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SUPREME COURT OF THE STATE OF NEW YORK.
COUNTY OF NEW YORK - CIVIL TERM - PART 54

-----X

MICHAEL KADOSH, on behalf of himself and as a
Member and in the right of
213 WEST 85th STREET LLC,

Plaintiffs,

-against-

DAVID KADOSH, 114 West 71st STREET, LLC.,
30 LEXINGTON AVENUE, LLC and 3D
IMAGING CENTER CORP.,

Defendants.

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Index # 651834/2010
PROCEEDINGS

60 Centre Street
New York, New York 10007
January 13, 2015

B E F O R E:

HONORABLE SHIRLEY WERNER KORNREICH,
Justice.

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ALDORINE WALKER, RPR
Official Court Reporter

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2 THE COURT: There are two motions before me. One
3 is basically Receiver's application to be paid, and to
4 release what he holds in escrow. And the other is a motion
5 for partial summary judgment. And it is basically to
6 dismiss claims and counterclaims. That's as much as I can
7 read of my handwriting. But let's deal with the Receiver
8 first.

9 And let me just start by saying, I have appointed
10 Receivers before, but this Receiver, without question, was
11 the best Receiver I have ever appointed. I was
12 extraordinarily impressed and thankful, because this is such
13 a difficult case, emotionally, because the parties fight
14 with each other. It's two brothers, and it's just a
15 terrible battle. And the property that is implicated in the
16 Receiver case, it's a building on 85th Street. And,
17 basically, the brothers were so -- their fight with each
18 other was so emotional and so important to them that they
19 were losing money on a property that should have been making
20 money. And I had no choice but to appoint a Receiver to
21 manage the property. And as soon as the Receiver went in,
22 the property started to throw off money. It was handled
23 extraordinarily well. And I think everybody, including the
24 brothers, were grateful, although they gave the Receiver a
25 lot of agita. And so, it was not at all an easy job. And
26 you did it remarkably well, so well that at one point I

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2 decided, once I granted the dissolution, that I wanted him
3 to be the Receiver for the dissolution as well. So, in a
4 sense, this Receiver did two different things. First, he
5 was the one who dealt with managing the building. And I
6 think that was separate from his appointment to sell the
7 building. And I believe it was the LLC. It was the LLC's
8 only asset. So, he then became the Receiver for the
9 dissolution. And I don't remember the date upon which I
10 appointed him for the dissolution. Does anybody know that
11 date?

12 MS. BERRY: I think it was October 2013.

13 THE COURT: Because it was a previous date that I
14 had appointed him and I wrote it down.

15 MR. ZAPSON: The order is Exhibit D to my papers.

16 MS. BERRY: October 21, 2013 after the oral
17 argument on motion, cross-motion upon an order of
18 dissolution of 213 West 85th Street, LLC.

19 MR. ZAPSON: She is correct, October 21, 2013.

20 THE COURT: And I had previously appointed him to
21 manage the building, I believe.

22 MR. ZAPSON: That's a different case.

23 THE COURT: Pardon?

24 MR. ZAPSON: In the other case.

25 THE COURT: Yes. And for managing the building, I
26 believe that it's a separate type of thing. I believe it

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would be the fee under CPLR 8004 for the management of the building, and then BCL 1217 for the dissolution. That's the way I read it. But I will hear argument.

Does anybody want to argue about his fee?

MS. BERRY: Well, yes, I will just make a brief statement.

THE COURT: And you represent?

MS. BERRY: My name is Christiane Berry, and I'm the attorney for the court-appointed Receiver, attorney Robert Lewis, who is here today. Thank you for your remarks.

THE COURT: And I am sorry that he had to hire an attorney to do this. And I must say that what was remarkable, it's one of the only cases where I had a Receiver, who is an attorney, not hire another attorney but did the closing and did anything else. I mean he was truly remarkable. I just want to say that.

MS. BERRY: Thank you, Your Honor.

I have previously stated my position in a memorandum of law that I submitted to the Court, and it has been electronically filed. I know that there was opposition from both parties and I replied --

THE COURT: Well, only one party really opposed the fee. The other party only wanted the money to stay in escrow, and they both want that. And I think it's a very

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2 good idea. Whether Mr. Lewis is willing to just keep it in
3 escrow or whether we have to put it in another account, it's
4 up to him. I really think at this point it should be up to
5 him. And it should be very little effort to keep it in an
6 escrow account. But, again, it's up to him.

7 So, the objection of both of them to releasing the
8 money, or least one of them to releasing the money, I agree
9 with. I think the money has to stay there until everything
10 is worked through, the accounting and even the case, because
11 I think there is an overlapping between all the different
12 causes of action. But in terms of the fees, what is your
13 position?

14 MS. BERRY: My position is, Your Honor, that the
15 Receiver is entitled to his request of five percent of the
16 sales proceeds for the building.

17 THE COURT: Excuse me. I'm sorry.

18 (Pause in the proceedings.)

19 THE COURT: Sorry about that. Okay. So, you
20 believe it should be a straight five percent?

21 MS. BERRY: Yes, I do believe that Mr. Lewis, for
22 all his work, is entitled to the statutory maximum of five
23 percent.

24 THE COURT: I agree with you in terms of the -- and
25 I can't remember the dates. For the management, absolutely.
26 I mean, he absolutely is entitled, I believe, to the five

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2 percent. I don't believe I have the ability to award him
3 the straight five percent for the dissolution. And we are
4 going to have to divide up the management of the building
5 and the dissolution.

