STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: September 20, 2022)

ELIZABETH A. WILSON, ***Plaintiff,***	:	
v.	:	**C.A. No. WC-2017-0018**
2 TOWER, LLC, JRJ RHODY, INC., JAMES S. ROLAND, Individually and JEAN M. ROLAND, Individually, ***Defendants*****.**	:	

DECISION

TAFT-CARTER, J. This matter is before this Court for decision following a non-jury trial on Elizabeth Wilson's (Ms. Wilson) claims against 2 Tower, LLC, JRJ Rhody, Inc., James S. Roland (Mr. Roland), and Jean M. Roland (Mrs. Roland) (collectively the Defendants) alleging breach of contract, fraud, and breach of fiduciary duty. The matter proceeded to trial on October 4 and 5, 2021. Thereafter, the parties submitted posttrial memoranda setting forth their respective arguments.

At trial, Ms. Wilson presented herself, William Nardone, Esq. (Attorney Nardone), Mrs. Roland, and Mr. Roland as witnesses. The Defendants did not present any additional witnesses.

Jurisdiction is pursuant to Rule 52 of the Superior Court Rules of Civil Procedure and G.L. 1956 § 8-2-14.

I

Findings of Fact

The testimony and evidence presented at trial established the following facts.

Ms. Wilson and Mrs. Roland are cousins who enjoyed a lifelong close friendship until the events preceding the filing of this lawsuit destroyed that relationship.

Mrs. Roland is married to her husband, Mr. Roland (collectively the Rolands). Ms. Wilson is a sophisticated businesswoman and attorney engaged in complex bond work in Hong Kong. Ms. Wilson typically travels to Westerly, Rhode Island during the summer months for vacation and to visit her family.

During a visit in the summer of 2011, Mrs. Roland informed Ms. Wilson that she and Mr. Roland had plans to open a restaurant in the Westerly area. At the time, the Rolands owned a successful restaurant in Punta Gorda, Florida where Mrs. Roland was the executive chef and Mr. Roland handled the business operations.

The Rolands retained Attorney Nardone to represent them in the acquisition of the real estate as well as the establishment of their restaurant business in Rhode Island. *See* Pl.'s Ex. 5 (e-mail correspondence between Mrs. Roland and Ms. Wilson dated Sept. 14, 2011) (containing statements regarding Attorney Nardone's involvement). Attorney Nardone—a licensed Rhode Island attorney practicing business, land use, and residential and commercial real estate law—provided highly credible and informative testimony regarding the transaction for the purchase of the property held by 2 Tower, LLC. According to Attorney Nardone's credible testimony, the documents that he prepared were a typical structure used for restaurants and businesses.

Attorney Nardone testified that on July 11, 2011, he prepared documents that led to the formation of two entities on behalf of the Rolands. *See* Defs.' Ex. A (Articles of Incorporation for

JRJ Rhody, Inc.); Defs.' Ex. B (Articles of Organization for 2 Tower, LLC). The first entity was 2 Tower, LLC, a member-managed LLC designed to hold title to the real estate associated with the Rolands' restaurant venture, Ella's Fine Food & Drink (the Restaurant). (Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 3 (stating purpose of 2 Tower, LLC is to "engage in the business of owning, operating, managing, buying, selling, leasing and otherwise dealing with real estate"); *id.* § 9 (member-managed provision); Pl.'s Ex. 41 (Town of Westerly Certificate of Ownership for JRJ Rhody, Inc.) (listing d/b/a name of the Restaurant). The members of 2 Tower, LLC are Mr. Roland, Mrs. Roland, and Ms. Wilson. *See* Defs.' Ex. I at 1; Defs.' Ex. C (Unanimous Written Consent of the Members of 2 Tower, LLC) (listing the Rolands and Ms. Wilson as the members of 2 Tower, LLC).

In addition, Attorney Nardone prepared the document that formed JRJ Rhody, Inc. JRJ Rhody, Inc. was incorporated as the operating company for the Restaurant that the Rolands planned to open. (Pl.'s Ex. 12 (e-mail correspondence between Mr. Roland and Ms. Wilson dated October 5, 2011) (explaining nature of business entities).) The Rolands are the sole shareholders of JRJ Rhody, Inc.

To accomplish this restaurant venture, the Rolands needed investors. After much discussion, Ms. Wilson advised Mrs. Roland that she would be willing to invest $150,000 in the venture. (Pl.'s Ex. 2 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Aug. 26, 2011).)

The Rolands moved forward with their plan to open the Restaurant and eventually purchased the real estate to accommodate it. *See* Defs.' Ex. D (Warranty Deed for 2 and 4 Tower St). The real estate is located at 2 and 4 Tower Street, Westerly, Rhode Island (the Tower Property). *Id.* The purchase price for this property was $925,000. *Id.*

Before the closing, the Rolands, Attorney Nardone, and Ms. Wilson exchanged e-mails concerning Ms. Wilson's investment. *See generally* Pl.'s Exs. 1-2, 4-14, 16-17, 19-21 (e-mail exchanges pertaining to Ms. Wilson's investment); *see also* Defs.' Ex. D (Warranty Deed for the Tower Property) (listing date of deed transfer upon closing). For instance, on August 20, 2011, Mrs. Roland e-mailed Ms. Wilson regarding the closing and suggested that Ms. Wilson prepare documents that would reflect the terms of their agreement. (Pl.'s Ex. 1 (e-mail correspondence from Mrs. Roland to Ms. Wilson dated Aug. 20, 2011).) Ms. Wilson declined and suggested that Attorney Nardone prepare the documents. (Pl.'s Ex. 2 (e-mail correspondence between Ms. Wilson and Mrs. Roland).)

