SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

----------X

KEVIN P. GALLAGHER,

Plaintiff,

- v -

JOHN CROTTY, JOHN WARREN, JOHN FITZGERALD

Defendants.

----------X

INDEX NO. 651498/2015

MOTION DATE 08/17/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 246, 247, 249, 251, 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, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300

were read on this motion to/for JUDGMENT - SUMMARY.

In this commercial dispute among partners, plaintiff moves for partial summary judgment on his breach of contract claim and seeks an order: (1) declaring that defendants breached certain operating agreements by impermissibly amending them; (2) declaring the amendments void; and (3) directing that defendants provide an accounting to plaintiff related to the amendments, or, alternatively, ordering an inquest to determine his damages.

Defendants oppose and cross-move to dismiss plaintiff's amended and supplemental complaint. Plaintiff opposes the cross motion.

I. PROCEDURAL BACKGROUND

As alleged by plaintiff, this is an action against defendants for "squeezing him out" of their partnership (NYSCEF 192). In his Amended and Supplemental Complaint, plaintiff alleges that there was "an oral agreement to form a partnership to be known as Workforce Housing Advisors," or WFHA.

Plaintiff further contends that WFHA and/or its partners and their personal affiliated entities manage certain lower-tier entities, and have outside investors as well, and some of them hold title to the real estate, which constitutes subsidized housing (*Id.*). Plaintiff alleges that "WFHA generates the bulk of its revenues from investment, development, acquisition, and management fees associated with each project, as well as from a consulting agreement with Winn Residential LLC ('Winn'), the nation's sixth largest property manager." (*Id.*).

Plaintiff previously moved for summary judgment on his cause of action for an accounting, and defendants cross-moved for summary judgment dismissing all causes of action on the ground, among others, that no WFHA partnership existed. On August 3, 2017, another justice of this court granted plaintiff's motion for summary judgment seeking an accounting, and denied defendants' cross-motion on the ground that there was ample evidence to raise issues of fact as to whether or not a WFHA partnership existed (NYSCEF 95). As set forth in that decision:

> Plaintiff seeks damages against defendants for breach of fiduciary duty, breach of contract and an accounting relating to their joint venture. Plaintiff alleges that he and Crotty entered into an oral agreement to form a partnership known as Workforce Housing Advisors ('WFHA'); Warren and Fitzgerald were later added as partners. WFHA acquires distressed multi-family real estate properties and/or facilitates investments for rehabilitating properties in partnership with private investors and government agencies. Plaintiff and defendants are also members/partners in various single purpose entities, which are held by managing member entities and managing member limited liability entities, for structuring and operating WFHA projects ('Workforce Entities').
>
> Workforce Entities include Workforce Housing Advisors MM, LLC ('MM-1') and Workforce Housing Advisors MM II, LLC ('MM-2'), which were formed in December 2010 and May 2011, respectively. MM-1 and MM-2 consist entirely of plaintiff and defendants as members. WFHA developed the Habitare Urbana Fund, LLC ('Habitare Fund') in December 2012, which encompassed two projects under MM-2.
>
> Plaintiff alleges that he and defendants were in negotiation with Morgan Stanley, among others, for the establishment of a new fund to be known as

> the NYC Distressed Multi-Family Housing I LP ('New Fund'). The New Fund would have included plaintiff as a designated developer through a WHFA entity; however, defendants formed a new entity, J-Cubed, in November 2013 and proceeded with the New Fund without plaintiff. Plaintiff asserts that he did not consent in writing to defendants' actions in the New Fund, nor was he provided with an opportunity to consent, invest or participate in the New Fund. Plaintiff claims that in forming J-Cubed without him, defendants breached their fiduciary duty and breached the joint venture agreement. Plaintiff further alleges that his requests for information concerning this transaction have been rejected by defendants, and that he has been blocked from accessing his WFHA email account. Plaintiff further alleges that after the establishment of the New Fund, defendants refinanced MM-2 mortgages, which were part of the Habitare Fund, with funds from the New Fund.
>
> * * *
>
> Plaintiff alleges that, as a manager and investor in these entities, he is owed distributions, which defendants previously remitted to themselves and other investors, but wrongfully withheld from him.

The court also rejected defendants' argument that plaintiff had failed to name all necessary parties, including all of the LLCs through which the alleged WFHA partnership conducted its business (*id.*).

Thereafter, following an attempt at conducting the court-ordered accounting, plaintiff filed an affidavit from his accountant, who opined that there were missing accounting records, including general ledgers, journals, financial statements and tax returns, among other things, which were of such "magnitude" that it "is not possible" to conduct an accounting (NYSCEF 147).

Plaintiff then moved to amend his complaint, and on October 28, 2020, another justice of this court granted that motion, allowing the Amended and Supplemental Complaint to become the operative pleading; it adds a claim for attorney fees and expands plaintiff's breach of contract claim to include the amendments at issue on this motion (NYSCEF 193).