6 MS. BERRY: Your Honor, it's not clear to me why
7 that is necessary.

8 THE COURT: Well, because there is caselaw that
9 says, basically, if there is an overlap -- if it involves
10 the dissolution, the dissolution trumps CPLR 8004. And even
11 though it's an LLC, it throws a little bit of a wrench into
12 the issue because there is no fee provision in the LLC law,
13 but the courts look at BCL all the time. And it seems to me
14 that following what would happen in the BCL case, and that's
15 Amusement Distributors Incorporated v. Oz Forum
16 Incorporated, 113 AD2d 855, Second Department 1985 case, and
17 there are other cases that basically say, look, you know,
18 you can't get 8004 fees for dissolution, you just can't.
19 And I think --

20 MS. BERRY: Well, Your Honor, you often refer to
21 8004, but the dominant statute here, which should govern the
22 outcome of this case, is CPLR 6401, which is where he was
23 appointed under. And so, you know, when he was appointed as
24 Receiver, it was pursuant to that provision.

25 THE COURT: For his management, I agree, anything
26 he did to manage the building. As a manager, he gets CPLR

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2 8004 fees, the fees under the CPLR, which is five percent.
3 However, for the sale of the building, which involve the
4 dissolution of the LLC, I believe BCL 1217 governs.

5 And does anybody else have anything to say about
6 this, any of the other parties?

7 MR. ZAPSON: Yes, Your Honor. I did a lot of
8 research and review also, and I would think that with regard
9 to the sale of the building is BCL 1217. And I included
10 what I thought was an accurate calculation based upon the
11 numbers that Mr. Lewis had submitted. And it is still a
12 substantial fee, over \$115,000. So, it's not like -- and
13 Mr. Lewis did a great job. So, everyone is very happy to
14 see him get paid, and it's a substantial fee. And I think
15 that --

16 THE COURT: It's five percent on the first 25,000,
17 and two-and-a-half percent on the next 80,000, and one
18 percent on the remainder. I wish it could be more, but it
19 isn't. It's just for the sale of the building. Everything
20 else he gets the five percent on, all the management, even
21 as it is extended. I'm giving him five percent on
22 everything except for the sale of the building.

23 MS. BERRY: Your Honor, I am familiar with the
24 cases that this attorney is referring to in his brief, and
25 none of them are on point.

26 THE COURT: I did my own research, and I thought

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2 about this long and hard. And it's my feeling that this is
3 what should happen here.

4 MS. BERRY: And, Your Honor, the case you cited was
5 113 AD2d --

6 THE COURT: Only on the point that if it involves a
7 dissolution, you can't follow the CPLR five percent fee.

8 MS. BERRY: That is what this case says?

9 THE COURT: I think there are a lot of cases that
10 say that. This may be one of them. No, this is not that
11 case. This case deals with CPLR 8004. I'm sorry. Does it?
12 Now I don't remember because I didn't write notes on it. It
13 just explains when you get the 8004. And based upon what he
14 did, he gets the 8004. But I think for dissolution, it's
15 BCL. I know it is from everything I read. For dissolution,
16 it would have to follow -- this may be just dealing with
17 8004. But for a BCL case, I believe I have to follow it.
18 There is caselaw that speaks to it. And, basically, when
19 there is a dissolution, it has to be a different fee.

20 MR. ZAPSON: The only other thing I would like to
21 just verify, Your Honor, is that the monies, because they
22 are substantial, be in an interest-bearing account. I think
23 this whole thing is not as low as we thought it was. Six,
24 \$7 million, even one percent interest is a lot of interest.

25 THE COURT: Is it in an interest-bearing account?

26 MR. LEWIS: It's in a high yield Chase money market

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account where I earn exactly five basis points, Your Honor.

THE COURT: That's wonderful. And it's typical that you have done that because you have been, as I said, remarkable.

MR. LEWIS: But I earn five basis points, Your Honor. That's like nothing.

THE COURT: I understand, but that's what the interest rates are now. And we don't want any of this money at risk.

MR. LEWIS: No, it's not.

THE COURT: I know that, that's why it is such a small amount. So, basically, the calculations have to be done, but that's going to be the basis for the calculations.

MR. LEWIS: Is it five percent on the first 25,000?

THE COURT: Yes, BCL 1217. And it's statutory. On the first 25, it's five percent. And the next is 80, it's two-and-a-half percent, and the rest is one percent. But on all of the management, all of it, because you are also the manager, you get five percent.

MR. LEWIS: But that's what I did already, right, five percent on the management?

THE COURT: And all your expenses, obviously. And if you want to, pursuant to that, submit an order following that, I would appreciate it, otherwise I will do it. Whichever you want.

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MR. LEWIS: Maybe we should calculate it now and have it so ordered on the transcript, because I think we are all in agreement. It's just a matter of calculation.

THE COURT: I think it would be better if you wrote out the order. And are you willing to keep it in escrow, or we will find another escrow agent?

MR. LEWIS: No, I can deal with it.

THE COURT: And we all agree to that?

MR. ZAPSON: Yes, Your Honor.

MS. GRODIN: Yes.

MR. ZAPSON: The only other question I had for Mr. Lewis, Your Honor, is that at the closing a refund from the bank went mistakenly to Michael Kadosh. Did you get that back?

MR. LEWIS: No, I did not.

THE COURT: Mr. Kadosh was supposed to return it. I thought there was a rider in the papers saying that he would return the money?

MS. GRODIN: No, Your Honor. And we will follow up on that with counsel for Mr. Lewis as well as counsel for Mr. Kadosh --

THE COURT: You will what?