On September 29, 2011, Attorney Nardone e-mailed Ms. Wilson indicating that he represented the Rolands with respect to the transaction. (Pl.'s Ex. 7 (e-mail correspondence between Attorney Nardone and Ms. Wilson dated Sept. 29, 2011).) In the e-mail, Attorney Nardone proposed the terms relative to the $150,000 loan to the Rolands. *Id.* In his e-mail, Attorney Nardone outlined the basic terms of the proposal, including the interest rate as well as an amortization schedule. *See id.*

After reviewing Attorney Nardone's e-mail, Ms. Wilson e-mailed Mrs. Roland on September 30, 2011, and stated that she was confused by the proposal. (Pl.'s Ex. 9 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Sept. 30, 2011).) It was Ms. Wilson's understanding that the funds she was providing was an equity investment, not a loan. *See id.* Ms. Wilson did not want such a significant amount of money tied up on a long-term investment. *See id.* As a result, Mrs. Roland agreed that Ms. Wilson was correct and stated "[w]e wanted you as a partner, 10%" and that she would resolve any points of confusion with Attorney Nardone. *Id.*

Despite Ms. Wilson's position that she was a partner in the Restaurant, the credible trial evidence established that Attorney Nardone and Mr. Roland had subsequent communications with Ms. Wilson to clarify the terms of the proposal and correct certain statements Mrs. Roland made. *See* Pl.'s Exs. 11-12 (e-mail correspondence explaining the terms of proposal to Ms. Wilson).

Mr. Roland e-mailed Ms. Wilson on September 30, 2011, apologized for any confusion, and clearly cemented the terms of the proposal to Ms. Wilson in the e-mail. *See* Pl.'s Ex. 8 (e-mail correspondence between Mr. Roland, Mrs. Roland, and Ms. Wilson dated Sept. 30, 2011). Specifically, the e-mail stated in pertinent part as follows:

> "If you are in agreement, we will make $130k of the money an investment of your partnership into the real estate. That is a 14% stake in the 2 Tower St. Corp. The breakdown would then be 43% , 43% and your 14% stake. The additional $20k will be a loan to the Rolands for use in startup and to be amortized at 3.25%[.]." *Id.*

On October 1, 2011, Mrs. Roland sent Ms. Wilson another e-mail stating as follows:

> "Just wanted to clarify that you will be partner in the business not just real estate. Your name would have to be on the liquor license etc[.] if we structured it different. We ultimately want you to be happy and if you would like to structure things different please let us know." (Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011).)

In reply to Mrs. Roland's e-mail, Ms. Wilson stated, "[w]e're good- am fine with what you propose." *Id.* It is this e-mail exchange that underlies Ms. Wilson's claims. *See id.*; *see also generally* Verified Compl.

On October 3, 2011, Attorney Nardone sent an e-mail to Ms. Wilson stating that his "understanding of the proposal is that you will be providing $150,000, 130k of which will be for a 14% interest in the real estate entity (2 Tower, LLC), and 20k of which will be for a loan to the Rolands[.]" (Pl.'s Ex. 11 (e-mail correspondence from Attorney Nardone to Ms. Wilson dated Oct. 3, 2011).) In addition, Attorney Nardone explained that Ms. Wilson's ownership interest would

be less than 15 percent to ensure she would not be exposed to personal liability for the debts of 2 Tower, LLC. *Id.*

Furthermore, Mr. Roland e-mailed Ms. Wilson on October 5, 2011, that 2 Tower, LLC "is the real estate company from which the operating company works." (Pl.'s Ex. 12 (e-mail correspondence between Mr. Roland and Ms. Wilson dated October 5, 2011).) He explained that the Tower Property and the building erected thereon constitute the assets of the LLC. *See id.* Ms. Wilson, an attorney, did not question Mr. Roland or mention Mrs. Roland's previous statement. *See id.*

At some point in October 2011, Attorney Nardone forwarded Ms. Wilson the documents associated with the business dealings between herself and the Rolands, along with 2 Tower, LLC's Operating Agreement. Ms. Wilson read the Operating Agreement, signed the documents, and returned the signed pages to Attorney Nardone on or before October 19, 2011. *See* Pl.'s Ex. 19 (e-mail correspondence between Ms. Wilson and Mrs. Roland). Accordingly, the credible evidence presented at trial demonstrates that the Operating Agreement constitutes the binding agreement between the Rolands and Ms. Wilson with respect to their business dealings and Ms. Wilson's investment of $150,000. *See generally* Defs.' Ex. I (2 Tower, LLC Operating Agreement). Significantly, the Operating Agreement clearly states that "[t]he purpose of the LLC is to engage in the business of owning, operating, managing, buying, selling, leasing and otherwise dealing with real estate." (Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 3.)

The closing for the Tower Property took place on November 4, 2011. *See* Defs.' Ex. D (Warranty Deed for Tower Property) (listing date of deed executed at closing). Ms. Wilson was not in attendance. *See* Pl.'s Ex. 22 (e-mail correspondence between Mrs. Roland and Ms. Wilson dated Nov. 6 and 7, 2011). At the closing, Shell Realty, LLC conveyed the Tower Property to

2 Tower, LLC via a Warranty Deed. Defs.' Ex. D. (Warranty Deed for Tower Property) (listing date of deed executed at closing).

In addition, 2 Tower, LLC executed a promissory note for $888,250 (the $888,250 Note), and JRJ Rhody, Inc. executed a Small Business Administration (SBA) Loan for $108,800 (the SBA Loan). (Defs.' Exs. F-G ($108,800 and $888,250 Notes).) The SBA Loan was not secured by a mortgage and is not a debt of 2 Tower, LLC. *See* Defs.' Ex. F ($108,800 Note). On the other hand, the $888,250 Note was secured by mortgages on the Tower Property, mortgages on the Rolands' Florida properties, UCC financing statements on restaurant equipment, and personal guarantees made by the Rolands. (Defs.' Ex. G ($888,250 Note), at 3-4.) The Rolands and Ms. Wilson agreed to secure the $888,250 Note with a mortgage on the Tower Property by unanimous consent. (Defs.' Ex. C (Unanimous Written Consent of the Members of 2 Tower, LLC).) In addition, Mrs. Roland executed a $20,000 promissory note (the $20,000 Note) in her capacity as President of JRJ Rhody, Inc. in favor of Ms. Wilson for money lent. (Ex. H ($20,000 Note).)

On April 30, 2012, the Rolands and 2 Tower, LLC executed a mortgage securing repayment of $379,000 as part of the funds borrowed in connection with the $888,250 Note. *See* Defs.' Ex. L (Mortgage dated April 30, 2012); Defs.' Ex. G ($888,250 Note), at 1 (detailing anticipated amount Ocean State Business Development Authority, Inc. would lend); Defs.' Ex. C (Unanimous Written Consent of the Members of 2 Tower, LLC) (providing that the Rolands, individually and as members of 2 Tower, LLC were "authorized to execute any and all documents in connection with [the] purchase and loan").

In October 2015, Ms. Wilson requested an exit from what she believed was an ownership interest in the Restaurant. *See* Pl.'s Ex. 34 (e-mail correspondence between Ms. Wilson and the Rolands in October 2015); Pl.'s Ex. 35 (e-mail correspondence between Ms. Wilson and Mrs.

Roland in November 2015) (Ms. Wilson explaining desire to exit the business). Mrs. Roland expressed concerns regarding the feasibility of meeting that request and advised Ms. Wilson that her desired exit would require refinancing the SBA Loan to repay her investment. *See* Pl.'s Ex. 34 (e-mail correspondence between Ms. Wilson and the Rolands in October 2015).

In a December 2015 e-mail, Ms. Wilson stated that she read the Operating Agreement and interpreted § 8 of the Operating Agreement to conclude that it governs the members' ability to withdraw from the LLC. (Pl.'s Ex. 36 (e-mail correspondence between Mrs. Roland, Ms. Wilson, and Attorney Nardone in December 2015).) Notwithstanding that fact, Ms. Wilson—a skilled attorney—maintains that she did not understand the six-page document. She also maintains that she was misled regarding the formation of JRJ Rhody, Inc. and its status as the operating company for the Restaurant. *See* Defs.' Ex. H (the $20,000 Note). Thus, Ms. Wilson claims that she would not have invested in 2 Tower, LLC if she knew the true nature of said investment before advancing the funds at issue. (Pl.'s Posttrial Mem. 14.)

Yet, at trial, Ms. Wilson acknowledged that she received an e-mail outlining the transaction. *See* Pl.'s Ex. 8 (e-mail correspondence between Mr. Roland, Mrs. Roland, and Ms. Wilson dated Sept. 30, 2011). The outlined transaction was followed. *See* Defs.' Ex. I (2 Tower, LLC Operating Agreement), at 8 (laying out ownership percentages for each member of 2 Tower, LLC); Defs.' Ex. H (the $20,000 Note). Moreover, even though she is a highly skilled attorney in the area of bonds, Ms. Wilson asks this Court to believe that she was unaware of JRJ Rhody, Inc.'s existence despite the fact that she was in possession of the $20,000 Note bearing Mrs. Roland's signature as President of JRJ Rhody, Inc. *See* Defs.' Ex. H (the $20,000 Note).

Here, Ms. Wilson's personal belief that she was made a partner in the business dealings of the Restaurant is against the overwhelming credible evidence on this trial record. *See id.*; Pl.'s Ex.

11 (e-mail correspondence from Attorney Nardone to Ms. Wilson dated Oct. 3, 2011); Pl.'s Ex. 12 (e-mail correspondence between Mr. Roland and Ms. Wilson dated October 5, 2011). Accordingly, this Court finds that Ms. Wilson held a 14 percent interest in 2 Tower, LLC and has no stake in the Restaurant or its operating company (i.e., JRJ Rhody, Inc.). (Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 3.)

On March 24, 2017, Mrs. Roland executed a $225,000 promissory note in favor of First Home Bank in her capacity as President of JRJ Rhody, Inc. (Ex. S ($225,000 Promissory Note).) That note was secured by a mortgage on the Tower Property (the $225,000 Mortgage). (Defs.' Ex. R ($225,000 Mortgage).) There is no dispute that the Rolands failed to notify Ms. Wilson of the $225,000 Promissory Note and Mortgage before executing the documents associated therewith.