II. DEFENDANTS' CROSS MOTION

As a decision on defendants' cross motion for summary judgment may be dispositive, it is addressed first.

Defendants' primary argument in favor of dismissal is that plaintiff's alleged oral WFHA partnership agreement violates the statute of frauds set forth in N.Y. General Obligations Law 5-701(a)(1), because the "by its terms [the agreement] is not to be performed within one year from the making thereof."

However, an oral agreement to form a partnership for an indefinite period creates a partnership at will, which is not barred by the statute of frauds (*see Moses v Savedoff*, 96 AD3d 466 [1st Dept 2012] ["statute of frauds is inapplicable to an agreement to create a joint venture or partnership because an oral agreement for an indefinite period creates a partnership or joint venture at will"]; *Prince v O'Brien*, 234 AD2d 12 [1st Dept 1996] [same]; *see also Gedula 26, LLC v Lightstone Acquisitions III LLC*, 213 AD3d 409 [1st Dept 2023] [statute of frauds does not render void oral partnership agreement that dealt in real property]).

In any event, that an agreement is likely to take more than a year to perform does not implicate the statute of frauds if it is conceivable, even if unlikely as a practical matter, that it can be performed within a single year (*see e.g., Petkanas v Petkanas,* 191 AD3d 708 [2d Dept 2021] [statute of frauds requires "no possibility in law and fact of full performance within one year" even if performance within a year is "unlikely or improbable"]). Here, defendants do not establish, as a matter of law, that the alleged partnership agreement had no possibility in fact or law of being performed within a year.

Moreover, defendants could have raised the statute of frauds argument in their prior motion for summary judgment, but failed to do so, and are thus barred from raising it here. The

remainder of defendants' arguments were already raised and decided against them in the prior summary judgment decision, and defendants offer no reason for revisiting them (*see Polygenis v Stone Lounge Press, Inc.*, 204 AD3d 479 [1st Dept 2022], *lv dismissed* 38 NY3d [2022] [second summary judgment properly denied as based on issues that could have been, but were not, raised in previous motion for summary judgment, and movant did not provide sufficient justification for court to entertain second motion; even if motions were not identical, "parties generally must assert all available grounds for relief when moving for summary judgment"]; *Kucher v Sohayegh*, 201 AD3d 521 [1st Dept 2022] [plaintiff failed to show that it was "procedurally proper for him to move a second time for the summary dismissal of defendants' counterclaim and affirmative defenses"]).

While the prior summary judgment motion concerned plaintiff's original complaint, and this one addresses plaintiff's amended and supplemental complaint, the grounds raised by defendants in moving for summary judgment again are unrelated to any new claims asserted by plaintiff, and defendants' arguments in favor of dismissal are largely identical to those they raised before. Their argument that the instant motion should not be rejected as an improper successive motion because it is "substantively valid and will serve to further the ends of justice, eliminating unnecessary wasting of judicial resources" (NYSCEF 299, p. 2), is unavailing.

III. PLAINTIFF'S MOTION

Plaintiff seeks summary judgment in connection with certain amendments made to certain LLC Operating Agreements which, according to him, had the effect of altering his distribution rights without his consent. In sum, plaintiff argues that the defendants asked him to consent to amendments to the LLC Operating Agreements to permit themselves to be paid a

management fee, and when he refused to consent, they made the amendments anyway, effectively granting themselves a priority payment in which he was not allowed to participate.

Relevant provisions of the Workforce Housing Advisors MM and MM II LLC Operating Agreements are as follows:

- Section 13.1 provides for distributions to Members, first and second to interest and principal respectively on Excess Cash Needs Loans (essentially Member loans to the LLC for operating cash needs); third and fourth, to Members in accordance with their respective capital contributions, unequal and equal respectively; and finally, in accordance with the Members' Percentage Interests, which were equal (e.g., NYSCEF 213-14, at pp. 31-32).

- Section 19.1 provides for amendment of the Operating Agreements by Majority Consent, provided that "none of the following amendments shall be made with respect to any such Member if the effect on such Member is disproportionate to such Member as compared to the effect on all other Members without such Member's consent," with a list thereafter that includes any amendment to Section 13.1 dealing with distributions, or "any amendment to this Agreement which alters the manner of computing the Distributions of any Member." (*Id.*).

All of the LLC Operating Agreements tendered to the Court for the various properties and transactions contain substantially similar provisions (NYSCEF 238-41).

It is undisputed that in July 2017, defendants, through counsel, sent a series of letters to plaintiff asking for his consent to a series of amendments to the relevant LLC Operating Agreements, which would permit defendants to pay themselves a new management fee of $1000 per unit per year for the various apartments in the subsidized housing projects they owned and/or had an interest in and/or were managing (NYSCEF 217, 222, 223).