MS. GRODIN: I said I will confirm with my client and let the Receiver and counsel for Mr. Kadosh know --

THE COURT: Well, just make sure your client does

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what he said he would do and return it directly to the Receiver to be put into escrow. We don't want anything further on it, okay.

MS. GRODIN: I couldn't agree more.

THE COURT: And have that done within the week.

MR. ZAPSON: Thank you.

THE COURT: Maybe the parties will order the transcript and e-file it, please. And let's continue with the rest of the argument.

And now we are dealing with the argument on partial summary judgment. Now, we are dealing with the partial summary judgment.

Counsel, do you want to argue your partial summary judgment?

MR. ZAPSON: Thank you, Your Honor. Michael Zapson for the defendants David Kadosh and 114 West 71st Street, LLC, 30 Lexington Avenue, LLC and 3D Imaging Center Corp.

As you know, Judge, it's been a long arduous task, and the matter was originally commenced almost five years ago with regard to a building on 85th Street. And there are a lot of allegations back and forth about the projects, about what was going to be built there, what was going to be developed there.

Over the last five years, Your Honor has ordered the dissolution of the LLC that owned the property, and Your

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2 Honor had also offered to sell the property. So, really, we
3 have got to do this now, as was just discussed on the
4 previous motion where the Receiver is holding all the
5 remaining assets of the LLC in a bank account, and we have
6 made a motion for a partial summary judgment to get rid of
7 this, all the other causes of action that were brought by
8 the plaintiffs against the defendants, other than the ones
9 that have to do with the money, because there is no longer a
10 project. And there is no longer any issue as to what is
11 going to be get developed on the property. So really --

12 THE COURT: But does it involve only this property?
13 From what I recall and what has been alleged, there are
14 allegations by -- and, you know, there are two different
15 cases here. And it's confusing because we are talking about
16 two -- there is David Kadosh and Michael Kadosh. And so,
17 you represent David Kadosh, who owns on paper these other
18 properties. However, there are allegations that not the
19 properties themselves, but certain profits from the property
20 were -- basically, there was a joint venture, perhaps, or
21 some kind of a partnership. Those profits were assigned,
22 not the properties themselves, not the LLC, but the profits
23 from those other entities were assigned in part to Michael,
24 his brother. And his brother in fact worked there? And
25 there is some evidence, and I don't know what the truth is,
26 worked there for several years, did all of this renovation

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on all of these properties, and all of this was done as a quid pro quo for him sharing in the profits from these different entities. And that's the argument. And you are asking that that be tossed.

MR. ZAPSON: Well, in reality, Your Honor, that's what their argument has morphed into. Their original argument set forth in the complaint, Paragraph 37 of the complaint, that Michael is a 50 percent owner. Paragraph 39 of the complaint, Michael and David are joint owners. Paragraph 104 of the complaint, Michael and David are each partners and members.

THE COURT: I understand that that was the original, and that is what they -- they have a different lawyer now.

MR. ZAPSON: That's what we are looking to have dismissed. Then as we make the motion to have that correctly dismissed --

THE COURT: Or amended in some way. So, are you arguing that -- because it seems to me what the argument now you is, and looking at the different LLC agreements and all the other agreements, clearly, there would be problems to arguing that there was an ownership assignment or sale, because there is no writing in this, nothing evidencing this, it would be against the agreements themselves. But they are arguing, and they have always argued to some degree

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2 -- they have always argued, in fact, that Michael and
3 Michael did work, managed the properties, got very little
4 money for it at times, got no money for it, that he did all
5 the construction on it. So, they are arguing what was, in
6 fact, promised was the profits. And that is feasible under
7 the agreements.

8 MR. ZAPSON: Well, it is really not. Because in
9 order to have joint venture agreements, oral joint venture
10 agreements, there also has to be a sharing of the losses.
11 It can't just be --

12 THE COURT: But he did share losses. He shared the
13 costs of doing all the construction, and all that.

14 MR. ZAPSON: Well, I would disagree. I mean, he
15 was paid \$115,000 --

16 THE COURT: Not from what I see. His laborers were
17 paid. Materials were paid, but I did not see that he got
18 paid.

19 MR. ZAPSON: He was paid. The checks are to him.

20 THE COURT: Yes, the checks were to him to pay for
21 labor and expenses, not for his time, for him as a GC, from
22 what I could see. I didn't see that, but maybe I'm wrong.

23 MR. ZAPSON: I think it's a real link. The action
24 was brought saying he owned half of these properties. When
25 he realized he couldn't own half of the properties, they
26 tried to change their argument to say it was going to be a

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joint venture. That's what they meant.

THE COURT: Was there an unjust enrichment claim in the original?

MR. ZAPSON: I don't see how. He was paid for the work that he did.

THE COURT: There was a quantum meruit and unjust enrichment claim, wasn't there?

MR. ZAPSON: If the underlying claim falls, that he could not have half the ownership, then all the claims that come out of that have to fall as well.

THE COURT: Not really. There would be no contractual claim, but there would still be a claim that if he did all this work and wasn't paid for it, he acted as a GC and wasn't paid for it, so there would still be an unjust enrichment and quantum meruit claim.

MR. ZAPSON: I don't think so. I think he was paid for it.

THE COURT: Well, I think that's an issue of fact.

MR. ZAPSON: It's not an issue of fact if we present the receipts and the checks and show he was paid.

THE COURT: Well, you presented things, but it looks to me that it was only labor and cost for material. It doesn't look like he got paid.

MR. ZAPSON: There is nothing presented as to what he didn't receive. What they are saying he didn't receive

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is not an outstanding invoice for a thousand dollars.

THE COURT: No, but as to all of his work and what he did, and there is no proof that he got paid for any of it.

MR. ZAPSON: There is proof that he got paid substantially. And there is no proof that anything he wasn't paid for.

THE COURT: You are not listening to what I said. There is proof that he his laborers got paid and that the expenses, the cost of the materials was paid, but where is the proof that he, himself, got paid other than once in a while \$1,500?

MR. ZAPSON: Once in a while? I don't think it was once in a while. I think it was weekly.

THE COURT: Did he get paid the weekly 1,500? Do you have proof of that? I think there is a question of fact here. And there is also a question of fact was he paid as a GC.

MR. ZAPSON: On 85th Street or on --

THE COURT: No, not on 85th. Leaving 85th aside for now.

MR. ZAPSON: Okay. In Exhibit U to my papers, there is not only all the checks and all the payments that were made to him, but Michelle's handwritten notes, Michelle's handwritten notes, not my client's as to who was

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2 getting what. So, Michael handwrote that he was getting
3 \$1,500 a week. That's what he was supposed to get. The
4 contemporaneous notes that he kept at the time say this is
5 what he was supposed to get, and he got it.

6 THE COURT: Were there checks showing -- did you
7 have checks as to the laborers and materials, do you have
8 checks for the 1,500, because I don't see them?

9 MR. ZAPSON: They are all there, all of Exhibit U,
10 first the handwritten notes are Michelle's.

11 THE COURT: The weekly 1,500 check.

12 MR. ZAPSON: May I approach and I can show Your
13 Honor?

14 THE COURT: Are you saying they are here? I will
15 look again.

16 MR. ZAPSON: They are all there. First, it's
17 Michelle's handwritten notes, okay, saying this is what he
18 is supposed to get. They are after the handwritten notes
19 the. The checks are after the handwritten notes.

20 THE COURT: I see the checks. What I'm trying to
21 say is I don't see weekly \$1,500 checks. I see other
22 checks. I have to look and see if they are weekly. That's
23 all.

24 MR. ZAPSON: They are there. They are weekly.
25 Check 110 and 180 on March 30th.

26 THE COURT: I see one.

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MR. ZAPSON: The next page, Your Honor, there is another one for \$1,500.

THE COURT: I understand, and he worked from what period to what period?

MR. ZAPSON: The summary is up front.

THE COURT: What was the period he worked for?

MR. ZAPSON: And this is from, what appears to be January 2006 to December 2004.

THE COURT: Wait. That doesn't make sense.

MR. ZAPSON: I'm sorry. I said it backwards. The checks covered the period from December 2004 to January 2006.

THE COURT: I think the period may have been longer, but I'm not sure. But at least it goes for those years. Do we have the \$1,500 checks for that period?

MR. ZAPSON: You do.

THE COURT: I didn't see that many checks. But you know what, I have to look.

MR. ZAPSON: Your Honor, they are all there. They are all there. The handwritten notes are Michelle's, saying that this is his salary, Michelle's, saying he was owed \$1,500 was Michelle's. The checks --

THE COURT: What I am saying is you are telling me that there are checks showing that for that entire period there are weekly checks for \$1,500 every week. I didn't see

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it, but I will look again.

MR. ZAPSON: Thank you, Your Honor.

MS. GRODIN: Your Honor, may I for a moment respond to these issues?

THE COURT: Yes, you may address that issue.

MS. GRODIN: Your Honor, there are allegations in the complaint as well as the --

THE COURT: I thought you were just addressing the \$1,500 checks.

MS. GRODIN: Only to the extent that the period that Michael Kadosh claims that he is owed monies for exceeds the period that is set forth -- even assuming the each of the payments for each of those weeks in the period that counsel suggests are there, which I do not believe they are, Michael Kadosh in the beginning in or about June of 2003 he began working, and he also further --

THE COURT: And worked until when?

MS. GRODIN: Worked until approximately May of 2005. So, I'm not sure if that time period is correct, but further, even though there may have been payments for \$1,500 periodically or even weekly, as counsel suggests, our unjust enrichment claim and only the unjust enrichment claim, expect that that payment should have been drastically more, and that he was underpaid. And he was willing to take this underpayment as a condition of a partnership, and that that

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was a joint venture, and opportunity with his brother.

THE COURT: The joint venture is not in the complaint, in the original complaint.

MS. GRODIN: A breach of the oral agreement is in the original complaint, Your Honor.

THE COURT: It does say that, but the oral agreement talks about ownership, doesn't it?

MS. GRODIN: There are certain allegations in the complaint that speak to ownership, Your Honor.

THE COURT: Is that your position still?

MS. GRODIN: No, Your Honor, it is not.

THE COURT: And your position now is that it isn't ownership, but it's the profits and the losses of the business?

MR. GRODIN: Yes, the income generated from the constituent businesses, Your Honor. And I will say that it is not a creation that was made up in opposition to summary judgment, that throughout Michael Kadosh's three day deposition testimony, he was consistently clear that he was not seeking an ownership in the properties themselves but in the income generated from the properties, which is a common occurrence in joint ventures involved in real estate.

THE COURT: Okay. So, let's continue.

MR. ZAPSON: But never once did he say he was sharing the losses too. And an important element to have an

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oral joint venture agreement is that you have to share in the losses. All the cases, all the cases that I reviewed that had to do with oral joint venture agreements --

THE COURT: Yes, you do have to share profit and loss.

MR. ZAPSON: Right, but there was also more to it. All of them either had one of the parties contributed towards the purchase of the building. One of the parties contributed towards the something somewhere --

THE COURT: Sweat equity.

MR. ZAPSON: But he got paid for it. He keeps coming back to there, but the problem is Michael submitted invoices, Michael got paid what he thought he was supposed to get paid. It's only after the fact that he comes around and said, well, you paid me what I asked for, but really I thought I was going to be a partner. It doesn't work like that.

THE COURT: This is really the issue here, right?

MR. ZAPSON: It's the issue, but I don't think it's the factual issue. And I don't think it's the factual issue, because we have Michelle's handwritten invoices. We have a complaint that says something, and we have proof of payment. I don't know what more there could possibly be to show that there is no issue of fact that he was working there and he got paid there. That's it. Having taken that

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away --

THE COURT: The problem is, even if he got paid the \$1,500 as a manager of what he did, and he said he worked like 70 to 100 hours a week, I have no idea. But let's say that he was willing to take \$1,500 a week for the 70 to 100 hours a week, and he did everything in the building, which there seems to be some evidence that he did manage the buildings and everything else, and the business --

MR. ZAPSON: We would refute that, Your Honor.

THE COURT: Well, I think there is an issue of fact. But let's say all of that is true, and you are arguing the \$1,500 is paid in full for whatever he did, then there is the question what about the construction work and acting as a GC?

MR. ZAPSON: With regard to 85th Street?

THE COURT: With regard to all of the buildings. He redid all of the buildings.

MR. ZAPSON: No.

THE COURT: His construction company redid two of the buildings.

MR. ZAPSON: If you look at his affidavit, he says he hung TV's, he said he installed equipment.

THE COURT: No, no, no. He said he rehabilitated the apartments in the building.

MR. ZAPSON: That's on 85th Street.

Proceedings

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2 THE COURT: No, that is not what I read. According
3 to what I read, it was the other buildings as well. But I
4 may be wrong, and I will look at it again.

5 MR. ZAPSON: No, no, no. And that was work that he
6 got paid for. So the question is --

7 THE COURT: Please, you know what, I think this is
8 going nowhere. Let me hear from the other side.

9 MS. GRODIN: Thank you, Your Honor. I will say
10 that many of the issues that were just expressed highlight
11 what summary judgment here is completely inappropriate.
12 These are factual issues. How much was he paid? Was he
13 paid appropriately? Was he paid pursuant to the joint
14 venture or as David Kadosh asserts that he was paid as an
15 employee. These are all issues that Michael Kadosh said one
16 thing --

17 THE COURT: Well, if he agreed to a \$1,500 payment
18 for the work he was doing as manager.

19 MS. GRODIN: Your Honor, that is not what Michael
20 Kadosh agreed to. And I think his affidavit is clear, and
21 his testimony is clear in his deposition. I direct you to
22 Exhibit 1 of Michael Kadosh's opposition -- I'm sorry, his
23 affidavit, including his opposition with respect to the
24 losses, at least. Did you agree -- counsel for David
25 Kadosh:

26 "Did you agree that you were going to be

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1 responsible for 50 percent of the losses of these
2 businesses?" And these businesses refer to the businesses
3 apart from 85th Street.
4

5 "Of course.

6 "You did?

7 "Yes, we were partners in everything.

8 "QUESTION: So, your agreement was I'm going to
9 assume most of the profit. I'm going to share with you the
10 profit and possibly the losses as well?"

11 Michael Kadosh said "yes."

12 Your Honor, in addition to the various sweat
13 equities you suggested would constitute an agreement to
14 share in the losses. I will say, the record here is perhaps
15 messy, to be kind, and it is clear that both parties have
16 very different ideas of what was happening, but it is not
17 appropriate to resolve this case at this stage. It is not
18 clear from the records.

19 THE COURT: What is the fact that perhaps we are
20 talking about brothers; according to Michael, best friends,
21 is there any argument at all, and I don't know if it I saw
22 that, I don't think I did, any fiduciary duty issues?

23 MS. GRODIN: As between the brothers, Your Honor?

24 THE COURT: As between brothers?

25 MS. GRODIN: The fiduciary duty claim in this case
26 has to do with West 85th Street property and their

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relationship as members in that property.

THE COURT: I understand, but there is no other fiduciary duty issue in regard to the other joint ventures?

MS. GRODIN: There was no allegation raised.

THE COURT: Because that type of relationship is alleged.

MS. GRODIN: I understand, Your Honor. In the verified pleading is the operative pleading in this case. There is no such claim raised.

THE COURT: And do you want to stand on that pleading? Are you asking to amend? What are you asking for?

MS. GRODIN: We would like the opportunity to amend, yes, to conform to the proof.

THE COURT: Counsel?

MR. ZAPSON: Your Honor, of course, we don't agree to that, but these are two --

THE COURT: Well, leave to amend is usually very freely given.

MR. ZAPSON: But not five years into a lawsuit, when --

THE COURT: Well, frankly, sometimes it happens pretty late into a lawsuit, and sometimes even at trial. Everything is amended because the complaint is amended to conform to the proof even at trial.

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2 MR. ZAPSON: That's why you are the judge and I'm
3 the counsel.

4 THE COURT: That happened to me many times.

5 MR. ZAPSON: But these are two people where
6 everything was in writing. They had an agreement.

7 THE COURT: Well, it seems to me everything wasn't,
8 which is always a problem, and particularly when we are
9 talking about close friends or relatives. But, let me say
10 this, I don't know what happened here, and I don't know what
11 happened here from the beginning. It's an extraordinarily
12 difficult case, because it is between family members who are
13 very close and did a lot of things that were not always in
14 writing. It seems to me what I want to do here is make my
15 life easier for once. I want everything to be clear and
16 easy for me. So because of that, I am going to reserve on
17 this. But my inclination is to give them permission to
18 amend, because I just want to know what exactly the defenses
19 are. There is a new attorney here, and that shouldn't be
20 reason enough to change anything, but a lot of these issues,
21 these issues were here before. They just weren't put down
22 clearly in a legal context. So, I am taking this motion. I
23 am reserving on it. But as I say, my inclination is to give
24 them leave to amend.

25 MR. ZAPSON: I would think, Your Honor, even if it
26 was amended, counsel do a language of oral joint venture

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2 agreement rather than an agreement to be owners of half the
3 real estate, it should still be dismissed. And it should
4 still be dismissed because every writing -- we have four
5 shareholders' agreements, we have other contracts.
6 Everything they did between them was in writing. There is
7 nothing to support --

8 THE COURT: Everything they did between them was in
9 writing? I'm not sure. There are so many issues raised by
10 the affidavits and the proof, I'm not sure that's the case.

11 MR. ZAPSON: Well, you have to look at the writings
12 that were done at the time. The agreement they entered into
13 with counsel in 2003 with regard to 85th Street that spelled
14 out what their rights were, it didn't say that's in
15 consideration for David being a partner in 85th Street,
16 Michael is going to have a joint venture --

17 THE COURT: What happened at 85th Street I think is
18 a case in point. There is a lot that's not in writing. It
19 was a mess. 85th Street was a true mess. And I don't think
20 it's a good comparison for anything. It was a food fight,
21 really, between two brothers, which involved the police,
22 involved a lot of different things, and the Buildings
23 Department. It was just a mess.

24 MR. ZAPSON: Correct, but the point is most of the
25 stuff is in writing. It makes no sense that Dave Kadosh,
26 who has a successful dental practice, who has a successful

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-- other real estate property would give Michael Kadosh an interest in a business that wouldn't exist in two years.

THE COURT: Well, it wasn't quite like that, not according to the proof and the affidavits that were submitted. And it seems to me -- and I don't know if it's true or not. That's a good point. I think there are issues of fact here.

You know what, I originally was going to reserve on this. I am changing my mind at this point. I am issuing this decision from the bench.

At this point, I am denying partial summary judgment. I believe there are issues of fact on everything at this point. However, I am also going to grant the defendant, because there are two different cases, leave to amend both the answer and their complaint. So, summary judgment is denied. And I think there are issues of fact, too many affidavits, too many proof that just raises issues of fact, and I am allowing the amendment.

MR. ZAPSON: Your Honor, can we also get a date for the hearing? Discovery has been concluded. Everything has been done.

THE COURT: On the 85th Street case.

MR. ZAPSON: So, I guess it's all one case?

THE COURT: It is all one case. Let's first get the amended complaint, and amended answer must be filed and

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2 served within two weeks. So, today is the 13th. By the
3 27th.

4 And now the problem here is a lot of it is
5 intertwined. And the issues in regard to all of the other
6 properties, the alleged joint ventures, what the other side
7 is arguing is that those profits were to be used to build
8 out West 85th Street, and that didn't happen. Instead, West
9 85th Street wasn't build out. Now, I'm not sure whether
10 85th Street shouldn't be dealt with separately, given the
11 fact that it's awaiting to be sold, and there are bills.
12 And why should there be not be, just in regard to West 85th
13 Street, so, why should there not be a hearing and an
14 accounting and just figure out 85th and cut that out of the
15 whole thing? Let me hear from you.

16 MS. GRODIN: You are speaking just of the
17 dissolution proceeding?

18 THE COURT: I am talking about the dissolution
19 proceeding.

20 MS. GRODIN: That all claims involving 85th Street
21 be heard as a dissolution proceeding, including the breach
22 of the fiduciary duty that are alleged in the breach of the
23 operating agreement?

24 THE COURT: Well, everything, just everything on
25 85th.

26 MS. GRODIN: I ask only because right now those two

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claims would be subject to the amendment in the complaint that you just grant it leave for would be amended.

THE COURT: Well, perhaps maybe we would forego amending the complaint in the 85th Street and just go forward on the 85th Street and complete that. What is your position?

MS. GRODIN: My position is that there are two claims involving West 85th Street that will result, we believe, in damages that will flow to Michael Kadosh.

THE COURT: Are you saying those two claims are intertwined with the other claims; is that what you are arguing?

MS. GRODIN: Yes, they are intertwined.

THE COURT: And aside from those two claims, which is breach of fiduciary duty --

MS. GRODIN: Breach of the operating agreement at West 85th Street, LLC.

THE COURT: Which is part of breach of fiduciary duty.

MS. GRODIN: Yes.

THE COURT: And in a sense is almost a derivative claim.

MS. GRODIN: Yes.

THE COURT: Now, basically, what the West 85th Street case would be, and that -- let me just step back.

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The derivative claim is really based on the -- is it an LLC?

MS. GRODIN: It is an LLC.

THE COURT: So, the LLC agreement, the operating agreement, which is separate from everything else, why can't it be done separately?

MS. GRODIN: If Your Honor feels that would be more appropriate, assuming that --

THE COURT: Couldn't they just release the monies, and it would deal with all of it?

MS. GRODIN: Well, Your Honor, with respect to releasing the monies, and as set forth in our opposition, the Receiver's motion cites there is a concern that that pot of money, which is currently around \$7 million, to the extent there is a judgment that's entered in favor of Michael Kadosh in this case, because all of the income is intertwined, that that money would be available to satisfy the judgments in this case.

THE COURT: You are talking about an attachment.

MS. GRODIN: Yes, Your Honor.

THE COURT: But we all know that David Kadosh owns buildings. He is not someone who has no money. He owns separate buildings in the city. He has a home. He has a lucrative dental practice. He has his other practice that may also have thrown off profits. Is there any reason I shouldn't deal with 85th Street separately?

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2 MS. GRODIN: Your Honor, your concern about whether
3 David Kadosh does generate substantial income for himself
4 and whether or not those buildings may be subject to other
5 encumbrances that we are not currently aware of, considering
6 that -- I understand Your Honor's desire as she stated
7 earlier makes her life much easier, and I can appreciate
8 that and perhaps separation of the two, let's say core
9 properties being the property subject to the joint ventures
10 and that the West 85th Street property may make that happen,
11 but the issues that would be raised, for example, here in a
12 trial and the monies that were expended, and things such as
13 that, I think, procedurally, would flow just as easily in
14 one hearing on this matter than to separate it into two.
15 But, if the ability to hear the merits of the breach of
16 fiduciary duty claim and the breach of the operating claim
17 were preserved, such as they could be heard in a separate
18 action on the dissolution, which I believe is what Your
19 Honor has suggested --

20 THE COURT: Well, you see, the problem I have here
21 there is definitely an operating agreement dealing with West
22 85th Street. There is an operating agreement.

23 MS. GRODIN: Yes.

24 THE COURT: Unlike this other joint venture.

25 MS. GRODIN: Yes, Your Honor.

26 THE COURT: The breach of fiduciary duty claim is

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pursuant to that operating agreement; am I correct?

MS. GRODIN: Yes, Your Honor.

THE COURT: So, it's separate from -- there is another -- you are not talking about breaching any kind of fiduciary duty dealing with the other overarching joint venture. It could be a separate issue.

MS. GRODIN: Yes, Your Honor. Those issues would be in the case derivatively, Your Honor.

THE COURT: I don't see any reason not to hold a hearing on the 85th Street case to deal with that pot of money, to deal with the monies that Michael put into constructing it, to deal with everything else, so that we can at least figure out who is owed what. And I will listen to you later if there is any argument as to whether or not it should be disposed. But at this point, I am going to set down a hearing for West 85th Street to sort through who is owed what and what gets what monies.

MS. GRODIN: Your Honor, just so I am clear, any evidence which may flow from those claims would be able to be heard in the hearing for West 85th Street and would be included in the eventual distribution to Michael and/or David?

THE COURT: It's a dissolution, so we have to figure out who gets what in winding down. And we also have superimposed upon that the kind of derivative claim. And

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2 even in that derivative claim, Michael would only get a half
3 of it, because he is only half owner, I guess. And I don't
4 remember, was there a demand --

5 MS. GRODIN: Your Honor, the claims that we have
6 asserted in this case are direct breaches of fiduciary duty.

7 THE COURT: To him in the West 85th Street case or
8 was it --

9 MS. GRODIN: In the claims raised in this case with
10 respect to the West 85th Street property. There are
11 separate -- in the dissolution proceeding in the answer to
12 this petition, there were breach of fiduciary duty claims
13 that were raised with respect to the bringing of the
14 petition it as well.

15 THE COURT: There was a lis pendens that was filed,
16 all kind of things done, which really impact the property
17 itself.

18 MS. GRODIN: Yes. What I may be slightly confused
19 on is, the two claims right now that are in this case - and
20 by this case, I mean the case that we just --

21 THE COURT: What I am trying to do is separate out
22 the two claims and just deal with the first claim in which
23 Michael Kadosh is the plaintiff on behalf of himself and
24 derivatively on behalf of the West 85th Street property.
25 That's under Index Number 651834 of 2010.

26 MS. GRODIN: Yes. That is the --

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2 THE COURT: That one, however, also is not only
3 against David Kadosh, it's also dealing with his properties.
4 So, there was that intertwining. And then the David Kadosh
5 case was also a claim on his behalf and a derivative claim
6 against Michael Kadosh's construction company under Index
7 Number 590830 of '11. So, one of them, I guess --

8 MS. GRODIN: There is a third proceeding.

9 THE COURT: And wasn't that the one for
10 dissolution?

11 MS. GRODIN: The index number is a 2013 index
12 number in the petition.

13 THE COURT: That was the dissolution case. But,
14 you know, it's funny because none of the - not even the
15 Receiver's action is brought under that index number.

16 MS. GRODIN: Your Honor, what you just mentioned
17 about all the properties sort of being intertwined,
18 particularly with respect to the basis of the joint venture
19 being --

20 THE COURT: Just one second.

21 (Pause in the proceedings.)

22 THE COURT: You know what, I was just trying to
23 figure out what my schedule would be. And apparently, there
24 is time. The last week of February I could do the hearing.
25 Is that good for the parties?

26 MR. ZAPSON: That would work for me, Your Honor.

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2 MS. GRODIN: Your Honor, I don't think that would
3 give us enough time.

4 THE COURT: Because the only other time I have
5 after that has to go into April.

6 MS. GRODIN: That would be preferable for us.

7 THE COURT: So, I have to find an April date. Are
8 there dates in April good for you? And I will try to work
9 with those dates.

10 MR. ZAPSON: May I confer with my client, Your
11 Honor?

12 THE COURT: Yes.

13 (Pause in the proceedings.)

14 MR. ZAPSON: All of April is fine with us, Your
15 Honor.

16 THE COURT: How about April 13th?

17 MS. GRODIN: Your Honor, can we do the 20th? Our
18 client will be unavailable for Passover.

19 THE COURT: Passover may be a problem. It starts
20 on the 3rd and ends the following weekend.

21 MS. GRODIN: Our client will not be available
22 during that time period. Is it possible to extend the date?

23 THE COURT: They are not going to be available on
24 the 13th, which is after Passover?

25 MS. GRODIN: I understand, Your Honor. Immediately
26 proceedings the 13th. If the 20th were an option, that

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2 week.

3 THE COURT: Fine, April 20th.

4 MR. ZAPSON: Thank you.

5 THE COURT: So, there is going to be a hearing
6 regarding the dissolution. And anything else?

7 MR. ZAPSON: With regard to the monies, right?

8 THE COURT: Yes, and all the monies involving West
9 85th. Okay.

10 MS. GRODIN: But, Your Honor, I would like to
11 clarify one issue, which I think I was cut off prematurely.
12 The two claims that are currently in this case, the summary
13 judgment that was just heard, a breach of the fiduciary duty
14 and a breach of the operating agreement, is the suggestion
15 that those will be presented at the hearing on West 85th
16 Street, and that the damages that may flow from those claims
17 would be also heard at the time of the hearing?

18 THE COURT: Yes, everything.

19 MR. ZAPSON: As would our counterclaims?

20 THE COURT: Everything. This hearing will
21 encompass everything.

22 How many witnesses do you think you will have?

23 MS. GRODIN: Four. I would have to confirm with my
24 client. I apologize for not being prepared to address this.

25 THE COURT: You know what, we are going to have to
26 have a conference before that. I want there to be exchange

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of witnesses, exchange of everything prior to this.

MS. GRODIN: Yes, Your Honor.

THE COURT: Evidence exchanges. And so, all of that has to be done. So, let's put it down for a conference before that, and we can have a conference that last week of February. Give me a date the last week in February for a hearing conference.

MS. GRODIN: I'm open that whole week, Your Honor. The 25th is a Wednesday.

THE COURT: No, it will be the 24th. Is that okay?

MS. GRODIN: Sure.

THE COURT: 2/24 at 10 a.m., and that's for the pre-hearing on the West 85th. And that's the dissolution.

It's a dissolution case, and when you are saying that there are other claims, is that in the 590830?

MS. GRODIN: No, Your Honor, in the main action, and that's --

THE COURT: I may not want to do it then if it is part of the main action.

MS. GRODIN: The two claims I'm referring to are part of the main action and were asserted from the beginning, and have to do with the overarching relationship --

THE COURT: You know what, let's leave it in the main action. We are only going to do the dissolution.

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Now, in terms of the main action, we have finished discovery; am I correct?

MR. ZAPSON: Correct. Note of issue have been filed.

THE COURT: There is going to be a new complaint, an amended complaint. You are going to file your amended complaint within two weeks. And I want to see you at a conference to figure out what we are going to do next. There will have to be an answer to the new complaint within ten days of service. And it's going to be e-filed. So, let's put this down for a conference on February 5th, which may well be a pretrial conference. 2/5, pretrial. Let's change it to the next week. Let's put this down also for the same day. What did I say, February?

MR. ZAPSON: 24th at 10 a.m.

THE COURT: February 24th. Yes, we will do everything. And in terms of the other case, discovery has pretty much been finished, and --

MS. GRODIN: I'm sorry. When you refer the other case --

THE COURT: Discovery is over in terms of the new complaint and the answer --

MS. GRODIN: Your Honor --

THE COURT: It will be a pretrial on that date. So, we are going to do a hearing, a pre-hearing conference

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2 and a pretrial conference. And look at the rules,
3 everything. All witnesses for pretrial have to be
4 exchanged. All evidence, evidence books have to be
5 exchanged. I require a spreadsheet where you exchange a
6 spreadsheet. Try to agree on all the evidence. If there
7 are any objections that's on the spreadsheet, meet and
8 confer subsequently. Try to agree on that. If not, on the
9 date of the pretrial, I make rulings on whatever is objected
10 to. By the time of trial, there are no issues. All the
11 motions in limine are submitted by then, and I will make
12 rulings on the bench on the in limine. Cross-reference any
13 EBT you want to read into evidence. But everything is done
14 on the date of the pretrial, all the rulings and we will
15 pick a trial date.

16 MS. GRODIN: And you want that to be --

17 THE COURT: On the same date.

18 MS. GRODIN: February 24th?

19 THE COURT: Yes.

20 MS. GRODIN: Your Honor, I would only note that in
21 the note of issue that was filed predating our substitution
22 of counsel there was an expressed note that there are
23 outstanding discover issues. A letter was submitted to the
24 Court --

25 THE COURT: Please, I have so many motions.
26 Enough. At this point, enough. My patience has run out

1 Proceedings

2 these are the rules.

3 MS. GRODIN: Thank you, Your Honor.

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7 It is hereby certified that the foregoing is a true
8 and accurate transcript of the proceedings.

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11 ALDORINE WALKER

12 SENIOR COURT REPORTER

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