Subsequently, the parties entered into a memorandum of understanding (the MOU) on June 18, 2019, in an effort to resolve Ms. Wilson's claim for money owed under the $20,000 Note. (Pl.'s Ex. 54 (MOU dated June 18, 2019).) Pursuant to this agreement, JRJ Rhody, Inc. agreed to pay the balance of the $20,000 Note "in full on or before the close of business on June 20, 2019." *Id.* In addition, Ms. Wilson agreed to provide JRJ Rhody, Inc. "on or before the close of business on June 19, 2019 . . . the balance due on the note with itemization thereof." *Id.*

On June 25, 2019, counsel for Ms. Wilson transmitted a letter to counsel for the Defendants, Attorney Kelly Fracassa, explaining Ms. Wilson's inability to meet her deadline under the MOU. (Defs.' Ex. Y (e-mail exchange between Attorneys Buck and Fracassa dated June 25, 2019).) As a result, it was agreed to modify the MOU. *See id.*

Based on a letter transmitted, the parties agreed—through counsel—that Ms. Wilson would have more time to provide an itemization of the amount owed, with the anticipated fulfillment of that obligation by close of business on June 28, 2019. *Id.* Hence, JRJ Rhody, Inc. was relieved of

its obligation to make payment on June 20, 2019, since Ms. Wilson failed to provide the precise balance owed by the close of business on June 19, 2019. *See id.* However, based on communications with Ms. Wilson, it was estimated that JRJ Rhody, Inc. owed $12,000 and stated that payment in that amount on June 28, 2019, would be credited against the precise sum once tabulated in full. *See id.*

Mr. Roland—as Vice President of JRJ Rhody, Inc.—wrote a check out to Ms. Wilson in the amount of $12,000 on June 19, 2019. (Defs.' Ex. X ($12,000 Check).) Yet, the Defendants admit JRJ Rhody, Inc."didn't pay the $12,000 into the [C]ourt's registry and . . . that [Attorney Fracassa] didn't inform Wilson's counsel that he received the check in late June [2019]." (Defs.' Posttrial Mem. 10.)

II

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon[.]" Super. R. Civ. P. 52(a). Therefore, in a non-jury trial, "[t]he trial justice sits as a trier of fact as well as of law." *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984). Consequently, "[s]he weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." *Id.* The trial justice need not engage in extensive analysis and discussion. *Wilby v. Savoie*, 86 A.3d 362, 372 (R.I. 2014). Strict compliance with the requirements of Rule 52 is not required if a full understanding of the issues may be reached without the aid of separate findings. *Eagle Electric Co., Inc. v. Raymond Construction Co., Inc.*, 420 A.2d 60, 64 (R.I. 1980). Even brief findings and conclusions are sufficient as long as they address and resolve pertinent, controlling factual and legal issues. *Broadley v. State*, 939 A.2d 1016, 1021

(R.I. 2008). A trial justice's findings of fact will not be disturbed unless such findings are clearly erroneous, the trial justice misconceived or overlooked material evidence, or unless the decision fails to do substantial justice between the parties. *Opella v. Opella*, 896 A.2d 714, 718 (R.I. 2006) (quoting *Bogosian v. Bederman*, 823 A.2d 1117, 1120 (R.I. 2003)).

III

Analysis

At trial, Ms. Wilson proceeded under the following counts alleged in her Verified Complaint: Count I, Breach of Contract; Count III, Fraud/Misrepresentation; and Count IV, Breach of Fiduciary Duty. (Pl.'s Posttrial Mem. 2.)

A

Count III: Fraud/Misrepresentation

The Court will first address Ms. Wilson's claim for rescission of the Operating Agreement of 2 Tower, LLC based on a theory of fraud and negligent misrepresentation. (Pl.'s Posttrial Mem. 10-14.)

Ms. Wilson predicates her claim for negligent misrepresentation upon Mrs. Roland's October 1, 2011 e-mail wherein she stated that Ms. Wilson would "be partner in the business not just [the] real estate." *See id.* at 12; Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011).

In response, the Defendants argue that Ms. Wilson cannot prove two key elements for her claim of rescission such that it fails as a matter of law. (Defs.' Posttrial Mem. 12-14.) Specifically, the Defendants maintain that Ms. Wilson cannot prove the Rolands made a false statement or that Ms. Wilson justifiably relied on the allegedly false statements at issue. *Id.* at 12.

It is well settled that "where one induces another to enter into a contract by means of a material misrepresentation, the latter may rescind the contract." *Halpert v. Rosenthal*, 107 R.I. 406, 413, 267 A.2d 730, 734 (1970). To succeed on a claim for negligent misrepresentation, a claimant must establish:

> "'(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.'" *Mallette v. Children's Friend and Service*, 661 A.2d 67, 69 (R.I. 1995) (quoting *Gibbs v. Ernst*, 647 A.2d 882, 890 (Pa. 1994)).

A misrepresentation occurs when there is a "'manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.'" *Halpert*, 107 R.I. at 413, 267 A.2d at 734 (internal quotation omitted). "A misrepresentation becomes material when it is likely to affect the conduct of a reasonable person with reference to a transaction with another person." *Dudzik v. Leesona Corp.*, 473 A.2d 762, 766-67 (R.I. 1984) (citing *Halpert*, 107 R.I. at 413, 267 A.2d at 734).

Furthermore, "'[i]t is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient[.]'" *Halpert*, 107 R.I. at 413, 267 A.2d at 734 (quoting 12 Williston *Contracts* § 1500 at 400-01 (Jaeger 3d ed. 1970)).

Here, the Operating Agreement contains a merger clause providing that the document "constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior agreements and understanding pertaining thereto." (Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 14(e).) That provision became operative on the date the Operating

Agreement was fully executed—i.e., November 4, 2011. *Id.* at 1. The communications at issue precede the effective date of the Operating Agreement, therefore warranting analysis under the parol evidence rule. *See id.* at 1, § 14(e); Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011).

"In general, th[e] [parol evidence] rule prohibits introduction of extrinsic evidence to change, vary, or alter the written terms of an agreement, unless the evidence is offered to show fraud, mistake, or a condition precedent to the existence of the contract." *Lisi v. Marra,* 424 A.2d 1052, 1055 (R.I. 1981) (citing *Supreme Woodworking Co. v. Zuckerberg,* 82 R.I. 247, 252, 107 A.2d 287, 290 (1954); *Allen v. Marciano,* 79 R.I. 98, 102, 84 A.2d 425, 427 (1951)). In addition, evidence of negligent misrepresentation is sufficient to overcome the parol evidence rule such that boilerplate language found in a merger clause will not operate to bar a claim for rescission based on fraud or misrepresentation. *See Halpert*, 107 R.I. at 416, 267 A.2d at 735.

Ms. Wilson's request for rescission of the Operating Agreement is based on a theory of negligent misrepresentation and fraud. *See* Pl.'s Posttrial Mem. 10-14; Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011). Therefore, it is appropriate for the Court to consider the extrinsic evidence Ms. Wilson has in support of those allegations to determine whether the Operating Agreement should be rescinded. *See Marra,* 424 A.2d at 1055; *Halpert*, 107 R.I. at 416, 267 A.2d at 735.

The credible trial evidence demonstrates that Mrs. Roland mistakenly stated to Ms. Wilson that she would be a partner with respect to the Restaurant. *Compare* Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011), *with* Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 3 (stating purpose of 2 Tower, LLC is to "engage in the

business of owning, operating, managing, buying, selling, leasing and otherwise dealing with real estate").

However, despite the fact that Mrs. Roland should have understood the structure and respective purposes of the two entities at issue, the trial evidence demonstrates that it was her husband who handled the books as part of the venture. *See, e.g.*, Defs.' Ex. A (JRJ Rhody, Inc. Articles of Incorporation); Defs.' Ex. B (2 Tower, LLC Articles of Organization); Pl.'s Ex. 8 (e-mail correspondence between Mr. Roland, Mrs. Roland, and Ms. Wilson dated Sept. 30, 2011). Furthermore, Mrs. Roland's statement was material in nature because it was offered with the purpose of solidifying Ms. Wilson's investment. *See* Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011); *Dudzik*, 473 A.2d at 766-67. However, the credible evidence established that Ms. Wilson's reliance on Mrs. Roland's innocent misrepresentation was neither reasonable nor justified under the circumstances. *Compare* Pl.'s Ex. 10 (e-mail correspondence between Ms. Wilson and Mrs. Roland dated Oct. 1, 2011), *with* Pl.'s Ex. 8 (e-mail correspondence between Mr. Roland, Mrs. Roland, and Ms. Wilson dated Sept. 30, 2011) *and* Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 3 (stating purpose of LLC). First, Ms. Wilson is an experienced attorney familiar with documents. Also, on September 30, 2011, the terms of the proposed agreement were unambiguously stated and sent to Ms. Wilson. (Pl.'s Ex. 8 (e-mail correspondence between Mr. Roland, Mrs. Roland, and Ms. Wilson dated Sept. 30, 2011).) It was claimed that the investment would be made "*into the real estate*[]" with "a 14% stake in the 2 Tower St. Corp." *Id.* (emphasis added). Furthermore, Attorney Nardone's e-mail to Ms. Wilson dated October 3, 2011, stated that her investment would "be for a 14% interest *in the real estate entity* (2 Tower, LLC)[.]" (Pl.'s Ex. 11 (e-mail correspondence from Attorney Nardone to Ms. Wilson dated Oct. 3, 2011) (emphasis added).)

Thereafter, at Ms. Wilson's suggestion, Attorney Nardone proceeded with drafting the Operating Agreement, wherein it states that the purpose of 2 Tower, LLC is to "engage in the business of owning, operating, managing, buying, selling, leasing and otherwise dealing with real estate." (Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 3.) Ms. Wilson signed the Operating Agreement on October 4, 2011. *See id.* at 1, 7.

In light of credible evidence, Ms. Wilson failed to demonstrate reasonable or justifiable reliance on Mrs. Roland's statements that she would be a partner in the restaurant business because the weight of the credible evidence proves otherwise. *See id.* § 3; Pl.'s Ex. 11 (e-mail correspondence from Attorney Nardone to Ms. Wilson dated Oct. 3, 2011); Pl.'s Ex. 8 (e-mail correspondence between Mr. Roland, Mrs. Roland, and Ms. Wilson dated Sept. 30, 2011).

Therefore, Ms. Wilson's claim for rescission under Count III fails as a matter of law. *See Mallette*, 661 A.2d at 69.

B

Breach of Contract

The Court will now address Ms. Wilson's claim for breach of contract under Count I of her complaint. Verified Compl.

Ms. Wilson asserts that the Rolands breached the Operating Agreement by "mortgaging the [Tower] [P]roperty without [Ms.] Wilson's consent, using those funds to finance the restaurant, and making other major financial decisions without abiding by the notice, meeting, and voting provisions of the [O]perating [A]greement[.] Pl.'s Posttrial Mem. 14. Based upon these allegations, Ms. Wilson seeks recovery of "damages, costs, and attorney's fees." *Id.* at 19. In addition, Ms. Wilson maintains that the Rolands are in breach of the $20,000 Note Mrs. Roland executed—as President of JRJ Rhody, Inc.—in favor of Ms. Wilson. *Id.* at 15. Here, Ms. Wilson

seeks an order for JRJ Rhody, Inc. to pay the $20,000 Note in full, including interest and late fees. *Id.* at 19.

The burden of proof in an action for breach of contract rests squarely with the plaintiff to demonstrate a breach that entitles them to relief. *Gorman v. St. Raphael Academy*, 853 A.2d 28, 33 (R.I. 2004). To succeed on a breach of contract claim under Rhode Island law, a plaintiff must prove that (a) an agreement existed between the parties, (b) the defendant breached the agreement, and (c) the breach caused the plaintiff to suffer damages. *Petrarca v. Fidelity & Casualty Insurance Co.*, 884 A.2d 406, 410 (R.I. 2005).

Ms. Wilson's argument that the Rolands' use of funds from the $225,000 mortgage on the Tower Property for the benefit of JRJ Rhody, Inc. does not provide a basis for breach of contract under the Operating Agreement. Rather, Ms. Wilson's Verified Complaint clearly seeks relief for this conduct based on a theory of breach of fiduciary duty. *See* Verified Compl. ¶¶ 70-80. The use of the funds stemming from the $225,000 mortgage on the Tower Property is therefore not relevant to Ms. Wilson's claim for breach of contract. *Compare id.*, *with* Pl.'s Posttrial Mem. 15, 17-18. Consequently, the breach of contract issues under Count I are two-fold.

The first issue is whether the Rolands' failure to provide notice to Ms. Wilson to vote on the $225,000 mortgage of the Tower Property and other major financial decisions for 2 Tower, LLC constitutes a breach of the Operating Agreement for which the Rolands are liable to Ms. Wilson for 14 percent of the purchase price for the Tower Lot. *See* Pl.'s Posttrial Mem. 14-15.

The second issue is whether damages are owed to Ms. Wilson under the $20,000 Note with respect to the calculation of interest and late fees because there is no dispute regarding the principal amount owed by JRJ Rhody, Inc. *See* Defs.' Posttrial Mem. 8-11.

1

Failure to Provide Notice

In Rhode Island, it is well settled that unambiguous contractual terms "will be given their plain and ordinary meaning." *DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474, 482 (R.I. 2004) (citing *Perry v. Garey*, 799 A.2d 1018, 1023 (R.I. 2002)). '"[A] contract is ambiguous only when it is reasonably and clearly susceptible of more than one interpretation."' *Perry*, 799 A.2d at 1023 (quoting *Hilton v. Fraioli*, 763 A.2d 599, 602 (R.I. 2000)). "If the terms are found to be unambiguous, however, the task of judicial construction is at an end and the parties are bound by the plain and ordinary meaning of the terms of the contract." *Zarrella v. Minnesota Mutual Life Insurance Co.*, 824 A.2d 1249, 1259 (R.I. 2003).

Section 11 of the Operating Agreement is unambiguous and provides that the Members of 2 Tower, LLC "shall be entitled to vote in proportion to the Member's capital account in relation to the entire capital of the LLC." (Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 11.) It further provides that "[t]he affirmative vote of Members entitled to vote, representing a majority of the capital of all membership interests which have not been assigned" are required to approve of "[t]he sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the LLC[.]" *Id.* § 11(b).

Applying the plain and ordinary meaning to these provisions means that each member of 2 Tower, LLC must receive notice of a proposed action on which they are entitled to vote. *See id.*; *DeCesare*, 852 A.2d at 481. Here, the action at issue is the decision to mortgage the Tower Property to secure the $225,000. *See* Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 11; *DeCesare*, 852 A.2d at 481.

The credible evidence presented, and the Defendants' admissions, established that the Rolands did not comply with § 11 of the Operating Agreement while encumbering the Tower Property. *See DeCesare*, 852 A.2d at 481; *Zarrella.*, 824 A.2d at 1259; Defs.' Pretrial Mem. 37. However, Ms. Wilson's breach of contract claim based on noncompliance with the notice and voting requirements provided in the Operating Agreement fails for the following reasons.

First, the SBA Loan is not an obligation of 2 Tower, LLC and does not encumber the Tower Property. *See generally* Defs.' Ex. F ($108,800 Promissory Note). As such, it does not provide a basis for breach of contract. *See id.*; *Petrarca*, 884 A.2d at 410.

Second, Ms. Wilson consented to the $379,000 borrowed from the Ocean State Business Development Authority on April 30, 2012, by signing the document entitled "Unanimous Written Consent of the Members of 2 Tower, LLC," dated April 4, 2011. *See* Defs.' Ex. G ($888,250 Note), at 1 (detailing anticipated amount Ocean State would lend); Defs.' Ex. C (Unanimous Written Consent of the Members of 2 Tower, LLC) (providing that the Rolands, individually and as members of 2 Tower, LLC were "authorized to execute any and all documents in connection with [the] purchase and loan"). Accordingly, there is no basis for breach of contract with respect to the $379,000 loan either. *See Petrarca*, 884 A.2d at 410.

Third, § 9 of the Operating Agreement states that "[t]he business and affairs of the LLC shall be managed by the Members[]" and that "[c]onsent of at least fifty-one (51%) percent of the membership interests shall be required for the LLC to act with respect to the management, conduct and operation of the business in all respects and in all matters." Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 9; *see also* G.L. 1956 § 7-16-19 (statutory provision providing same requirements). While § 11 requires that notice be given for votes to mortgage the LLC's property, it clearly provides that such a decision requires the affirmative vote of members whose combined

interests would constitute a majority of the unassigned interests in the LLC. *See* Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 11. The Rolands collectively control 86 percent of the voting rights for the LLC and voted in favor of the actions taken. *Id.* at 8. Therefore, the Rolands' failure to comply with the notice and voting provisions amounted to technical breaches of the Operating Agreement. *See id.*; *see also id.* §§ 9, 11.

What is more, Ms. Wilson failed to establish that she suffered damages for breach of the notice requirements under § 11 of the Operating Agreement. *See* Pl.'s Posttrial Mem. 15. In arguing this point, Ms. Wilson submits that she is entitled to a 14 percent interest of the $925,000 purchase price for the Tower Property because the Rolands "reduced the equity in the real estate directly affecting Ms. Wilson's share." *Id.*

However, Ms. Wilson ignores the fact that 2 Tower, LLC's business purpose is to deal in real estate, which includes the ability to mortgage the property. *See* Defs.' Ex. I (2 Tower, LLC Operating Agreement), §§ 3, 11. There was no evidence on this issue that established that the decision to encumber the Tower Property has caused Ms. Wilson to incur damages. Rather, the evidence readily demonstrates that Ms. Wilson agreed to be bound by the Operating Agreement, a document which clearly authorizes its members to mortgage the assets of 2 Tower, LLC. *See id.* §§ 3, 9, 11. Accordingly, Ms. Wilson's conclusory assertions directly contradict the plain and ordinary language of the Operating Agreement and fail to establish that she suffered damages based on a technical breach thereof. *See id.*; *Petrarca*, 884 A.2d at 410.

2

Amount Owed Under $20,000 Note

On the issue of the amount owed under the $20,000 Note, the parties do not dispute the amount of principal due and owing. *See* Defs.' Posttrial Mem. 8-10. Accordingly, judgment shall

enter in Ms. Wilson's favor under Count I for breach of the $20,000 Note. *See id.*; Verified Compl. ¶¶ 42, 44-46. However, the parties dispute the amount of interest JRJ Rhody, Inc. should pay based on a memorandum of understanding dated June 18, 2019 (the MOU) and the events transpiring thereafter. *Compare* Defs.' Posttrial Mem. 8-10, *with* Pl.'s Posttrial Mem. 15.

Ms. Wilson maintains that JRJ Rhody, Inc. should be liable for the interest that has accrued on the $20,000 Note since its incipiency and that the MOU has no impact on the calculation of interest owed under the $20,000 Note. (Pl.'s Posttrial Mem. 15.) Ms. Wilson thus argues that the balance owed as of November 10, 2021, was $13,949.71 with interest continuing to accrue at the agreed rate thereafter. *Id.*

The Defendants argue that the doctrine of tender should apply because JRJ Rhody, Inc. was ready, willing, and able to pay the estimated balance of $12,000 pursuant to the MOU and subsequent modifications to the same. *See* Defs.' Posttrial Mem. 8-10; (Defs.' Ex. Y (e-mail exchange between Attorneys Buck and Fracassa dated June 25, 2019). As such, the Defendants conclude that the Court should find that the amount effectively owed as of July 4, 2019, was reduced to $599.38 such that interest at the contractually agreed to rate of 3.25 percent only attached to that amount after July 4, 2019. *See* Defs.' Posttrial Mem. 10. The Defendants also submit that neither pre-judgment nor post-judgment statutory interest should attach pursuant to G.L. 1956 § 9-21-10(a) because the $20,000 Note contains a contractually agreed to interest rate. *Id.* at 11.

The Defendants rely on three cases to argue their position regarding tender. *See id.* at 9-10 (quoting and relying on *Stillman v. Justice*, 132 So. 107, 108 (Fla. 1931); *Adams v. Hackensack Improvement Commission*, 44 N.J.L. 638, 642 (1882); *Hills v. Place*, 48 N.Y. 520 (1872)). However, these cases do not lend support to the Defendants' position for the following reasons.

In *Stillman v. Justice*, the court relied on a Florida statute to hold that a plea of tender accompanied by a deposit of money with the court "of a sufficient sum to cover the amount due at the date of the occurrence of the act . . . equivalent to tender, would, if sustained by proof . . . suspend the running of interest on the amount due at that time and bar the liability of defendant for costs and charges incurred *after the occurrence of the acts made by statute equivalent to tender*." *Stillman*, 132 So. at 108 (emphasis added).

In *Adams v. Hackensack Improvement Commission*, the court held that "[t]he only effect of the payor having the money *at the bank where the paper is payable* is, that it will enable him to plead a tender in exoneration of interest and costs of suit, *provided he makes his tender good by payment of the principal into court*." *Adams*, 44 N.J.L. at 647 (emphasis added).

Third, in *Hills v. Place*, the court held that if the obligor "*was ready at the time and place appointed to pay it*, and there was no one there to receive the money[]" such action would have been "equivalent to a tender of the sum payable," such that "an answer pleading that fact, *and a payment of the money due into court*, would be a bar to a recovery of interest and costs[.]" *Hills*, 48 N.Y. at 522-23 (emphasis added).

Based on these holdings, the Defendants' reliance on *Stillman*, *Hills*, and *Adams* is unpersuasive because: (a) there was insufficient evidence to show that JRJ Rhody, Inc. was ready to make payment at the bank in Hong Kong as required under the $20,000 Note, (b) there is no evidence that the $12,000 check was deposited at the bank in Hong Kong, and (c) the $12,000 was never deposited into this Court's registry. *See Stillman*, 132 So. at 108; *Adams*, 44 N.J.L. at 647; *Hills*, 48 N.Y. at 522-23.

Moreover, in *Sweeney v. Brow*, 40 R.I. 281, 100 A. 593 (1917), our Supreme Court addressed whether it was appropriate to suspend the attachment of interest after the purchaser of

certain real estate (the Complainant) made the advanced payment required under the contract and tendered the balance of the purchase price—prior to the creditor's rejection of said tender—in accordance with the contract. *See Sweeney*, 40 R.I. at 284-85, 100 A. at 594-95.

On that issue, the *Sweeney* Court held that the Complainant "would have been relieved from any charge for interest[]" if he "deposited the amount in the bank to the credit of the respondent, and had he notified the respondent that such deposit had been made[.]" *Id.* at 290, 100 A. at 595. Furthermore, the Court highlighted the importance of "a continuous readiness to pay," and held that it "means something *more than a mere mental attitude amounting to a desire or willingness to pay should an opportunity be afforded to do so*. It means *setting aside or appropriating the required amount in such a manner and under such conditions as would exclude the vendee from any benefit or advantage which might otherwise accrue to him therefrom*." *Id.* at 294, 100 A. at 596-97 (emphasis added).

Accordingly, *Sweeney* further undermines the Defendants' argument because: (a) the money was not deposited into the designated bank; (b) neither Ms. Wilson nor her attorney had notice of the $12,000 check; and (c) the Defendants failed to prove that JRJ Rhody, Inc. set the funds for the $12,000 check aside in such a manner that it could no longer derive benefit therefrom. *See id.* at 595-97. Therefore, the contractually agreed to rate of 3.25 percent continued to attach to the full amount owed. *See id.*

With respect to the issue of pre-judgment and post-judgment interest, that issue was not before the Court at trial and is therefore not implicated by the applicable standard of review. *See Hood*, 478 A.2d at 184. As such, either party may bring an appropriate motion on the issue of statutory interest at their election, and the Court will reserve on that issue to the extent it is in dispute.

C

Breach of Fiduciary Duty

The final issue before the Court is whether the Rolands, in their capacity as members of 2 Tower, LLC, breached fiduciary duties owed to Ms. Wilson. *See* Verified Compl. ¶¶ 71-80. In support of this claim, Ms. Wilson maintains that the Rolands breached fiduciary duties by: (a) misleading Ms. Wilson regarding the nature of her investment; (b) violating the notice and voting provisions of the Operating Agreement; (c) mortgaging the Tower Property notwithstanding Ms. Wilson's request to withdraw from 2 Tower, LLC and the instant lawsuit; and (d) engaging in self-dealing. (Pl.'s Posttrial Mem. 17-18.)

In response, the Defendants "agree that [the Rolands], as majority members of the LLC, owe a fiduciary duty to [Ms.] Wilson as a minority member." (Defs.' Posttrial Mem. 14.) However, they argue that they did not commit a breach of fiduciary duty because the Rolands' actions were not taken in bad faith and do not amount to constructive fraud. *Id.* at 14-15. With respect to violations of the notice and voting provisions under the Operating Agreement, the Defendants surmise that those violations can be remedied by subsequent ratification of the business decisions at issue. *Id.* at 16-17. The Defendants further maintain liability should not attach because Ms. Wilson failed to prove that she suffered damages as the proximate result of the Rolands' allegedly wrongful conduct. *See id.* at 15, 18.

It is well settled that breach of a fiduciary duty amounts to constructive fraud. *See Matarese v. Calise*, 111 R.I. 551, 564, 305 A.2d 112, 119 (1973); *Cahill v. Antonelli*, 120 R.I. 879, 883, 390 A.2d 936, 938 (1978). In general, "the elements of a fiduciary duty claim consist of '(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.'" *Chain Store Maintenance, Inc. v. National Glass & Gate Service, Inc.*, No. Civ. A. PB

01-3522, 2004 WL 877599, at *13 (R.I. Super. Apr. 21, 2004) (*National Glass*) (quoting *Griffin v. Fowler*, 579 S.E.2d 848, 850 (Ga. App. 2003) and then citing *Lyons v. Midwest Glazing*, 265 F. Supp. 2d 1061, 1076 (N.D. Iowa 2003); 37 Am. Jur. 2d *Fraud and Deceit* § 31.)

Here, the Court has previously found that Ms. Wilson knew about JRJ Rhody, Inc. and its status as the operating company for the Restaurant. *See* Defs.' Ex. H ($20,000 Note); Pl.'s Ex. 11 (e-mail correspondence from Attorney Nardone to Ms. Wilson dated Oct. 3, 2011); Pl.'s Ex. 12 (e-mail correspondence between Mr. Roland and Ms. Wilson dated October 5, 2011). Therefore, Ms. Wilson's claim that the Rolands breached fiduciary duties by not disclosing the formation of an entity separate from that of 2 Tower, LLC to operate and manage the Restaurant fails.

The Defendants' argument regarding the potential for future ratification of actions taken in violation of the Operating Agreement is unpersuasive. *See Hood*, 478 A.2d at 184. The fiduciary duties that the Rolands owe to Ms. Wilson are based not only on the Defendants' admissions—they are also rooted in statutory law. *See* §§ 7-16-14, 7-16-15, 7-16-17(a). The Operating Agreement provides that the LLC is to be managed by its members. *See* Defs.' Ex. I (2 Tower, LLC Operating Agreement), § 9. Here, § 11 of the Operating Agreement permits the LLC to mortgage its assets with an affirmative vote of the members. *See id.* § 11. Thus, the Rolands, in their capacity as members of 2 Tower, LLC, did not breach any fiduciary duties owed to Ms. Wilson.

IV

Conclusion

Based on the foregoing, judgment shall enter in favor of the Defendants with respect to Count III, Count IV, and Ms. Wilson's claim for breach of the Operating Agreement under Count I.

Conversely, judgment shall enter against the Defendants under Count I for breach of the $20,000 Note in accordance with this Decision.

Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Elizabeth A. Wilson v. 2 Tower, LLC, et al.**
CASE NO:	**WC-2017-0018**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**September 20, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Michelle A. Buck, Esq.**
For Defendant:	**Kelly M. Fracassa, Esq.**