Plaintiff did not consent, but by a series of additional letters in July and August 2017 defendants made the amendments anyway (*Id.*). Plaintiff claims this had the effect of diverting $463,000 per year to the defendants at his expense, thus altering his Section 13.1 distribution rights without his consent, in violation of Section 19.1 of the Operating Agreements. He also

relies on deposition testimony of defendants Fitzgerald and Warren, and specifically Warren's testimony that defendants considered that the amendments "would have an economic impact" on plaintiff and that "[i]n theory, it would diminish distributions to [plaintiff]" (NYSCEF 208, 209).

Based on the evidence submitted, plaintiff establishes, *prima facie*, that the amendments were issued without his consent and in contravention to the parties' operating agreements, and that they adversely affected him by diminishing the distributions he received.

In opposition, defendants argue that plaintiff wasn't harmed by the amendments, and, in fact, he benefitted therefrom, as someone had to manage the properties and if they had to hire an outside management firm, it would have cost more money than the $1,000 per unit fee that they agreed to pay themselves. However, defendants offer no testimony or other evidence reflecting that they considered hiring a management firm but instead decided to perform their own management duties in order to save money. While Warren submits an affidavit on this motion and asserts that defendants had to either choose to hire a management firm or continue managing the properties on their own, there is no evidence that defendants ever actually investigated the cost of hiring a firm. Moreover, at his deposition, Warrant testified that the $1,000 fee did not result from any analysis but rather a brief discussion among defendants based on what they "thought was a reasonable number," and that the reason for the amendments was "to compensate those of us who are working on the projects on a daily basis to be compensated for the work we're doing" (NYSCEF 208). Thus, the undisputed evidence supports plaintiff's claim that defendants decided to pay themselves for work they were already doing, despite knowing that it would diminish plaintiff's distributions, and defendants submit no evidence to support their argument that it would have cost more to hire a management firm.

Having testified at their depositions that the amendments would diminish plaintiff's distributions, and absent any evidence that such diminishment would have been greater if defendants had hired an outside management firm, defendants do not raise a triable issue as to whether the amendments adversely affected plaintiff.

Defendants also contend that the amendments did not disproportionately affect plaintiff only, but rather applied to all members equally. While the amendments as written seemingly apply to all members, the reality of the situation at the time that the amendments were made is that plaintiff had already filed the instant lawsuit and was in an adverse position to defendants, that he had either been "frozen out" of the day-to-day operations of the various partnership entities by defendants, as he contends, or had abandoned his duties and failed to pursue any role with the entities, as defendants contend, and that it was extremely unlikely that he would have been able to or wanted to regain a role in the operations of the entities.

Indeed, as described by defendant Fitzgerald at his deposition, "[plaintiff], at this point the relationship is broken. He abandoned his position and he's actually working against us . . . [defendants] really had it at that point saying they're not working for free any more, especially when [plaintiff] is actively working against us, so they implemented [the management fee]" (NYSCEF 209). Thus, defendants' argument that plaintiff could have participated in managing the properties in order to receive a management fee like the other members is specious at best, and they therefore fail to demonstrate that there remains a triable issue as to whether the amendments affected plaintiff disproportionately.

To the extent that defendants argue that their actions are protected by the business judgment rule, the rule is inapplicable to obviously conflicted transactions (*see Matter of Kenneth Cole Productions, Inc. Shareholders' Litigation,* 27 NY3d 268 [2016] [absent fraud or

bad faith, courts should not examine business determinations]; *Wolf v Rand*, 258 AD2d 401 [1st Dept 1999] [business judgment rule does not protect corporate officials who engage in fraud or self-dealing or corporate fiduciaries who make decisions affected by inherent conflicts of interest]), such as the ones at issue here.

Moreover, the business judgment rule does not insulate defendants from being held liable on plaintiff's breach of contract claim, as a contractual duty overrides the discretion which the business judgment rule might otherwise allow (*see Tsui v Chan*, 135 AD3d 597 [1st Dept 2016]; *Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101 [1st Dept 2013]). Thus, defendants do not demonstrate that the business judgment rule precludes them from liability on plaintiff's breach of contract claim related to the amendments.

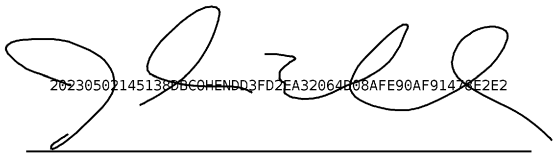
Defendants' other arguments in opposition were either already raised and rejected during prior motion practice or should have been raised earlier, and are thus not considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on liability on his breach of contract claim is granted, and plaintiff is directed to submit a proposed order and judgment forthwith; and it is

ORDERED, that defendants' cross motion for summary judgment is denied.



5/2/2023
DATE

DAVID B. COHEN, J.S.C.

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