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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET NO. C- 317-09

DR. DAVID BIKOFF, individually and derivatively on behalf of NORTH JERSEY AMBULATORY SURGICAL CENTER, LLC and TOWER REAL ESTATE HOLDINGS, LLC, *Plaintiff(s)*, **vs.** **DR. ALFREDO GARCIA,** *Defendant(s)*.	**CIVIL ACTION** *OPINION*

DECIDED: May 27, 2011

APPEARANCES: Nagel Rice, LLP (Bruce Nagel, Esq., appearing), attorneys for plaintiffs Sokol, Behot and Fiorenzo (Joseph Fiorenzo, Esq., appearing), attorneys for defendants

HARRY G. CARROLL, J.S.C.

PROCEDURAL BACKGROUND

Plaintiff commenced this action by way of Verified Complaint and Order to Show Cause filed on October 13, 2009. In that Complaint plaintiff, Dr. David Bikoff, individually and derivatively on behalf of North Jersey Ambulatory Surgical Center LLC ("North Jersey") and Tower Real Estate Holdings, LLC ("Tower"), sought the right to redeem the interest of the defendant, Dr. Alfredo Garcia, in both those companies pursuant to each company's operating agreement. On December 23, 2009, the return date of the Order to Show Cause, it was agreed that defendant would be restrained and enjoined from acting on behalf of both North Jersey and Tower. Plaintiff's additional requests for relief that defendant sell his interest in the two companies and that a fiscal agent be appointed were both denied without prejudice by the Honorable Ellen Koblitz, J.S.C.

Defendant filed his Answer and Counterclaim on December 10, 2009. In that Counterclaim

Dr. Garcia requested that both North Jersey and Tower be dissolved, their affairs wound up, and their assets distributed to their members. Alternatively defendant sought to compel the companies to buy out his interests. Defendant further sought an accounting and an award of damages predicated on various causes of action including breach of fiduciary duty, breach of contract, negligent mismanagement, conversion, and unjust enrichment.

On January 22, 2010 Judge Koblitz entered an Order denying defendant's motion to dissolve North Jersey and Tower and to award defendant 50 percent of the distributions resulting from such dissolutions. Judge Koblitz further denied defendant's alternative request to compel the companies to buy out defendant's interests in those companies.

Subsequently, by Order entered on July 2, 2010, Judge Koblitz granted plaintiff's motion for partial summary judgment so as to provide that the companies were to redeem defendant's interest in them at 50% of the value, in an amount to be determined at trial. Additionally the court entered judgment on behalf of North Jersey and Tower against defendant in the amount of $183,205.99 for his capital call obligations.

SUMMARY OF TESTIMONY AND EVIDENCE

Trial in this matter was highly contentious and was frequently punctuated by acrimonious exchanges between counsel. It commenced on September 14, 2010 and continued on September 27, December 13, 14 and 15, 2010, January 10, 11, 12, February 1, 2, 8, 9, and March 2, 2011. Following several extensions granted by the court for the parties to resolve any disputed evidence issues and to submit written summations, plaintiff's written summation was received on May 13, 2011 and defendant's on May 20, 2011.

In his testimony Dr. Bikoff described how his relationship began with Dr. Garcia in or around 1999 when it became apparent to him that he had to leave his Essex Street office. At that time a piece of land became available upon which he considered constructing a small building. He then met with and hired accountant Milton Brown, who indicated that he had a client who was similarly situated. They arranged to meet and decided to pool their resources so as to construct a larger building on the property which would house their respective medical practices.

As a result, Dr. Bikoff and Dr. Garcia formed two limited liability companies, one for the operation of a surgical center known as North Jersey Ambulatory Surgical Center, LLC and the other a real estate entity known as Tower Realty Holdings, LLC. The parties then entered into Operating Agreements for each of the LLCs (Exhibits P-1 and P-2).

Following a process in which architects and contractors were interviewed, the existing structure on the property was demolished in early 2002 and ground was broken on a new building. Dr. Bikoff lived directly across the street from the new office site and indicated that he was present on the construction site usually once or twice a day for which he received no additional compensation. He testified that Dr. Garcia's involvement in this process was minimal, that he was rarely on the construction site and only rarely attended construction progress meetings which were held.

Dr. Bikoff testified that from the outset he had asked Dr. Garcia if he was financially able to afford this project and Dr. Garcia indicated he could. At some point during the construction phase Dr. Garcia's medical license was suspended for a six-month period, during which time he experienced financial problems and was unable to make required capital contributions.

The construction was financed by a construction loan which was then converted to a permanent loan upon completion. According to Dr. Bikoff the original amount of the mortgage loan held by Valley was some 4-5 million dollars although the loan balance was since brought down to some 3.4-3.6 million dollars. Both Dr. Bikoff and Dr. Garcia personally guaranteed this loan.

Dr. Bikoff described the construction process in detail. He indicated that substantial delays had arisen during construction and that he wished to fire the original contractor, OCC Construction, but originally Dr. Garcia disagreed. However, after 2 ½ -3 years Dr. Garcia eventually agreed to terminate OCC as general contractor. An attorney, Lee Tesser, Esq., was retained to sue OCC which lawsuit remains pending. According to Dr. Bikoff Tower has paid approximately $77,000 in legal fees to litigate its claim against OCC. After Dr. Garcia ceased making contributions Dr. Bikoff then expended $7,638 of his own funds in preparation of an expert report relative to that construction litigation.

Following the termination of OCC another contractor was retained to perform work for approximately an additional year until that company ceased its operations. Eventually, the person who had coordinated the project completed it.

During the construction phase each month the administrator would made a capital call and according to Dr. Bikoff it was frequently difficult to get Dr. Garcia to make all or part of his capital contribution, or same would be paid late.

Eventually construction was completed thus resulting in a building which housed each doctor's medical practice with a separate surgery center located on the first floor. Prior to

September 2009 rentals for the surgery center were generated by each doctor performing surgery there as well as a few other doctors who utilized the facility. Dr. Garcia brought in more revenue than Dr. Bikoff; however this stopped when Dr. Garcia was arrested in 2009. According to Dr. Bikoff the ambulatory center has not had sufficient funds to pay the rent since January 2010 and has been forced to cut back its hours of operation from 5 days to 3 days in addition to cutting back the number of its employees.

Dr. Bikoff identified 2009 tax returns for North Jersey Ambulatory Surgery Center (Exhibit P-3) which showed a loss of $522,096. Since that time the surgery center's losses have continued to escalate.

Dr. Bikoff testified that Dr. Garcia's rent is $11,000 per month which has not been paid since January 2010. In addition there is a $4,250 per month sublease on the property which represents rent that Dr. Garcia has collected from the subtenant and has not paid over. Also Dr. Garcia has another tenancy known as Tower Infidelity for which the rent is also not being paid. Due to Dr. Garcia's failure to pay rent for his own office and that of Tower Infidelity, neither Tower nor North Jersey can survive without the infusion of additional money and as a result Dr. Bikoff has had to loan money to both companies in order to keep them afloat. Additionally, after the construction phase was completed, Dr. Bikoff contributed funds for electrical items totaling $9,072 as well as $2,355 paid to PAC Construction to remove debris left on the roof. Dr. Bikoff further reviewed a schedule of loans which he contended had been made to the companies (Exhibit P-26) for capital calls, loans made to Tower Real Estate and other expenses which totaled $660,448 so that the building would not go into foreclosure and the surgery center would not go into bankruptcy. Nonetheless Dr. Bikoff expressed a desire to continue practicing at that location and did not wish to dissolve the business entities but rather sought to redeem Dr. Garcia's interest in them. With respect to capital call contributions which had been made to the companies, Dr. Bikoff testified that he considered these to be equity investments notwithstanding that the accountant had apparently listed them on the company's books as loans.

On cross examination Dr. Bikoff was presented with documentation (Exhibit D-39) showing that Dr. Garcia had paid his full $11,000 rent on March 11, 2010 as well as $4,250 in April, May, June and July of that year. He testified that he has no familiarity with the financial statements of the companies nor has he read them nor was he aware of the items which were shown as loans payable to both himself and Dr. Garcia each in the amount of 1,748,645.22 which again according to his

belief represented capital investments rather than loans. When questioned on cross examination with respect to the amount of his loans to the entities, Dr. Bikoff testified that the correct amount of funds which he had loaned to Tower was $204,546.48, in addition to loans to the surgery center in the amount of $351,337.

Dr. Bikoff testified that his attorney had sent a letter dated February 24, 2009 indicating that he wished to terminate the parties' business relationship, which was approximately six months prior to Dr. Garcia's arrest in September 2009.

Dr. Bikoff was also questioned on cross examination with respect to his former wife Kathleen who at some point had commenced oversight of the construction project after the general contractor had been terminated. Although she had been compensated for her services on an hourly basis, she had demanded and apparently was paid an $89,000 completion fee. Dr. Bikoff was shown copies of cancelled checks paid to American Express from Tower by Kathleen totaling $30,263.49 (Exhibit D-21). Dr. Bikoff indicated that he had never seen these before, had no awareness that they were paid, nor did he authorize them. Similarly, when shown copies of cancelled checks paid to Kathleen (Exhibit D-20) Dr. Bikoff indicated he did not authorize these or know that they had been paid.

On redirect examination when questioned with respect to the purported loans, Dr. Bikoff indicated that he never executed any promissory notes nor was any interest ever paid on such amounts. On re-cross examination when shown paragraph 4.2 of the Operating Agreement which dealt with capital accounts, Dr. Bikoff testified that he was unaware whether he had a capital account. However, his K1 (Exhibit P-8) showed a capital account reflecting a negative balance of $629,149.

Dr. Bikoff was recalled to testify as a witness on defendant's case and also to respond to the issues raised in defendant's Counterclaim. During the course of the trial, in late December or early January, he entered into a contract (P-47) to sell the assets of North Jersey to Prestige Surgical Center, LLC. Included in the sale were all of North Jersey's equipment, furniture, fixtures, inventory, patient records and goodwill, as well as its State license and all rights under any executory contracts. Specifically excluded from the sale were all accounts receivable and cash on hand, the judgment previously obtained against Dr. Garcia in the amount of $183,000, and Dr. Bikoff's personal property.

The aggregate purchase price for the purchased assets was $1,038,000. Payment was

structured so as to include payment to Dr. Bikoff of $380,000, the assumption of unpaid payables up to $308,000, the assumption of equipment leases, and the assumption of a note payable to Valley National Bank having an approximate balance of $350,000. Additionally, under Section 2.6 of the Contract Dr. Bikoff was to receive a 20% equity interest in Prestige.

Dr. Bikoff described the dire circumstances which were confronting him around the time period that he entered into the contract for the sale of North Jersey. Dr. Garcia was no longer practicing and both he and the surgery center had stopped paying rent. The loans to Valley were in default and he had to personally put in $380,000 or so to pay the expenses of the surgery center, absent which it faced the prospects of declaring bankruptcy, shutting down, and/or losing the State license. Dr. Bikoff identified a spreadsheet (D-77) placing the immediate monetary needs of the surgery center at $512,417.65, including rent of $306,500 owed to Tower and $205,912.65 in other amounts payable.

Dr. Bikoff also refuted the various contentions raised in Dr. Garcia's Counterclaim and which will be further elaborated upon in the discussion of Dr. Garcia's testimony. He denied any knowledge of any improper expenditures by Kathleen Bikoff which were not related to the building or its construction, or that he benefited in any way from the Tower checks which she wrote to herself (D-20) or to American Express (D-21). He further indicated that he, rather than Tower, paid for the apartment which she occupied during construction of the building.

With respect to the lead lining installed on his floor of the building at his request, Dr. Bikoff indicated his belief that he paid for it although he could not locate anything in his own records showing that he had done so, nor could he explain why a $16,425 check had been issued by OCC to Global Partners in an amount corresponding to Global's invoice for this work.

As to the brick façade, Dr. Bikoff was adamant that the work performed by the original mason was defective and needed to be removed and redone. He agreed to be exclusively responsible for these costs. As a result, checks were issued by Tower for what was supposed to have been paid to the original mason contractor, with the remaining balance of some $88,686 paid personally by Dr. Bikoff.

Gail Carroll is the administrator and director of nursing at North Jersey Ambulatory Surgical Center and testified on behalf of plaintiff. She is also a licensed nurse who oversees the company's billing and payment operations. Ms. Carroll testified that she began working there during the construction process and assisted in the design and construction phase. She also had occasion to

issue capital calls whenever funds were needed. Initially these were verbal and Dr. Garcia had never voiced an objection to the verbal nature of these capital calls. She testified that Dr. Bikoff would meet the calls on a timely basis while Dr. Garcia was a little slower until September 2009 when he was arrested. On November 5, 2009 she issued a written capital call (Exhibit D-26) in the total amount of $136,264 for which each party was responsible to pay $68,132. From that point forward she had never received any money from Dr. Garcia, although Dr. Bikoff had continued to pay which enabled the surgery center to continue its operations. Ms. Carroll itemized all the invoices of the surgery center that were outstanding (Exhibit P-41) and which as of September 5, 2010 totaled $351,137.54.

Dr. Garcia has not been paying his rent for the surgical center nor has his other company, IVF of North Jersey. Accordingly they have reduced the schedule of employees at the surgery center as well as its hours of operation. Approximately $6,000 remained in the company's checking account. On cross examination Ms. Carroll reiterated that Dr. Garcia did not have the money to pay following his arrest in September 2009.

Harvey W. Young testified that he was engaged by Dr. Bikoff to manage Tower in March, 2010. Since that time Tower has continually operated at a deficit. Upon commencement of his duties Drs. Bikoff and Garcia were each responsible to pay $11,000/month rent for the areas occupied by their respective practices. Dr. Bikoff has continually met his rental obligation. Dr. Garcia has not, with his last $11,000 rental payment having been received in March. Thereafter, the only monthly payments which were received were from Dr. Garcia's subtenant who paid $4,250 in April, May, June, July, October and November.

Due to the monthly shortfall in meeting debt service and operating expenses, Mr. Young recommended that each doctor's monthly rental payment be increased to $15,000. Dr. Bikoff complied effective as of June, 2010. In contrast, when Mr. Young attempted to discuss the rent with Dr. Garcia he either hung up the phone or failed to return Mr. Young's messages. Dr. Bikoff also made numerous advances totaling $167,000 between May 26, 2010 and September 23, 2010 at Mr. Young's request in order to satisfy Tower's ongoing expenses. (Exhibit P-43). Notwithstanding those advances Tower still owed outstanding obligations of $116,079.05 as of November 12, 2010 (Exhibit P-44). Only approximately $1500 remained in Tower's account to meet those expenses.

Enrico J. Russo testified as plaintiff's expert real estate appraiser. Mr. Russo has been a member of the Appraisal Institute since 1976. In 1985 he formed his own company which has

performed approximately 70 appraisals per year, primarily commercial, on behalf of various clients including several banks and other companies. Mr. Russo testified that he has been the primary appraiser for Solaris Health Care Systems, as a result of which he has performed appraisal services relating to surgical centers, imaging centers, oncology centers and medical offices.

In performing his appraisal, Mr. Russo considered the three accepted methods of analysis, i.e., the cost, sales comparison, and income approaches. Although Mr. Russo gave consideration to the cost approach, ultimately he did not use it in his final analysis as he felt the property was "over-finished" and the construction costs were excessive relative to its nature and location, and that the building was no longer deemed to be new construction and factors such as depreciation and obsolescence more difficult to gauge.

More accurate according to Mr. Russo were the sales comparison and income approaches. The sales comparison method involves an analysis of other recent comparable sales, to which appropriate adjustments are then made. Taking such comparable sales into account, with adjustments accordingly, led Mr. Russo to value the subject property at $325.00 per square foot. Multiplying that number by 14,112 square feet thus yielded a total value under the sales comparison approach of $4,586,400.00.

Mr. Russo also considered the income approach, which he indicated was applicable in evaluating income producing properties such as the subject property. In this instance market rent for this property was estimated, a capitalization rate was applied, thus yielding a value under the income approach of approximately $4,400,000.00.

Having considered these approaches, the characteristics of the building and property, and the current market and economic conditions, Mr. Russo opined that the estimated market value of the property as of September 10, 2010 was $4,500,000.00.

Alan Hirschfeld, CPA was called by plaintiff as an expert witness as to the valuation of North Jersey Ambulatory Surgery Center, LLC. Mr. Hirschfeld has performed valuations since the early 1980's and has previously qualified as an expert witness in valuing medical practices and surgery centers. Mr. Hirschfeld described the three main approaches utilized to establish value, i.e., the income, asset, and market approaches. The income approach was not utilized because the surgery center was not making money but rather was experiencing losses. The asset approach was also rejected because it is normally utilized in liquidation situations rather than here where the entity is an ongoing concern, and also since this approach would not adequately quantify such factors as

patient base and goodwill. Accordingly, Mr. Hirschfeld concluded that the market approach, which examines other companies within the same industry, would be the most reliable. Upon performing that market analysis, Mr. Hirschfeld determined that it resulted in a value of ($674,767), and hence that its fair market value as of August 31, 2010 was negligible.

Milton Brown is a licensed public accountant who has done accounting work for Dr. Garcia in excess of 15 years and for Dr. Bikoff for more than 10 years. Mr. Brown introduced the two doctors to each other with the thought that they might make a good match in teaming up to establish a surgical center. Mr. Brown's office has prepared the financial statements and the tax returns for North Jersey and Tower since their inception.

Mr. Brown testified that the monies contributed by Drs. Bikoff and Garcia were shown on Tower's financial statements and tax returns as loans rather than capital contributions. This was done for tax purposes so that if the business was to turn a profit the doctors could take their money out tax-free, or, alternatively, could treat losses as ordinary rather than capital losses which would be subject to capital loss restrictions. Nonetheless, Mr. Brown said these were not in fact bona fide loans, in which event promissory notes would have been drawn up by attorneys and a rate of interest either established or imputed.

Robert Jenkins is a licensed general real estate appraiser who is currently employed as a senior commercial real estate appraiser by Cooney Bovasso Realty Advisors, Inc. That appraisal firm was engaged by J.P. Morgan Bank to conduct an appraisal of the subject property in connection with a mortgage loan that was applied for by Dr. Garcia. Subsequently, following preparation and submission of his appraisal report (D-1), Mr. Jenkins was retained to testify as an expert on behalf of Dr. Garcia and to render a report analyzing the appraisal reports that were prepared by the plaintiff's expert Mr. Russo.

Mr. Jenkins, upon completing his research, rejected the use of the sales comparison approach. He concluded that the highest and best use of the property was as an ambulatory surgical center, which he characterized as a special purpose property. Mr. Jenkins was unable to identify any comparable sales of ambulatory surgical centers, thus rendering use of the sales comparison approach inappropriate.

Mr. Jenkins next went on to examine the cost approach, which he ultimately determined to be the most applicable to this property and hence he placed primary emphasis on it. The reasons identified by Mr. Jenkins for utilizing this approach were its special suitability to (i) new or newer

properties that have not yet depreciated or (ii) special purpose properties such as this which are not often traded in the market. After identifying and correcting an error in the calculations contained in his report, Mr. Jenkins arrived at a value for the property of $7,950,000. To that amount Mr. Jenkins then turned to the income approach so as to ascribe an additional $400,000 to the communications tower on the property, and then deducted $25,000 to finish out the penthouse, thus yielding a total value utilizing the cost approach of $8,325,000.

Mr. Jenkins also went on to utilize the income approach, which after his final analysis yielded a value of $8,500,000. Under this approach it is first necessary to determine the gross income to be generated from the property using the rental value, which required Mr. Jenkins to research the market for leases involving similar surgical centers. After examining three such centers and concluding that the information gleaned therefrom was not extremely beneficial, Mr. Jenkins ultimately rejected this approach in favor of the cost approach which he determined to be the most reliable.

In his rebuttal report (D-66) prepared on behalf of Dr. Garcia in connection with the pending litigation Mr. Jenkins took issue with respect to several of the methods utilized and conclusions reached by plaintiff's expert Mr. Russo. Included among Mr. Jenkins' criticisms of Mr. Russo were his use of a restricted format appraisal report, a purported inaccuracy in the building's square footage, his failure to adequately inspect and describe the property, such as its operating rooms and communications tower, violation of appropriate standards by identifying the property as a medical office building rather than an ambulatory surgical center and failure to state the highest and best use of the property, his failure to adopt the cost approach, and his use of irrelevant comparable sales in the sales comparison approach. Hence, according to Mr. Jenkins, all these factors led him to conclude that Mr. Russo's services were rendered in a careless and reckless manner.

Dr. Garcia confirmed that he had been introduced to Dr. Bikoff by Milton Brown, who had been his accountant for 10 years and who also served as Dr. Bikoff's accountant. Mr. Brown then guided them through the process of establishing the two companies, and following consultation with Mr. Brown, Dr. Garcia agreed that for tax purposes the monies which they contributed would be reflected in the financial statements and tax returns as loans rather than capital contributions. Dr. Garcia testified that both he and Dr. Bikoff contributed about $2.2 million of their own funds in addition to obtaining bank financing of some $3.6 million, and that the total cost to construct the building was approximately $9 million.

Dr. Garcia related the various problems encountered during the course of construction. Initially, the plans prepared by the first architect, Paul Troast, at a cost of $180,000, proved to be worthless and a new architect needed to be retained. The first contractor hired in 2001, OCC, was terminated and Tower is still engaged in an ongoing arbitration proceeding in an attempt to secure an award of damages from OCC based upon its alleged deficient performance. After OCC was fired a new construction company was retained but then walked off the job after four months. Kathleen Bikoff and the second project architect then managed the construction, which led to disputes regarding the amounts charged by Kathleen in performance of her duties. Kathleen demanded, and received, an $89,000 bonus which both doctors apparently viewed as extortion but opted to pay rather than starting over with a new construction manager. At some point Kathleen raised her salary from $50 to $60/hour without consulting either doctor, and according to Dr. Garcia Kathleen was billing them for 60 hours/week which number he felt was inflated. On July 21, 2008 Dr. Garcia wrote to Dr. Bikoff expressing concern over the issue of Kathleen's compensation (D-18). Also of concern to Dr. Garcia were Tower checks which Kathleen had written to herself totaling $8,531 (D-20), and checks paid to American Express for items apparently incurred by Kathleen totaling $30,264.49 (D-21).

The construction project, which began in 2001 and was originally estimated to take approximately one year, was not completed until 2007. Various change orders requested and/or approved by Dr. Bikoff added to the cost of the project. These included, in Dr. Garcia's view, unnecessary removal and replacement of the initial brick façade which Dr. Bikoff originally agreed to pay the cost of but later partially reneged, thus resulting in an additional $67,500 expenditure (D-22 & 23). Also, installation of lead sheeting to reduce noise volumes from Route 17 at Dr. Bikoff's request totaled $28,325 (D-24).

In September 2006, disputes related to the construction, Kathleen's compensation, and late financial contributions by Dr. Garcia were the subject of a letter sent to him by Dr. Bikoff, who indicated that he had been in touch with his attorney "to set the wheels in motion to dissolve our partnership". (D-16). Sometime around February 2009 Dr. Bikoff again advised Dr. Garcia that he wished to terminate their relationship following a conversation involving their respective spouses. Subsequently, Dr. Garcia received a letter (D-25) from Mr. Nagel indicating that Dr. Bikoff elected to terminate their relationship based upon his "numerous failures to abide by the terms of their agreements." According to Dr. Garcia this was not at all consistent with their prior discussions and

up until that time Dr. Garcia stated that he had in fact complied with their agreements. Following receipt of that letter Dr. Garcia stated that he and Dr. Bikoff never spoke again but rather all further communications were between counsel. For a time he was denied access to the books and records, although eventually some were made available through Milton Brown's office. Copies of the American Express bills were never provided.

Dr. Garcia indicated that prior to the commencement of this litigation he never received a capital call request but rather that all funds requested were termed loans rather than capital contributions. Even after commencement of the litigation, by letter dated November 5, 2009 addressed to Drs. Bikoff and Garcia Gail Carroll indicated that due to declining revenue for the surgery center a cash call was required from them both. (D-26). That letter went on to state "I would appreciate a loan from each of you in the amount of $68,132.00 and another payment in the beginning of December in the amount of $38,013." Rather, Dr. Garcia identified a December 24, 2009 letter from Mr. Nagel to Mr. Fiorenzo as the first time that anyone had either made a capital call request or referred to it as a capital call. (D-28).

Dr. Garcia indicated that over the course of their relationship that both he and Dr. Bikoff periodically made loans totaling $1.7 each to Tower, and he identified some of the checks evidencing these payments (D-14).

As pointed out on cross-examination, however, none of these checks bore the notation "loans". Neither were any promissory notes or other documents signed evidencing these loans, nor any interest rate ever ascribed to them. Rather, Dr. Garcia indicated his belief that such documentation was not necessary because both doctors were contributing equal amounts, and that only when the monies were removed from the company would an appropriate interest rate be designated and established. Since the companies were not solvent no principal or interest payments were ever made on these loans.

Dr. Garcia indicated that as of February 6, 2010, Tower was indebted to Valley National Bank in the amount of $3,622,467.42 on the mortgage, $241,293.41 on the line of credit, and that North Jersey was indebted to the bank in the amount of $344,066.46. (D-39). He understood that these bank loans, which he and Dr. Bikoff guaranteed, were secured by the property and took priority over his and Dr. Bikoff's loans. He also understood that there was the possibility that he might not get back the monies he was loaning to the company. Dr. Garcia was unable to explain why the books and records showed that Tower had made some $3.2 million in loans to North Jersey.

Dr. Garcia was arrested in September 2009 and was then prohibited from practicing medicine. Although he indicated that up until that time he was current with his obligations he stopped paying rent after that date. Additionally, for a period of some months he collected $4,250/month from a sub-tenant without paying it over to Tower.

Richard Lane is a C.P.A. who was called as an expert witness by the defendant in the areas of forensic accounting and business evaluations. Specifically he was asked to render an opinion on the reclassification of loans from the members to their capital accounts. Mr. Lane examined Tower's Operating Agreement, financial statements and tax returns. He noted that Section 4.4 of the Operating Agreement contemplated loans from the members, and that the amounts in issue were consistently treated as loans in the tax returns and financial statements. Hence Mr. Lane concluded that the tax returns and financial statements of Tower historically and properly reflected the monies contributed by the members as loans, which was consistent also with both their intent and the provisions of Tower's Operating Agreement. Accordingly there were loans owed by Tower to Dr. Garcia in the amount of $1,748,645.22 as of April 30, 2010.

Due to the vast discrepancy in the opinions rendered by the parties' experts with respect to the valuation of the real estate owned by Tower, on December 15, 2010, over defendant's objection, the court entered an Order appointing The Herold Appraisal Group as the court's independent real estate appraiser to value the subject property. The appraisal was performed by Mr. Thomas Aknay, whose report was introduced as a court exhibit (C-1), and both counsel were afforded the opportunity to cross-examine Mr. Aknay relative to his findings and conclusions.

Although Mr. Aknay gave consideration to all three approaches to valuation, he completely rejected the cost approach as not representing an accurate market value barometer. Further, Mr. Aknay testified that in his vast experience save for a singular instance he had never used the cost approach as the lead barometer in his ultimate determination as to value.

Although Mr. Aknay considered the sales comparison approach he determined not to adopt it in this case due to the lack of comparable sales data. Ultimately he concluded that the income approach was most representative of market value and that it widely applied in appraising income-producing properties. Further, in his report Mr. Aknay indicated that the direct capitalization technique is best suited to determine value when a stabilized income stream was reasonable to anticipate. Based upon his analysis, and giving greatest weight to this approach, Mr. Aknay concluded that the market value of the subject real estate as of February 4, 2011 was $5,000,000.

LEGAL ANALYSIS

I. Overview

On January 22, 2010 Judge Koblitz entered an Order denying Dr. Garcia's motion to dissolve Tower and North Jersey and to award him 50% of the distributions resulting from such dissolutions. Thereafter, on July 2, 2010 Judge Koblitz granted plaintiff's motion for partial summary judgment so as to order that the entities redeem Dr. Garcia's interest at 50% of the value, in an amount to be determined at trial. Additionally, judgment was entered on behalf of North Jersey and Tower against Dr. Garcia in the amount of $183,205.99 for his capital call contributions pursuant to the terms of the July 2, 2010 Order Granting Partial Summary Judgment.

This court has had the benefit of reviewing the transcript of the July 2, 2010 oral argument before Judge Koblitz so as to more thoroughly familiarize itself with the thrust of Judge Koblitz's determination and the basis upon which it was made. As Judge Koblitz noted:

> The issue here, and this was clearly put forth the first time these doctors appeared through counsel before me, was is Dr. Garcia going to receive the full value of the shares or half of the value of the shares. T8-12-15.

Judge Koblitz then determined that the "FOR CAUSE" redemption provisions of the entities' Operating Agreements had been triggered in three respects. First, Judge Koblitz found that Dr. Garcia's inability to practice medicine as a condition of his bail was equivalent to a suspension, and that his inability to so practice had exceeded 180 days. Thus, Section 8.2(a)(1)(iii) of the Operating Agreements of both Tower and North Jersey were triggered, thereby allowing each company the right to redeem Dr. Garcia's entire interest in both companies. Similarly, Judge Koblitz found that Dr. Garcia's failure to make contributions when requested by the accountant under the provisions of the Operating Agreements constituted a failure to fulfill an obligation under the Agreements which also served as a basis for a "for cause redemption" under Section 8.2(a)(2) of both Agreements. Finally, Section 8.2(a)(3) of North Jersey's Operating Agreement provided a third basis for finding a "for cause redemption" due to Dr. Garcia having ceased to practice medicine on substantially a full time basis.

Noting that these were commercial agreements that should be enforced, Judge Koblitz ruled that Dr. Garcia's interests would be redeemable at 50% of their value, which values were to be

determined at the time of trial. It is thus within this context, rather than the context of dissolution as sought by defendant and which Judge Koblitz rejected, that the court proceeds to determine the value at which Dr. Garcia's interests in both entities shall be redeemed.

II. Valuation of North Jersey Ambulatory Surgical Center, LLC

Plaintiff's expert witness, Alan Hirschfeld, C.P.A., was the only expert witness called at trial to render an opinion as to the value of North Jersey Ambulatory Surgical Center. Following Mr. Hirschfeld's review of the company's financial statements and income tax returns, he arrived at a negative $674,767 figure, thus concluding that its value, if any, was negligible.

Richard P. Lane, C.P.A., was retained on behalf of defendant to review Mr. Hirschfeld's report. While Mr. Lane disagreed with Mr. Hirschfeld's re-classification of loans from the members to their capital accounts, the court notes that in the final analysis Mr. Lane did not offer any competing opinion as to the ultimate value of the surgery center.

In reviewing North Jersey's income tax returns (D-9), the court notes that while North Jersey showed a profit of $112,299 in 2008, the returns for 2007 and 2009 showed losses of $359,877 and $522,096 respectively. The court further finds that Dr. Garcia was unable to practice medicine commencing with his arrest on criminal charges in September 2009. This resulted in severe hardship to this entity as he was no longer performing surgery at the surgery center, thus causing a substantial decline in its revenue. The court further finds that these circumstances lend credence to that portion of Dr. Bikoff's testimony wherein he asserted that the substantial loss shown on the 2009 tax return had thereafter continued to escalate.

During the course of the trial the court was presented with a proposed contract for the sale of North Jersey. The court further accepts plaintiff's position that due to the surgery center's continued widening losses and Dr. Garcia's continued failure to make contributions to the surgery center, both monetary and via his services, the center's financial condition had become severely imperiled and hence its sale was necessary so as to mitigate any further losses. The court further notes that during the course of his testimony Dr. Garcia appeared to give scant recognition to, or accept any responsibility for the fact that the criminal allegations which had led to his inability to practice medicine had no doubt visited significant financial harm upon the business.

The aggregate purchase price for North Jersey's assets under the Asset Purchase Agreement was listed as $1,038,000, plus up to $10,000 additional for accrued interest on the outstanding loan

held by Valley National Bank. That purchase price was essentially comprised of the following:

- assumption of a $380,000 loan due from North Jersey to Dr. Bikoff
- assumption of unpaid payables in an amount not to exceed $308,000
- assumption of all obligations under equipment leases
- assumption or satisfaction/discharge of the approximately $350,000 loan balance due to Valley National Bank, plus up to $10,000 in accrued payables.

Excluded from the sale were (a) all accounts receivable and cash on hand, (b) the judgment receivable against Dr. Garcia in the approximate amount of $183,000, and (c) Dr. Bikoff's personal property. Pursuant to the terms of the agreement Dr. Bikoff is to acquire a 20% interest in the purchasing entity.

The court therefore finds that this asset has no equity. The court likewise concludes that the contemplated sale of this entity will be beneficial to both Dr. Bikoff and Dr. Garcia in that it will allow for the payment and/or satisfaction of the trade payables, the outstanding Valley National Bank loan #315085800 which was guaranteed by both doctors (and which reflected a $344,066.46 balance as of 10/6/2010; D-39), the re-payment of at least a certain amount of contributions made by Dr. Bikoff to keep the business operation afloat, and the payment of the monthly rental income to Tower to assist in keeping that entity viable.

III. Valuation of Tower Real Estate Holdings, LLC

Certainly a significant portion of the trial testimony and evidence focused upon the parties' competing and vastly different positions as to the valuation which should be assigned to the Tower entity.

To briefly summarize, plaintiff's expert, Enrico Russo, opined Tower's value to be $4,600,000 using the sales comparison approach and $4,400,000 utilizing the income approach. Mr. Russo appears to have then melded these two values in arriving at an ultimate opinion that Tower should properly be valued at $4,500,000.

Defendant's expert, Robert E. Jenkins, found the cost approach to be most indicative of value which, allowing for certain corrections made at trial, led him to value Tower at $8,325,000. Alternatively, were the income approach to be utilized, Mr. Jenkins determined that value to be

$8,500,000.00

In view of this wide disparity the court during trial, with the consent of the plaintiff and over the defendant's objection, saw fit to appoint its own independent expert, the Herold Appraisal Group. Herold's representative, Mr. Aknay, determined the income approach to be most suitable here and, under that analysis, valued the property at $4,986,100 (rounded to $5,000,000).

It is left then for the court to determine which opinion as to value, or alternatively which combination of factors utilized in formulating those opinions, would result in the most accurate assessment of Tower's value.

After having had the opportunity to consider the training, experience, and opinions arrived at by the three experts, the court largely rejects the conclusions of Mr. Jenkins and finds the value of the property to be more accurately reflected in the range of values established by Mr. Russo and Mr. Aknay. The reasons for this court's conclusion follow.

Mr. Jenkins placed primary emphasis upon the cost approach. However that approach was totally repudiated, successfully in the court's view, by both Mr. Russo and Mr. Aknay. Mr. Russo, who the court notes was the only expert qualified as an MAI, rejected use of the cost approach not solely due to the uniqueness of the property, but also due to the difficulties in estimating replacement costs and because estimates of accrued depreciation and obsolescence are largely empiric. Also, based on his inspection of the property, he concluded that this building appeared over-finished for the area and hence not truly indicative of current market value. Similarly Mr. Aknay, with his 22 years of experience having performed thousands of appraisals, gave no weight to the cost approach in this case, deeming it not to be an accurate market value barometer and not accurately reflecting what a willing buyer would pay.

In placing substantial weight on the cost approach Mr. Jenkins expressly noted the uniqueness and newness of this special purpose property. However, there was testimony in the case that Dr. Bikoff took occupancy around August 2006, which would lend credence to the other experts' observations that the building could no longer really be considered new or that this approach to valuation was most suitable. The court further notes that its review of the income tax returns for Tower (D-8) for the years 2005-2009 reflect that depreciation had been taken in each of those five (5) years.

Mr. Jenkins also used the income approach as support for his primary cost approach to determine value. However, in doing so he ascribed a $50/square foot value to the whole building

and not just the portion used for the surgical center. Again both of the other experts repudiated this methodology and concluded that the $50 per square foot attributed to the doctors' office space in the building was simply not sustainable. Again this court agrees and for the reasons which follow finds that the income approach, as developed by the other experts, is more sound and hence entitled to greater weight by this court.

As an aside, while not critical to this court's ultimate determination as to valuation, the court addresses that portion of defendant's argument made in opposing the court's appointment of an independent appraiser that same was not necessary because Mr. Jenkins' initial appraisal report was done on behalf of a bank rather than Dr. Garcia. While certainly an argument can be made that Mr. Jenkins' initial appraisal may thus be viewed as "neutral" or "independent", it should be further noted that Dr. Garcia apparently made application to the bank alone rather than in conjunction with Dr. Bikoff. Additionally, in preparing his appraisal report Mr. Jenkins gleaned certain of his information, at least with respect to the existence of any leases, from Dr. Garcia, and during the course of this litigation was retained by and actually became the client of Dr. Garcia in rendering a critique of Mr. Russo's report and testifying on Dr. Garcia's behalf at trial. Hence, while Mr. Jenkins' initial involvement came via JP Morgan Bank, NA, the court cannot conclude that by the time of trial he continued to function as a neutral and disinterested participant.

In contrast, the court views the range of values identified by Mr. Russo and Mr. Aknay to be more indicative of the property's true market value. Mr. Russo relied on the sales comparison approach and considered various comparables in arriving at a value of $4,586,400 (rounded to $4,600,000). He further indicated that the income approach was useful in the valuation of income-producing properties such as this, and application of this approach yielded a value of $4,379,719 (rounded to $4,400,000).

While considering the comparable sales approach Mr. Aknay did not fully develop it due in part to a lack of comparable sales and most notably due to his opinion that the income approach was best suited to determine the value of commercial properties such as this which are tenant-occupied and where a stabilized income stream can reasonably be anticipated.

It appears then that all three experts fully developed and considered the income approach in determining value, and it is likewise the method which this court will utilize in arriving at its ultimate conclusion as to value. In so doing, the court finds that the variables used by the experts explain, at least in part, the discrepancy in their valuations.

One of the components in applying the income method is the net operating income. Mr. Aknay arrived at a net operating income of $409,850, applying the $30,000/month rent for the surgery center space as per its lease provisions, and $23/square foot for the remaining 7434 square feet of medical office space. Mr. Aknay based his square footage calculations on the official tax records. Mr. Russo utilized a substantially similar net income of $405,124 in his calculations. On the other hand, the extreme discrepancy in Mr. Jenkins' valuation is largely attributable to the fact that he ascribed a value of $50 square foot to the entire building, a determination that, as indicated, neither of the other experts nor this court accepts as valid. If, on the other hand, using Mr. Jenkins' $50/square foot amount for the 7434 square foot surgery center but applying a $23 square foot value for the remaining 7434 square feet of medical office space which the court deems more reliable, yields income of $542,682. Subtracting then his $27,134 calculation for 5% vacancy loss and $111,137 calculation for expenses thus yields net operating income of $404,411, and which hence falls in line with the net operating income arrived at by Mr. Russo and Mr. Aknay. Averaging that $404,411 figure with the $405,124 computed by Mr. Russo and the $409,850 by Mr. Aknay, yields a net operating income of $406,461.66, which the court will hence use in its ultimate calculation as to value.

Upon arriving at that net operating income figure, it must then be divided by the applicable cap rate. Applying Mr. Jenkins' 8.5% cap rate yields a value of $4,781,902, using Mr. Russo's 9.25% cap rate yields a value of $4,394,180, and using Mr. Aknay's 8.22% cap rate yields a value of $4,944,789. Averaging those three amounts, the court arrives at a valuation of $4,706,957, which valuation it hence ultimately ascribes to Tower.

IV. Loans vs. Capital Contributions

During the course of the trial issue was taken as to whether monies advanced to Tower and/or North Jersey by Drs. Bikoff and Garcia represented loans or capital contributions. To the extent that resolution of such issue may be relevant, the court determines it as follows.

Milton Brown was the accountant for both doctors prior to and at the time of the formation of both entities, and his relationship with those entities continued through the time of trial. The court finds that Mr. Brown advised Drs. Bikoff and Garcia that the monies which they contributed should be set up on the books and records of the entities as loans for the tax benefits which would inure by virtue of such designation. Specifically, if these monies were characterized as loans, and if the

doctors made a profit, they would then be in a position to take the monies back out tax-free. Conversely, if the businesses operated at a loss, they would then treat these as ordinary losses as opposed to capital losses which would be subject to greater restrictions. In accordance with this tax advice provided by Mr. Brown at the inception, the court finds that the contributions were thereafter consistently shown on the profit and loss statements and tax returns, which were regularly provided to both doctors, as loans rather than capital contributions. The court further finds that portion of Mr. Brown's testimony that these monies really represented capital contributions rather than loans because no promissory notes were prepared or interest imputed, to be inconsistent both with his initial advice to the doctors and the course of conduct that followed whereby these monies were always designated as loans.

To the extent that Mr. Hirschfeld during the course of his analysis reclassified these loans as capital, it appears that he did so based in large part upon his conversation with Mr. Brown, who advised him that these were advances made by the doctors to the business and it was more advantageous from a tax standpoint to treat them as loans, but that no promissory notes, amortization schedules, or re-payment terms existed.

The court accepts the testimony of plaintiff's expert, Richard E. Lane, C.P.A. Mr. Lane reviewed Tower's operating agreements, tax returns and financial statements, and concluded that they properly reflected loans payable by Tower to Drs. Bikoff and Garcia. The balances of these loans, which were in excess of $1.7 million each, were thus liabilities owed by Tower to each doctor. Mr. Lane further concluded that a sound business basis existed for treating them as loans, and that this represented a common practice in closely held real estate holding companies.

As to this issue, the court accepts Dr. Garcia's testimony as to his belief that the monies which he had advanced represented loans rather than capital contributions. The court finds his testimony as to the tax advantages associated with the loan designation to be consistent with the advice provided by Mr. Brown, upon which he relied. The court further accepts Dr. Garcia's testimony that meetings took place at which this loan designation was discussed, agreed upon, and then reviewed on a regular basis, and that the monies contributed were always referred to as loans rather than capital contributions.

To the extent that Dr. Bikoff had a contrary understanding with respect to the nature or designation of these contributions, the court ascribes scant weight to his testimony on this issue. Dr. Bikoff during the course of his testimony consistently claimed a total lack of familiarity or

knowledge with respect to the financial workings of the businesses, including their operating agreements, financial statements and tax returns. Hence, due to what appears to have been his deliberate lack of care, concern, or attention to those details, and his total professed lack of familiarity with them, little if any weight can be given to any argument advanced by him that these monies should be classified as capital contributions rather than loans.

In summary, the court finds that since the time of inception of these entities that the monies contributed by the doctors were shown on the financial records and tax returns as loans rather than capital. It would now be inequitable to treat them in a manner different than they have always been treated, i.e. as capital rather than debt. Therefore, to the extent that resolution of this issue may be relevant to the court's ultimate determination which follows, the court is in agreement with Mr. Lane's conclusion that these monies properly reflected loans of more than $1.7 million each payable by Tower to both Drs. Bikoff and Garcia.

V. Defendant's Counterclaim

In his Counterclaim, Dr. Garcia raised various claims against Dr. Bikoff. These included delay in the construction work resulting from Dr. Bikoff's actions, numerous change orders that were allegedly approved by Dr. Bikoff unilaterally without proper authorization, improper payment by Dr. Bikoff through Tower of expenses for work related to resurfacing a brick façade and lead isolation for Dr. Bikoff's flooring, and excessive bonuses and compensation that were paid by Tower to Kathleen Bikoff. A discussion of each of those claims follows.

1. Construction delays. By all accounts construction on the building was plagued by delays and lasted far longer than the parties originally anticipated. The plans prepared by the initial project architect, Paul Troast, proved to be deficient, causing delay and further expenditures. The original contractor, OCC, was eventually discharged which was originally resisted by, but then subsequently agreed to by, Dr. Garcia. A second construction company was retained but they walked off the job after a relatively short period of time. Kathleen Bikoff, ex-wife of Dr. Bikoff, and the second project architect, Laurie Sason, then took over management of the construction until its completion.

No expert testimony was presented on behalf of Dr. Garcia to establish or allocate responsibility for the construction delay on the part of any of the participants, i.e. the architects who prepared the plans, the contractors who managed the construction or performed the work, Kathleen

Bikoff or Dr. Bikoff. Similarly, no expert testimony was presented to establish the amount of damages which may have been attributable to the conduct or actions of Dr. Bikoff in this matter. The court is simply then left with a dearth of competent evidence from which it can reasonably conclude that Dr. Bikoff was the cause of the delays or that his actions damaged either the companies or Dr. Garcia.

However, the court notes that Tower still has a pending claim against OCC for the deficiencies and/or delays in their performance of the construction. Both Dr. Bikoff and Dr. Garcia acknowledge that should there be any recovery on this claim that it will inure as an asset to Tower. Accordingly the court hereby orders that should there be any future recovery on Tower's claim against OCC that the net recovery, following the payment and/or reimbursement of attorneys fees, expert fees, and other costs, shall be distributed equally between Dr. Bikoff and Dr. Garcia.

2. Brick Façade. Dr. Garcia claimed that when the brick façade on the building was installed that he was satisfied with the way it looked, but that Dr. Bikoff disagreed and wanted it removed and replaced and agreed to do so at his sole cost and expense. Neither the mason who installed the initial façade, nor the second mason who removed and re-installed it (Catanese & Sons) was called to testify. Neither was any expert testimony presented as to whether the façade was installed properly or improperly, and hence the court lacks adequate competent evidence to determine this issue. However, even if the position taken by Dr. Garcia is correct, i.e. that the brick façade was not deficient and was simply removed and re-installed to satisfy Dr. Bikoff's whim and fancy, Dr. Garcia has failed to establish that he was damaged thereby. Although he pointed to two (2) checks paid by Tower to Catanese totaling $67,500 (D-23), Dr. Bikoff successfully rebutted this in his testimony that this payment was withheld from the first mason and that he then personally paid the balance of the $145,000 Catanese proposal (D-22), thus resulting in no increased cost to Tower.

3. Lead Insulation. Dr. Garcia next challenged Dr. Bikoff's $28,325 expenditure for lead insulation that Dr. Bikoff installed to reduce noise coming from Route 17 on his side of the building. He identified one check and invoice paid by OCC to Global Partners in the amount of $16,425 as attributable to this item, the entire cost of which Dr. Bikoff had instead agreed to bear (D-24). Dr. Bikoff admitted that he agreed to pay for this, although he was unable to explain the OCC check to Global Partners nor could he locate anything in his own records to substantiate his own payment.

Thus, the court finds that Tower did pay $16,425 toward this expenditure which was the sole responsibility of Dr. Bikoff and hence one-half of this amount, or $8,212.50, should properly be credited to Dr. Garcia.

4. Kathleen Bikoff. Dr. Garcia took issue with a $89,000 bonus paid to Kathleen Bikoff toward the end of the construction. Although both doctors apparently characterized this as extortion, the bottom line is they agreed to pay it.

Dr. Garcia also pointed out that Kathleen, apparently without authorization, at a certain point raised her salary from the $50/hour rate (which Mr. Brown testified had been agreed upon at meetings attended by himself and Drs. Bikoff and Garcia) to $60/hour. However the testimony at trial also established that she had gone some five years without a pay raise. The court also accepts as credible and reliable Mr. Brown's testimony that Dr. Garcia had never requested Kathleen's termination.

Also questioned were Tower checks totaling $8531 that Kathleen had written either to herself or to cash (D-20), and an additional series of Tower checks totaling $30,263.49 that Kathleen issued to American Express. However, when questioned as to these checks, Dr. Garcia admitted that he did not know what they represented, nor could he state that these represented improper personal expenditures of Kathleen as opposed to legitimate reimbursements for expenditures related to the building.

As to all of the payments made to or for Kathleen, Dr. Garcia conceded that he did not claim, nor could he establish, that these payments in any way benefited Dr. Bikoff as opposed to his ex-wife Kathleen. Kathleen was not added as a party to this action, nor was she called as a witness to explain her role and activities on behalf of Tower. There was simply insufficient evidence presented that Kathleen did not perform her duties, that her total payment was disproportionate to her duties, or that utilization of another construction manager would have resulted in a cost savings to Tower. Even if this were the case, such claim should have properly been made against Kathleen, rather than Dr. Bikoff, against whom all these claims are hereby dismissed.

VI. Fashioning a Remedy

As previously noted, on July 2, 2010 Judge Koblitz entered an Order granting plaintiff's motion for partial summary judgment so as to order that the entities redeem Dr. Garcia's interest at

50% of their value, which value was to be determined at trial.

For the reasons set forth above, the court has determined (i) that North Jersey Ambulatory Surgical Center has no value and that its debts exceed its assets, and (ii) that the Tower property is valued at $4,706,957. The court further finds that the Tower property is encumbered by bank loans with Valley National Bank in the amounts of $3,622,467.42 and $241,293.41, for a total of $3,863,760.83 (D-39). It appears undisputed that Valley's mortgage loans on the property take priority over repayment of any loans to Tower's members. Accordingly the existence of these bank loans thus serves to reduce the outstanding equity in the property to $843,196. Since, however, the court has also determined that both Drs. Bikoff and Garcia have each contributed loans to Tower in excess of $1.7 million which remain outstanding, such loans simply consume the remaining equity in the property leaving it in essence with no value to redeem.

Both parties cite for the court's consideration Knecht v. Mandek Corp., 281 N.J. Super 439 (App. Div. 1995) which touched upon the inherent common law power of the Chancery Division to achieve equity in concluding, under the facts of that case, that the court in a "buy out" situation possessed the equitable power to order repayment of debt. In fashioning the appropriate relief the court in Knecht at page 448 stated the following:

> Hence, in ordering the repayment of debt, the corporations' ability to survive must be considered. The corporations cannot be left on the "verge of insolvency" to the detriment of their surviving shareholders and other creditors, and at the risk of jeopardy to repayment of the same debt owed the individual defendants. In essence, the "buy-out", including the repayment of debt, "is warranted only when it would be "fair and equitable to all parties". [citing Brenner v. Berkowitz, 134 N.J. 488, 514 (1993).

In Brenner, supra, the court noted that, importantly, courts are not necessarily limited to statutory remedies, but "have a wide array of equitable remedies available to them." The court went on to state:

> Indeed, the statutory remedy of dissolution should be imposed only in the most egregious cases. The buy-out remedy is a preferable alternative to dissolution, but it may not be preferable to equitable remedies also available to the court. In many cases, the court will find that its equitable powers adequately balance the need to redress the statutory violation against society's interest in maintaining functioning corporations. Id. at 516.

While Knecht and Brenner dealt with corporate entities as opposed to limited liability

companies such as those involved here, the court nevertheless finds the principles espoused therein to be analogous and illustrative of the court's inherent authority to fashion an appropriate equitable remedy.

Defendant continues to argue, as he did previously before Judge Koblitz, that the court should order dissolution of North Jersey and Tower. On January 22, 2010 Judge Koblitz denied defendant's motion to dissolve both entities and to award defendant 50% of the distributions resulting from such dissolutions. Rather, on July 2, 2010, recognizing that defendant had failed to live up to various obligations under the entities' operating agreements, Judge Koblitz instead ordered a redemption of his interest in the entities.

The court finds that nothing has changed in the interim which would cause it to order a dissolution of the entities rather than allow Dr. Bikoff to in essence "redeem" or "buy-out" Dr. Garcia's interest in the entities. Dr. Bikoff has expressed a desire and willingness to continue his business operations at the Tower facility and toward that end he has continued to make financial contributions to keep the entities afloat, thus maintaining the viability of the surgical center's license and preserving it as a viable entity whose operations in turn will provide the necessary revenue stream for Tower's continued existence. On the other hand, Dr. Garcia remains barred from practicing medicine, and has exhibited neither the ability to contribute to the entities' continued operations nor the desire to buy-out Dr. Bikoff's interests in those entities. Accordingly the court again rejects defendant's request that the entities be dissolved, which request for relief is hereby dismissed.

Although the court also agrees with Judge Koblitz's earlier determination that Dr. Garcia's interests were to be redeemed at 50% of their value to be determined at trial, the result of that trial has been to establish that, following re-payment of the bank loans, the entities remain obligated to both doctors for the repayment of the loans they made to the entities and most notably Tower in amounts in excess of the current equity.

The uncontroverted proofs before the court established that both doctors contributed equal amounts of approximately $1.7 million deemed loans to Tower over the course of several years, and that the expectation was that, if they were to be repaid, they would be repaid in similar amounts. While Dr. Garcia seeks repayment of his $1.7 million loan in full, there is simply insufficient equity in Tower to re-pay the entire loan. Repayment of the full loan amount would either leave Tower on the verge of insolvency or push it over the brink, a result which Knecht and Brenner undoubtedly

viewed with disfavor. Similarly, repayment of the full loan amount would certainly be unfair to Dr. Bikoff who the court finds would be entitled to repayment of his loan in the same amount but would not be in a position to receive it since all remaining equity would have thus been swallowed up by Dr. Garcia.

Hence, in fashioning an appropriate remedy, the court concludes that Dr. Garcia should receive 50% of the $843,196 equity remaining, or $421,598, representing his equal share of the amount available for re-payment of the loan balances due to both doctors. The court finds from Dr. Garcia's testimony that he knew the potential for losses existed in the event that one or both of the entities proved not to be profitable and planned accordingly so that any losses would receive more favorable tax treatment by virtue of their status as loans rather than capital contributions. The simple fact here is that both entities ultimately proved not to be profitable and hence Dr. Garcia should only receive 50% of whatever equity remains to be applied toward his outstanding loans.

Hence, the court directs that Dr. Bikoff buy-out Dr. Garcia's interest in the companies for $421,598, which amount shall be increased by the $8,212.50 credit allowed Dr. Garcia relative to the lead insulation component of his Counterclaim. From that $429,810.50 sum shall be deducted $3,200 representing 50% of the $6,400 Herold Appraisal Group's fee which the court has directed Dr. Bikoff to pay. Also, since Dr. Bikoff is buying out Dr. Garcia's interest in the entities, 50% of the $183,205.99 judgment previously entered by Judge Koblitz on behalf of the entities should thus inure as a credit to Dr. Bikoff to be applied toward the buy-out amount. Application of these two credits (i.e. $3,200 and 91,603) thus reduces the total amount to $335,007.50 to be paid by Dr. Bikoff to "buy-out" Dr. Garcia's interests in the two companies.

In addition, the court hereby orders the following relief:

1. Dr. Bikoff shall indemnify and hold Dr. Garcia harmless relative to the Valley Bank loans which both doctors have personally guaranteed.

2. Upon payment of the $335,007.50 buy out amount, the July 2, 2010 judgment entered on behalf of North Jersey Ambulatory Surgical Center, LLC and Tower Real Estate Holdings, LLC against Dr. Garcia in the amount of $183,205.99 shall be deemed extinguished.

3. In the event of any future recovery by the entities in the pending litigation/arbitration involving OCC, Dr. Bikoff shall be reimbursed $7,638.81 for payment of the Porcello fee, following which any net recovery shall be divided equally between Dr. Bikoff and Dr. Garcia.

4. Dr. Bikoff shall immediately pay, if he has not already done so, the fee to Herold

Appraisal Group in the amount of $6,400.00.

The court has prepared a form of judgment which accompanies this opinion.

Dated: May 27, 2011

HARRY G. CARROLL, J.S.C.