. (57 Misc 3d 1201[A], *5 [Sup Ct, Kings County, 2017].) Plaintiff sued defendant for breach of fiduciary duty (*id.* at *1) and the court found that the motion to dismiss the fiduciary duty claim was denied because as the litigants were both managing members and equal owners of the LLC, the complaint alleged special circumstances that transformed the parties' business relationship into a fiduciary one. (*Id.* at *5.) In *Cortazar v Cortazar*, citing to *Jones*, the court found that, after a trial, plaintiff and defendant were each 50% members of the LLC. (64 Misc 3d 1204[A], *1 [Sup Ct, Queens County, 2019].) Further, the court in *Cortazar* found that "when James Cortazar locked Vincent Cortazar out of the Company's day-to-day operations, he had a duty to manage the Company in a proper and responsible manner." (*Id.* at *9.) Other cases in this jurisdiction have also held similarly. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" (*AG Cap. Funding Partners, L.P. v State Street Bank and Trust Co.*, 11 NY3d 146, 158 [1st Dept 2008] [citations omitted].)

Taken together, the court finds that *Jones* and its progeny is consistent with *Landes* and *Kalikow*, the cases provided by MacArthur. In view of the foregoing, it appears that a fiduciary duty is imposed upon the non-managing member who shares management duties (*Verkhoglyad*, 57 Misc 3d 1201[A] at *5) or takes control of management duties where management duties are not shared (*Cortazar*, 64 Misc 3d 1204[A] at *9). Here, the FAC and the facts in opposition are devoid of any allegations that MacArthur shared management duties with Doeblin or assumed any managerial duties at the time MacArthur allegedly spoke with the landlord. The FAC claims that

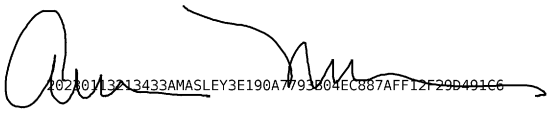
MacArthur "went behind Doeblin's back and commenced his own negotiations with the landlord in order to secure the retail space for a competing bookstore"[4] (NYSCEF 22, amended compl ¶ 35), and "was effectively negotiating against BCC's interest by trying to secure a lease at the Book Culture location for a competing company[ ]" (*id*. ¶ 140). However, Doeblin does not allege how MacArthur, as a non-managing member of BCC, assumed fiduciary duties prior to his conversation with the landlord. It is only in the opposition brief and supporting affidavit where Doeblin argues that "At various times between 2014 and 2019, Mr. MacArthur would be involved in BCC employment decisions, including the hiring of BCC's accountant in or around 2016. He was also involved in other hiring, promotion, merchandising, event planning, and marketing suggestions." (NYSCEF 56, Doeblin aff ¶ 4.) Yet, the affidavit, nor the FAC, does not allege whether these activities are managerial duties and is insufficient to warrant the denial of the motion to dismiss. This statement also appears to contradict the allegation in the FAC that MacArthur "originally had no day-to-day involvement in the operation or management of Book Culture." (NYSCEF 22, FAC ¶ 47.)

Accordingly, it is

ORDERED that motion sequence number 002 is granted and the complaint is dismissed with prejudice in its entirety as against the defendant, with costs and

[4] Doeblin states in his affidavit that MacArthur wanted to speak to the landlord "to determine whether [landlord] would have any objection to Mr. MacArthur replacing me as the personal guarantor of the BCC lease in the event I sold me [sic] shares to him. Insofar as this concerned a piece of our buyout negotiations, I told Mr. MacArthur that he was free to speak to [landlord] on this subject." (NYSCEF 56, Doeblin aff ¶ 6.) Doeblin's statement contradicts the FAC that MacArthur went behind his back to speak with the landlord.

disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant.



1/13/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE