

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
PRESENT: HON. TIMOTHY J. DUFFICY, JUSTICE PART 35

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VINCENT CORTAZAR, Individually and
Derivatively on behalf of
47th ROAD LLC,

Index No.:705029-2016

Plaintiffs,

JUDGMENT AND ORDER

-against -

JAMES CORTAZAR, a/k/a JIM E. CORTAZAR
a/ka JAMES EDWIN CORTAZAR and
47th ROAD LLC, a New York
Limited Liability Company,

Defendants.
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The Court held a Bench Trial to consider the claims of the parties with respect to their breach of fiduciary duty and other related damage claims against each other as 50% members of 47th Road LLC (the "Company"). The Bench Trial was conducted after this Court Ordered the Dissolution of 47th Road LLC by decision dated February 16, 2017 and entered on February 22, 2017 after hearing held on December 2, 2016 and December 9, 2016. (See Exhibit 1)¹. This Bench Trial was conducted on October 17, 2018; October 18, 2018; October 19, 2018; November 5, 2018; November 8, 2018; November 16, 2018 and concluded on November 19, 2018.

Procedural History

Plaintiff, Vincent Cortazar, filed a Summons & Complaint on April 28, 2016, alleging, inter alia, damages individually and derivatively on behalf of the Company for breach of

¹ During the course of this Trial the Plaintiff put into evidence the exhibits admitted in the Dissolution Proceeding. Those exhibits when referred to herein will be marked "Exhibit Diss. Proc." all other references to Exhibits will be from this Derivative Action and marked "Exhibit".

fiduciary duty, fraud, waste, conversion, unjust enrichment and negligence. (See ECF Document #1).

The Defendant, James Cortazar filed his Answer with Counterclaims on June 10, 2016 seeking declaratory relief that the Company was “100%” owned by James Cortazar, breach of fiduciary duty, the imposition of a constructive trust, conversion, equitable and promissory estoppel, unjust enrichment, restitution, an accounting and injunctive relief. (See ECF Document #8).

Plaintiff Replied to the Counter-Claims denying the allegations therein and setting forth Affirmative Defenses of Statute of Frauds and Statute of Limitations. (See ECF Document #11).

The Court in its Judgment/Order After Dissolution Hearing made certain findings of fact with respect to the ownership of the Company and, after determining that Vincent Cortazar and James Cortazar were each 50% members of the Company, Ordered the Company’s dissolution pursuant to §702 LLCL finding that due to a foreclosure in an action pending in this Court entitled 47th Road Funding Inc v. Cojam Realty Inc. et al. this single asset Company could not reasonably carry on its business (See Exhibit 1).

The Court Ordered that Joseph J. Risi, Esq. be appointed Receiver of the property of the Company located at 5-19 47th Road, Queens, New York and further

ORDERED, that pursuant to the provisions of the General Obligations Law Section 7 – 105, anybody holding any deposits or advances of rental as security under any lease or license agreement affecting space in the Premises affected by this action shall turn same over to the Temporary Receiver with in five (5) days after said Temporary Receiver shall have been qualified; and there upon the said Temporary Receiver shall hold such security subject to the disposition there of as shall be provided in an Order of this Court

to be made and entered in this action; and it if further

ORDERED, that the said Receiver is hereby authorized, empowered, and directed to demand and take all steps necessary to collect from the tenants of said real property, or from any persons liable therefore, all rents and profits thereof now due and unpaid or hereafter to become due during the winding up, and said tenants be and hereby are directed to pay over to the receiver any and all rents now due and unpaid or here after due during the pendency of this action, and all persons in possession, other than lawful tenants are hereby directed to surrender possession to said Receiver, and it is further

ORDERED, that any tenants of the aforesaid real property and all persons liable for said rents and profits are hereby enjoined and restrained from paying any rents or profits to any party other than the Receiver, his agents, servants, employees or attorneys, and it is further

ORDERED, that the parties to this action, there designated or representative agents, servants, employees and attorneys, shall provide the Receiver or his designated agent, true and complete copies of all insurance policies, including but not limited to general liability or property damage governing the subject premises, all bank records and/or documents in their actual or constructive possession relating to the rents and profits from the aforesaid real property commencing with the date on which this action was filed until the present, all leases, licenses and other agreements with tenants or occupants of the aforesaid real property, and all contracts, licenses and leases for equipment and building systems and services and it is further

ORDERED, that the parties to this action and their representatives are designated agents, servants, employees or attorneys and each of them are hereby enjoined and restrained from

collecting any rents or profits of the aforesaid real property, or
from any part thereof, and from interfering in any manner with said
Receiver,

Upon appointment of Joseph J. Risi, Jr. as a Court of Claims Judge the Court, by Order dated August 3, 2017, relieved and discharged Joseph J. Risi, Jr. and appointed Joseph Mattone, Jr. Esq. as substitute Receiver (ECF #53). Mr. Risi filed an affirmation dated July 7, 2017 setting forth his accounting through June 2017, (See Exhibit 3). Both Mr. Risi and Mr. Mattone had limited success in collecting rents and managing the property due to the conduct of James Cortazar as will more fully be set forth in the Court's Findings.

