

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF BROOKLYN: TRIAL PART COMMERCIAL 11

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4 DORINE BORRIELLO , individually, and as Trustee of the
5 LoConte Family Irrevocable Trust f/b/o Dorine
6 Borriello, and derivatively on behalf of CATERINA
7 REALTY, LLC,

8 Plaintiff, Index No.
9 503180/13

10 - against -

11 MICHAEL LO CONTE, individually, and as Trustee of the
12 LoConte Family Irrevocable Trust f/b/o Michael LoConte
13 DIANE SCHMIDT, individually, and as Trustee of the
14 LoConte Family Irrevocable Trust f/b/o Diane Schmidt,
15 and MARIA PENNEY SELIGSON, individually, and as Trustee
16 of the LoConte Family Irrevocable Trust f/b/o Maria
17 Penney Seligson,

18 Defendants,

19 -and-

20 CATERINA REALTY, LLC and THE LO CONTE FAMILY
21 IRREVOCABLE TRUST,

22 Nominal Defendants.

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24 360 Adams Street
25 Brooklyn, New York 11201
August 16, 2016

BEFORE:

HONORABLE SYLVIA ASH, Justice

APPEARANCES:

THOMAS TORTO, ESQ.
Attorney for the Plaintiff
419 Park Avenue South
New York, New York 10016

CHIESA, SHAHINIAN & GIAN TOMASI, PC
Attorneys for the Defendants
One Boland Drive

West Orange, New Jersey 07052

BY: HOWARD J. SCHWARTZ, ESQ., Of Counsel

THERESA J. SANTILLI,
Official Court Reporter

1 THE COURT: Good morning.

2 At the close of business yesterday the
3 defendant made a motion for directed verdict. The Court,
4 having had the opportunity to review the testimony of the
5 parties and the exhibits, is prepared to render its
6 decision.

7 Before the Court is defendants' motion for a
8 directed verdict. A motion for directed verdict may be
9 granted when the Court, accepting as true evidence of the
10 non-moving party and all inferences reasonably drawn
11 therefrom, determines that by no rational process could
12 the trier of fact find in a non-movant's favor.

13 Upon hearing plaintiff's case, the Court has
14 determined that no trier of fact could find that the
15 actions of defendants were a breach of the fiduciary
16 duties as members and managers of Caterina, L.L.C.

17 The crux of plaintiff's case is the allegations
18 that defendants have engaged in self-dealing by voting in
19 favor of a lease agreement whereby Caterina receives an
20 annual rent of \$342,000 from its sole tenant, Jersey
21 Lynne Farms.

22 Plaintiff alleges that this annual rent is
23 below market rate and that the fair market rate for the
24 property is closer to 600,000 a year.

25 Both sides produced qualified appraisal experts

1 in support of their position. Upon hearing the testimony
2 in this matter, the Court is convinced that the
3 defendants, in relying on the advice of their previous
4 counsel, Steven Schwartz, to obtain an independent
5 appraisal to determine the fair-market value of the rent
6 of Caterina, L.L.C. did not breach their fiduciary duties
7 by retaining the services of M.C. O'Brien to conduct the
8 appraisal.

9 The mere fact that M.C. O'Brien had previously
10 performed appraisals for the family's companies during
11 the past two decades fails to demonstrate that the
12 subject appraisal report was not independent.

13 There is no indication that the existing
14 business relationship clouded Mr. Malcolm Newman's
15 professional judgment and duty to perform an independent
16 appraisal.

17 Mr. Newman testified that he did not have any
18 input from any of the members when conducting the
19 appraisals; that his appraisal was not influenced by the
20 fact that Caterina and Jersey Lynne were comprised of the
21 same shareholders; and that at the time the appraisal was
22 done, he was unaware that plaintiff was no longer an
23 employee or officer of Jersey Lynne. Mr. Newman also
24 testified that he based the yearly rent of \$342,000 on
25 similar properties in the neighborhood.

1 Although plaintiff's expert testified that the
2 fair-market annual rent for the property is \$560,000,
3 three out of the four properties used by plaintiff's
4 expert for his appraisal were located in Queens.

5 Moreover, plaintiff's expert's report was done
6 for the purpose of litigation. Additionally, plaintiff's
7 expert testified that he cannot give an opinion as to
8 whether or not it was improper for O'Brien to perform the
9 appraisal.

10 Based on the above, the Court accords the
11 defendants' expert testimony more weight in determining
12 the fair-market weight of the subject property.

13 However, even if the plaintiff's expert's
14 appraisal reflected a lower amount than the fair-market
15 value, Caterina's operating agreement protects members so
16 long as they rely on an expert.

17 Moreover, defendants have established that
18 since 2011 Caterina has remained profitable, as plaintiff
19 conceded as much during her testimony.

20 In this regard, plaintiff fails to proffer any
21 reason why defendants were not entitled to rely on
22 Mr. Newman's report.

23 Accordingly, there is no evidence that
24 defendants breached any fiduciary duty to Caterina, and
25 the Court hereby renders judgment in favor of defendants.

1 That is the decision of the Court.

2 MR. SCHWARTZ: Thank you, your Honor.

3 THE COURT: You're welcome.

4 Based on the Court's decision, this matter is
5 now concluded.

6 If there are to be any motions or applications,
7 you may make the application now.

8 MR. TORTO: I take an exception to the ruling.

9 THE COURT: Duly noted, counsel. Duly noted.

10 All right, good luck to everyone.

11 And I hope that this family can unite and come
12 back together. I'm sure your parents are not pleased
13 with the situation as it is, and, you know, sometimes you
14 have to put business aside and take into consideration
15 that family comes first, and that, you know, family is
16 important. So just consider that.

17 All right.

18 MR. TORTO: I would just say that your Honor's
19 decision is contrary to the findings by Judge Demarest
20 and the conclusions in her order dated February 24th,
21 2014. And the same proof was presented as part of the
22 plaintiff's direct case that was presented to the Court,
23 and under Judge Demarest's order, clearly a prima facie
24 case is made out and it was a question of fact for the
25 Judge at the end of the case to render a decision.

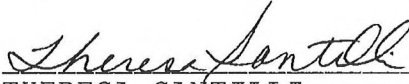
1 THE COURT: Well, the Judge, based on the
2 facts, the Judge reached her conclusion, even though it
3 may be contrary to Judge Demarest. Based on the
4 testimony and evidence that I heard, the Court stands by
5 its decision.

6 And counsel, your exception to the Court's
7 ruling is duly noted, and you know what remedy -- what
8 your next move is, if you so decide.

9 Good luck to everyone.

10 MR. SCHWARTZ: Thank you very much.

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12 CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

13 
14 THERESA SANTILLI,
15 OFFICIAL COURT REPORTER

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