By Decision and Order dated June 4, 2018 the Court approved the Purchase and Sale Agreement dated May 4, 2018 for the sale of 5-19 47th Road Long Island City, New York for the gross sales price of \$2,500,000.00 with the purchaser taking the premises subject to the violations and fines placed on the property by the various agencies of the City of New York totaling in excess of \$500,000. (ECF Document #181 and Exhibit #22 and testimony dated October 17, 2018, pages 37-39).

By Decree and Order dated June 13, 2018 the Court, on Motion of the Receiver, consolidated the Dissolution Proceeding and this Action as above captioned (ECF Document #41).

Mr. Mattone after the sale of the premises on June 29, 2018, filed his interim accounting on September 1, 2018. (ECF Document #181).

Upon motion of the Plaintiff's attorney, the Court granted the Plaintiff's application to hold the Defendant James Cortazar in contempt for failure to obey this Court's Order of February 16, 2017 (ECF Document #49 & Exhibit 10).

The Contempt Order set forth the following:

Petitioner demonstrated that respondent James Cortazar disobeyed the Court Order, dated February 16, 2017, resulting in prejudice to petitioner (*see Garbitelli v Broyles*, 257 AD2d 621 [2d Dept 1999]; *Baralan Intern, S.P.A. v. Avent Industries, Ltd*, 242 AD2d [1st Dept 1997]). Respondent has offered an unreasonable excuse for his failure to comply with said Order.

Here, the Court finds that the contemptuous conduct by the respondent was calculated to actually defeat, impair or prejudice the rights of the petitioner and court appointed receiver Joseph Mattone.

Respondent must purge the contempt by providing the said requested documents and other material by July 30, 2018. If the respondent does not provide this material, he will be fined \$250 per day until they are delivered to the petitioner from the date of this receiving a copy of this Order.

Accordingly, it is

ORDERED, that James Cortazar is found in contempt for failure to provide documents and other materials to the petitioner, pursuant to this Court's Order, dated February 16, 2017; and it is further

ORDERED, that respondent must purge the contempt by providing the said requested documents and other material by July 30, 2018. If the respondent does not provide this material, he will be fined \$250 per day until they are delivered to the petitioner from the date of this receiving a copy of this Order; and it is further

ORDERED, that in the event James Cortazar fails to comply, the petitioner may enter judgment against him for the sums due and owing; and it is further

ORDERED, that the petitioner shall serve a copy of this order with Notice of Entry, upon the respondent James Cortazar, within twenty days (20) of the date of this Order.

Defendant was personally served with the Order with Notice of Entry on June 20, 2018 (See Exhibit 10).

Upon the unopposed application of the plaintiff's attorney made on November 4, 2018, the Court Ordered the amendment of the caption to reflect the Defendant's name as James Cortazar a/k/a Jim E. Cortazar a/k/a James Edwin Cortazar. (See ECF# ____ and page #429-430 Derivative Action).

Findings of Fact

The following facts are found by this Court based upon the testimony of witnesses and by the Court's evaluation of their credibility and upon the exhibits introduced into evidence and this Courts evaluation of their authenticity, meaning and the probability that the recitations in the exhibits reflect the actual facts, all within the context of this Action. As an initial finding the Courts prior Findings of Fact in its unappealed Order of Dissolution dated February 16, 2017 is the law of the case and such findings are specifically incorporated herein and made a part hereof. Counsel for Plaintiff put into evidence the minutes of that hearing and the exhibits introduced as part of the record in this proceeding (See Exhibit 20 and Exhibit 1 through 29 Diss. Proc.)

Specifically, the Court finds, as it did in the consolidated Dissolution Proceeding at the time of that hearing, that:

47th Road, LLC is a New York limited liability company, which was established on August 18, 2009 by Vincent Cortazar and James Cortazar. The brothers each own a 50% interest in the company. The sole asset of the company is real property located at 5-19 47th Road, Long Island City, New York, designated as Block 29, Lot 17, in Queens County. The brothers purchased the property in their individual names as joint tenants by deed, dated August 29, 1996. The property transferred from the brothers as joint tenants to 47th Road LLC. The property consists of a residential, four story

walk-up apartment unit with eight separate apartment units occupied by tenants, which have a fair market rental value of approximately \$160,000.00 per year rent. On August 25, 2009, the company borrowed the sum of \$800,000.00 from Hypothecator Realty Corp. On October 4, 2010, the company took an additional mortgage from the same entity, in the sum of \$250,000.00. On February 14, 2011, the brothers borrowed the sum of \$1,200,000.00 from Hudson Valley Bank, which is now known as Santander Bank. This loan was secured by a \$1,200,000.00 mortgage on the subject premises. The funds from the mortgage loans, in the approximate amount of \$1,000,000.00, were used to purchase approximately one hundred acres in Rio Del, California. This California property was titled only in the name of James Cortazar. When Vincent Cortazar found out, there was a physically violent confrontation between the brothers. Vincent Cortazar was locked out of the Company's day-to-day operations, claiming the property was mismanaged. James Cortazar was collecting the rents from these apartments, while not paying down any of the indebtedness of the mortgage. The Santander mortgage loan matured on March 1, 2016. As a result, all amounts due under the note became due and payable. James Cortazar refused to pay the mortgage. As a result the property is in foreclosure. He refuses to work with his brother Vincent, to resolve the mortgage. There are numerous outstanding violations on the property and James Cortazar has collected the rents without making repairs, paying the violations, or the mortgage. He apparently does not care that the only asset of the company will be lost to foreclosure. An entity known as 47th Road Funding, Inc. acquired the defaulted loan from Santander Bank for \$1,000,000.00. Vincent Cortazar has attempted to renegotiate a loan extension with 47th Road Funding. However, without his brother's cooperation, which has not been forthcoming,

since he is a 50% member of the company this has been impossible.

These incorporated facts are extremely relevant to the finding made herein upon the consideration of all of the evidence adduced at both the dissolution hearing and Bench Trial in the derivative action.

As also found after the dissolution hearing, after witnessing the testimony and demeanor of both James Cortazar and Vincent Cortazar, and the respective witnesses called on their behalf, the Court finds that the testimony of Vincent Cortazar was credible as was the testimony of Joseph Mattone, Receiver, and that the testimony of James Cortazar was not credible as was the testimony of his only witness, Jose Guadalupe Escudero. James Cortazar's lack of credibility was compounded by the total lack of cooperation given by James Cortzar to Receiver Mattone and James Cortazar's persistent failure, even in the face of the Contempt Order, to transfer and transmit to Receiver Mattone the Company's, books, records, bank accounts, securities and collected rent, (pgs. 17-92). The court takes note that the Defendant James Cortzar attempted to call as a witness at trial his employee and bookkeeper Christine Gavino but she refused to testify on the Defendant's behalf, (pg. 319). Christine Gavino testified in the Dissolution Proceeding that she was employed by Defendant James Cortazar since 2015. She collected and deposited rents, allocated tenants, paid bills and had an active full time role in the management of the Company for the past three (3) years (pages 85-86 Diss. Proc. Exhibit 20)

The Plaintiff called Mr. Joseph Mattone, Jr. to the stand. Mr. Mattone is an attorney who, as previously noted, was the substitute receiver appointed for Judge Risi on August 3, 2017.

Mr. Mattone testified that when he took over as substitute Receiver he reviewed Mr. Risi's interim account report which revealed that rent was never collected for apartments 1L or 1R and that these apartments were rented to the Defendant James Cortazar's employee, Christine

Gavino and a Georgio Christodolou respectively. The Christodolou apartment (1R) was apparently being utilized as an air B&B and the listed contact for that daily rental was “Christine”, James Cortazar’s employee. (See pgs. 18-20). Mr. Mattone served a Notice to Attorn on the property on December 5, 2017 and received no contact from any of the tenants who resided at the premises. Investigation by Mr. Mattone revealed that the notices had been sent to a common mailbox and that only James Cortazar and “someone from the basement apartment” had the key, (pg. 21). The subject premises is an eight story apartment building and no basement tenancy would be legal.

Upon Mr. Mattone discovering that there was a tenant in the basement he left a note on the basement door indicating that the dwelling was not legal and its continued occupancy would result in the commencement of a civil proceeding. (pg. 22).

Shortly thereafter, Mr. Mattone was contacted by an attorney Alfredo Tapia, who informed him that he represented the basement tenant who had an “arrangement” with James Cortazar in exchange for living and/or working in the basement. Mr. Mattone visited that basement unit and it was apparent to him that the basement was being used as a dwelling unit. Mr. Mattone then received an email from attorney Tapia which confirmed “that Mr. Jose Guadalupe Escudero, lives in the basement apartment . . . as part of a [sic] employment arrangement with Mr. James Cortazar . . .”) (See Exhibit 24)

Mr. Mattone testified that despite his numerous requests of James Cortazar’s attorney, James Costo and of Christine from the Defendant James Cortazar’s office he was never provided with any bank records or rents from James Cortazar or his agents, (pgs. 26-34 and Exhibit 4 & Exhibit 5). The Receiver’s emails with Christine and James Costo were admitted into evidence and support, beyond question, that the Defendant James Cortazar was receiving rents from the

Premises and failed and refused to turn over those rents and profits to the Receiver, despite repeated demands, (See Exhibit 5). Mr. Mattone's communications with Christine were replete with misrepresentations by her regarding payments made for real estate taxes, insurance and the failure to provide any receipts for alleged expenses, (pgs. 29-34). In fact the only monies received by Mr. Mattone from James Cortazar during his tenure as substitute Receiver was one check written from James Cortazar's personal account for \$7,414.00 of the \$13,641.76 in outstanding tenant security (See Exhibit 1, Exhibit 7 and pg. 36).

The substitute Receiver entered into a Purchase and Sale Agreement (PSA) for the Premises on May 4, 2018 (See Exhibit 6 and pg. 36). The PSA was for a purchase price of \$2,500,000.00. The biggest issue in the sale was the fact that there were over \$500,000 in liens against the Premises for violations concerning, for the most part, the illegal change and occupancy of the basement. The purchaser of the property, 519 Management Corp., pursuant to the PSA, took title to the property subject to the violations and had to establish a conditional escrow regarding these open judgments to close, (See pg. 38). These violations reduced the purchase price that the Premises sold for. Documentary evidence revealed that the violations reduced to judgment totaled \$548,521.50, all entered at the time after James Cortazar wrested control of the Premises from Vincent Cortazar, (Exhibit 22). Although Mr. Mattone did testify that there were violations on the Premises which predated 2011 the title report and his testimony confirmed that these had been either paid or "written-off" before the date of the closing (pg. 68).

The Premises was sold on June 29, 2018. At the time of the sale there was \$16,936.21 due the City of New York for delinquent water and sewer charges together with delinquent real estate taxes of \$50,500.00 all deducted from the proceeds of the sale to the Company's detriment and all accruing during James Cortazar's management of the Company. (Exhibit 7 & Exhibit 15).

At the closing the delinquent mortgage was paid off in the sum of \$1,723,626.25. This sum represented \$1,097,904.31 in principal and the balance in default interest which increased from the date of default March 1, 2016 from 4.5% to 19.5% in the total amount of \$625,721.94 (for default interest and lenders attorney's fees) (Exhibit 7, 8 & 9 pgs. 39-43).

Vincent Cortazar was the next witness to testify on his own behalf. He described the Premises owned by the Company at 5-19 47th Road (the "Premises") as a four-story walk-up with eight (8) rent stabilized apartments and a basement. Vincent Cortazar testified that in 2009 and 2010 his brother James Cortazar went to California to develop property there for resale. The Premises was then used as collateral to acquire an \$800,000 mortgage (pg. 95 Diss. Proc.). The documentary evidence produced during this trial and the dissolution proceeding set the date upon which this loan was given as August 25, 2009 (See Exhibit 6 & 8 Diss. Proc.). From these proceeds a check in the sum of \$714,420.21 was given to 47th Road, LLC and thereafter endorsed by James Cortazar, (See Exhibit 9 Diss. Proc.).

These proceeds (\$714,420.21) were used by James Cortazar to fund a development parcel known as Rio Dell Pilar in Rio Dell, California. Vincent Cortazar and James Cortazar had an understanding that they would each own 50% of this California development property (pg. 95). Vincent Cortazar relied upon his brother's assurances that this money would be used to fund the California project and that they would both share equally in that project (pg. 96-97). In or about late 2010 to early 2011 Vincent Cortazar's suspicions were aroused when he came to find out that his brother had forged his signature to transfer a parcel of property in Florida (pg. 97). This incident caused Vincent Cortazar to research the California acquisition and he discovered that James Cortazar had purchased the Rio Dell property in the name of a company only owned by James Cortazar.

These funds (\$714,420.21) were never returned to the Company.

In early 2011 the brothers had a confrontation over this and other related matters and Vincent Cortazar was forced out of the Company's offices. Vincent Cortazar left and left all of the Companies paperwork and accounts with James Cortazar in the Company's office (pg. 98).

Since 2011, Vincent Cortazar has never received any funds from the Company and no disbursements of profit have been shared with him (pg. 99).

On October 4, 2010 the Company borrowed \$250,000 from Hypothecator Realty Corp. After payment of expenses, the sum of \$151,759.33 was given to the Company (See Exhibit 13, 14, 15 Diss. Proc.). These proceeds were lost when the brothers invested in a stock purchase which turned out to be a Ponzi scheme (See Exhibit D).

Since James Cortazar provided no bank records or expense reports to this Court, the Receiver or opposing counsel, (despite the dissolution order and the contempt citation that ordered this production), Vincent Cortazar testified from his own knowledge of the Premises' expenses and from a historical expense report dating to 2010 the last time he was managing the Company. Using the 2010 expenses spreadsheet (Exhibit 13) and certified DHCR rent records (Exhibit 14) Vincent Cortazar, after applying the Consumer Price Index annual adjustment, was able to fairly calculate the rents received and expenses for the Company from 2011 through the time of trial (See Exhibits 15 & 16). This rental income and expense extrapolation was put into evidence as Exhibit 18 and the Court finds that, except for some minor adjustment to be discussed herein, it fairly reflects the Company's income and expenses on an annual basis. In fact, these figures are conservative in that there is no account for the illegal basement apartment rent, or the air B&B rental of the units (pg. 119). None of this income was shared with Vincent Cortazar as a 50% member and owner of the Company.

The Premises was refinanced for the last time with the Hudson Valley Bank on February 14, 2011 for the sum of \$1,200,000.00 (Exhibit 16 Diss. Proc.). This mortgage was thereafter assigned to Santander Bank and then further assigned to 47th Road Funding, Inc. (Exhibit 9). The mortgage had an interest rate of 4.5% and matured by its own terms on March 1, 2016. In the event of a default the default rate increased 1% every month and was at 19.5% when paid by the Receiver at Closing, (Exhibit 8). The Premises could not be refinanced to avoid foreclosure and the exorbitant default interest penalty because James Cortazar would not recognize Vincent Cortazar as a co-equal member of the Company (pg. 124-125), (see also Dissolution Order Exhibit 1, pg. 20). Even throughout this trial James Cortazar refused to acknowledge Vincent Cortazar as a 50% member/owner of the Company (pg. 485).

The record additionally reveals that upon taking over the company James Cortazar persistently failed to pay the mortgage in a timely manner and numerous default notices were sent by the mortgagee to the Company together with a forbearance agreement that reflected a failure to make mortgage payments from July 2012 to November 2012 (See Ex. 23 pg. 459-460), and default notices Oct. 22, 2013, Oct. 8, 2013, August 19, 2015 and Jan. 13, 2016 (Exhibits 23-26 Diss. Proc.). The monetary damage suffered by the Company for this failure, as previously noted was \$625,721.94 which comprised the default interest and attorneys fee due and paid by the Receiver at the closing.

The Plaintiff then rested and the Defendant called his first witness Guadalupe Escudero Rodriguez, to testify (pg. 300). Mr. Rodriguez was the individual identified by the Receiver as having lived in the basement apartment. Mr. Rodriguez testified that he did not know Alfredo Tapia despite the fact that Mr. Tapia advised the Receiver via email that he was Mr. Rodriguez' attorney and that Mr. Rodriguez was living in the basement of the Premises (See email of Feb.

23, 2018, Exhibit 24). After being confronted with the email Mr. Rodriguez acknowledged that attorney Tapia represented him with respect to the occupancy of the basement of the Premises.

Based upon the evidence produced with respect to the continued occupancy of the illegal basement apartment and the continuing violations issued by the City of New York for this illegal basement, the evidence clearly supports Vincent Cortazar's testimony that, prior to having the management of the premises wrested from him in 2011, the basement had been brought into compliance with plumbing fixtures and partitions removed. Exhibit G, which is a photo taken during the appraisal of the property on May 29, 2009, shows the vacant status of this area, (See p. 246).

After taking back control of the property the Court finds that James Cortazar reconstructed the basement for use as living quarters and Mr. Rodriguez lived there until at least Feb. 2018 when, due to the Receiver's demand, he vacated the Premises (p. 273-274; Exhibit G; Exhibit 24).

These persistent violations resulted in judgments against the Premises from June 2011 through Feb. 2015 in the total sum of \$548,521.50 (Exhibit 22) all docketed at a time when James Cortazar was the controlling member of the Company.

Despite this evidence when James Cortazar testified in his own behalf, he incredibly took the position that when he managed the Premises from 2011 to 2018 he never permitted the occupancy of the basement of the Premises for living purposes (pgs. 354-356). James Cortazar's testimony is clearly and convincingly contradicted by Mr. Mattone's observations, by Mr. Tapia's email, and by the persistent violations issued post 2011 regarding this illegal occupancy. Even James Cortazar's own evidence confirms the installation of an intercom system for nine (9) apartments in 2014 (Exhibit Q).

As part of the Defendant's claims, James Cortazar put into evidence receipts for bills paid during his control of the Company which were extraordinary expenses. These items were for the installation of an intercom system for 9 apartments on Feb. 10, 2014 for \$1,248; conversion of oil heat to gas for \$18,800 and Rhino Heating & mechanical Systems on April 10, 2014 for \$953.84 (Exhibit. Q). The Plaintiff agreed that in calculating profits due that these expenses would be deducted.

James Cortazar then contended that Vincent Cortazar, without his knowledge or consent took the balance of the proceeds from the \$250,000 Hypothecator Loan (\$151,759.33 Exhibit 15 Diss. Proc.) and invested it in a Ponzi Scheme in the name of A Plus Construction. Vincent Cortazar has consistently maintained that both he and his brother James Cortazar decided together to invest in the Green Solutions company which turned out to be a scam which resulted in a federal investigation and arrests (See pgs. 28 and 53 Diss. Proc. Exhibit 20). James Cortazar, in one moment claimed that A Plus Construction was Vincent Cortazar's company while, earlier in the trial he alleged that he (James Cortazar) founded and funded A Plus Construction (pg. 348). The testimony of James Cortazar with regard to the \$151,759 Ponzi Scheme transfer in light of all of the evidence, is not credible and this Court finds that such investment was made with the knowledge and consent of both Vincent Cortazar and James Cortazar.

The Defendant then went on to confirm that despite this Court's Order to the contrary, he did not supply the Receiver with any rent payments (although emails from his office to the Receiver confirm the collection of rents) or with any bank records at any time during the pendency of this action (pgs. 491-504). In fact, the Defendant admitted to depositing rent checks in his own personal account after the Dissolution Order (pg. 502). The Defendant's constant refrain that he would "have to check his records" when asked questions about compliance with

the Court's directives confirm the Defendants total lack of regard for these proceedings, this trial and the Court's orders, (pgs. 520-521).

At the conclusion of the evidence the Court finds that the Plaintiff Vincent Cortazar sustained his burden to prove that the Defendant James Cortazar breached his fiduciary duties owed to his brother as a 50% owner/member of the Company as follows:

(1) by diverting the sum of \$714,420.21 from the company to the Rio Dell Project on August 25, 2009 and not sharing same with the Company or Vincent Cortazar despite his representations to the contrary;

(2) by permitting the sum of \$548,521.50 to be docketed as Judgment liens against the premises during his control of the Company;

(3) by failing to pay and allowing the mortgage on the premises to go into default by refusing to recognize Vincent Cortazar as a member of the Company, causing default interest to become due with bank attorney's fees in the sum of \$625,721.94 as paid at the closing of June 29, 2018;

(4) in failing to disburse and properly share with Vincent Cortazar 50% of the rents and profits of the Company from May 1, 2013 through June 29, 2018 in the sum as more specifically set forth in Appendix #1 herein;

(5) in failing to provide the Receiver with the sum of \$6,227.76 in securities (\$7,414 received of \$13,641.76 outstanding); and

(6) in failing to pay water and sewer rents to the City of New York in the sum of \$16,936.21 (Exhibit 7).

The Court also finds that the Defendant James Cortazar violated the Court's Order of Dissolution and the Court's Order of Contempt dated Feb. 16, 2017 and June 11, 2018

respectively and that the Contempt Order was personally served upon James Cortazar on June 20, 2018. James Cortazar has failed and refused to purge himself of the contempt and should be fined the sum of \$250 per day from the date of service June 20, 2018 through the commencement of this trial Oct. 17, 2018 in the sum of \$29,750 (119 days x \$250).

Finally, the Court finds that it is suitable that the Plaintiff Vincent Cortazar be awarded counsel fees in an amount to be determined.

The Defendant James Cortazar's Counter-Claims are dismissed. The Defendant failed to offer any credible proof of any viable claims against Vincent Cortazar for any period of time remotely within the Statute of Limitations. James Cortazar's incredible testimony and lack of any documentary evidence in support of his claims leads the Court to this finding. The Court also finds the Defendant's failure to call his employee, Christine Gavino, to testify about her day to day management of the Company since 2015 highly suspect. Ms. Gavino clearly had many email interactions with the Receiver (Exhibit 5) and was intimately involved with rent collections and deposits and the B&B use of one of the apartments. She was in a unique position to testify to support James Cortazar's otherwise unsupported claims, yet when called to testify by her own employer, the Defendant, she refused.

Conclusions of Law

As members of the 47th Road LLC (the "Company") both Vincent Cortazar and James Cortazar had a fiduciary duty not only to each other but also to the Company. When James Cortazar locked Vincent Cortazar out of the Company's day-to-day operations he had a duty to manage the Company in a proper and responsible manner and a duty to provide Vincent Cortazar with an appropriate share of the rents and profits of the Company during his ouster.

“It is elemental that a fiduciary owes a duty of individual loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty”, (*Birnbaum v. Birnbaum* 73 NY2d 461 [1989]). That duty not only extends to the fellow members of the Company but to the Company itself. James Cortazar owed the Company his individual loyalty and he was not permitted to derive a personal profit at the expense of the Company, (*Kulik v. Hoteltron Systems, Inc.* 96 AD2d 1038 [2nd Dept 1983]).

As noted in the finding of fact in this trial and the consolidated dissolution proceeding, James Cortazar, during his management of the Company, collected the rents and failed to make needed repairs subjecting the company to exorbitant judgments and violations while at the same time defaulting in making the Premises’ mortgage payments and allowing the mortgage to come in to default.

To establish a breach of fiduciary duty the movant must prove the existence of a fiduciary relationship, misconduct by the other party and resultant damages, (*Kurtzman v. Bergstol*, 40 AD 3rd 588 [2nd Dept. 2007]). Vincent Cortazar presented credible evidence that James Cortazar breached his fiduciary duty both to Vincent Cortazar and the Company by failing to provide Vincent Cortazar with his 50% share of the rents and profits of the Company since early 2011; in permitting the mortgage loan to default with accumulated default interest; in permitting the violations against the Premises to go to judgement and in wrongfully taking the net proceeds of the Company’s \$800,000 mortgage to acquire his own California development project. Throughout this litigation the Defendant James Cortazar has consistently violated the Courts Orders in failing and refusing, even after a citation for contempt, to provide the Receiver the

books, records and bank accounts of the Company. In fact, the only receipt of any sort by the Receiver was a check for partial payment of the tenants' security, drawn on the personal account of James Cortazar. Defendant has taken great steps to insure the ability to hide and obfuscate the finances of the Company.

Under such circumstances the stringent rules for damage calculations are relaxed. Where a breach of fiduciary duty has been established this court has significant discretion in ascertaining a fair approximation of the losses suffered by the Company and by Vincent Cortazar. (*See Gibbs v. Breed, Abbot & Morgan* 271 AD2nd 180 [AD 1st Dept. 2000]).

Such discretion is important in this case where, after all, the difficulty faced in calculating lost profits due Vincent Cortazar was attributable to the Defendant's misconduct and contemptuous behavior (*See Wolf v. Rand* 258 AD2nd 401 [A.D. 1st Dept. 1999]).

The Court finds that the methodology utilized by the Plaintiff in determining an annualized loss of profit or distribution to him was reasonable and supported by both documentary evidence and historical data (*See Venizelos v. Oceanic Maritime Aging* 268 AD2nd 291 [A.D. 1st Dept. [2000]]).

Under such circumstances it is appropriate to award the Plaintiff Vincent Cortazar with pre-judgment interest on the ending date of each year within the applicable three year statute of limitations for the annualized damages as set forth in Appendix A (i.e. from April 28, 2013 to June 12, 2018), (see *Wolf v. Rand*, supra.)

With respect to the accumulation of violations that reduced the value of the premises, the only asset of the Company, all of these judgments were entered and imposed upon the Company after the last refinance of the Premises with Hudson Valley National Bank on February 4, 2011.

The Court finds that no pre-refinance monetary violations existed after the refinance because Hudson Valley Bank required, as part of the terms of its loan, a payment of all outstanding monetary violations against the Premises. Thereafter, under the management of James Cortazar the Premises were allowed to be burdened and the sole asset of this Company depleted by the imposition of judgments against the Company in the sum of \$548,521.50. Rather than converting the rents and profits of the Company for his own use, Defendant James Cortazar was obligated to fulfill his fiduciary obligations to the Company by the correction of this violation. Rather than correct this continuing violation the Defendant continued to maintain the basement as a dwelling unit even through the Receiver's appointment and until at or near the closing on the Premises. Such conduct was in clear violation of the duties and obligations of James Cortazar as the manager of the Company and caused a distressed sale of the Premises, subject to the judgments, reducing the ultimate value of the Premises by a like sum. The Court therefore awards Vincent Cortazar judgment against James Cortazar in the sum of 50% of the full amount of the docket judgments of \$548,521.50, to wit the sum of \$274,260.75 with interest from the date of this Order.

As previously noted it was James Cortazar's failure to even recognize his brother Vincent Cortazar as member of the Company that prevented the Company from refinancing the Premises at a time before the default of the mortgage. As a result of this default the rate of default interest increased from 4.5% to 19.5% accumulating to \$617,671.33 at the time of the closing just in default interest and bank attorney's fees. This entire loss was directly attributable to James Cortazar's conduct and as a result Vincent Cortazar is entitled to a judgment in the sum of 50% of the full amount of the default interest and bank attorney fees of \$617,671.33, to wit the sum of \$303,835.66 with interest from the date of this Order.

The Statute of Limitations for a breach of fiduciary duty depends upon the substantive remedy sought by the Plaintiff. Where the claim seeks equitable relief, it is governed by the six year statute of limitations of CPLR §213(1). Where the claim seeks legal relief, it is governed by the three year statute of limitations. Where, however, the claim for damages is based upon a fraud committed by one of the members against the other the statute of limitations for such claims is six years from the date the cause of action accrues subject to the doctrine of equitable estoppel.

In this Action the Plaintiff Vincent Cortazar requests damages from James Cortazar in fraud for his theft of \$714,420.21 of proceeds from the first mortgage placed on the Premises. Rather than use these funds as promised, for a joint venture in California, Defendant purchased acreage in Rio Dell California under his own company to the detriment of Vincent Cortazar and 47th Road, LLC, who was now saddled with this indebtedness. This money was taken from the Company by check endorsed by James Cortazar on August 31, 2009. Since the Summons & Complaint in this action was filed in April 2016 such claim would normally be barred by the statute of limitations.

In this action, however, the doctrine of equitable estoppel precludes the Defendant from asserting the statute of limitations as a defense.

The doctrine of equitable estoppel will preclude a Defendant from asserting the defense of statute of limitations where it is the Defendant's affirmative wrongdoing which produced the delay between the date of accrual and date of the legal proceeding. (*North Coast Outfitters, Ltd v. Darling* 134 AD2nd 998 (AD 2nd Dept. [2015])). Here the Plaintiff reasonably relied upon James Cortazar's representations that the proceeds of the loan were going to be used for their joint benefit and was lulled into a false sense of security as his brother James Cortazar left New

York for several years to facilitate that development. It was only after the discovery of his brother's fraud in 2011 that Vincent Cortazar was ousted from the Company. Under these circumstances the Court finds that equitable estoppel is appropriate to prevent Defendant's utilization of the defense of the statute of limitation (*Simcuski v. Saeli* 44 NY2d 442 [1978]). As such, the Plaintiff Vincent Cortazar is awarded damages in the sum of 50% of such conversion (\$357,210.10) with interest from the date of this Order.

In this action the Plaintiff has requested that Plaintiff's attorney's fees be asserted against the Defendant as the Plaintiff, Vincent Cortazar's legal fees may be recouped in this action. In such a circumstance under these facts the Court finds that Vincent Cortazar is entitled to be reimbursed his attorneys fees directly from James Cortazar in a sum to be determined after submission by counsel for the Plaintiff (*See Venizeles v. Oceania Maritime Agency, Inc.* 268 AD2d 29 [1st Dept. 2000]; *Tzolis v. Wolff* 10 NY3d 100 [2008]).

Judgments and Decretals

As a result of the foregoing this Court hereby finds that the Plaintiff is entitled to the following relief:

It is ORDERED and DECREED that the Plaintiff Vincent Cortazar be awarded judgment against Defendant James Cortazar for loss of rents and profits as set forth in Appendix 1 with pre-judgment interest at 9% per annum for each annualized period as of December 31st of that year to the date of this Order, as set forth in Appendix 1, in the sum of \$226,783.00 with interest from the date of this Order, and it is further

ORDERED and DECREED that the Plaintiff Vincent Cortazar be awarded judgment against the Defendant James Cortazar for default interest imposed and accumulated against the Company in the sum of \$303,835.66 with interest from the date of this Order, and it is further

ORDERED and DECREED that the Plaintiff Vincent Cortazar be awarded judgment against Defendant James Cortazar for the damages done to the value of the Company by the docketing of judgments against the Premises in the sum of \$274,260.75 with interest from the date of this Order, and it is further

ORDERED and DECREED that the Plaintiff Vincent Cortazar be awarded judgment against Defendant James Cortazar equal to 50% of the proceeds of the first mortgage used to finance James Cortazar's California development project in the sum of \$357,210.10 with interest from the date of this Order, and it is further

ORDERED and DECREED that the Plaintiff Vincent Cortazar have judgment against the Defendant James Cortazar in the sum of \$29,250.00 as and for James Cortazar's violation of the Contempt Order of this Court as with interest from the date of this Order, and it if further

ORDERED and DECREED that the Plaintiff Vincent Cortazar have judgment against the Defendant James Cortazar in the sum of \$3,024.62 as and for 50% of the security not provided the Receiver by James Cortazar and the sum of \$2,250.00 paid by Vincent Cortazar to Receiver Risi for the Receiver's bond all in the sum of \$5,274.62 with interest from the date of this Order and it is further

ORDERED and DECREED that attorney's fees shall be awarded to the Plaintiff Vincent Cortazar in an amount as may be fixed by the Court in accordance with this decision and order on at least 20 days' notice to Defendant James Cortazar, setting forth in detail the schedule of services performed and time spent and disbursements proceeding and derivative action and that judgment on such award shall be by further order of this Court entered against Defendant James Cortazar and it is further

ORDERED ADJUDGED and DECREED that the Receiver prepare and file a final accounting with this Court within 30 days of the entry of this Order and upon confirmation of said accounting and payment of final fee to the Receiver that the monies left as a balance in the Receiver's account be paid to Plaintiff Vincent Cortazar through his attorneys White, Cirrito & Nally, LLP and that 50% of that sum received be as a credit against the sums awarded in this Order.

The foregoing constitutes the decision, order, judgment and opinion of the Court.

Dated: January 15, 2019

TIMOTHY J. DUFFICY, JSC

APPENDIX 1

Loss of Profits from 5-1-13 (three years from filing Action) to 6-12-18 (date of Sale by Receiver)

<u>Year</u>	<u>Profit</u>	<u>Water/Sewer</u>	<u>Other Adjustment</u>	<u>Vincent Cortazar's 50% int</u>	<u>Interest from 12/31 of year</u> <u>to 1-18-19</u>	<u>Total</u>
2013 (7/12)	\$ 18,274.81	\$5,000.00	_____	\$ 6,637.40	\$ 3,418.89	\$10,056.29
2014	\$ 33,380.97	\$5,000.00	_____	\$14,190.48	\$ 6,452.19	\$20,642.67
2015	\$ 60,444.36	\$5,000.00	_____	\$27,722.18	\$10,109.86	\$37,832.04
2016	\$148,730.97	\$5,000.00	_____	\$71,865.48	\$19,740.36	\$91,605.84
2017	\$150,427.88	\$5,000.00	Risi Rects \$21,034.64	\$62,196.62	\$11,471.44	\$73,668.06
2018 (5/12)	\$ 75,128.62	\$5,000.00	Mattone Rects \$63,440.38	\$ 3,344.12	\$ 134.40	<u>\$ 3,478.52</u>
Total:						\$237,283.42
Less 50% of agreed adjustments						
Broker: \$18,800 = \$ 9,400.00						
Intercom: \$ 1,248 = \$ 624.00						
Rhino: \$953.84 = \$ <u>476.92</u>						
Adjustment Total:				\$10,500.92		

TOTAL DUE TO VINCENT CORTAZAR FROM JAMES CORTAZAR
\$226,783.00